

2001

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WILLIAM ANTHONY KRAATZ,
Plaintiff-Appellant and
Cross-Appellee,

vs.

HERITAGE IMPORTS, a Utah
corporation, dba HERITAGE HONDA,

Defendant-Appellee and
Cross-Appellant,

and O. BRYAN WILKINSON, and
JEFFREY J. WILKINSON,

Defendants.

APPELLANT'S OPENING BRIEF

Case No. 20010598-CA

Priority No. 15

**APPEAL FROM JUDGMENT OF THE THIRD DISTRICT COURT,
SALT LAKE COUNTY
THE HONORABLE J. DENNIS FREDERICK**

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APPELLANT'S OPENING BRIEF

Case No. 00010598 CA

PRIORITY NOTICE

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STATEMENT OF JURISDICTION

Final Judgment was entered on June 29, 2001 [Addendum ("Add.") B, Record on Appeal ("R.") 5037-39]. Plaintiff timely filed his notice of appeal to the Utah Supreme Court on July 17, 2001 (R. 5047-48) pursuant to UTAH R. APP. P. 4(a) and UTAH CODE ANN. §-78-2-2(3)(j). The Utah Supreme Court transferred this appeal to this Court pursuant to UTAH CODE ANN. § 78-2-2(4). This Court has jurisdiction over this appeal pursuant to UTAH CODE ANN. § 78-2a-3(2)(j).

STATEMENT OF ISSUES

Issue No. 1: Whether in determining Plaintiff William Anthony Kraatz's ("**Kraatz**") damages the trial court erred in finding that the value of 100% of the stock of Defendant Heritage Imports ("**Heritage**") was worth \$3.1 million, based upon Larry H. Miller's ("**Miller**") testimony that he had purchased 60% of the stock for that amount.

Standard of Review: Whether the challenged finding is "against the clear weight of the evidence" or such that "the appellate court otherwise [may reach] a definite and firm conviction that a mistake has been made." *State v. Walker*, 743 P.2d 191, 193 (Utah 1987). A finding is clearly erroneous if it is without adequate evidentiary support or is induced by an erroneous view of the law. *Id.* Appellant must marshal the evidence in support of the finding and then show why the finding was clearly erroneous. *Saunders v. Sharp*, 793 P.2d 927 (Utah App. 1990), remanded on other grounds, 806 P.2d 198 (Utah 1991). The appellate court will presume a trial court's award of damages to be correct and

will overturn it only if it is clearly erroneous with no reasonable support in the evidence.

Glezos v. Frontier Investments, 896 P.2d 1230, 1235 (Utah Ct. App. 1995).

Citation to the Record Showing Preservation of the Issue: R. 5084-87.

Issue No. 2: Whether the trial court erred in excluding from the calculation of Kraatz's damages, all benefits of his employment which were not expressly required by the employment agreement he signed, even though such benefits were allowed by the agreement and were actually enjoyed by him during his employment and provided to his successor.

Standard of Review: The appellate court reviews the trial court's legal conclusions for correctness, affording no deference to the trial court. *Reliance Insurance Co. v. Utah Department of Transportation*, 858 P.2d 1363, 1366 (Utah 1993).

Citation to the Record Showing Preservation of the Issue: R. 5073-84.

Issue No. 3: Whether in calculating the profit bonus Kraatz would have earned had he not been wrongfully discharged, the trial court erred in refusing to allow adjustments of Heritage's reported profits in light of undisputedly excessive expenses paid to or for the benefit of Heritage's majority shareholder (Larry Miller), based on the court's interpretation of language in the employment contract.

Standard of Review: Where a court's interpretation of an employment contract presents a question of law, the appellate court shall review the court's conclusions for correctness, affording no deference. *Glick v. Holden*, 889 P.2d 1389, 1392 (Utah Ct. App. 1995).

Citation to the Record Showing Preservation of the Issue: R. 5071-73.

Issue No. 4: Whether the trial court erred in refusing to award Kraatz, as part of his damages, all of the expert witness fees he incurred and all of the deposition costs he incurred, given the language of the employment agreement entitling him to all costs and expenses as the prevailing party at trial.

Standard of Review: A trial court's interpretation of costs awardable under a contract presents a question of law, which the appellate court shall review for correctness, affording no deference to the trial court. *Chase v. Scott*, 2001 Utah Ct. App. 404, ¶ 10, 437 Utah Adv. Rep. 20.

Citation to the Record Showing Preservation of the Issue: R. 5087-89.

Issue No. 5: Whether the trial court erred in refusing to award pre-judgment interest on some of Kraatz's damages, and his attorney fees and costs.

Standard of Review: Entitlement to pre-judgment interest is a question of law that the appellate court reviews for correctness, affording no deference to the trial court. *Lefavi v. Bertoch*, 2000 Utah Ct. App. 5, ¶ 23, 994 P.2d 817.

Citation to the Record Showing Preservation of the Issue: R. 5089-98.

Issue No. 6: Whether as to damages on which the trial court did not award pre-judgment interest, the trial court erred in refusing to increase Kraatz's damage award by the Consumer Price Index in order to compensate Kraatz for the diminished value of United States currency between the time or times his damages arose and the time of judgment.

Standard of Review: This is an issue of law to be reviewed by the appellate court for correctness, affording the trial court no deference. *Reliance Insurance Co.*, *supra*.

Citation to the Record Showing Preservation of the Issue: R. 5098-99.

STATEMENT OF THE CASE

This is an action by Kraatz for wrongful termination of a written five-year Employment Agreement (the "**Contract**"), by his employer, Heritage. Kraatz asserted claims for breach of contract and related claims against Heritage and its officers (R. 1-41). After a bench trial ending on August 30, 1996, the trial court found in favor of Defendants, ruling that Heritage had terminated Kraatz for cause under the Contract (R. 1681-1720).

Kraatz appealed, challenging many of the trial court's findings as clearly erroneous. This Court reversed (1999 Utah Ct. App. 70) and remanded the case to the trial court with instructions to determine the amount of Kraatz's damages, along with attorney fees and costs as provided by the Contract.

After remand, the parties briefed the issues of damages, attorney fees and costs, based on the evidence at trial, as supplemented (R. 5060). Kraatz claimed total damages, attorney fees and costs of \$1,073,437.68, consisting of \$553,485.00 in lost wages and benefits, \$432,941.36 in attorney fees, \$48,186.26 in expert witness fees, and \$38,825.06 in costs. In addition, Kraatz claimed \$440,840.80 in pre-judgment interest, for a total claim of \$1,514,278.48. The trial court took additional evidence, heard argument and entered Amended Findings of Fact, Conclusions of Law (Add. A, R. 4974-5020) and

Judgment (Add. B, R. 5037-39), awarding Kraatz \$643,816.99, consisting of damages for lost wages and benefits of \$124,118.56, pre-judgment interest thereon of \$21,828.67 plus \$9.35 per day until entry of Judgment, attorney fees of \$432,941.36, expert witness fees of \$35,502.09, and costs of \$29,155.16.

The \$124,118.56 award for lost wages and benefits consisted of the following (Add. A, R. 5014):

Base Salary	\$35,255.70
Annual Fixed Bonus	12,000.00
Profit Bonus Credit (<i>i.e.</i> , net offset)	(46,082.28)
Demonstrator Auto	15,951.03
Health Insurance Benefits	16,994.11
Stock Appreciation	90,000.00

In determining Kraatz's damages, the trial court, as a matter of law, disallowed any recovery for compensation or benefits Kraatz enjoyed as an employee of Heritage which were not expressly required by the Contract (Add A, R. 5001). Thus, the trial court rejected, as a matter of law, the following consequential damages claimed by Kraatz in the following amounts (based on the value of each during the remaining term of the Contract) (Add. A, R. 5002, 5017, 5041-44, 5073-84, Ex. 302).¹

<u>Category</u>	<u>Amount</u>
401(k) Retirement Contributions	\$8,109.04
Season tickets to the Utah Jazz	18,898.50
Annual Christmas bonuses	1,500.00
Second home (St. George) Reimbursement	2,210.53

¹Excerpts of Plaintiff's Ex. 302 and 302(c) are attached hereto as Add. D and E. respectively.

Warranty income	119,856.51
Private (non-business) use of Sports Mall membership	6,187.50

The trial court also rejected, as a matter of contract interpretation, Kraatz's claims to the following benefits expressly required by the Contract:

1. A profit bonus in the amount of \$107,952.03 [before mitigation, \$26,894.34 after mitigation (Ex. 302) based on the earnings of Heritage after his discharge (Add. A, R. 4997-98; R. 5071); and

2. The value of the use of a membership at the Hidden Valley Country Club in the amount of \$10,863.00 (Add. A, R. 4997-99, R. 5075, Ex. 302).

