

1990

Walter P. Larson, an individual, and Larson Ford Sales, Inc., a Delaware corporation v. Stephen Wade, individuall, and Stephen Wade, Bryce Wade, Kipp Wade, dba SBK, a general partnership, and Valley Ford, a Utah corporation : Brief of Appellant

Utah Court of Appeals

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Gary E. Jubber, Patrick L. Anderson; Fabian & Clendenin; attorneys for respondents.

L. Edward Robbins; attorney for appellants.

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**UTAH COURT OF APPEALS  
BRIEF**

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DOCKET NO.

900535-CA

IN THE COURT OF APPEALS OF THE  
STATE OF UTAH

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WALTER P. LARSON, an indi-	:	
vidual, and LARSON FORD	:	
SALES, INC., a Delaware	:	BRIEF OF APPELLANT
corporation,	:	
	:	
Plaintiffs/Appellants,	:	
	:	
vs.	:	
	:	
STEPHEN WADE, individually,	:	
and STEPHEN WADE, BRYCE WADE,	:	
KIPP WADE, dba SBK, a general	:	
partnership, and VALLEY FORD,	:	Case No. 900535-CA
a Utah corporation,	:	
	:	
Defendants/Respondents.	:	Argument Priority (b)(16)

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Appeal from the Third Judicial District Court  
in and for the County of Salt Lake,  
the Honorable J. Dennis Frederick presiding,  
(District Court No. C87-4273)

---

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IN THE COURT OF APPEALS OF THE  
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vidual, and LARSON FORD	:	
SALES, INC., a Delaware	:	BRIEF OF APPELLANT
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ADDENDA

- 1--First Amended Complaint
- 2--Affidavit of Stephen Wade
- 3--Memorandum in Support of Motion to Dismiss
- 4--Affidavit in Opposition to Defendants' Motion to Dismiss
- 5--Memorandum in Response to Defendants' Motion to Dismiss
- 6--Order (of Dismissal)
- 7--Order of Utah Supreme Court in No. 880344,, June 19, 1990
- 8--Notice of Appeal

(to be considered upon only supplementation of record)

- 9--Second Amended Plan of Reorganization Submitted by Stephen Wade, Inc.
- 10--Order (modifying effective date of Plan of Reorganization)
- 11--Order Further Modifying the Effective Date of the Plan of Reorganization on Motion for Reconsideration

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KIPP WADE, dba SBK, a general	:	
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a Utah corporation,	:	
Defendants/Respondents.	:	

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JURISDICTION OF THIS COURT  
AND NATURE OF PROCEEDINGS BELOW

On July 14, 1988, the Third Judicial District Court, Salt Lake County, the Honorable J. Dennis Frederick presiding, granted defendants' motion to dismiss, considered as a motion for summary judgment, based on Utah's four year statute of limitations, Section 78-12-25, Utah Code (R. 73-74). Thereafter, plaintiffs, appearing pro se, sought a one day extension of time to appeal that decision (R. 75-76). The District Court denied this request (R. 97-99). In a separate proceeding, the Utah Supreme Court found this denial to be an abuse of discretion and granted leave to appeal [Utah Supreme Court Case No. 88-0344] (R. 105). This appeal followed, (R. 107), and after filing, the Utah Supreme

Court transferred this appeal to the Utah Court of Appeals.

Plaintiffs appealed to the Utah Supreme Court pursuant to Section 78-2-2(3)(j), Utah Code ["orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction'] and the Utah Supreme Court thereafter transferred this appeal to the Utah Court of Appeals pursuant to Section 78-2-2(4), Utah Code. The Utah Court of Appeals has jurisdiction over this appeal pursuant to Section 78-2a-3(2)(j), Utah Code ["cases transferred to the Court of Appeals from the Supreme Court"].

ISSUE PRESENTED FOR REVIEW  
AND STANDARD OF REVIEW

Whether the District Court erred in dismissing plaintiffs' entire complaint, including plaintiffs' claims both in tort and contract, based on confirmation of a bankruptcy court plan more than four years prior to the filing of this suit, when the plan of reorganization was not even submitted by a party to this litigation, the terms of the plan of reorganization were never submitted into evidence, and the motion was opposed by affidavit and memorandum creating clear issues of fact requiring trial.

In reviewing this issue, no discretion need be accorded to the trial court. This Court views the facts in the light most favorable to plaintiffs, including all reasonable inferences arising therefrom. Spor v. Crested Butte Silver Mining, 740 P. 2d 1304 (Ut., 1987); Geneva Pipe Co. v. S. & H. Ins. Co., 714 P. 2d 648 (Ut., 1986). Further, this Court is free to reappraise



the District Court's legal conclusions since summary judgment may be granted only as a matter of law. Atlas Corporation v. Clovis National Bank, 737 P. 2d 225 (Ut., 1987).

DETERMINATIVE CONSTITUTIONAL PROVISIONS,  
STATUTES, ORDINANCES, RULES, AND REGULATIONS

Rule 8(c), Utah Rules of Civil Procedure:

"Affirmative defenses....statute of limitations."

Rule 9(h), Utah Rules of Civil Procedure:

"In pleading the statute of limitations it is not necessary to state the facts showing the defense but it may be alleged generally that the cause of action is barred by the provisions of the statute relied on, referring to or describing such statute specifically and definitely by section number, subsection designation, if any...."

Rule 12(b)(6), Utah Rules of Civil Procedure:

"....failure to state a claim upon which relief can be granted...."

Rule 12(b), Utah Rules of Civil Procedure:

".... If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Rule 56(c), Utah Rules of Civil Procedure:

"....The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material

fact and that the moving party is entitled to a judgment as a matter of law...."

Section 78-12-1, Utah Code:

"Civil actions may be commenced only within the periods prescribed in this chapter, after the cause of action has accrued, except in specific cases where a different limitation is prescribed by statute."

Sections 78-12-25(1) and (3), Utah Code:

"Within four years:

"(1) An action upon a contract, obligation, or liability not founded upon an instrument in writing....

"....

"(3) An action for relief not otherwise provided for by law."

#### STATEMENT OF THE CASE

##### Nature of the Case

This is a suit by plaintiffs against defendants for breach of contract, interference with business relations, breach of fiduciary duty, unjust enrichment, conversion, and punitive damages (R. 2-9, Add. 1).

##### Course of Proceedings

By order entered July 14, 1988, the District Court dismissed plaintiffs' amended complaint in its entirety (R. 73-74, Add. 6). Thereafter, on September 19, 1988, the District Court denied plaintiffs' motion for a one day extension of time to appeal (R. 97-99).

On June 19, 1990, in a separate appeal, the Utah Supreme Court reversed the September 19, 1988 Order of the District Court and granted leave to appeal the dismissal of plaintiffs' amended complaint (R. 105). Following this grant of leave to appeal, plaintiffs filed the present appeal (R. 107). The Utah Supreme Court then transferred this appeal to the Court of Appeals.

#### Disposition in the Court Below

The court below dismissed plaintiffs' amended complaint in its entirety (R. 73-74, Add. 4). Plaintiffs appeal (R. 107).

#### Statement of Facts /1

1. On June 24, 1987, plaintiffs filed their complaint against defendants alleging:

a. breach of an oral contract to purchase Larson Ford Sales, Inc., to hold plaintiffs' harmless from certain debts and obligations of the business, and to provide other benefits;

b. interference with business relations in inducing third parties to breach their agreement with Mr. Larson;

c. breach of fiduciary duty, unjust enrichment, and conversion in that defendant Stephen Wade used his status as a bishop in the L. D. S. Church to acquire confidential information from the plaintiffs and thereafter used that information to convert substantial assets of Larson Ford Sales, Inc. (R. 2-10).

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1/Plaintiffs' present counsel not acquainted with this case at the district court level and appeared only after prior counsel had appealed the extension issue, Case No. 88-0344, to the Utah Supreme Court.

2. On July 9, 1987, plaintiffs filed their first amended complaint which stated the same causes of action (R. 11-19, Add. 1).

3. On July 28, 1987, defendants filed a motion to dismiss (R. 37-38).

4. Defendants grounded their motion to dismiss on confirmation of the Second Amended Plan of Reorganization of Stephen Wade, Inc., not a party to this suit, in the bankruptcy case of Larson Ford Sales, Inc., confirmed on June 10, 1983, more than four years prior to the filing of the Larsons' initial complaint in this action (R.40-42).

5. Despite this position, defendants never placed any portion of the confirmed plan into the record of the present proceedings.

6. Plaintiffs opposed the motion to dismiss by arguing that the statute of limitations constitutes an affirmative defense which must be affirmatively pled by way of answer (R. 46-48) and further by the affidavit of plaintiff Walter P. Larson in which he states:

(a) that he learned of the default under the oral contract only on June 24, 1983, within four years prior to filing of this suit, when he was ordered to vacate the Larson Ford Sales facilities;

(b) that the \$200,000.00 parts inventory converted by defendants was intact as of June 24, 1983 and that an official sale of the final \$5,000.00 portion of those parts did not occur

until eighteen months after June 24, 1983; and

(c) that Stephen Wade, Inc., which submitted the plan of reorganization confirmed by the bankruptcy court, was not a party to the present suit (R. 49-50).

7. Notwithstanding this opposition, the district court considered defendants' motion to dismiss as a motion for summary judgment and dismissed plaintiffs' amended complaint with prejudice (R. 73-74).

NOTE: The Court should consider the following information only if it grants plaintiffs' pending motion to supplement the record:

8. The Stephen Wade, Inc. plan of reorganization was contingent upon the occurrence of future events. Article IX of the plan provided:

"IX. CONDITIONS TO CONFIRMATION

"In addition to the conditions to Confirmation set forth in Bankruptcy Code, and notwithstanding any other provisions of the Plan, the effectiveness of the Plan shall be conditioned upon each of the following conditions which may be waived by Valley [Valley Ford, formed to implement the plan] in its sole discretion:

"A. Issuance of the Confirmation Order by June 1, 1983 in form and substance satisfactory to Valley including a provision assuming the J. J. Inc. lease and assigning it to

Valley and a provision terminating the Debtor's franchise agreements with Ford Motor Company listed on Attachment 2 provided that Ford appoints Valley as its authorized dealer at Debtor's location.

"B. Approval by Ford Motor Company of Valley Ford, Inc. as its authorized dealer at Debtor's location.

"C. Receipt of the loan proceeds on or before the Effective Date from Citizens Bank and Commercial Security Bank under the terms as described in Article VI." [Emphasis supplied.] (Add. 9).

9. In addition, by Order dated June 24, 1983, exactly four years prior to the filing of the complaint herein, the Bankruptcy Court expressly modified its confirmation order "to allow the Plan to become effective when both conditions B and C as outlined in Article IX of the Plan are satisfied." (Add. 10).

10. Finally, by a follow-up Order, dated July 1, 1983, the Bankruptcy Court fixed July 11, 1983 as the effective date of the plan of reorganization, well within four years prior to the June 24, 1987 filing of plaintiffs' complaint herein. (Add. 11).

#### SUMMARY OF ARGUMENT

Dismissal on a motion to dismiss, considered as a motion for summary judgment, may be sustained only if (1) there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law.

Defendants below relied wholly on confirmation of a plan of

reorganization, more than four years prior to this suit, by a non-party to the contract alleged in this suit. This cannot be sustained as a matter of law. The concept of breach of contract by a non-party to that contract is foreign to the law. No cause of action for breach of contract accrued to plaintiffs upon confirmation of that plan because the corporate proponent of that plan is not a party to the oral contract alleged in this suit. Moreover, defendants elected not to place any of the terms of the plan itself into the record. It is therefore impossible to conclude, as a matter of law, that a breach even occurred.