The trial court also rejected, on factual grounds, Kraatz's claims to:

1. \$285,000.00 of "stock appreciation" rights (instead, awarding \$90,000.00 on this claim) (Add. A, R. 4999-5001, R. 5087); and

2. Unreimbursed health care costs for 1991 in the amount of \$3,484.26 (Add. A, R. 4998-99).

The trial court also rejected, as a matter of law, Kraatz's claims to \$9,369.90 in deposition costs (Add. A, R. 5003, 5019, 4318-20, 4955); and \$12,684.17 in expert witness fees (Messrs. Schmidt and Hall) (Add. A, R. 5002-03, 5018, 4231, 4956).

The trial court further rejected, as a matter of law, Kraatz's claim to prejudgment interest on "Stock Appreciation" damages [which would be \$79,200.00 in interest on the \$90,000.00 the trial court awarded or \$208,245.20 (R. 4230) in interest on the \$285,000.00 Kraatz sought], on the attorney fee award (\$79,020.51 in interest) (R.

4927-29; 4966), and on the expert fees, deposition and other litigation expenses Kraatz claimed (\$15,671.20 in interest) (R. 4315, *see also* Add. A, R. 5003-04, 5014-15).

The trial court also rejected Kraatz's contention (R. 5098-99) that his damages on which pre-judgment interest was not awarded should be increased based on the increase in the Consumer Price Index, to compensate for the measurable loss in the value of the U.S. dollar over time (Add. A).

STATEMENT OF FACTS

Kraatz's damages arise out of Heritage's (n/k/a Larry H. Miller Honda) wrongful termination, on September 11, 1992, of his written employment Contract, pursuant to which Kraatz was promised employment for at least five years (through June 15, 1995), and substantial compensation. Under the Contract, Kraatz's compensation and benefits include (1) \$8,000.00 per month, (2) a yearly bonus equal to \$4,000.00 plus ten percent (10%) of the dealership's net profits in excess of \$280,000.00, (3) two demonstrator automobiles (including insurance, maintenance and gasoline), (4) use of a Salt Lake Sports Mall family membership, (5) use of a Hidden Valley Country Club membership, (6) health insurance for Kraatz and his family, (7) reimbursement of non-covered healthcare costs incurred by Kraatz and his family, not to exceed \$5,000.00 per year; (8) expenses related to Kraatz's relocation from St. George to Salt Lake City, and (9) "additional compensation within the discretion of Company" (Add. C, Ex. 38, ¶¶ 3.1, 3.2, 3.4 and Schedules A & C, R. 4063, 4067, 4071-72; R. 1759).

During Kraatz's employment, Heritage agreed to pay him substantial "additional compensation" over and above the first eight items specified in the Contract, such as contributions to a retirement plan (R. 1872-73), Christmas bonuses (R. 1865), participation in profits from the sale of automobile warranty contracts (R. 1873-74), season tickets to the Utah Jazz (R. 1872), and additional reimbursement of expenses associated with Kraatz's move from St. George to Salt Lake City (R. 1872, *see also* R. 1777, 1799-1807, 1808, 1835-36, 1872-75).

Under the Contract, Kraatz is also entitled to an amount equal to 15% of the value of the dealership over \$2.5 million upon the termination of his employment without cause. (*See*, Add. C, Ex. 38 ¶ 3.2 and Schedule B, R. 4063, 4068-70.)

A. LOST WAGES AND BENEFITS.

Mr. Bruce Wisan, CPA, presented to the trial court a detailed calculation summarizing the damages suffered by Kraatz, showing lost wages and benefit damages of \$268,485.55, after mitigation from Kraatz's subsequent employment. (*See*, Ex. 302, R. 4079.) Mr. Wisan's calculations were not challenged by Heritage. Indeed, Heritage's counsel advised the court that he had no objection to Mr. Wisan's calculations and urged Kraatz's counsel to forego foundational testimony from Kraatz, as to the bases for Mr. Wisan's opinion, on the grounds that it was unnecessary (R. 1808).

Mr. Wisan's calculations consist of 13 categories of compensation, in the form of wages and benefits, Heritage owed to Kraatz. Nine categories are at issue on appeal as follows:

1. Profit Sharing. The Contract entitles Kraatz to receive 10% of the dealership's profits in excess of \$280,000.00 per year [Add. C, Ex. 38, Sch. "A," ¶ (b), R. 4067]:

A yearly bonus equal to \$4,000.00 plus 10 percent (10%) of the Dealership Net Profits in excess of \$280,000.00 determined in accordance with accounting practices acceptable to and used by company in reporting to American Honda, Inc., or such other accounting method as is mutually acceptable to both company and employee.

Within 90 days after Kraatz was wrongfully discharged, O. Bryan Wilkinson ("**Wilkinson**") agreed to sell his 60% stock ownership in Heritage to Miller and had no more influence over the dealership or its finances (R. 2086-87, 2210-13). In January 1993, Miller implemented his own management policies (R. 2419-20; Ex. 208, 333, R. 4078, 4138). The corporate entity with which Kraatz had contracted did not change (R. 1026, Joint Pretrial Order).

At trial, Mr. Wisan calculated that Kraatz was entitled, before mitigation, to \$107,952.03 (Ex. 302) in lost income from his contractual right to share in the net profits of Heritage earned after his wrongful discharge. In making his calculation, Mr. Wisan made adjustments for two unreasonable expenses not directly related to the production of income. The reported profits were adjusted so as not to burden Kraatz with the price paid to Wilkinson for the stock purchased by Larry Miller (which Miller had arranged for Heritage to pay) (R. 2109-10; 2217; 2233, 2187-88; 4072) and undisputedly excessive

rents Miller caused Heritage to pay to himself as Heritage's landlord after he took over (Ex. 302 at Sch. A-1.2 and A-1.2-2, R. 2109-13, 2238; 4081).

To show the effect each of the adjustments had on the calculation of Kraatz's damages, Mr. Wisan prepared Exhibits 327 and 328 (R. 4138-39). These exhibits showed that if the rent adjustment were not allowed it would decrease Kraatz's damages award by \$20,073.33, and if the stock purchase adjustment were not allowed it would decrease Kraatz's award by an additional \$54,362.83 (Ex. 327, 328). While Kraatz's right to share in Heritage's net profits was not disputed, the trial court rejected Mr. Wisan's calculation of those profits based on its interpretation of the above-quoted language of the Contract and the following rationale (Add. A, R. 4997-98):

Plaintiff sought to adjust Heritage's accounting practices for portions of the purchase price and for the rent charged by Miller. (Ex. 302.) However, under the Agreement any profit bonus due Plaintiff is to be based on the "accounting practices acceptable to and used by Company in reporting to American Honda." As the Court of Appeals held on p. 2, of the Memo Decision, where the Agreement is unambiguous, "the parties' intentions must be determined solely from the language of the contract." There is no evidence American Honda ever objected to the accounting methods actually used by Heritage. While Plaintiff is willing to claim the benefits from Larry H. Miller's operation of the Dealership in the form of profits earned, he must also take any burdens in the form of Larry H. Miller's "accounting practices acceptable to and used by the Company in reporting to American Honda."

2. Sports Mall Membership. Schedule A of the Contract states that Kraatz would receive as additional compensation:

Use of a Salt Lake Sports Mall family membership during the term of the agreement. . . . Employee shall be responsible for all charges relating to nonbusiness use of the membership.

[Add. C, Ex. 38, Sch. A, ¶ (d), R. 4067.]

Wilkinson admitted that during Kraatz's employment, Wilkinson authorized Heritage to pay all of the Sports Mall dues and fees incurred by Kraatz and his family (regardless of nonbusiness use), and that this had become part of Kraatz's compensation (R. 1872-73). Nevertheless, the trial court disallowed any recovery by Kraatz for the loss of this benefit because the Contract, as signed, obligates Heritage to pay only for Sports Mall expenses "related to business use" (R. 4999).

3. Country Club Membership. Schedule A of the Contract states that Kraatz would receive as additional compensation:

Use of an equity membership in Hidden Valley Country Club commencing June 1, 1992, and continuing throughout the term of this agreement. . . . Employee shall be responsible for all charges related to nonbusiness use of the membership.

[Add. C, Ex. 38, Sch. A, ¶ (e), R. 4067.]

At trial Heritage's counsel made much of the fact that Kraatz had not incurred any charges on the membership throughout the two years of his employment (R. 1859)—apparently oblivious to the fact that Kraatz's entitlement to the membership did not accrue until June 1, 1992, and that the promised membership was never actually given him before he was fired approximately three months later (September 11, 1992) (R. 1859).

Mr. Wisan valued Kraatz's right to the Country Club membership based upon his conversations with Kraatz wherein Kraatz indicated that he would use the membership in the summer months to the extent of three golf trips per month (or, in other words, six golf rounds for Kraatz and his guest) (Ex. 312, Sch. A1.5.; R. 4085). Mr. Wisan contacted the Country Club to ascertain the cost of a membership and related expenses for the indicated usage and derived a value of \$4,152.00 per year, for a total of \$10,863.00 during the remaining term of the Contract (R. 2117; Ex. 302, Sch. A1.5. Mr. Wisan's methodology was not challenged at trial. The trial court nevertheless denied Kraatz any recovery for the loss of this benefit because (Add. A, R. 4999):

Plaintiff admitted at trial that in [the] twenty-seven months he was General Manager, he did not use the Hidden Valley membership for business use (R. 1859). The Court of Appeals did not overturn these admissions, and therefore, there is no basis for recovery by Plaintiff.

4. St. George Home Reimbursement. Schedule C of the Contract states that Kraatz would receive additional compensation consisting of reimbursement for leaving his home in St. George and moving to Salt Lake City as follows:

Commencing on the date on which the new residence being constructed for Employee is available for occupancy, and continuing thereafter for a period of not to exceed six (6) months, duplicate housing expenses incurred by Employee prior to the sale of Employee's residence in St. George, Utah. During said period, Company shall reimburse Employee for the lesser of (a) Employee's house payment on the residence in St. George or (b) Employee's house payment on the new residence in the Salt Lake area. Employee shall be required to use all reasonable effort to effect the sale of Employee's St. George residence. House payment is defined as the payment of

monthly loan principal and interest and reserves for taxes and insurance for an employee owned residence. Company's obligation to reimburse Employee for those duplicate housing expenses shall terminate at the earlier to occur of (a) the expiration of said six month period, or (b) the sale of Employee's residence in St. George.

(Add. C, Ex. 38, Sch. C, ¶ 6, R. 4071-72.)

Thereafter, the Contract was modified in two ways with respect to this provision. First, Kraatz did not require Heritage to pay the entire monthly mortgage payment for the St. George property, but only the differential between the mortgage payment and the rental amount that Kraatz received from the property (R. 1767-69). Heritage, on the other hand, agreed that it would continue to pay this differential until the home was sold and would not limit its commitment to the six months following Kraatz's move to Salt Lake City (R. 1872, Ex. 305).

Heritage continued to pay Kraatz this differential, in the amount of \$631.58 per month, only through September 1992, when Kraatz was discharged (Ex. 302). Kraatz finally sold the St. George home in December 1992, and therefore seeks recovery of only \$2,210.53 on this item of compensation.

The trial court, as a matter of law, refused to award Kraatz any damages for the loss of this and other benefits, with the following analysis (Add. A, R. 5001):

Paragraph 3.2 of the Agreement provides "Employee may receive additional compensation **within the discretion of Company** for other services rendered or other duties as assigned by the Company and agreed to by Employee." (Ex. 38.) (Emphasis added.) There is no basis to award Plaintiff additional compensation since he:

failed to demonstrate any evidence of further consideration given by him for any additional compensation or perks received during his employment. The use of Jazz tickets, payments for Plaintiff's daughter's tennis lessons, participation in service contract companies of Lariat and Ryan, retirement, Christmas bonus, or St. George home subsidy are not "compensation" under the Agreement. (Original CL B.11; See also, original CL B.4 & 12.)

* * *

The trial court concluded, as a matter of law, that such consequential damages are precluded based upon: (1) lack of consideration given by Kraatz for such additional compensation (Add. A, R. 5002, 5009), (2) the parol evidence rule (Add. A, R. 5016-17), (3) that the loss of these benefits was not reasonably foreseeable (Add. A, R.5017), or (4) that the damages claimed were speculative (Add. A, R. 5017).

5. Annual Christmas Bonuses. During Kraatz's employment he received, each Christmas, a bonus of \$500.00 (R. 1865; Ex. 302). Nevertheless, the trial court refused to award Kraatz any damages for the loss of this benefit under the analysis quoted and discussed above.

6. Jazz Tickets. Wilkinson admitted at trial that season tickets to the Utah Jazz basketball games had become part of Kraatz's compensation (R. 1872). During the 1991-92 season, Kraatz received four season tickets which he was free to use as he wished (R. 2144-46).

Mr. Wisan calculated the value of these tickets to Kraatz, based on the actual cost of the tickets as reported by the front office of the Utah Jazz as \$18,898.50 for the

remaining term of the Contract (Ex. 302 at Sch. C). There is no evidence in the record to the contrary. Nevertheless, the trial court refused to award Kraatz any damages for the loss of this benefit under the analysis quoted and discussed above.

7. Retirement Contributions. During the entire period of Kraatz's employment at Heritage, he participated in the company's 401-k retirement plan, pursuant to which the company matched his contribution up to 2 % of his annual compensation (R. 1865 1872-73; Ex. 302 at Sch. D).

Under Heritage's 401-k plan each employee was required to save 2 % of his income and the company was required to match that amount (Ex. 302 at Sch. D). In addition, Heritage had discretion to make additional contributions over and above the minimum required by the plan. *Id.* However, Mr. Wisan's calculation was based on a loss to Kraatz of only the minimum 2 % contribution totaling \$8,109.04. *Id.* Mr. Wisan's methodology in valuing this element of damage was not challenged by any evidence at trial. Nevertheless, the trial court refused to award damages arising out of the loss of this benefit under the analysis quoted and discussed above.

8. Participation in Warranty Income. During Kraatz's employment at Heritage, he participated in the income from the sale of warranty contracts (R. 1872-75). This was an important part of his compensation (R. 1806-07, Ex. 302). Mark Schmitz, Ph.D., testified that it was common practice in the industry to compensate general managers by allowing them to participate in such income (R. 2434).

Jeff Wilkinson (Bry Wilkinson's son and Kraatz's successor as General Manager of Heritage) also participated in income derived from the sale of warranty contracts (also referred to as "service contracts") (Ex. 302(c), R. 4110). Jeff Wilkinson also received other types of compensation as Kraatz's successor that Kraatz did not receive during his employment, such as \$15.00 per car sold and bonuses based on leases sold. (*Id.*)

Mr. Wisan calculated this category of damages based on Heritage's actual sales of vehicles to be \$119,856.51 (Ex. 302 at Sch. F). Mr. Wisan's method of calculating this item of damage was not challenged by any evidence introduced at trial. Nevertheless, the trial court refused to award damages arising from the loss of this benefit, as quoted and discussed above.

9. Unreimbursed Health Care Costs. Under paragraph (f) of Schedule A of the Contract (Add. C), Kraatz was promised that he would be reimbursed up to \$5,000.00 in medical expenses not covered by the company-provided health insurance policy. Kraatz's claim for \$3,484.26 of such expenses incurred in the calendar year prior to his discharge (1991) were denied by the trial court for the stated reason that (Add. A, R. 4999):

In claiming insurance benefits, Plaintiff is ignoring his oral agreement with Bry Wilkinson to forego noncovered health reimbursements because the company was unprofitable (R. 1837-38).

The actual transcript of Kraatz's testimony the trial court cited, however, states as follows (R. 1837-38):

Q So you agreed to postpone it?
A I did.

Q Did you agree to just waive it, not ask for it?

A No.

Q And you're asking for those now?

A Yes.

The trial court's finding is simply an erroneous observation of what Kraatz actually said.

10. Summary of Lost Wages and Benefits. Mr. Wisan's unrefuted calculations (Ex. 302) show that Kraatz has suffered damages in the nature of unpaid wages and benefits, after mitigation, equal to \$268,485.55. This figure is corroborated by comparison of Kraatz's post-Heritage wages and benefits with the wages and benefits received for the same period of time by Jeff Wilkinson, a much less experienced manager, who took Kraatz's place as general manager at Heritage. That comparison shows that during the remainder of the term of Kraatz's Contract, Jeff Wilkinson made \$208,514.37 more as Kraatz's successor than Kraatz made at his subsequent employment (Ex. 302, Sch. K).