The facts and inferences of Walter P. Larson's affidavit in opposition to the motion to dismiss create clear issues of fact requiring reversal of the dismissal below. By that affidavit, Stephen Wade, Inc. is not a party to the oral contract, no breach of contract occurred until plaintiffs were actually evicted from the dealership, a date within four years years prior to the filing of this suit, and the assets of the dealership were intact at that time.

The district court erred in dismissing this complaint, prior to answer, because a limitations defense is an affirmative defense which must be specifically pleaded.

In the event the court orders supplementation of the record on plaintiffs' pending motion, the court should also consider that the terms of the plan, not placed into the record by defendants, were expressly contingent upon future, uncertain

events and that confirmation was not finally effective until July 11, 1983, a date within four years prior to filing of this suit.

#### ARGUMENT

To sustain the district court's dismissal of plaintiff's amended complaint, on the basis of the present record, this court must find that (1) the bare fact of confirmation of a plan of reorganization, terms undisclosed, by a non-party to the oral contract alleged in this suit constitutes a breach of that oral contract, as a matter of law; and that (2) the affidavit of Walter Park Larson creates no issue of fact requiring trial.

In making these decisions, the court must view the facts in the light most favorable to plaintiffs, including all reasonable inferences arising therefrom. Spor v. Crested Butte Silver Mining, 740 P. 2d 1304 (Ut., 1987); Geneva Pipe Co. v. S. & H. Ins. Co., 714 P. 2d 648 (Ut., 1986). Further, because summary judgment may be granted properly only as a matter of law, an appellate court is free to reappraise the district court's legal conclusions. Atlas Corporation v. Clovis National Bank, 737 P. 2d 225 (Ut., 1987).

Under these standards, the dismissal below simply cannot be sustained.

I. DEFENDANTS' OWN EVIDENCE IS NOT LEGALLY SUFFICIENT TO PROVE, AS A MATTER OF LAW, THAT THE PLAN OF REORGANIZATION BREACHED THE CONTRACT BETWEEN PLAINTIFFS AND DEFENDANTS.

Defendants below relied wholly on the bare fact of confirmation of a plan of reorganization by Stephen Wade, Inc.--



not a party to the oral contract alleged in this suit--more than four years prior to filing of this suit, to obtain dismissal of this suit as a matter of law. Plaintiffs submit that a simple analysis of the record will show why this was error.

First, the concept of breach of contract by a non-party to that contract is wholly foreign to the law of contracts. Stephen Wade, Inc., proponent of the plan of reorganization, is not even a party to the oral contract alleged in this suit. In light of this, how can any action taken by Stephen Wade, Inc. be said, as a matter of law, to breach that contract? To be sure, Stephen Wade is, by affidavit the "principal shareholder" of Stephen Wade, Inc., but defendants, who prevailed below, are entitled to no favorable inference from that fact.

Nothing here makes the actions of Stephen Wade, Inc., a corporation, equal the actions of Stephen Wade, an individual, as a matter of law. It is entirely conceivable that Stephen Wade, the individual, continued to stand by his personal commitment to plaintiffs, notwithstanding the corporate position of Stephen Wade, Inc., whatever that undisclosed position truly is.

Second, "the true test in determining when a cause of action arises or accrues is to establish the time when the plaintiff could have first maintained the action to a successful conclusion. In other words, an action cannot be maintained until a right of action is complete, and hence the statute of limitations cannot run before that time." Limitation of Actions, Section 107, 51 Am Jur 2d 679-680.

Can this Court say, as a matter of law, that plaintiffs could have successfully sued these defendants immediately after Stephen Wade, Inc., a non-party to the oral contract, filed its plan of reorganization? Clearly not, for the simple reason that these defendants could oppose such a suit by saying, "we are not Stephen Wade, Inc., we have done nothing in breach of our contract, we still intend to perform."

Third, despite arguing that confirmation of the Stephen Wade, Inc. plan of reorganization breached the oral contract as a matter of law, defendants put no evidence into the record to prove that point.

Defendants chose not to place the plan of reorganization into the record. This is a curious omission of itself. For all the present record shows, the plan of reorganization could provide that Stephen Wade, Inc., the corporation, will assume and pay the contract obligations of Stephen Wade, the individual, to plaintiffs. If the plan did so, it would certainly prove nothing on which to base a breach of contract.

Or, the plan of reorganization could be wholly contingent upon the occurrence of future events. These future events could be of such a nature that their non-occurrence would force defendants here to honor their verbal contract with plaintiffs. Perhaps the plan requires a subsequent infusion of capital and a dealership agreement, without which defendants would have no choice but to abide by the terms of their verbal contract with plaintiffs.

All of these inferences flow legitimately from the affidavit of Walter P. Larson that he did not know defendants were not going to honor their contract until evicted from the dealership on June 24, 1983 and are permissible since defendants chose not to place any of the terms of the plan of reorganization into the record.

There is no question that a party's evidence must be sufficient to prove his entitlement to summary judgment, as a matter of law, "strict observance" of this principle being required. Summary Judgment, Section 16, 73 Am. Jur. 2d 737. Absent proof of the terms of the plan itself, the evidence put forth to support defendants' motion is legally insufficient to sustain summary judgment.

## II. THE AFFIDAVIT OF WALTER P. LARSON CREATES TRIABLE ISSUES OF FACT ON THE LIMITATIONS ISSUE.

Plaintiffs are entitled to the following inferences from the affidavit of Walter P. Larson:

(1) that the contract alleged in this suit was not breached by the plan of reorganization of Stephen Wade, Inc., Stephen Wade, Inc. not being a party to the oral contract;

(2) that the contract was not breached until Walter Park Larson was affirmatively evicted from the dealership.

(3) that plaintiffs' lack of knowledge of any breach of contract prior to eviction from the dealership was entirely reasonable, Stephen Wade, Inc. not even being a party to the oral

contract.

(4) that plaintiffs' lack of knowledge of any breach of contract prior to eviction from the dealership was exactly what defendants wanted because of doubts as to the ability of Stephen Wade, Inc. to perform its plan of reorganization.

As with the making of a contract, a breach of contract cannot rise from a secret intention of a party to that contract. No breach occurs until that intention is manifest by some overt act. The only overt act of any party to the contract alleged in this suit is the order evicting Walter P. Larson from the premises of the Larson Ford dealership. Plaintiffs are entitled to the inference, on this record, that no breach of contract occurred until that time. Since that time is within four years of the filing of this suit, the order of dismissal below should be reversed.

These inferences protect plaintiffs' first two causes of action from dismissal on a summary basis.

Plaintiffs' third cause of action alleges breach of fiduciary duty, unjust enrichment, and conversion. By the affidavit of Walter P. Larson, these torts were not completed until eighteen months after June 24, 1983, when the final \$5,000.00 of assets involved were disposed of by official sale. (R. 50). The reasonable inference of this affidavit is that the torts alleged continued well within the limitation period of Section 78-12-25(3), Utah Code, relied upon below.

The order dismissing this cause of action should be

reversed, as well.

III. THE COURT ERRED IN DECIDING A STATUTE OF LIMITATIONS ISSUE, AN AFFIRMATIVE DEFENSE, IN THE CONTEXT OF A RULE 12(B)(6) MOTION TO DISMISS.

By Rule 8(c), Utah Rules of Civil Procedure, any statute of limitations is made an affirmative defense. By Rule 9(h), Utah Rules of Civil Procedure, specific identification of the section and subsection relied upon is required in the pleading of that defense.

The Rule 12(b)(6) defense of failure to state a claim is inconsistent with a limitations defense. Plaintiffs' complaint clearly states a claim. The objection made is not that no claim is stated, but that the claim stated is not timely. Defendants should have been required to answer before seeking dismissal upon a limitations issue, in the context of a motion for summary judgment.

NOTE: The Court should consider the following section only if plaintiffs' pending motion to supplement the record is granted.

IV. THE PLAN OF REORGANIZATION, AS ORIGINALLY "CONFIRMED," WAS WHOLLY CONTINGENT UPON FUTURE, UNCERTAIN EVENTS. THE PLAN DID NOT FINALLY BECOME EFFECTIVE UNTIL JULY 11, 1983, WELL WITHIN FOUR YEARS PRIOR TO FILING OF THIS SUIT.

A review of the plan of reorganization makes clear why the defendants never placed the plan itself into the record of this suit. The plan contains an Article containing "Conditions to Confirmation," by which the entire plan is moot if either bank

funding of the plan or a Ford dealership agreement are not obtained (Add. 9, p 11).

Moreover, by two subsequent orders, the effective date of the plan of reorganization was first continued indefinitely to account for contingencies yet to occur (Add. 10), and later specifically fixed at July 11, 1983, well within four years prior to filing of this suit (Add. 11).

None of this was presented to the court below, precisely because it reconciles plaintiffs' lack of knowledge of any breach of contract with confirmation of the plan of reorganization. Despite that plan, plaintiffs were led to believe that the contract would still be honored, precisely because the success of the plan was uncertain.

All of this creates clear issues of fact precluding summary dismissal.

#### CONCLUSION

Plaintiffs respectfully request reversal of the Order of dismissal below and remand of the present suit for trial.

DATED this 21<sup>st</sup> day of January, 1991.

By: 

L. Edward Robbins  
Attorney for Plaintiffs

Certificate of Service

I hereby certify that on the 22<sup>nd</sup> day of January, 1991, I served the foregoing Brief of Appellant together with the accompanying Addenda upon the following individuals by depositing in the U. S. Mails, first class postage fully prepaid, four copies thereof, one copy manually signed by counsel, addressed as follows:

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Attorneys for Defendants/Respondents

  
\_\_\_\_\_  
L. Edward Robbins

ADDENDA

- 1--First Amended Complaint
- 2--Affidavit of Stephen Wade
- 3--Memorandum in Support of Motion to Dismiss
- 4--Affidavit in Opposition to Defendants' Motion to Dismiss
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- 6--Order (of Dismissal)
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- 9--Second Amended Plan of Reorganization Submitted by  
Stephen Wade, Inc.
- 10--Order (modifying effective date of Plan of Reorganization)
- 11--Order Further Modifying the Effective Date of the Plan of  
Reorganization on Motion for Reconsideration



3.32/7.16

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*James P. [Signature]*

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

WALTER P. LARSON,  
an individual, and  
LARSON FORD SALES, INC., a  
Deleware Corporation,

Plaintiffs,

vs.

STEPHEN WADE, individually, and  
STEPHEN WADE, BRYCE WADE, KIPP  
WADE, d/b/a SBK, a General  
Partnership, and VALLEY FORD,  
a Utah Corporation,

Defendants.

:

:

FIRST AMENDED COMPLAINT

(Jury Demanded)

:

:

:

Civil No. 00704273

:

:

:

:

PLAINTIFFS for cause of action against the Defendants,  
allege as follows:

General

1. Plaintiffs, WALTER P. LARSON is an individual residing  
in Salt Lake County, State of Utah.

2. Plaintiff LARSON FORD SALES is a Delaware Corporation  
of which WALTER P. LARSON is the sole shareholder thereof.

3. STEPHEN WADE, BRYCE WADE, and KIPP WADE are individuals residing in Salt Lake County, State of Utah who are doing business as individuals and as a General Partnership under the name and style of SBK as well as VALLEY FORD.