As of September 1992, Kraatz was 47 years old (R. 1747) and Jeff Wilkinson was 27 years old (R. 1793). Jeff Wilkinson had never been a general manager before and had not yet been fully trained for that position at the time of Kraatz's wrongful discharge (R. 2380-81, 2385-86). Kraatz, on the other hand, had over 25 years of experience in the auto industry, had owned his own dealership (R. 1746-48) and enjoyed a good reputation as a general manager in the auto industry (Testimony of Larry Miller, R. 2091-92).

Miller admitted at trial that he would have retained Kraatz as general manager if it had been up to him (R. 2090-91) and that Kraatz would have been offered a 10%

shareholder interest in Heritage (R. 2087). Within one month before Kraatz was discharged, he received a raise (which is not included in his damages calculation) (R. 1833). There was no testimony presented by anyone at trial that the wages and benefits Kraatz had been receiving during his employment would not have continued if he had remained as general manager at Heritage.

Jeff Wilkinson testified that some of the income he received from Heritage in the form of warranty income and profit sharing came to him because he was a shareholder of Heritage as opposed to an employee (R. 2405). However, in comparing Kraatz's income from his subsequent employment, with Jeff Wilkinson's income as Kraatz's successor, Mr. Wisan did not include any dividend income for Jeff Wilkinson, but only W-2 income as reflected in Jeff Wilkinson's pay stubs and W-2 forms issued by Heritage reflecting wages, tips and other compensation [Ex. 302, Sch. K and R. 4110-14; *see also* Ex. 302(c), Add. E. R. 4110].

B. FIFTEEN PERCENT OF THE VALUE OF HERITAGE'S STOCK OVER \$2.5 MILLION.

Schedule B of the Contract gives Kraatz the right to receive 15% of the value of Heritage's stock over \$2.5 million at the time his employment was terminated (Add. C, Ex. 38). The trial court found the value of 100% of Heritage stock to be only \$3,100,000.00 and thus awarded Kraatz only \$90,000.00 in damages which is 15% of the difference between \$2.5 million and \$3.1 million (Add. A, R. 5001).

In its written findings, the trial court justified its finding of value by erroneously observing that (Add. A, R. 5001):

Larry H. Miller testified he purchased the dealership for between 3 and 3.1 million dollars (R. 2216-22). Based upon Larry H. Miller's valuation, plaintiff is entitled to stock appreciation of \$90,000 (calculated as \$3,100,000 less \$2,500,000 = \$600,000 x 15% = \$90,000.00).

Miller testified, however, that he purchased only 60% of the stock of Heritage for between \$3,000,000.00 and \$3,100,000.00 (R. 2216). This fact was never disputed at trial. The trial court's finding is simply an erroneous observation of what Miller actually said.

C. ATTORNEY FEES, COSTS AND EXPENSES.

The Contract entitles Kraatz to recover:

All expenses and costs incurred by [Kraatz] in enforcing the terms [of the Contract], including but not limited to, costs, reasonable attorney's fees, expert witness fees, and/or deposition costs whether incurred through legal action or otherwise and whether incurred before or after judgment.

(See Ex. 38, ¶ 5.6 of the Contract, Add. C, R. 4065.)

1. Attorney Fees. Plaintiff does not appeal from the amount of attorney fees the district court awarded him.

2. Deposition Costs and Witness Fees (other than expert witness fees). The trial court disallowed \$9,269.90 in deposition costs and witness fees for any witnesses or depositions not actually utilized at trial (Add. A, R. 5003, 5019; R. 4955). Kraatz's

request for these costs and expenses was supported by the un rebutted Affidavit of Michael

N. Zundel (R. 5102), wherein Mr. Zundel explained that:

25. Some specifically identifiable factors giving rise to the extensive services provided to Kraatz through trial are: (a) Heritage's failure to cooperate during the discovery phase of this case as evidenced by this Court's Order compelling discovery dated June 2, 1993; (b) the multitude of groundless accusations made by Heritage against Kraatz in conclusory and foundationless fashion, with hope of establishing "cause" for discharging Kraatz, which required Kraatz's counsel to ferret out the truth regarding each of said allegations, to the extent there was any, and organize the evidence so as to place the facts in proper context, showing all such allegations to have been utterly foundationless, pretextual, petty, immaterial or irrelevant; (c) the aggressiveness of Heritage's attack upon the enforceability of the contract, as written, pursuant to which Kraatz was employed, *e.g.*, Heritage's attempt to equate the contract's use of the term "refusal" with "failure;" and (d) the fact that almost all of the available witnesses were biased against Kraatz because they were: (i) part of the Wilkinson family, (ii) still employed by Defendant Heritage at the time of trial, or (iii) business associates of Larry Miller, the majority stockholder of the Defendant.

..*

36. The extensive preparation evidenced by the billing records attached hereto allowed Plaintiff's counsel to know, near the end of the fourth day of trial, that Kraatz's case had been established by the evidence and that further evidence was not necessary. Thus Kraatz's counsel rested and did not call additional unnecessary witnesses.

37. I have reviewed the amounts and categories of costs and expenses advanced by the Firm in this case and I am of the opinion that they are proper, reasonable and were necessarily incurred for the following reasons:

..*

f. The category of "Deposition and Witness Fees" contains those charges incident to obtaining testimony of numerous witnesses or potential witnesses identified by Defendants in response to Plaintiff's interrogatories. All of the numerous depositions taken prior to trial were necessary to either ascertain the alleged factual basis of Heritage's allegations against Kraatz or to secure foundation for Kraatz's damage claims, often from out of state witnesses. Heritage complains in its Trial Brief Re: Attorney Fees that "22 volumes of depositions" were taken in this case, but Defendants identified, in their Second Amended Answer to Plaintiff's Interrogatories, 30 people who had information relevant to this case. Many of the witnesses deposed were persons identified by Heritage as persons having knowledge of Kraatz's alleged malfeasance and were friendly to Heritage. Under such circumstances, there is no cause for Heritage to complain about the number of depositions taken in this case.

3. Expert Witness Fees. The trial court disallowed expert witness fees for Walter Hall in the amount of \$10,384.17, and for Kent Schmidt in the amount of \$2,300.00 (R. 4231), because they did not testify at trial, were, in the court's opinion, "unnecessary" and did not provide unique information to Kraatz (Add. A, R. 5002-03, 5018, R. 4957). The necessity of these experts to the development of Kraatz's case was supported by the Affidavit of Mr. Zundel (R. 5102), wherein he explained that he personally communicated with and hired Kent Schmidt and Walter Hall and that the assistance of each of those experts was necessary and helpful in developing his understanding of the issues involved in the appraisal and damages calculation process and

the evidence necessary to establish Kraatz's case (R. 5106). Mr. Zundel's Affidavit was un rebutted by any other evidence.

4. Pre-judgment Interest.

a. *Interest on Lost Wages and Benefits.* Beginning September 11, 1992, when Kraatz was discharged, and at the end of each month thereafter for the remainder of the contract term, the following elements of Kraatz's damages were fixed as of the end of each month and measurable by facts and figures with a high degree of certainty (in addition to the amounts on which the district court awarded pre-judgment interest) (Ex. 302):

i. uninsured health care costs incurred by Kraatz for the year of 1991 in the amount of \$3,484.26;

ii. value of a family membership to the Sports Mall in the amount of \$187.50 per month;

iii. annual Christmas bonus of \$500.00 per year;

iv. the \$18,898.04 value of four season tickets for three seasons to the Utah Jazz;

v. the \$8,109.04 value of contributions to Heritage's retirement plan on behalf of Kraatz;

vi. the \$2,210.53 difference between the monthly mortgage payments made on Kraatz's St. George home and the rent received from the tenants of the home for the period September 1992 through December 1992;

vii. the \$119,856.57 income to Kraatz for the sale of warranty contracts based on Heritage's actual sales of cars during the remaining term of the Contract and the historical rates of warranties sold; and

viii. 10% of Heritage's total profits (as adjusted for excess rent and the cost of Miller's buyout of Wilkinson) over \$280,000.00 per year, or (before mitigation) \$3,708.63, \$58,779.77 and \$45,463.68 for each of the years 1993, 1994 and 1995, respectively.

Mr. Wisan, plaintiff's expert, calculated pre-judgment interest on the above lost wages and benefits on a month-by-month or year-by-year basis to be \$150,455.44 through December 31, 1999, plus \$73.56 per day thereafter until entry of judgment (R. 4229).

b. *Interest on Stock Appreciation Right.* Although the value of Heritage as of September 11, 1992 was \$4.4 million, a minimum value of \$4.2 million was measured by facts and figures as of a later point in time (*i.e.*, the December 1992 sale to Miller) (R. 2199-2002; 2216). In December, 1992, Miller purchased 60% of the stock for \$3 million, and simultaneously offered to purchase the remaining 40% of the stock for \$1.2 million (R. 2199-2202). Thus, the total value of Heritage was fixed at \$4.2 million as of that time.