4. On or about the 10th day of Jan., 1983, the Defendant STEPHEN WADE entered into a verbal agreement with the Plaintiff. Whereby the Defendant would purchase and acquire the business known as LARSON FORD SALES from the Plaintiff, WALTER P. LARSON with SYBIL LARSON and 3 children as witnesses. Included in the terms of said agreement were the following:

(a) The Defendant STEPHEN WADE agreed to substitute collateral for the Small Business Administration loan agreement and assume the S.B.A. loan to LARSON FORD SALES and hold Plaintiff, WALTER P. LARSON harmless from the requirements of said S.B.A. loan as guarantor.

(b) Citizens Bank and Commercial Security Bank had made claim against LARSON FORD SALES and WALTER P. LARSON for \$670,000.00 overdraft. STEPHEN WADE agreed to assume this debt to the extent he would obtain a release of said claim by which Plaintiffs would be relieved of this obligation.

(c) STEPHEN WADE agreed to assume and pay the Sales Tax liability of LARSON FORD SALES in an amount of approximately \$512,000.00 and to hold Plaintiffs harmless from the demands thereof.

(d) Defendants agreed to submit on behalf of LARSON FORD SALES, a debtor's plan in the Chapter XI Bankruptcy and obtain approval thereof at no cost to WALTER P. LARSON. Such plan to include payment of \$175,000.00 to WALTER P. LARSON.

(e) To provide WALTER P. LARSON with 4 dealer demos for a period of 4 years.

(f) To provide for WALTER P. LARSON and family health and accident insurance for a period of 4 years after the transaction date.

5. The above referred to verbal contract was based upon good and valuable consideration in that the Plaintiff in reliance on the assurances of Wade did not search further for a backer to support the Larson Ford debtor plan of reorganization except for Wade and two other groups.

#### First Cause of Action

##### Breach of Contract

6. Plaintiff incorporates paragraphs 1 through 5 of the First Cause of Action and make them a part hereof.

7. Notwithstanding the agreement between the parties as set forth above, the Defendant STEPHEN WADE breached the contract with the Plaintiff in the following particulars:

(a) No substitution of collateral was made in the S.B.A. loan case as agreed and the Plaintiff has been damaged in the amount of \$509,000.00 and interest thereon at 19.25% since the 30th day of June, 1983.

(b) As a result of the failure of Defendant STEPHEN WADE to settle with Citizens Bank and Commercial Security Bank and obtaining the releases for the Plaintiff, it was necessary for Plaintiff to employ counsel and engage in a grevous lawsuit by which Plaintiff was damaged in the amount of \$100,000.00

(c) The failure of STEPHEN WADE to obtain a release from the Utah State Tax Commission and holding harmless, WALTER P. LARSON from the sales tax responsibility of LARSON FORD SALES has damaged Plaintiff in an amount of approximately \$512,000.00.

(d) The failure to submit an acceptable plan in the Bankruptcy Court Chapter XI Bankruptcy of LARSON FORD SALES which would protect the Plaintiff and cause payment of \$175,000.00 to be made to the Plaintiff has caused a loss of \$175,000.00 as well as the failure to receive \$175,000.00 as agreed.

(e) Plaintiff has suffered damages in the approximate amount of \$50,000.00 for not being able to have the demo automobiles to drive for a 4 year period.

(f) Plaintiff has been damaged by the failure to have health and accident insurance and the cumulative medical and hospital charges since that time have resulted in \$20,000.00 damages.

8. Plaintiff has been damaged in the amounts set forth above.

WHEREFORE Plaintiff prays judgment as hereinafter set forth.

## Second Cause of Action

(Interference with Business Relations)

9. Plaintiff incorporates paragraphs 1 through 8 of his introductory allegations as well as the First Cause of Action and incorporates the same by reference.

10. Subsequent to the breach of contract by WADE as set forth in the First Cause the Plaintiffs negotiated an agreement with a partnership known as HGBH, a partnership composed of Owen C. Hogle, Dennis Gay, Stephen Bruno and James Hogle, Jr.

11. In said agreement HGBH agreed to purchase LARSON FORD SALES on terms substantially similar to those set forth and agreed to by WADE as set forth in the First Cause of Action.

12. Plaintiff believes and therefore alleges that the Defendant STEPHEN WADE communicated with HGBH and prevailed upon HGBH to breach its contract with the Plaintiff.

13. The conduct of the Defendant was wrongful in that Defendant STEPHEN WADE, having breached his agreement with the Plaintiff, conspired with and induced the HGBH partnership to breach their contract to provide like benefits. This breach of HGBH was induced in order that the Defendant STEPHEN WADE could submit a creditors plan in Chapter XI Bankruptcy.

WHEREFORE, Plaintiff prays judgment as hereinafter set forth.

### Third Cause of Action

(Breach of Fiduciary duty and unjust enrichment and conversion)

14. Plaintiff incorporates paragraphs 1 through 12 and specifically make them a part hereof.

15. In the process of and concurrent with the negotiations involved in the contract referred to in the First Cause of Action herein, the Plaintiff made available to the Defendant confidential data and information in order that the Defendant could formulate and provide a debtor in possession plan for the Larson Ford Sales Chapter XI Plan of Reorganization. This information was provided STEPHEN WADE for the express reason that Defendant WADE gave his solemn word of honor as a bishop in the L.D.S Church that if Defendant WADE could not support a debtors plan of reorganization as agreed with Plaintiff that the Defendant would take no action whatsoever that would harm or injure Plaintiff, but would back off and not interfere with Plaintiff's debtors Plan of Reorganization.

16. The Defendant STEPHEN WADE made use of the information received and with the afore mentioned assurances that Defendant would take no action to harm Plaintiff, he, together with his brothers, Defendant BRYCE WADE and Defendant KIPP WADE d/b/a SBK, a partnership took actions allowing Defendants to come into possession of the following assets.

(a) J. & J. lease, value \$1,800,000.00 which became the property of SBK while LARSON FORD SALES had substantial unsecured indebtedness and since SBK took the lease (approx. June, 1983) SBK has profitted in an amount of approximately \$25,000.00/month thereafter. None of which has accrued to the unsecured indebtedness.

(b) Automobile parts inventory, value approximately \$200,000.00.

(c) Furniture equipment, value approximately \$90,000.00.

These above assets (a), (b), and (c) had been pledged by LARSON FORD SALES to the S.B.A. as security for the SBA Guaranteed Loan for which Plaintiff is obligated as guarantors.

17. The Defendant having received the confidential data and information about the operation of LARSON FORD SALES, INC., did utilize said information such that based upon a claimed debt of \$130.12 did submit a contrary and adversary Plan to the Plaintiff's plan as a creditors plan to the bankruptcy court which plan violated the contractual agreement between Plaintiff and Defendants as well as took an unfair advantage of confidential information provided by Plaintiff which use constituted a breach on the S.B.A. loan of LARSON FORD SALES, however, the assets were converted to the use and benefit of the Defendants and the Defendants were unjustly enriched thereby in an amount of \$2,155,000.00 and the Plaintiff was diminished in a like amount to his damage.

WHEREFORE, Plaintiff prays judgment as hereinafter set forth.

#### Fourth Cause of Action

(Punitive Damages)

18. Plaintiff incorporates paragraphs 1 through 16 and specifically make them a part hereof.

19. The damages occasioned to the Plaintiff herein are substantial and are the result of intentional, malicious conduct calculated to unjustly enrich the Defendants STEPHEN WADE, BRYCE

WADE and KIPP WADE individually and in the form of SBK, a partnership, and of VALLEY FORD, a Corporation.

20. By reason of the malicious conduct of the Defendants the Plaintiff is entitled to punitive damages in the amount of \$500,000.00.

WHEREFORE, Plaintiff prays damages as follows:

1. On his First and Second Cause of Action as follows:

(a) Failure to substitute collateral and to hold Plaintiff harmless from S.B.A. loan, the sum of \$509,000.00 plus interest at 19.25% per anum since July 1, 1983, even through the SBA had agreed to Defendant's proposal to substitute his collateral for the LARSON FORD loan and assume the said loan.

(b) For failure to resolve the dispute with Citizens Bank and Commercial Security Bank in an amount of \$100,000.00 with release for Plaintiff.

(c) For failure to obtain releases for Plaintiff's liability in the amount of approximately \$512,000.00 in Utah State Sales Tax matter.

(d) For failure to submit the agreed upon debtor's plan in bankruptcy, the sum of \$11,175,000.00.

(e) For failure to provide demo autos for 4 years the sum of \$50,000.

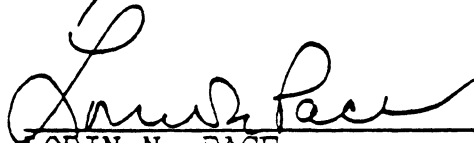


(f) For failure to provide health and accident insurance for 4 years, damages in the amount of \$20,000.00

2. On his Third Cause of Action for breach of fiduciary duty and unjust enrichment and conversion for \$2,155,000.00 plus interest since July 1, 1983.

3. For punitive damages \$500,000.00.

DATED this 8th day of July, 1987.

  
\_\_\_\_\_  
LORIN N. PACE

## ADDENDUM 2

FILED IN CLERK'S OFFICE  
SALT LAKE COUNTY, UTAH

JUL 31 12 59 PM '87

H. J. ...  
E. ...

Gary E. Jubber, A1758  
Patrick L. Anderson, A4787  
FABIAN & CLENDENIN,  
a Professional Corporation  
Attorneys for Defendants  
Twelfth Floor  
215 South State Street  
Salt Lake City, Utah 84111  
Telephone: (801) 531-8900

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH  
WALTER P. LARSON, an individual :  
and LARSON FORD SALES, INC., a :  
Delaware corporation, : AFFIDAVIT OF STEPHEN WADE  
Plaintiffs, :  
vs. : Civil No. ~~G-0704273~~  
STEPHEN WADE, individually, and : c87-4273  
STEPHEN WADE, BRYCE WADE, KIPP :  
WADE, d/b/a SBK, a general :  
partnership, and VALLEY FORD, :  
a Utah corporation, :  
Defendants. :

STATE OF UTAH )  
: ss.  
COUNTY OF SALT LAKE)

STEPHEN WADE, being duly sworn, states as follows:

1. I am the President, a Director and the principal  
shareholder of Stephen Wade, Inc.

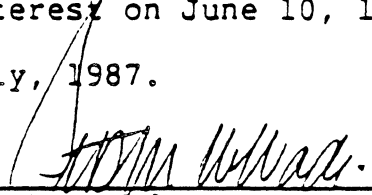
2. I am a named defendant in the above-referenced mat-  
ter and have personal knowledge of the creditors Plan of Reorga-  
nization submitted on behalf of Stephen Wade, Inc. in In re  
Larson Ford Sales, Bankruptcy No. 82C-02186.

3. In early spring of 1983, the creditors Plan of Reorganization referred to in paragraph 1 was submitted on behalf of Stephen Wade, Inc., in connection with the aforementioned bankruptcy case.

4. On or about June 1, 1983, a Second Amended Plan of Reorganization was submitted on behalf of Stephen Wade, Inc., in the Larson Ford Sales Chapter 11 bankruptcy.

5. On June 10, 1983, the Bankruptcy Court confirmed the Plan of Reorganization filed by Stephen Wade, Inc. and entered an order confirming the plan. Notice of the Confirmation Order was mailed to all parties in interest on June 10, 1983.

DATED this \_\_\_\_\_ day of July, 1987.

  
\_\_\_\_\_  
Stephen Wade

SUBSCRIBED AND SWORN TO before me this 30 day of ~~June~~, 1987.  
July

  
\_\_\_\_\_  
NOTARY PUBLIC

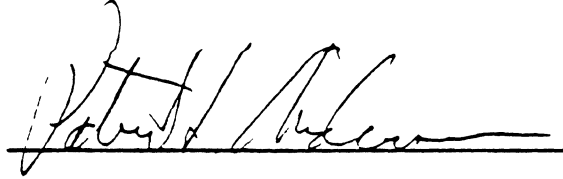
Residing At: 444 N. 1st St.

My Commission Expires:

9-25-89

CERTIFICATE OF SERVICE

This is to certify that on this 30<sup>th</sup> day of July, 1987, I caused to be mailed a true and correct copy of the foregoing Affidavit of Stephen Wade, postage prepaid, to Lorin N. Pace, Esq., Pace & Parsons, 350 South 400 East, Suite 101, Salt Lake City, Utah 84111.

A handwritten signature in dark ink, appearing to read "Robert H. Nelson", is written over a horizontal line.

072987A:PLA

## ADDENDUM 3

JUL 28 4 48 PM '87

H. DICKY HINDLEY CLERK

BY                       
CLERK

Gary E. Jubber, A1758  
Patrick L. Anderson, A4787  
FABIAN & CLENDENIN,  
a Professional Corporation  
Attorneys for Defendants  
Twelfth Floor  
215 South State Street  
Salt Lake City, Utah 84111  
Telephone: (801) 531-8900

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

WALTER P. LARSON, an individual,  
and LARSON FORD SALES, INC., a  
Delaware corporation,

Plaintiffs,

vs.

STEPHEN WADE, individually, and  
STEPHEN WADE, BRYCE WADE, KIPP  
WADE, d/b/a SBK, a general  
partnership, and VALLEY FORD,  
a Utah corporation,

Defendants.

MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS

Civil No. C-0704273  
(Judge Sawaya)

C.S. 7-4273

Defendants Stephen Wade, individually, and Stephen Wade,  
Bryce Wade, Kipp Wade, d/b/a SBK, and Valley Ford submit this  
memorandum in support of its Motion to Dismiss.

#### FACTS

Plaintiffs' First Amended Complaint alleges that on or  
about January 10, 1983, the plaintiff entered into a verbal  
agreement with defendant Stephen Wade for the purchase of the  
business known as Larson Ford Sales. Plaintiffs further allege

that pursuant to the specific terms of this verbal agreement that defendants agreed to submit a debtor's plan in the Chapter 11 bankruptcy, In re Larson Ford Sales Bankruptcy No. 82C-02186, pending in the United States Bankruptcy Court for the District of Utah. All terms of the alleged verbal agreement were related to the requirement that defendants submit a debtor's plan.

Plaintiffs' First Cause of Action claims that defendant Stephen Wade breached the January 10, 1983 verbal agreement by failing to submit an acceptable debtor's plan in the Chapter 11 bankruptcy proceedings. Plaintiffs' Second Cause of Action for Interference with Business Relations claims that "subsequent" to the breach of the verbal agreement by defendants that plaintiffs negotiated an agreement with a partnership known as HGBH, and that defendant Stephen Wade conspired with and induced the HGBH partnership to breach their contract with plaintiffs in order that defendant Stephen Wade could submit a creditor's plan.

Plaintiffs' Third Cause of Action for Breach of Fiduciary Duty and Unjust Enrichment and Conversion claims misuse of information obtained by defendant Stephen Wade for the purpose of submitting a creditor's plan in the Larson Ford Sales Chapter 11 bankruptcy. Plaintiffs' Fourth Cause of Action for Punitive Damages alleges malicious conduct by the defendants prior to defendants' failure to submit an acceptable debtor's plan in the Larson Ford Sales Chapter 11 bankruptcy as required by the alleged verbal agreement.

In early spring of 1983 defendant Stephen Wade submitted a creditor's Plan of Reorganization in connection with the



aforementioned bankruptcy case. On or about June 1, 1983, defendants submitted a Second Amended Plan of Reorganization ("creditor's plan") in the Larson Ford Sales Chapter 11 bankruptcy. On June 10, 1983, after hearing and notice, the Bankruptcy Court entered the Confirmation Order approving the Plan of Reorganization for the Larson Ford Sales Chapter 11 bankruptcy. Notice of Order of Confirmation of Plan of Reorganization Filed by Stephen Wade, Inc. was sent to all parties on June 10, 1983. A copy of this Notice is attached hereto as Exhibit "A."

On or about June 29, 1987 plaintiffs filed their complaint commencing this action. An Amended Complaint was filed on July 8, 1987. Defendants' Motion to Dismiss is in response to plaintiffs' First Amended Complaint.

#### ANALYSIS

##### PLAINTIFFS' FIRST AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR RELIEF AS ALL CLAIMS FOR RELIEF THEREIN ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS

All of plaintiffs' causes of action are governed by a four-year statute of limitation. Utah Code Ann. § 78-12-25(1) and (2) (1953). As set forth below, the facts underlying each cause of action occurred on or before June 10, 1983, the date Stephen Wade's plan of reorganization was confirmed by the Bankruptcy Court. Plaintiffs received notice of the confirmation order and therefore, had actual knowledge of defendants' actions no later than June 10, 1983. This action was commenced more than four years after the latest date any of the causes of action could

be deemed to have arisen. Thus, all plaintiffs' causes of action are time barred.

1. First Cause of Action

Plaintiffs' First Claim for Relief is for breach of a verbal agreement that was allegedly entered into on or about January 10, 1983. Pursuant to Utah Code Ann. 78-12-25(1), an action based upon a contract not founded upon an instrument in writing must be brought within four years from the date upon which the claim for relief is deemed to have arisen. It is the generally accepted rule that a cause of action on a verbal contract arises upon the breach thereof. Upland Industries v. Pacific Gamble Robinson, 684 P.2d 638, 643 (Utah 1984). The alleged verbal agreement, even though containing separate performance requirements, was an entire agreement, and the breach of any of the conditions thereof would start the running of the statute of limitations. An integral part of this verbal agreement was the requirement that the defendants submit on behalf of Larson Ford Sales, a debtor's plan of reorganization. In open breach of the alleged verbal agreement defendants filed a creditor's plan which was approved on June 10, 1983 and notice of entry thereof was sent on June 10, 1983 by the Bankruptcy Court to all parties. Therefore, the alleged verbal agreement was breached on or before June 10, 1983, and plaintiffs' claim is time barred based upon their failure to bring an action within four years as required pursuant to Utah Code Ann. § 78-12-25(1) (1953).

## 2. Second Cause of Action

Plaintiffs' Second Cause of Action for interference with business relations recites that the facts underlying this cause of action occurred subsequent to the breach of the verbal agreement by Stephen Wade but prior to the Bankruptcy Court's approval of the creditor's Plan of Reorganization on June 10, 1983. This cause of action, which sounds in intentional tort, is governed by the four-year statute of limitations as set out in Utah Code Ann. § 78-12-25(2).

In paragraph 13 of the First Amended Complaint plaintiffs admit that the cause of action arose prior to June 10, 1983. The paragraph provides:

The conduct of the Defendant was wrongful in that Defendant Stephen Wade, having breached his agreement with the Plaintiff, conspired with and induced the HGBH partnership to breach their contract to provide like benefits. This breach of HGBH was induced in order that the Defendant Stephen Wade could submit a creditors plan in Chapter 11 bankruptcy. (emphasis added).

Stephen Wade first submitted a plan in the bankruptcy in the spring of 1983. According to the plaintiffs' own allegation, all of the tortious conduct occurred prior to the submission of the creditor's plan. Stephen Wade's plan was approved by the Bankruptcy Court June 10, 1983. The statute of limitations in the case of a willful, intentional tort begins to run when the tort or activity leading thereto occurs, not when the damages are ascertainable. Obray v. Malmberg, 484 P.2d 160, 162 (Utah 1971). Damages resulting from an intentional tort need not be

shown, except nominally. Id. In this case it is clear that the conduct complained of occurred well before June, 1983 and therefore the action is time barred.

### 3. Third Cause of Action

Plaintiffs' Third Cause of Action for Breach of Fiduciary Duty and Unjust Enrichment and Conversion also claims that the activities which constitute defendants' wrongful conduct occurred in the process of and concurrent with the negotiations of the verbal contract. Thus, this cause of action is also barred by Utah's four-year Statute of Limitations. See Utah Code Ann. § 78-12-25(2) (1953). Moreover, plaintiffs' unjust enrichment claim is based upon the alleged misuse by defendants of confidential information obtained during the verbal contractual negotiations, for the purpose of developing the creditor's plan which was submitted prior to June 10, 1983.

### 4. Fourth Cause of Action

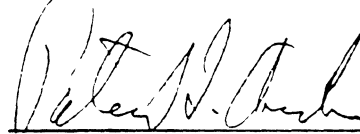
Plaintiffs' Fourth Cause of Action for Punitive Damages is derived from the previous causes of action. For the same reasons as set forth above, this cause of action is also time barred.

### CONCLUSION

Plaintiffs had actual knowledge of all facts which form the basis of their four causes of action prior to June 10, 1983. Furthermore, all four causes of action accrued on or before June 10, 1983. Plaintiffs did not file their Complaint until June 29, 1983. Therefore, pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure, this Court must dismiss the plaintiffs' First

...and complaint for failure to state a claim upon which relief can be granted as all claims outlined therein are barred by the applicable statutes of limitations.

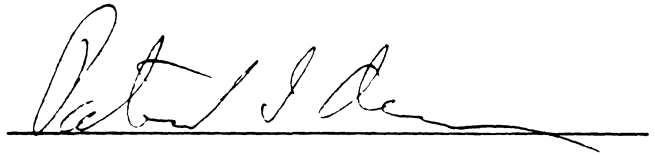
DATED this 28th day of July, 1987.



Gary E. Jubber  
Patrick L. Anderson  
FABIAN & CLENDENIN,  
a Professional Corporation  
Attorneys for Defendants

CERTIFICATE OF SERVICE

This is to certify that on this 28th day of July, 1987, I caused to be mailed a true and correct copy of the foregoing Memorandum in Support of Motion to Dismiss, postage prepaid, to Lorin N. Pace, Esq., Pace & Parsons, 350 South 400 East, Suite 101, Salt Lake City, Utah 84111.



6301j:PLA

RECEIVED

JUN 9 1983

Peter W. Billings, Jr.  
Gary E. Jubber  
FABIAN & CLENDENIN,  
A Professional Corporation  
800 Continental Bank Building  
Salt Lake City, Utah 84101  
Telephone: (801) 531-8900

OFFICE OF JUDGE  
GLEN E. CLARK

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:

LARSON FORD SALES, INC., a  
Delaware corporation,

Debtor.

Bankruptcy No. 82 02186 *b*

NOTICE OF (i) ORDER OF CONFIRMATION OF  
PLAN OF REORGANIZATION FILED BY  
STEPHEN WADE, INC., (ii) DISCHARGE,  
AND (iii) INJUNCTION

TO: THE DEBTOR, ITS CREDITORS, ITS EQUITY SECURITY HOLDERS AND  
OTHER PARTIES IN INTEREST:

NOTICE IS HEREBY GIVEN, pursuant to Interim Bankruptcy  
Rules 2002(c) and 3008(b), of an order of this Court entered on  
June 8, 1983 (the "Confirmation Order") confirming the Second  
Amended Plan of Reorganization Submitted by Stephen Wade, Inc.  
(the "Plan"), and providing further that:

1. Subject to the exceptions listed below, the  
exceptions listed below, the provisions of the Plan bind the  
debtor, any entity issuing securities under the Plan and any  
creditor, or equity security holder of the debtor, whether or  
not the claim or interest of such person is impaired under the  
Plan and whether or not such person has accepted the Plan.