Under the Contract, Kraatz was entitled to 15% of the difference between \$4,200,000.00 and \$2,500,000.00, *i.e.*, a principal amount of \$255,000.00 (for pre-judgment interest purposes). Pre-judgment interest on this amount from December 31,

1992, to December 31, 1999, is \$178,569.85, plus \$69.86 per day thereafter until entry of judgment (R. 4230).

c. *Interest on Expert Witness Fees, Deposition Costs and Other Litigation Expenses.* The amounts of expert witness fees, and other costs and expenses, were fixed as of the date of each invoice or billing statement sent to Kraatz for these costs and expenses (R. 4231-4313). Through December 31, 1999, the amount of pre-judgment interest accrued on expert witness fees and other costs and expenses incurred and paid by Kraatz totaling \$48,186.26, was \$18,123.44, plus \$13.20 per day thereafter until entry of judgment (R. 4231).

d. *Interest on Attorney Fees.* The amount of attorney fees awarded in this case was measured by the hours of service multiplied by the applicable billing rates of the service providers, as reflected in monthly invoices (R. 4331-4602). By reference to these invoices, one can determine the precise date (*i.e.*, a fixed time) when the fees were incurred. Even where some charges were disallowed or reduced, the remaining charges were nevertheless fixed at a particular time and can be measured by facts and figures, with reasonable mathematical certainty. The trial court should have awarded interest of \$79,020.51 on attorney fees, through the date of judgment (R. 4927-29; 4966).

5. Consumer Price Index. Between the time Kraatz was wrongfully discharged on September 11, 1992 and March, 2001, the Consumer Price Index-Urban rose by 20.09% (R. 4605-06).

SUMMARY OF ARGUMENT

The trial court Judgment severely understates Kraatz's damages. The evidence relied upon by the trial court to find that the value of Heritage's stock was \$3.1 million as of Kraatz's wrongful termination in September, 1992, was the testimony of Miller that he purchased 60% of that stock (directly or indirectly) in December, 1992 for that price. It was clearly erroneous, with no reasonable support in the evidence, for the trial court to attribute no value to the other 40% of the stock. The great weight of the evidence, including admissions by Miller himself, established that the value of 100% of that stock was \$4.4 million in September, 1992.

With regard to Kraatz's lost wages and benefits, the trial court erred in failing to adjust Heritage's calculation of Kraatz's profit bonus, to account for the effect on profitability of Miller causing Heritage to pay most of his purchase price for the Heritage stock, and of the undisputedly excessive rents Miller caused Heritage to pay to himself.

With regard to the other items of Kraatz's lost wages and benefits that the trial court refused to award (*i.e.*, the value of the Sports Mall membership for non-business use, the value of the Hidden Valley Country Club membership, additional reimbursement for the delay in selling Kraatz's St. George Home, the annual Christmas bonus, the value of the season tickets to the Utah Jazz, the retirement contributions, the participation in warranty income, and the additional unreimbursed health care costs), the trial court erred in excluding these items of damage based upon (1) the parol evidence rule, (2) lack of consideration, (3) lack of foreseeability of the damages claimed, or (4) that the damages

claimed were speculative. The erroneous application of these legal principles by the trial court has the effect of depriving Kraatz of the "consequential" damages he suffered as a result of Heritage's breach of his employment agreement. This is contrary to the ruling of the Utah Supreme Court in *Heslop v. Bank of Utah*, 839 P.2d 828, 840-41 (Utah 1992), that such damages are recoverable in a wrongful termination case.

The trial court erred as well in failing to award Kraatz his expert witness costs for experts that did not testify at trial, and his deposition costs for deponents that did not testify at trial. The Contract expressly requires that Kraatz be awarded all of his expert witness costs and other litigation costs, such as depositions. Costs awarded pursuant to contract are not subject to the limitations on costs awarded pursuant to UTAH R. CIV. P. 54(d).

Kraatz is entitled to an award of pre-judgment interest on all of his damages, attorney fees and costs. Such damages, fees and costs could be determined with reasonable mathematical certainty, based upon facts and figures.

In addition, pre-judgment interest is merely a form of consequential damages, compensating Kraatz for the loss of the use of the money to which he was entitled, during the period between defendant's breach, and entry of judgment (here, over eight years). Because defendant has wrongfully had the use of the same money during this period, defendant is not being penalized by being required to pay pre-judgment interest on it.

Alternatively, Kraatz should be awarded an additional 20% of all amounts on which pre-judgment interest is not awarded, based upon that same percentage increase in the

Consumer Price Index during the period between Heritage's breach of contract and entry of judgment for that breach.

ARGUMENT

POINT I

THE DISTRICT COURT'S FINDING THAT 100% OF HERITAGE'S STOCK WAS WORTH ONLY \$3.1 MILLION IS CLEARLY ERRONEOUS

Kraatz has carefully reviewed all evidence admitted during trial that might be said to support the trial court's findings that (1) "[t]here was little or no increase in the value of Heritage's stock as of September 1992" (Add. A, R. 4999) over the \$2.5 million initial value agreed to by the parties in May 1990, and (2) that the value of 100% of Heritage's stock was \$3,100,000.00. All such evidence is marshaled below:

Miller testified that he purchased 60% of the stock of Heritage for between \$3 and \$3.1 million as follows (R. 2215-17):

Q Mr. Miller, you answered a question at the end of your deposition that seemed to indicate that the value of this dealership was \$4.2 million. My question to you is, why did you agree to that figure?

* * *

A Because — because the 1.2 million that we discussed with the children is being added back in that question and at that point late in the deposition that Mr. Zundel referred to, I answered the question without qualification that I felt should have been there, that if you look at it that way, with adding the 1.2 million back for the kids, then yes, it's four two.

Q And today as you sit here in this courtroom, what qualification should be added to that statement?

A That I think I'd bought 60 percent of the stock on the basis of between 3 and 3.1 million dollars total and that's — and my opinion is that that's the valuation of the stock of that corporation as reflected in the document that closed the deal.

With respect to the value of the remaining 40% of Heritage's stock, Miller testified as follows (R. 2217):

Q And why — if you bought, Mr. Miller, if you bought 60 percent of the stock for 3,000,000 to 3,100,000, why does that equate to the value of the dealership? Or how does it equate to the value of the dealership?

A Well, if the corporation pays a hundred percent of the obligations reflected in the formula that we've gone through earlier, then I pick up 60 percent of that and I think that it clearly establishes in real numbers, not any theory, but in real numbers what was paid in the transaction.

Q So you paid 60 percent or you paid \$360,000 for 60 percent of the stock?

A Correct.

Q And every other amount that was paid to Mr. Wilkinson was paid by the company from a hundred percent of the stock?

A That's correct.

Miller minimized the probative value of his offer to buy the remaining 40% of the stock from Wilkinson's four children (10% each) (referenced in the record at R. 2199-2002) for \$1,200,000.00, with the following testimony (R. 2201-02):

Q Yeah but I wasn't there. Why don't you give us your explanation sir? I'm sure you will at a later point anyway, so tell us what you think.

A Okay. I think that when you introduce the childrens' percentages, that then we seriously begin to mix apples and oranges because Bry and I had been talking about this deal since 1983 or 4 in one form or another. The first discussion we had and every subsequent discussion over the years included the opening line, or very close to it, that my kids have to be taken care of in

this deal, so that the agreement, when I said I extended it as one part of the offer to buy his children out for \$300,000.00 each, it was in keeping with an agreement I'd been making with him for 11 or 12 years that I don't think was relevant to the value of the stock, but keeping a commitment.

I also told him that I thought they would be unwise to take \$300,000.00 for it because even though for the last few years it seemed their share of the stock seemed [sic] very little practical value, my hope and plan was that it would, to get to have value and that it would serve them for many years if they retained ownership rather than cash out at that time, but to me, the \$1.2 million takes on a different character than the stock value.

Now if you go back to the way you've been asking, is that what Bry got or would have gotten, then the answer is yes. If you talk about the value of the stock, I still say it comes back to \$3 million. That's a matter of definition and opinion, I suppose, but I think its important, an important clarification.