2. Except as otherwise provided in the Plan or the Confirmation Order, the confirmation of the Plan vests all of the property of the estate in Valley Ford, Inc.

3. The property dealt with by the Plan is free and clear of all liens, claims, encumbrances and interests of creditors and of equity security holders in the debtor, except as otherwise provided in the Plan or in the Confirmation Order.

4. Except as otherwise provided in the Plan, or in the Confirmation Order, the confirmation discharges the debtor, the proponent of the Plan, SBK, and Valley Ford, Inc. from any debt that arose before the Confirmation Order was entered on June <sup>10</sup>~~8~~, 1983 at 10:00 a.m. and any and all debts specified in Sections 502(g), 502(h), or 402(i) or title I of the Bankruptcy Reform Act of 1978 (the "Bankruptcy Code") whether or not:

(i) a proof of claim based on such debt is filed or deemed filed under Sections 501 and 1111(a) of the Bankruptcy Code;

(ii) the claim is allowed under Section 502 of the Bankruptcy Code; or

(iii) the holder of the claim has accepted the Plan.

5. Any and all holders of liens, claims, encumbrances or interests from which the debtor has been discharged are permanently restrained and enjoined from taking any action whatsoever to enforce such discharged claims or interests.

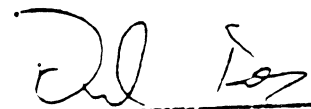
DATED this 10 day of June, 1983.

BY THE COURT:

  
United States Bankruptcy Judge

CLERK  
I, the undersigned, Clerk of the United States Bankruptcy Court, do hereby certify that the foregoing is a true and correct copy of the original as the same appears in the files of the Court and is true and correct as the same appears in the files of the Court and is true and correct as the same appears in the files of the Court.

JUN 10 1983

  
Deputy Clerk



## ADDENDUM 4



3. The parts (value \$200,000.00) pledged as collateral to SBA loan were intact on June 24, 1983. It was only learned eighteen (18) months later when an official sale took place that all but \$5,000.00 (appraised) had disappeared.

4. The reorganization plan was of Stephen Wade Inc. which organization is not a party to this action.

DATED this 16 day of Oct., 1987.

  
WALTER P. LARSON

Personally appeared before me Walter P. Larson who duly acknowledged to me that he had executed the above and foregoing Affidavit and that the information contained therein is true and correct to the best of his knowledge, information and belief.

SUBSCRIBED and SWORN to before me this 16 day of Oct 1987.

  
Notary Public

My Commission Expires:

8-23-91

Residing At: S. h. County, Utah

## ADDENDUM 5

LORIN N. PACE #2498  
PACE & PARSONS  
350 South 400 East, Suite 101  
Salt Lake City, Utah 84111  
Telephone: (801) 364-1300

FILED

SALT LAKE COUNTY

OCT 19 2 40 PM '87

BY *Rafael Trujillo*

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

---

WALTER P. LARSON,	)	
an individual, and	)	
LARSON FORD SALES, INC., a	)	MEMORANDUM IN RESPONSE TO
Delaware Corporation	)	DEFENDANTS MOTION TO DISMISS
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
STEPHEN WADE, individually, and	)	Civil No. C-0704273
STEPHEN WADE, BRYCE WADE, KIPP	)	(Judge Sawaya)
WADE, d/b/a SBK, a General	)	
Partnership, and VALLEY FORD,	)	
a Utah Corporation,	)	
	)	
Defendants.	)	

C 8' 4273

---

Plaintiffs by and through there attorney submit this  
memorandum in response to defendants motion to dismiss.

FACTS

Plaintiffs filed their first complaint on or about June <sup>24</sup>~~29~~,  
1987 which commenced this action. On July 8, 1987 plaintiffs  
filed an amended complaint. Defendants as of this date have yet  
to file an answer to plaintiffs' complaint. Defendants first  
response to plaintiffs' complaint was a motion to dismiss of  
which this memorandum is in response.

## ANALYSIS

DEFENDANTS' MOTION TO DISMISS SHOULD BE QUASHED AS DEFENDANTS WAIVED THEIR RIGHT TO USE THE STATUTES OF LIMITATIONS AS A DEFENSE BY FAILING TO ANSWER PLAINTIFFS' COMPLAINT AND PLEADING THE STATUTE OF LIMITATIONS AS AN AFFIRMATIVE DEFENSE.

The Utah Rules of Civil Procedure Rule 8(c) provide that the statute of limitations is an affirmative defense and must be plead as such in a responsive pleading. Because an affirmative defense is a factual issue and outside the realm of the plaintiff's prima facia case, the Utah Supreme Court has held that the defendant must specifically plead an affirmative defense as outlined in Rule 8(c). Pratt v. Board of Education, 564 P.2d 294 (Utah 1977); General Insurance Co. of America v. Carnicero Dynasty Corp., 545 P.2d 502 (Utah 1976).

The Utah courts have always held that the failure to plead the statute of limitations as an affirmative defense in a responsive pleading amounts to a waiver, unless an amended pleading asserting the defense is allowed pursuant to the requirements of Rule 15(a). Slaker v. Huntington Cleveland Irrigation Co., 664 P.2d 1188 (Utah 1983); Tygesen v. Magna Water Co., 375 P.2d 456 (Utah 1962); See also Hanson v. Morris, 283 P.2d 884 (Utah 1955); Thomas v. Braffet's Heirs, 305 P.2d 507 (Utah 1966).

The Utah Supreme Court has held that certain affirmative defenses can not be plead by motion. In W.W. & W.B. Gardner, Inc., v. Pappas, 470 P.2d 252 (Utah 1970) the court stated that the statute of frauds was an affirmative defense which must be plead pursuant to Rule 8(c) and may not be raised by a motion to

dismiss pursuant to Rule 12(b).

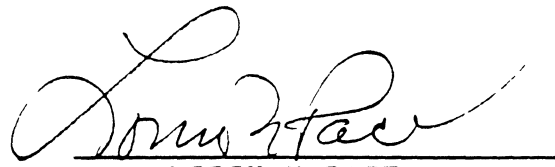
The Statute of limitations is similar to that of the statute of frauds in that they are both affirmative defenses that must be plead specifically in a responsive pleading or they are waived. Likewise, the statute of limitations can not be raised pursuant to a motion to dismiss, unless it is first plead in a responsive pleading.

#### CONCLUSION

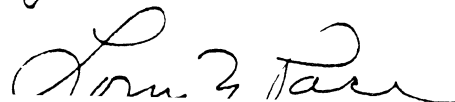
The Utah Rules of Civil Procedure and the case law interpreting those rules are clear that the statute of limitations is an affirmative defense that must be plead as such in a responsive pleading. If the statute of limitations are not plead as an affirmative defense the defendants waive their rights to use that defense. The courts have also held that affirmative defenses such as the statute of limitations can not be raised pursuant to a Rule 12(b) motion to dismiss.

Therefor, Plaintiffs ask this court to quash Defendants motion to dismiss and to rule that defendants have waived there right to that defense.

Dated this 14 day of October, 1987


  
LORIN N. PACE  
Attorney for Plaintiffs

I CERTIFY THAT I HAVE DELIVERED A COPY OF  
THE MEMORANDUM, <sup>AND</sup> AFFIDAVIT TO GARY E. JUBBER  
ATTY FOR DEFENDANTS THIS 14th day of Oct, 1987



## ADDENDUM 6





## STATE OF UTAH

• • • • •

Civil No. C87-04273  
(Judge Dennis Frederick)

This matter came before this Court for hearing on June 20, 1988, pursuant to Stephen Wade, Bryce Wade, Kipp Wade, d/b/a S.B.K. and Valley Ford's Motion to Dismiss Plaintiffs' First Amended Complaint. At the hearing, defendants were represented by Gary E. Jubber and plaintiffs Walter P. Larson and Larson Ford Sales, Inc., were represented by Peter Waldo. The Court having considered the memoranda and arguments of counsel, and good cause appearing therefor,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss plaintiffs' First Amended Complaint shall be considered as a Motion for Summary Judgment and based on the record and the absence of any material issues of fact, plaintiffs' First Amended Complaint is dismissed with prejudice.

DATED this 14<sup>th</sup> day of July, 1988.

BY THE COURT,

Dennis Frederick  
District Court Judge

CERTIFICATE OF SERVICE

This is to certify that on this 22<sup>nd</sup> day of June, 1988, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing Order, to the following:

Peter Waldo, Esq.  
5250 South 300 West, Suite 255  
Salt Lake City, Utah 84107

062188A:PLA

## ADDENDUM 7

STATE OF UTAH

SALT LAKE CITY, UTAH

June 19, 1990

OFFICE OF THE CLERK

---

L. Edward Robbins, Esq.  
1200 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111

Walter P. Larson, an individual and  
Larson Ford Sales, Inc., a Delaware  
corporation,

Plaintiffs and Appellants,

v.

NO. 880344

Stephen Wade, an individual, and  
Stephen Wade, Bryce Wade, Kipp Wade  
dba SBK, a general partnership and  
Valley Ford, a Utah corporation,  
Defendants and Appellees.

Having heard oral argument, the Court  
elects, pursuant to rule 30(d) of the Utah  
Rules of Appellate Procedure, to dispose  
of this case under rule 31, without  
written opinion.

A majority of the Court determines that  
the trial Judge abused his discretion in  
denying plaintiffs' motion to extend the  
time for appeal. The Order dated  
September 19, 1988, denying said motion is  
accordingly reversed, and plaintiffs have  
thirty days from the entry of this order  
to file an appeal from the summary  
judgment entered July 14, 1988.

Hall, C.J., and Zimmerman, J., dissent.

Geoffrey J. Butler, Clerk

## ADDENDUM 8

L. Edward Robbins, #2766  
Attorney for Plaintiffs  
1200 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111  
Telephone: (801) 355-7030

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


---

WALTER P. LARSON, an indi-	:	
vidual, and LARSON FORD	:	
SALES, INC., a Delaware	:	NOTICE OF APPEAL
corporation,	:	
	:	
Plaintiffs/Appellants,	:	
	:	
vs.	:	
	:	
STEPHEN WADE, individually,	:	
and STEPHEN WADE, BRYCE WADE,	:	Civil No. C87-4273
KIPP WADE, dba SBK, a general	:	
partnership, and VALLEY FORD,	:	
a Utah corporation,	:	
	:	(Judge J. Dennis Frederick)
Defendants/Respondents.	:	

---

Plaintiffs, through counsel, hereby appeal to the Utah Supreme Court from that certain Order of the Third District Court, Salt Lake County, State of Utah, granting defendants' motion to dismiss considered as a motion for summary judgment, which Order was signed and entered on July 14, 1988.

DATED this 17<sup>th</sup> day of July, 1990.

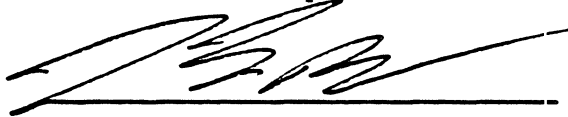
By:   
L. Edward Robbins  
Attorney for  
Plaintiffs/Appellants

Certificate of Service

I hereby certify that on the 17<sup>th</sup> day of July, 1990, I served the foregoing Notice of Appeal upon the following individuals by depositing a true and correct copy thereof in the U. S. Mails, first class postage fully prepaid, addressed as follows:

Gary E. Jubber  
Patrick L. Anderson  
FABIAN & CLENDENIN  
Twelfth Floor  
215 South State  
Salt Lake City, Utah 84111

Attorneys for Defendants/Respondents

A handwritten signature in black ink, appearing to be "G. Jubber", written over a horizontal line.

## ADDENDUM 9



Peter W. Billings, Jr.  
Gary E. Jubber  
FABIAN & CLENDENIN,  
a Professional Corporation  
Attorneys for Stephen Wade, Inc.  
800 Continental Bank Building  
Salt Lake City, Utah 84101  
Telephone: (801) 531-8900

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:	}	SECOND AMENDED
	}	PLAN OF REORGANIZATION
LARSON FORD SALES, INC.,	}	SUBMITTED BY
a Delaware corporation,	}	STEPHEN WADE, INC.
	}	
Debtor.	}	Bankruptcy No. 82-02186
	}	(Chapter 11)

---

Stephen Wade, Inc. hereby proposes the following Plan of Reorganization pursuant to Section 1121 of the Bankruptcy Code.

I. INTRODUCTION

Larson Ford Sales, Inc., a Delaware corporation (the "Debtor") filed a Chapter 11 petition on August 31, 1982. Prior to the filing of its petition, the Debtor incurred substantial indebtedness which it has not paid. Since the date of the filing, the Debtor has continued to manage its affairs as a debtor in possession under the provisions and restrictions of the Bankruptcy Code and certain Court orders. Debtor has filed its First Amended Plan of Reorganization.

Stephen Wade, Inc. ("Wade"), a small creditor of the Debtor and an automobile dealer which operates a Pontiac-Mazda dealership in downtown Salt Lake City and a small import dealership adjacent to the Debtor, wishes to submit a plan of its own.

## II. DEFINITIONS

For the purposes of this Plan of Reorganization the following definitions shall apply:

"Administrative claims" shall mean those claims of creditors entitled to priority under Section 507(a)(1) of the Bankruptcy Code.

"Claim" shall mean a duly listed claim or a timely filed proof of claim.

"Court" shall mean the United States Bankruptcy Court for the District of Utah in which this case is pending.

"Creditors" shall mean all creditors of the Debtor holding claims for priority, secured or unsecured debts, liabilities, demands or claims of any character whatsoever.

"Debtor" shall mean Larson Ford Sales, Inc.

"Effective date" shall mean the date on which the order confirming this Plan of Reorganization becomes final and nonappealable.

"Lien" shall mean a mortgage, pledge, judgment lien, security interest, charging order or other charge or encumbrance on the Debtor's property effective under applicable law as of the date of the Debtor's petition for reorganization.

"Plan" shall mean this Plan of Reorganization in its present form or as it may be amended or supplemented.

"Priority expenses" shall mean those claims of creditors entitled to priority under Section 507(a) (3), (a) (4), (a) (5) and (a) (6) of the Bankruptcy Code.

"Secured claims" shall mean all claims secured by liens on the property of the Debtor, which liens are valid, perfected and enforceable under applicable law, are not subject to avoidance under the Bankruptcy Code or other applicable nonbankruptcy law, to the extent such claims are allowed under 11 U.S.C., §506 and are duly established in this case.

"Shareholders" shall mean those individuals who own shares of the Debtor.

"Unsecured claims" shall mean all claims held by creditors of the Debtor, other than Secured Claims and other than the claims of The Citizens Bank, and shall include claims arising out of the rejection of executory contracts.

"Valley" shall mean Valley Ford Inc., a Utah corporation, formed for the purpose of implementing this Plan.

"Wade" shall mean Stephen Wade, Inc.

### III. CLASSIFICATION OF CLAIMS AND INTERESTS

For the purposes of distribution under this Plan, claims are divided into the following classes:

Class 1: Administrative claims authorized and allowed by the Court pursuant to Section 507(a) (1) of the Bankruptcy Code.

Class 2: Priority expenses authorized and allowed by the Court pursuant to Sections 507(a)(3), (a)(4), (a)(5), and (a)(6) of the Bankruptcy Code except those of the Utah State Tax Commission.

Class 3: The claims of the Utah State Tax Commission which are priority expenses and are authorized and allowed by the court pursuant to Section 507(a)(6) of the Bankruptcy Code.

Class 4: The claims of Ford Motor Credit Company as authorized and allowed by the Court.

Class 5: The claims of Ford Motor Company as authorized and allowed by the Court.

Class 6: The secured claims of the Small Business Administration, including principal, interest and attorneys' fees authorized under applicable law, as the same are allowed and ordered paid by the Court.

Class 7: The claim of Citizens Bank as allowed by the Court.

Class 8: The claim of Commercial Security Bank as allowed by the Court.

Class 9: The claims of certain secured creditors listed on Schedule C, including principal, interest and attorneys' fees authorized under applicable law, as the same are allowed and ordered paid by the Court.

Class 10: The claims of unsecured creditors including the deficiency claims of the secured creditors.

Class 11: Shareholders of Debtor.

Class 12: Any and all claims of Larson Enterprises, Walter P. Larson, Sybil Larson, Jon Larson, Richard Larson, Scott Hillier, Julie Hillier and David Larson.

#### IV. SALE OF ALL OF DEBTOR'S ASSETS TO VALLEY FORD

The principals of Wade, Stephen W. Wade, H. Bryce Wade and Kip O. Wade, have formed a new corporation, Valley Ford Inc., to take over the operations of the Debtor and to execute the Plan. These principals, through their partnership SBK will borrow \$1,175,000 from Commercial Security Bank and Citizens Bank, Commercial Security Bank will loan \$750,000 secured by real property now owned by SBK, Citizen's Bank will loan \$425,000 secured by the J.J., Inc. lease. Of the total \$1,175,000, approximately \$450,000 will be used to satisfy existing encumbrances on the SBK property and the remaining \$725,000 will be contributed as capital to Valley to fund the Plan. SBK will also provide \$200,000 of capital to Valley.

Valley Ford will purchase all the assets of the Debtor not being returned to secured creditors and assume responsibility for paying the creditors in Classes 1, 2 and 4, 5, 6, 9 and 10 as provided in the Plan. Classes 7 and 8 will be paid by SBK as provided in the Plan and Class 3 will be paid by Wade as provided in the Plan. Upon confirmation, the Debtor will voluntarily terminate its franchise agreements with Ford Motor Company as listed in Attachment 2.

## V. CONTINGENT FUNDING

Currently Debtor is involved in legal action against Universal Underwriters Insurance Company for a claim in the approximate sum of \$300,000. This claim will become part of the assets of Valley Ford. Should any amount be recovered from Universal Underwriters, such sums shall be paid first to the Utah State Tax Commission up to \$56,045.40 and then up to \$93,000 shall be paid to the Small Business Administration. This Plan shall in no way be interpreted or deemed as a waiver of Debtor's claims against Universal Underwriters, which claim Valley shall continue to pursue during the term of this Plan.

## VI. TREATMENT OF CLAIMS

Upon confirmation of this Plan of Reorganization, claims shall be paid in the following amounts at the following times:

I. Class 1. Section 507(a)(1) administrative expense claims shall be treated as follows:

(a) As compensation for legal services, Prince, Yeates & Geldzahler, attorneys for Debtor, shall be paid \$17,500 cash within thirty (30) days of the Effective Date. Within sixty (60) days after the Effective Date, Prince, Yeates & Geldzahler shall be paid an additional \$17,500 cash. Prince, Yeates & Geldzahler shall be entitled to one-half of any amount recovered from Nielsen & Senior for a retainer previously paid to Nielsen & Senior by the Debtor. In addition, Prince, Yeates & Geldzahler shall retain any amounts paid to them previously by the Debtor.

(b) ALL other 507(a) (1) claims allowed by the Court, except those set forth in (c) and (d) hereof, as listed on Schedule "A" attached hereto and made a part hereof, shall be paid in full ninety (90) days after the Effective Date.

(c) The claim of HBGH entitled to superpriority status under § 364(c) shall be paid as follows: \$80,000 on the Effective Date; \$25,000 six months from the Effective Date at 14% interest and the balance one year from the Effective Date at 10% interest. HBGH shall waive any administrative claim over \$150,000.

(d) The allowed administrative claims of the Internal Revenue Service shall be paid in full on the Effective Date.

2. Class 2. ALL 507(a) (3), (a) (4) and (a) (5) claims allowed by the Court, as listed on Schedule "B", shall be paid ninety (90) days after the Effective Date of the Plan. The allowed 507(a) (6) claims of the Internal Revenue Service shall be paid over a period of six years in five annual payments beginning one year from the Effective Date and shall bear at a rate of interest of 10%.

3. Class 3. The claims of the Utah State Tax Commission less any credits and less any amounts claimed for interest or penalties shall be paid by Wade on 12 year amortization schedule for 72 months and then a balloon payment for the remaining balance within 30 days of the 72nd payment. The first payment shall be due 30 days after the Effective Date. Should Valley recover anything on Debtor's claim against Universal Underwriters, such recovery shall first be applied to pay any interest owed to the Commission by the

Debtor up to \$56,045.40. Except as modified in this subsection VI3, the agreement entered into on March 31, 1983 between the State Tax Commission of Utah and Stephen Wade, Inc. (attached hereto as Attachment I) is incorporated by reference and made part of this Plan.

4. Class 4. Ford Motor Credit Company (FMCC) shall be receive all of the Debtor's property securing its claim. The value of the collateral shall be determined by the court. Any deficiency shall be treated as an unsecured claim.

5. Class 5. Ford Motor Company shall receive all of the Debtor's property securing its claim. The value of the collateral shall be determined by the Court. Any deficiency shall be treated as an unsecured claim.

6. Class 6. The Small Business Administration (SBA) shall receive all of the Debtor's property securing its claim. The value of the SBA collateral shall be determined by the Court. Any deficiency shall be treated as an unsecured claim. The SBA shall be entitled to up to \$93,000 of any amount collected on the claim against Universal Underwriters after \$56,045.40 has been paid to the State Tax Commission.

7. Class 7. Citizens Bank will be paid by SBK 60% of its claim on a 20 year amortization schedule for 72 months at 10% interest and then a balloon payment for the remaining balance. The first payment shall be due 30 days after the Effective Date. In consideration of SBK's paying Citizen's 75% of its claim, Citizen's shall loan to SKB a sum of \$425,000 secured by the J.J., Inc lease



and to be repaid on a 20 year amortization schedule at 10% interest for 72 months and then a balloon payment for the remaining balance. In addition, SBK will repay Citizens \$100,000 of the \$425,000 after three years. The first payment will be due 30 days after the Effective Date.

8. Class 8. Commercial Security Bank will be paid by SBK 75% of its claim on a 20 year amortization schedule for 72 months at 10% interest and then a balloon payment. In consideration of SBK's paying Commercial Security Bank 75% of its claim, Commercial Security Bank shall loan to SBK a sum of \$750,000 secured by property of SBK to be repaid on a 20 year amortization schedule at 10% interest for 72 months and then a balloon payment for the remaining balance. The first payment will be due 30 days after the Effective Date.

9. Class 9. Class 9 claimants Listed on Schedule C will receive the property securing their claim. The value of the collateral shall be determined by the Court. Any deficiency shall be treated as an unsecured claim. If the property has been sold they will be treated as unsecured creditors.