Miller testified that he has purchased between 30 and 35 dealerships and that he "generally" only pays \$2 million "blue sky" in addition to the net book value of the dealership (which in this case was \$1,100,000.00) (R. 2217-18).

Other evidence which might be construed as supportive of the Court's finding is as follows: In May 1990, at the time Kraatz signed the Contract (27 months prior to his wrongful discharge on September 11, 1992), he and Heritage agreed in paragraph 1.(c)(1) of Schedule "B" of the Contract (Add. C) that the fair market value of 100% of Heritage's stock was \$2,500,000.00, "[f]or the purposes of this paragraph." *Id.*

Heritage lost money in two of the three years during which Kraatz was employed (albeit he was employed for only seven months in 1990 and eight months in 1992) as follows: (1990) <\$295,515.00>; (1991) +\$5,169.00; (1992) <\$124,980.00> (Add. A, R. 5000).

Wilkinson testified that he felt the net worth of the dealership had declined by 50% since Kraatz was employed (R. 2035-36):

Kraatz's valuation expert, Mark Schmidt, Ph.D., testified that his valuation of \$4.4 million was in part based upon a subjectively determined capitalization rate (R. 2286, 2300), which he applied to the dealership's actual income after he made adjustments thereto, based, in part, on National Automobile Dealers Association (NADA) guidelines (which is a compilation of averages for the best Honda dealers) (R. 2302, 2322), not the actual costs incurred by this particular dealership (R. 2322).

The company's financial statements (as summarized by Defendants' Ex. 593, *see also* Add. A, R. 5000) shows that the average gross income earned for new and used vehicles sold during Kraatz's employment declined during the years he was employed as follows:

<u>Used Cars</u>		<u>New Cars</u>	
1990	\$642/unit	1990	\$1,120/unit
1991	\$533/unit	1991	\$ 950/unit
1992	\$577/unit	1992	\$1,312/unit

The foregoing evidence is not sufficient to support the trial court's finding that 100% of Heritage's stock was worth only \$3.1 million in light of the great weight of the evidence as demonstrated below.

The trial court's finding that "Larry H. Miller testified he purchased the dealership for between \$3 and \$3.1 million" is an erroneous observation of how Miller actually

testified. Miller clearly testified that he purchased only 60% of the dealership for between \$3 and \$3.1 million (R. 2216-17).

Miller's deposition testimony was read into the record wherein he admitted that 100% of the stock of Heritage as of December, 1992 had a minimum value of 4.2 million and was worth as much as \$200,000.00 more in September of 1992 (for a total of 4.4 million dollars) when Kraatz was wrongfully discharged as follows (R. 2210-13):

Q As of January, 1993, your deal with Bry Wilkinson, as far as compensation that he would get for his shares was fixed; isn't that right?

* * *

A Well I think so, but — so I would say by January that it was fixed. I would say that by January of 1993 I think that was fixed, yeah.

Q He was going to get 3 million dollars for 60%?

A That's correct.

Q That didn't ever change between January and afterward?

A No.

Q And did I understand your testimony yesterday that if you had — that you were willing at that time to pay the children \$300,000.00 each for their 10% each?

A At that point I was not thinking of buying them out, but that would be valid, yes.

Q So that would be an additional \$1,200,000.00 that would be paid?

A That would.

* * *

Q And would it be fair to say that the minimum value of the store without real estate would be 4.2 million?

A I would agree to that.

* * *

Q [] — the value of the store as of September, 1992?

A Ok.

Q Would be at least 4.2 million and perhaps \$200,000.00 more than that; is that correct?

A I would agree to that.

Miller corroborated this deposition testimony at trial by stating that the total value of Heritage's stock was worth \$194,000.00 more in September 1992 than in December 1992 (R. 2200). Miller's testimony (quoted above in support of the trial court's finding) that he "generally" pays 2 million dollars blue sky plus book value when acquiring a dealership was followed by cross examination wherein he admitted that he in fact paid more than \$2 million blue sky for Wilkinson's stock in Heritage (R. 2225-26) and that he had done so in purchasing other dealerships as well. (*Id.*) He admitted also that in August of 1992 (just weeks before Kraatz was discharged) that he was willing to pay \$3.4 million in blue sky (but not as much as \$4 million) plus book value (R. 2205-10) and that the book value in September, 1992 of Heritage was \$1.2 million for a total value of \$4.6 million dollars (R. 2209).

Miller also admitted in his deposition that he used a pro-rata approach to purchasing the stock of Heritage, with the following testimony read into the record at R. 2223-25:

Q So had you gone through with the deal that was contemplated between you and Mr. Wilkinson just before you wrote the August 29 [1992] letter, you would have owned 100% of the stock?

A Or adjusted the price accordingly. For example, had I bought 60%, then I would have paid 60% of the price.

Applying this calculation to Mr. Miller's purchase of 60% of Heritage's stock for between \$3 million and \$3.1 million yields an indicated value as of December 1992 of between \$5 million and \$5,166,666.00.

Miller's willingness to pay so much for the dealership is easily understood in light of his testimony that his review of Heritage's books showed that due to Wilkinson's expenditures the historic expenses were "out of whack" (R. 2084) and that he recognized Heritage presented an opportunity he could take advantage of (R. 2085). In addition to Heritage's expected adjusted income, he expected to make \$300.00 per car, or approximately \$750,000.00 per year in "ancillary income" from his ownership interest in Heritage (R. 2072-74).²

Dr. Mark Schmitz, Ph.D., a qualified expert for valuing Honda dealerships, opined that the value of 100% of Heritage's stock as of September, 1992 was \$4.4 million (R. 2237; 2242; 2252). In determining the value of Heritage, Dr. Schmitz adjusted historical

²Ancillary income is income to the owner of the dealership which flows from (1) management fees; (2) sales of service contracts; and (3) sales of credit life insurance (R. 2072). Income from these ancillary sources normally does not appear on the income statement of the dealership because it is generated by separate companies owned or controlled by the owner/dealer. (*Id.*) Miller confirmed that all large automobile dealers, of which there are several in Utah, and many throughout the nation, would make ancillary income from a dealership such as Heritage (R. 2073).

income statements of Heritage for expenditures which were not within industry standards as a result of Wilkinson's personal expenditures (Ex. 329, Tabs 2 and 3; R. 2237; 2256-60) just as Miller did (R. 2071). (*See*, for example, R. 2170-71; 2177-78; 2181-82 and Ex. 329, Tab-2 showing that for the years 1989 through 1992, Wilkinson took as much as \$281,877.00 out of the business for his personal benefit over and above the more than \$240,000.00 reported in W-2 income for each of those years.)

Such expenditures included an instance in November, 1990, when Wilkinson caused Heritage to assume and show on its books a \$200,000.00 loan from Comerica Bank, which another dealership, solely owned by Wilkinson, was not able to pay. (*Id.*) In that same year, Wilkinson caused Heritage to begin paying a \$100,000.00 debt to the FSLIC incurred by Wilkinson as a director of a failed savings and loan. (*Id.*) Such adjustments by Dr. Schmitz of the historic accounting records were premised on the undisputed and reasonable assumption that potential buyers would make the same types of adjustments, when reviewing the income statements, as a method of predicting future income. The adjustments showed that Heritage could be expected to make a profit in excess of \$700,000.00 per year (excluding additional ancillary income of \$750,000.00 per year) (R. 2433) if expenditures were kept within industry standards (R. 2238). There is no evidence in the record contrary to Dr. Schmitz' opinion.

The parties' agreement that in May, 1990 the "initial value" of 100% of Heritage stock was \$2,500,000.00 is not good evidence of the value of the stock 27 months later, when Kraatz was wrongfully discharged because: (1) the agreement is a stipulated value

and has no independent evidentiary basis such as an actual sale might have; and (2) as a matter of law, the valuation date is too remote to be reliable. *Glezos v. Frontier Investments*, 896 P.2d 1230, 1235 (Utah App. 1995) (clear error for the trial court to ignore un rebutted evidence of appraiser and rely instead on sale three years after relevant valuation date). In this case the relevant valuation date is September 11, 1992.

The trial court's oral finding that "the corporate net worth declined to approximately one-half from June 1, '90 to August of '92" (R. 2470, Add. A, R. 5000) is supported only by Wilkinson's testimony at R 2035-36 that "the net worth of the dealership in total, as I remember, was reduced almost in half from June 1st of '90 until August of '92" (R. 2035-36). However, the financial statements show that on May 31, 1990, the Murray dealership's net worth was \$908,790.00 (Ex. 295, Bates No. 000069, Line 62) and that on August 31, 1992, it was \$737,681.00 (Ex. 297, Bates No. 000185, Line 63), for a decline of only 18.83%, not "approximately one-half." The trial court's reliance on Wilkinson's oral testimony, as opposed to the financial statements themselves, was clear error. Both parties in this case offered the financial statements into evidence (R. 2323-24).

The fact that Heritage may have lost money after Kraatz's employment began was explicitly considered by both Miller and Dr. Schmitz in coming to their valuations and/or admissions of value (R. 2084; 2238). Inasmuch as Heritage's expenses undisputedly exceeded industry standards [Ex. 329 (Tabs 2 and 3)] and as Miller stated were "out of whack" (R. 2084), Heritage's historic lack of profitability is not a reasonable basis to ignore Miller's admissions of value or the un rebutted opinion of Dr. Schmitz.

The trial court's reliance on Miller's testimony for its valuation of 100% of Heritage's stock at \$3.1 million is clearly erroneous given Miller's actual testimony that he purchased only 60% of the stock for that amount. It is not reasonable to say that the other 40% on the same day was worthless; particularly, when Miller admitted that he was willing to pay \$1.2 million for it. The overwhelming weight of the evidence, from Kraatz's expert as well as Miller himself, established that the value of 100% of the stock was no less than \$4.4 million in September 1992. Thus, Kraatz was entitled to stock appreciation damages of \$285,000.00 rather than the \$90,000.00 awarded by the trial court.

POINT II

KRAATZ IS ENTITLED TO CONSEQUENTIAL DAMAGES ARISING FROM THE LOSS OF BENEFITS OF EMPLOYMENT IN ADDITION TO THE MINIMUM COMPENSATION REQUIRED BY THE CONTRACT

Kraatz is entitled to recover both the benefit of his bargain and consequential damages. *Heslop, supra*, 839 P.2d at 840-41 (wrongfully terminated employee entitled to broad range of both general and consequential damages). The proper measure of Kraatz's damages is calculated by comparing what he would have received in compensation and benefits as the general manager of Heritage between September 11, 1992 (the date of discharge), and June 1, 1995 (the end of the five year Contract term), with what he actually received from his subsequent employment. *Panhandle Eastern Pipe Line Co. v. Smith*, 637 P.2d 1020 (Wyo. 1981). All reasonably foreseeable losses, costs and expenses are recoverable by a wrongfully terminated employee, as either benefit of the bargain or consequential damages. *See Heslop*, 839 P.2d at 840-841. A claim of damages based on

actual compensation history is not speculative. *Boothby v. Texon, Inc.*, 414 Mass. 468, 608 N.E.2d 1028, 1038-39 (1993).

In terms of his lost wages and benefits (*i.e.*, profit bonus, the Sports Mall membership, Hidden Valley Country Club membership, St. George home reimbursement, annual Christmas bonus, Utah Jazz tickets, retirement contributions, participation in warranty income, and unreimbursed health care costs), Kraatz is seeking to recover only the objectively measurable economic amounts he would have received during the remainder of his contract term, as evidenced by the wages and benefits he actually received while employed, and the compensation and benefits received by his less experienced successor.

An implied-in-fact contract is created when an employer makes representations or promises that employees reasonably understand to constitute a promise in exchange for continuing services. *See, Berube v. Fashion Center, Ltd.*, 771 P.2d 1033, 1044 (Utah 1989). For purposes of damages, there is no articulable reason to distinguish between employment contracts "implied in fact," as in *Heslop*, or written.

Indeed, although the written Contract here required compensation to Kraatz at certain minimum amounts, each time Kraatz received a raise or "additional compensation" during his employment, a new implied-in-fact contract for the additional compensation was created, or the old contract was modified so as to incorporate the new or modified elements of compensation. Even where, as here, a contract provides that it may be amended only in writing (Add. C, Section 5.2, R. 4064), the parties are free to amend it

verbally (or by course of conduct). *See, Ted R. Brown and Assoc., Inc. v. Carnes Corp.*, 753 P.2d 964, 968 (Utah App. 1988).

Under a "consequential damage" analysis, damages from the loss of each of the elements of compensation and benefits for which Kraatz now seeks recovery became foreseeable at the time each element was added to his compensation package. As such, the damages now sought were foreseeable at the time any new contract was "made," or, alternatively, the old contract was "modified." With respect to each element of lost wages and benefits damages, the evidence on foreseeability is unrebutted, and the trial court's conclusion of law to the contrary was erroneous.

The trial court also committed legal error in ruling that Kraatz could not use extrinsic evidence to prove the totality of his damages (R. 5016). In making this ruling, the trial court purported to rely on this Court's decision in the first appeal, holding that the termination for cause provisions of the Contract were unambiguous, and that the trial court erred in considering extrinsic evidence on that issue (*Id.*).

However, nothing in this Court's prior decision, holding Heritage liable for breach of the Contract, prevented Kraatz from using extrinsic evidence to establish what "additional compensation," as contemplated by the Contract, was actually agreed to by Heritage or what consequential damages he suffered as a result of the breach. *See, Stanger v. Sentinel Sec. Life Ins. Co.*, 669 P.2d 1201, 1205 (Utah 1983) (parol evidence may be used to show remaining terms of partially integrated agreement, or to show contract modification). Extrinsic evidence is almost always necessary in order to prove

consequential damages. *See, Beck v. Farmers Ins. Exchange*, 701 P.2d 795, 801 (Utah 1985) (consequential damages reach beyond the bare contract terms).

The trial court also erred, as a matter of law, in finding (based on its earlier reversed findings on the liability issue) no consideration for the "additional compensation" to which Heritage admits it agreed (Add. A, R. 5001). The consideration for this compensation was Kraatz's continued performance of services that Heritage believed justified the additional compensation. *See, Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 56, n. 2 (Utah 1991). Moreover, consideration is not an issue as to consequential damages that reach beyond the bare contract terms.

With these legal principles in mind, Kraatz now turns to the specific items of damage rejected by the trial court and the specific evidence and findings of the trial court pertaining thereto.

1. Profit Sharing. The trial court erred, as a matter of law, in interpreting the contract so as to allow Larry Miller to arbitrarily decrease reported profits upon which Kraatz's bonus was based. In calculating the value of Kraatz's profit bonus, the trial court ignored the adjustments to Heritage's accounting that should have been made to eliminate the effect of Miller causing Heritage to pay the bulk of the purchase price for the Heritage stock he bought, and of Miller causing Heritage to pay undisputedly excessive rents to himself.

Every contract is imbued with an implied covenant of good faith and fair dealing. *Ted R. Brown and Assoc., Inc., supra*. It is not fair or in good faith for Heritage to require

Kraatz to bear any of the financial burden of Miller's purchase of Wilkinson's stock, or for Heritage to unilaterally decrease corporate profits by inflating the rents paid to Miller, as the company's landlord and majority shareholder. Heritage never offered any evidence challenging plaintiff's adjustment to these items.

The trial court confused ". . . accounting practices acceptable to . . . American Honda . . ." in paragraph (b) of Schedule A to the Employment Agreement (Add. C, R. 4067), with expenditures that were excessive or unfair. In claiming an adjustment, Kraatz is not arguing that the accounting practices were somehow improper, but rather that the expenditures accounted for were unreasonable and should therefore be adjusted in order to give Kraatz the benefit of his bargain.

The trial court's findings that Heritage's accounting practices were known to Kraatz and never changed (Add. A, R. 4997) are irrelevant, because they do not address the amounts accounted for. The excessive rent paid to Miller and the amounts paid to Wilkinson for his stock, appeared only after Kraatz was wrongfully discharged. They were not expenditures that can fairly and reasonably be charged to Kraatz for the purpose of calculating his share of Heritage's profits after his employment was wrongfully terminated.

Miller could just as easily have artificially deflated the company's profits by paying himself a monthly bonus equal to all of the profits made by Heritage during any month. Under this hypothetical, Kraatz would be entitled to an adjustment, without attacking the "accounting procedures" per se.

Thus Kraatz is entitled to a net profit bonus of \$26,894.34 after mitigation (calculated as gross bonus of \$107,952.03 less \$81,057.68 profit bonus earned from subsequent employment = \$26,894.34) (Ex. 302), rather than the negative \$46,082.28 the trial court imposed as an offset against Kraatz's other damages.

2. Unreimbursed Health Care Costs. With regard to Kraatz's claim for unreimbursed health care costs, the trial court found that Kraatz made an oral agreement to "forego" payment of unreimbursed health costs (R. 4999, 1837-38). However, the portion of the record the trial court cites in support of this finding shows that Kraatz merely agreed to "postpone" this payment (R. 1837-38). Thus, Kraatz is entitled to additional damages of \$3,484.26 (Ex. 302).