10. Class 10. The unsecured creditors shall receive the remainder of \$300,000 after payment of the claims of classes 1 & 2 and payment of the amount required to bring the J.J., Inc. lease current.

11. Class 11. The interests of the shareholders of Debtor shall be cancelled as of the Effective Date and such persons shall not be entitled to any distribution under the Plan.

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12. Class 12. The insider claims shall be subordinated to all other claims and such claimants shall not be entitled to any distribution under the Plan.

#### VII. EXECUTORY CONTRACTS

Except for the J.J., Inc. lease, the right to reject, prior to confirmation, any executory contract or unexpired lease is specifically reserved. The lease agreement with J.J., Inc. is assigned to Valley and all obligations under the lease are assumed by Valley. Valley will cure by the Effective Date any monetary defaults as determined by the Court, and will commence to cure any defaults in maintenance or repair as determined by the Court within 90 days of the Effective Date. Proofs of Claim for damages arising out of rejection of any contract or lease, if such rejection is made, shall be filed within thirty (30) days after the mailing of notice of confirmation of the Plan.

#### VIII. PAYMENTS TO CREDITORS

Valley shall make all payments to creditors required hereunder except those to Classes 3, 7 and 8. In the event that Valley shall fail to make any payment by the time set forth herein, the creditor shall give the Valley a fifteen (15) day written notice, sent by certified mail, that it shall seek relief from the Court unless Valley makes payment by the expiration of the fifteen (15) day period. If no such payment is made, the creditor shall petition the Court for appropriate relief.

## IX. CONDITIONS TO CONFIRMATION

In addition to the conditions to Confirmation set forth in Bankruptcy Code, and notwithstanding any other provisions of the Plan, the effectiveness of the Plan shall be conditioned upon each of the following conditions which may be waived by Valley in its sole discretion:

A. Issuance of the Confirmation Order by June 1, 1983 in form and substance satisfactory to Valley including a provision assuming the J.J., Inc. lease and assigning it to Valley and a provision terminating the Debtor's franchise agreements with Ford Motor Company Listed on Attachment 2 provided that Ford appoints Valley as its authorized dealer at Debtor's location.

B. Approval by Ford Motor Company of Valley Ford, Inc. as its authorized dealer at Debtor's location.

C. Receipt of the loan proceeds on or before the Effective Date from Citizens Bank and Commercial Security Bank under the terms as described in Article VI.

## X. PREFERENCES

Following confirmation of this Plan, Valley shall assume the responsibility of investigating and pursuing preferential payments in accordance with Section 547. Any recoveries obtained by such efforts shall become an asset of Valley and shall be used to fund this Plan.

## XI. RETENTION OF JURISDICTION

The Court shall retain jurisdiction of this case after confirmation until all payments and distributions called for under the Plan have been made and until the entry of a final decree. Such jurisdiction shall relate to the following matters:

A. Consummation by any party in interest of any and all proceedings that it may bring prior to confirmation to set aside liens, or to recover any preferences, transfers, assets or damages to which it may be entitled under the provisions of the Bankruptcy Code or other federal or state law and continuation of suits now pending by Debtor;

B. Hearing and determination of all claims, including claims arising from the rejection of any executory contract and any objections which may be made thereto;

C. Liquidation or estimation of damages, or determination of the manner and time for such liquidation or estimation, in connection with any contingent or unliquidated claim;

D. Adjudication of all claims to any lien or any property of the Debtor or any proceeds thereof;

E. Adjudication of all claims or controversies arising during the pendency of the Chapter 11 case;

F. Recovery of all assets and properties of the Debtor, wherever located, to the extent necessary for the consummation of this Plan;

G. Allowance or disallowance of any claim;

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H: Determination of the propriety of the terms and conditions of the sale of any property of the Debtor; and

I. Such orders as are necessary or appropriate to carry out the provisions of the Plan.

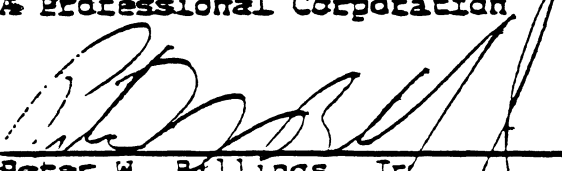
On the Effective Date of the Plan, all of the Debtor's property not being turned over to secured creditors, wherever located, shall vest in Valley, and Valley shall continue the Debtor's business operations in accordance with and subject to this Plan.

XII. DISPUTED CLAIMS; OBJECTIONS TO CLAIMS

Any party in interest may file an objection to any claim within ninety (90) days after the date the order confirming the Plan becomes final and nonappealable. Objections not filed within such time shall be deemed waived.

DATED this 31 day of May, 1983.

FABIAN & CLENDENIN,  
A Professional Corporation

By   
Peter W. Billings, Jr.  
Gary E. Jubber

SCHEDULE A

Class 1(b) ADMINISTRATIVE CLAIMS

507(a) (1) claims

Payroll for February 5, 1983	\$ 975.46
Paul H. Jones	\$724.85
Jeff Cetner	\$250.61
 Payroll for February 20, 1983	 \$ 1,455.58
Paul H. Jones	\$731.99
Gary Eves	\$611.63
Lucille Camp	\$111.96
 Fireman's Fund Insurance Company	 \$ 15,477.00
American Insurance Corp.	948.00
Fremont Indemnity Co.	2,500.00
Mountain Bell	1,870.23
Murray City Power & Water	5,583.48
Mountain Fuel Supply Co.	8,497.96
Associated Business Products	267.47
Central Processing	311.18
Coverall Locksmith	100.00
Mildred's Flowers	328.60
E Z Start	474.93
Fox Edwards & Gardner	103.90
Utah Hotel Co.	89.20
A-I Glass	158.47
Clean-Jet	580.00
Credit Bureau of Salt Lake City	59.00
Hinkley's, Inc.	355.83
Utah Welders Supply	3.50
Welders Supply Co.	386.09
Chris Body Shop	1,400.00
Executone Mountain West	146.48
Federal Express	95.77
Finn Wall Inc.	221.55
FMA	180.76
Garrett Freight	178.19
Twentieth Century Lights	902.75
Welch Heat & Air	56.00
Browning Ferris Ind.	213.00
Borg Warner Ins. Finance Co.	2,205.48
Total	\$ 46,125.86

SCHEDULE B

CLASS 2 CREDITORS

507(a) (3)

Steven K. Winn	\$ 301.50
Carl White	537.00 (disputed)
Laura J. Wutschke	214.00 (disputed)
Utah Industrial Commission Claim (believed to be duplicate of Winn claim)	301.05 (disputed)
Utah Industrial Commission Claim (believed to be duplicate of Winn claim)	301.05 (disputed)
Utah Industrial Commission Claim	400.00

507(a) (4)

Utah Automobile Dealers Association Employee Group Policy	\$ 2,451.72
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507(a) (5)

Warranty Claims

Robert Oates	413.00
Pamela K. Steen	230.00
Leon P Draper	209.00
Jamie L. Miller	230.00
Ross F. Wooley	278.00
John C. Cooper	311.00
Susan A. Kirby	413.00
Scott M. Haskins	550.00
Melvin Meyers	230.00
Blake & Vickie Zerull	109.00
Robert L. Nielson	209.00
Edward Betts	245.00
Randy C. Loudahl	278.00
Jeffery G. McNeil	188.00
Stephen B. Maeger	257.00
David D. Meskimen	295.00
Stewart Wilson	278.00
Elmer R. Anderson	230.00
Alan Demison	190.00
Nancy Clark	230.00
Dave N. Cok	311.00
Jim J. Cunningham	230.00
Jim F. Bryant	209.00
Sherryl Blossch	230.00
R. R. Sutherland	347.00
Jerry Kathleen Anthony	209.00
	<u>6,909.00</u>

\$11,415.32

SCHEDULE C

CLASS 9 SECURED CREDITORS

GMAC Provo Gish, Dinger trade-in	1,944.00
First Security Bank Denieson trade-in	11,981.14
Zions First National Bank Killgore trade-in	4,300.00
Midas Vans New Vehicle	10,300.00
Green	6,500.00



SCHEDULE D

CLASS 10 UNSECURED CREDITORS

A-1 Glass	\$ 2,997.04	
A-G Body, Inc.	550.39	
Acme Fence	166.00	
ALL American Auto	9,814.47	
ALL Makes Typewriter	131.25	
American Radiator	1,487.29	
Auto Body Supply	5,064.23	
Bexell Distributing	431.35	
Big Nickel Want Ads	509.16	
Bolt Center	638.16	
Brinton Electric	1,220.41	
Butterfield Ford	851.08	(disputed)
Cardwell Distributing	3,050.61	
Carpet Towne	390.00	
Chris Body & Paint	1,453.00	
City Glass, Inc.	140.00	
Clark Buick Datsun	119.94	
Clean-Jet	1,774.00	
Communication Investment	758.00	
Cowboy Oil Co.	386.80	
Credit Bureau	701.33	
Datafax	1,636.06	
Davis Distributing Co.	7,058.12	
Henry S. Day & Co.	1,540.30	(disputed)
Dealer's Discount Supply	2,641.42	
Dean's Locksmith	10.00	
Doctors & Merchants	245.59	
Doenseous Glass	116.95	
Draycutt Corporation	532.50	
Dresser Industries	1,314.17	(disputed)
Economy Storage	171.00	
Engh Floral	1,452.40	
EZ Start	527.70	
FM Company	1,343.00	
Fashion Office Supply	239.35	
Fasten-Ware, Inc.	250.18	
Fireman's Fund Insurance	18,735.00	
FM 94	240.00	
Fontain Truck Equipment	1,576.00	
Ford Motor Co.	53,228.78	
Foxwood, Inc.	118.16	
Freed's Chrysler-Plymouth	1,248.38	
Fremont Indemnity Co.	12,104.00	(disputed)
GMAC	1,744.18	
GT Welding	73.45	
Garrett Freight	377.42	

H.D. Garrett	204.45	
Genuine Parts	4,239.14	
Glass Doctor	354.00	
Grainger, Inc.	424.29	
Hanson, Barnett & Maxwell	26,372.69	(disputed)
Richard Stillman Harding	905.00	
Hinckley's, Inc.	667.86	
Holladay Color Center	383.54	
Hodson Labs	60.00	
Blaine Hudson	196.61	
Intermountain Jobbers	646.52	
Intermountain Radiator	544.14	
International Business Supplies	222.49	
Jerry Seiner Chevrolet	72.87	
Jordan Nursey	525.00	
KALL 910	508.99	
KSL 1160	1,331.95	
Kelly Printing	194.84	
Kent Industries	1,196.55	
Kenz & Leslie Distributing Co.	281.60	
Steven Bradley Leu	1,200.00	(disputed)
Luverne Truck Equipment	930.70	
Martinez Maintenance	655.00	
McMillan & Co.	14.97	
Midas Muffler	5,455.42	
Midas Vans	6,200.00	
Midwest Dealer Supply	6,169.38	
Minnesota Dealers Supply	3,350.16	
Mountain Bell Telephone	1,571.42	
Mountain Fuel Supply	240.15	
NAPA	4,063.81	
Newpark Drilling	3,739.92	
Olsen's Wasatch Ext	482.00	
Olympus Glass	609.61	
Peerless Oil Distributing	720.00	
Pepsi-Cola Bottling Co.	217.50	
Pierson's	429.72	
Postal Instant Press	248.87	(disputed)
Price Books & Forms	336.00	
Progressive Printing	442.84	
Rainbow Wear Distributing	287.60	
Riverton Motors	255.11	
Rodeway Inn	645.47	
Rocky Mountain Bank Note	493.69	
S & H Terminal	243.66	
Salt Lake Auto Auction	22,253.80	
Salt Lake Chrome Plating	1,290.50	
Lowell Sandwich (Sandwich Detail)	1,395.00	
Seat Cover Co.	3,011.00	
Sessions & Moore	1,523.85	
Sprint	104.97	

Standard Supply Co.	1,564.78
Tanner, Keser, Rust & Williams	8,534.74
Sunset Sports	277.02
T-K Distributors	312.46 (disputed)
Term Service Co./Salt Lake City	2,459.94
Tires Unlimited	1,576.61
Trim-Line of Utah	155.00
Twentieth Century Lites	1,802.75
United Pacific Life Insurance	117.12
Union Pen & Pencil	232.63
U.S. Pencil	385.71
Utah Cont. Credit Union	2,780.25
Utah Welders Supply	97.70
Valley Bank & Trust Co. (repossession)	unknown (disputed)
Stephen Wade Pontiac	130.12
Wang Laboratories	2,699.55
Welders Supply, Inc.	2,137.89
Western Paper Co.	122.97
Williamson Truck Parts	292.13
Xerox	88.70
Zee Medical Service	111.72
Zions First National Bank	2,259.27
Zipprint	131.65

#### Claims under \$100

AVRV Distributing	80.00 (disputed)
Ace Tel-A-Tape	49.61
American Magazine	7.95
Atex, Inc.	90.20
Busch & Gudgeon	30.00
Blair Photo	78.75
British-Italian Motors	27.81
Chuck's Lock & Key	90.50
Clarke/McGraw Ed.	65.45
Climate Control Service	82.37
Coordinated West	77.34
Dean's Locksmith	10.00
Department of Revenue	1.50
Dan Eastman	38.76
Eko Tek, Inc.	52.00
Eldredge Insurance	30.00
Fleming Distribution Co.	6.46
GRS Drivelines	32.00
Garff Oldsmobile-Honda	41.90
Hearst Magazine	21.97
Karens Auto Upholstery	40.00
Kiewitt & Sons	11.81
Kiplinger Letter	15.00
LeFavor Envelopes	73.82
Mepco 4x4 Warehouse	11.81

Paulos Chevrolet	46.10
Don Richards Lincoln	12.45 (disputed)
Lois M. Rudd	45.94
Schettler-Williams	66.46
Schuler Ford, Inc.	56.16
Sheet Metal Special	27.71
Lorenzo Smith & Son	11.45
Steiner Corporation	89.62
Stewart & Sons Oil Service	87.75
L.H. Strong	57.25
Ungricht, Randle & Deamer	12.00
UADA	43.87
UPS	21.22 (disputed)
Judge VanWagoner	23.00
Weinstocks	81.06
Winmark, Inc.	7.72
Owen Wright, Inc.	3.19 (disputed)

Attachment I

AGREEMENT

The State Tax Commission of Utah and Stephen Wade, Inc. hereby enter into this mutual Agreement in order that a Plan of Reorganization for Larson Ford, Inc. may be submitted to and accepted by the United States Bankruptcy Court.

It is mutually recognized and agreed as follows:

1) Larson Ford, Inc. has incurred a Utah Sales Tax liability of \$456,217.86, accrued penalties of \$44,612.00 and accrued interest of \$56,045.40, for the taxable periods, beginning with the First Quarter, 1980 and terminating with the Second Quarter, 1982.

2) On account of this liability, Larson Ford, Inc. has made payments totalling \$175,743.83.

3) Stephen Wade, Inc. agrees to assume the \$456,217.86 sales tax liability and the \$56,045.40 accrued interest, as set forth above, and further agrees to assume any and all sales and withholding tax obligations incurred by Larson Ford, Inc. since July 1, 1982, which amounts are as yet undetermined.

4) The State Tax Commission of Utah agrees not to hold Stephen Wade, Inc. liable for any accrued penalty nor for any additional interest to accrue on account of any sales or withholding tax liability incurred before the acceptance of the Plan of Reorganization.

5) The State Tax Commission of Utah agrees to apply the \$175,743.83 of credits to the tax and interest liabilities

of Larson Ford, Inc., beginning with the earliest quarters of liability and continuing until such amount has been fully credited.

6) Upon a mutual determination of the total amount of tax and interest to be assumed by Stephen Wade, Inc., a twelve-year amortization schedule shall be generated.

7) Stephen Wade, Inc. agrees to make monthly payments of the amortized amount, with the first payment due thirty (30) days following the acceptance of Stephen Wade, Inc.'s proposed Plan of Reorganization. Such payments shall continue, uninterrupted, for seventy-two (72) months.

8) Within thirty (30) days following the seventy-second (72nd) payment, Stephen Wade, Inc. agrees to pay the balance of the amortized liability, without further notice or demand from the State Tax Commission of Utah.

9) Stephen Wade, Inc. agrees to submit such financial documentation and statements as the State Tax Commission of Utah shall request to verify Stephen Wade, Inc.'s solvency and ability to successfully perform the requirements of this agreement.

10) Stephen Wade, Inc. agrees to obtain from Mr. Stephen Wade, President, Stephen Wade, Inc., a personal guaranty for the payment of the tax liability. Such guaranty shall not extend to any interest assumed by Stephen Wade, Inc. nor to any period not covered under this Agreement. Such

guaranty shall be submitted to the State Tax Commission of Utah on or before the effective date of this Agreement.

11) This Agreement is effective and valid only between the State Tax Commission of Utah and Stephen Wade, Inc.

12) This Agreement is contingent upon the following:

a) acceptance of Stephen Wade, Inc.'s Plan of Reorganization by the United States Bankruptcy Court;

b) the timely and complete payment of each of monthly installment payment and of the balloon payment of the balance of the amortized amount;

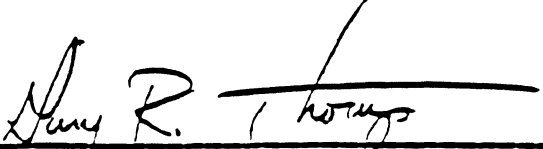
c) the timely filing of Stephen Wade, Inc.'s sales and withholding tax returns and the timely payment of any sales and withholding tax liabilities which may be incurred by Stephen Wade, Inc. during the pendency of this Agreement.

DATED this 31<sup>st</sup> day of March, 1983.

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STEPHEN WADE, President  
Stephen Wade, Inc.

  
\_\_\_\_\_  
DAVID L. DUNCAN, Chairman  
Utah State Tax Commission

  
\_\_\_\_\_  
GARY R. THORUP  
Assistant Attorney General  
Tax and Business Regulation Div.

Attachment 2

FRANCHISE AGREEMENTS BETWEEN DEBTOR AND FORD MOTOR CO.  
TO BE TERMINATED BY THE CONFIRMATION ORDER

1. Ford Sales and Service Agreement dated June 1, 1972
2. Ford Authorized Leasing System Agreement dated September 12, 1978
3. Ford Foreign Vehicle Sales Agreement - Fiesta dated May 2, 1977
4. Ford Foreign Vehicle Sales Agreement - Courier dated July 12, 1972
5. Ford Rent-A-Car Systems Agreement dated September, 15, 1967



## ADDENDUM 10

Peter W. Billings, Jr.  
Gary E. Jubber  
FABIAN & CLENDENIN,  
A Professional Corporation  
800 Continental Bank Building  
Salt Lake City, Utah 84101  
Telephone (801) 531-8900

RECEIVED  
JUN 23 1983

OFFICE OF JUDGE  
GLEN E. CLARK

Attorneys for Stephen Wade, Inc.

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

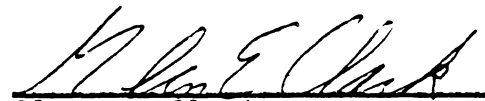
In re:	)	Bankruptcy No. 82 02186
	)	
LARSON FORD SALES INC.,	)	
a Delaware Corporation,	)	ORDER
	)	
Debtor.	)	

Upon ex parte motion of Stephen Wade, Inc., and good cause appearing therefor,

IT IS HEREBY ORDERED that the Plan of Reorganization filed by Stephen Wade, Inc. and confirmed by Order of this Court dated June 10, 1983, is hereby modified to allow the Plan to become effective when both conditions B and C as outlined in Article IX of the Plan are satisfied.

DATED this 24 day of June, 1983.

BY THE COURT:


  
Glen E. Clark  
United States Bankruptcy Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the attached order  
to the following:

Peter W. Billings, Jr., Esq.  
FABIAN & CLENDENIN  
800 Continental Bank Building  
SLC, Utah 84101

Dated: June 24, 1983

  
Secretary to Judge Clark

## ADDNDUM 11

7/11/83  
9

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

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In re:	:	No. 82-02186
LARSON FORD SALES, INC., a Delaware Corporation,	:	ORDER FURTHER MODIFYING THE EFFECTIVE DATE OF THE PLAN OF REORGANIZATION ON MOTION FOR
Debtor.	:	RECONSIDERATION


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The above-entitled matter having come on for hearing before the Honorable Glen E. Clark, U. S. Bankruptcy Judge on the 1st day of July, 1983 upon the Motion of J. J. Inc. to reconsider the Court's Order modifying the effective date of the Plan of Reorganization; and J.J. Inc. appearing by and through its counsel of record, Herschel J. Saperstein of Watkiss & Campbell; and Stephen Wade, Inc., the proponent of the Plan of Reorganization, appearing by its counsel, Gary E. Jubber of Fabian & Clendenin; and the court having duly considered the statements and stipulations of counsel; and good cause appearing therefor; it is hereby

ORDERED that the Plan of Reorganization proposed by Stephen Wade, Inc. and confirmed by Order of this Court dated June 10, 1983 and more particularly the definition of "Effective Date" in Article II of the Plan be and the same is hereby modified as follows:


"Effective Date" is July 11,  
1983.

DATED this 1st day of July, 1983.

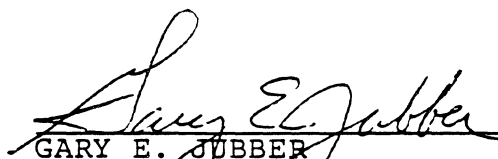
  
\_\_\_\_\_  
GLEN E. CLARK  
U. S. Bankruptcy Judge

The above and foregoing Order is hereby approved  
as to both form and content this 1st day of July, 1983.

WATKISS & CAMPBELL

  
\_\_\_\_\_  
HERSCHEL J. SAPERSTEIN  
Attorneys for J. J. Inc.

FABIAN & CLENDENIN

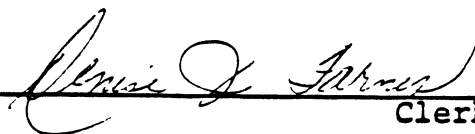
  
\_\_\_\_\_  
GARY E. JUBBER  
Attorneys for Stephen Wade, Inc.

I hereby certify that I mailed a copy of the foregoing  
to the following:

Herschel J. Saperstein  
WATKISS & CAMPBELL  
310 South Main St. 12th Floor  
Salt Lake City, Utah 84101

Gary E. Jubber  
FABIAN & CLENDENIN  
800 Continental Bank Bldg  
Salt Lake City, Utah 84101

Dated: July 5, 1983. df

  
Clerk