3. St. George House Reimbursement. The trial court also found that Heritage never agreed to pay the differential between Kraatz's receipt of rental on his St. George home, and the amount of his mortgage on his Salt Lake home, "indefinitely" (Add. A, R. 5001-02; R. 1859). However, Kraatz's testimony cited by the trial court in support of this finding is that Heritage did not agree to pay this differential "forever" (R. 1859). Heritage did agree to make the payment until the St. George home was sold, which was unknown and therefore "indefinite" when the promise was made. Therefore, Kraatz is entitled to an additional \$2,210.53 based on Mr. Wisan's undisputed calculations (Ex. 302).

4. Retirement Contributions. The trial court made no factual determinations in support of its refusal to award Kraatz consequential damages for the loss of retirement contributions he would have received during the term of his employment under Heritage's

401-k retirement plan. There was no evidence presented that this plan was ever terminated or modified in any way during the remaining term of the Contract. Therefore, Kraatz is entitled to additional \$8,109.04 pursuant to Mr. Wisan's unchallenged calculation (Ex. 302).

5. Annual Christmas Bonuses. Similarly, the trial court made no findings in support of its refusal to include the value of this lost benefit in its damage award. No evidence was adduced that this benefit was not given to Heritage employees after Kraatz was terminated or that Kraatz would not have received this benefit had he stayed. Therefore, Kraatz is entitled to additional damages of \$1,500.00 pursuant to Mr. Wisan's unrefuted calculation (Ex. 302).

6. Participation in Warranty Income. Again, the trial court made no findings of fact in support of its refusal to include this damage award for Kraatz's loss of this valuable benefit. There was no evidence presented at trial refuting the facts that (a) this type of income had become an important part of Kraatz's compensation, (b) it is common practice in the industry to compensate general managers by allowing them to share in the income from sales of warranty contracts, (c) that Kraatz's successor, Jeff Wilkinson, shared in this type of income, or (d) challenging Mr. Wisan's method of calculating the value of this benefit to Kraatz during the remaining term of his contract. Therefore, Kraatz is entitled to additional damages of \$119,856.51 (Ex. 302).

7. Country Club Membership. The trial court's finding that Kraatz actually never used the membership to the country club during his employment is irrelevant given

that Kraatz was not ever given a country club membership and was not entitled to one under the Contract until three months prior to the time he was fired. Wisan's calculations of the value of this contractually mandated benefit, for businesses uses only, based upon Kraatz's estimate of how much golf he would play with business guests, was unrefuted. Therefore, Kraatz is entitled to additional damages of \$10,863.00 (Ex. 302).

8. Sports Mall Membership and Jazz Tickets. The trial court made no factual findings to the effect that these benefits enjoyed by Kraatz during his employment and which had admittedly become part of his compensation would not have continued during the remainder of the term of the Contract. There was no evidence presented from which to make such findings. Mr. Wisan's calculations were unrefuted and therefore Kraatz is entitled to additional damages of \$4,537.50 and \$18,898.50, respectively, pursuant to Mr. Wisan's unrefuted calculations (Ex. 302).

In sum, the evidence of the "additional compensation" Heritage agreed to pay Kraatz was undisputed, and the trial court erred in failing to award any consequential damages at all.

POINT III

UNDER THE CONTRACT, PLAINTIFF IS ENTITLED TO AN AWARD OF ALL OF HIS EXPERT WITNESS FEES AND DEPOSITION COSTS

In refusing to award Kraatz witness fees for experts who did not testify at trial, and deposition costs for deponents who did not testify at trial, the trial court appears to have applied limitations imposed by UTAH R. CIV. P. 54(d), as interpreted by Utah case law.

However, Rule 54(d) does not apply in light of Section 5.6 of the Contract which requires an award of ". . . all expenses and costs incurred . . . including . . . expert witness fees, and/or deposition costs . . ." (Add. C, R. 4065, emphasis added). *See, Chase v. Scott*, 2001 Ut. Ct. App. 404, ¶¶ 18-20, 437 Utah Adv. Rep. 20.

In *Chase*, this Court held that ". . . in order to give effect to the term 'costs' in the Contract, we hold that 'costs' should not be limited by case law interpreting Rule 54(d)". 2001 Utah Ct. App. 404, ¶ 20.

Thus, the trial court here should be directed to award Kraatz an additional \$12,684.17 in expert witness fees, and an additional \$9,369.90 in deposition costs.

POINT IV

KRAATZ IS ENTITLED TO PRE-JUDGMENT INTEREST ON ALL OF HIS DAMAGES, ATTORNEY FEES AND LITIGATION EXPENSES

A. KRAATZ'S DAMAGES, ATTORNEY FEES AND LITIGATION EXPENSES COULD ALL BE CALCULATED WITH REASONABLE MATHEMATICAL CERTAINTY, BASED ON FACTS AND FIGURES.

The current law in Utah with regard to pre-judgment interest is summarized as follows:

Where the damage is complete and the amount of the loss is fixed as of a particular time, and that loss can be measured by facts and figures, interest should be allowed from that time and not from the date of judgment. On the other hand, where damages are incomplete or cannot be calculated with mathematical accuracy . . . the amount of the damages must be ascertained and assessed by the trier of the fact at the trial, and in such cases pre-judgment interest is not allowed.

Utah Foam Products Co. v. Upjohn, 930 F.Supp. 513, 523 (D. Utah 1996) *aff'd*. 154 F.3d 1212 (10th Cir. 1998), *cert. denied*, 526 U.S. 1051 (1999) [citing *Bjork v. April Indus., Inc.*, 560 P.2d 315, 317 (Utah 1977), *cert. denied*, 431 U.S. 930 (1977)].

This Court has also explained:

For damages to be calculable with mathematical certainty, they must be ascertained "in accordance with fixed rules of evidence and known standards of value, which the court or jury must follow in fixing the amount rather than be guided by their best judgment in assessing the amount to be allowed for past as well as for future injury, or for elements that cannot be measured by any fixed standards of value."

Price-Orem Inv. Co. v. Rollins, Brown & Gunnell, Inc., 784 P.2d 475, 483 (Utah App. 1989) [quoting *Fell v. Union Pac. Ry. Co.*, 32 Utah 101, 88 P. 1003, 1007 (1907)].

Cases that have applied the above principles in awarding pre-judgment interest include *Jorgensen v. John Clay & Co.*, 660 P.2d 229 (Utah 1983), and *Bjork, supra*. In *Jorgensen*, the court found the calculation of damages sufficiently certain to award interest under a contract to purchase 10,000 sheep at a stated price per pound. The court stated:

This is not an instance such as a case involving personal injury, false imprisonment, wrongful death, defamation or the like. Regardless of variability of the weight of the sheep, these damages were mathematically calculated. The jury awarded seller damages based upon the difference between what seller should have received under the contract with buyer and what he actually received from [another buyer] as of the date of last delivery. Seller was entitled to interest on that difference.

660 P.2d at 233.

Similarly, in *Bjork*, the court found that damages under a stock registration agreement were sufficiently fixed and measurable. In *Bjork*, the defendant issued stock with a restrictive legend stating that the shares could not be transferred, but agreed to include these shares in any future public offering of common stock. The holders of the restricted stock brought suit when the company refused to include their stock in the public offering and remove the restrictive legend.

To calculate damages, the court assumed the stock would have been sold at its highest price during the public offering and then reduced that price by the present value of the stock and a typical sales commission on stock sales. Stating the general rule, the court awarded pre-judgment interest on that amount because "the law in Utah is clear, viz: where the damage is complete and the amount is fixed as of a particular time, and that loss can be measured by facts and figures, interest should be allowed from that time and not from the date of judgment." 560 P.2d at 317 (citations omitted). In addition, pre-judgment interest is awardable even on disputed amounts, where the amount awarded at trial can be determined with the requisite mathematical certainty. *See, Lefavi v. Bertoch, supra*, 2000 Utah Ct. App. 5, ¶¶ 22-27.

Applying these general principles to the case at hand, Kraatz is entitled to pre-judgment interest on the various components of his damage award on which the trial court refused to award pre-judgment interest, as demonstrated below.

1. Pre-judgment Interest on Kraatz's Wage and Benefits Damages. There is no evidence contesting the calculation of the amounts due Kraatz for Sports Mall dues and

expenses, Christmas bonuses, Jazz tickets, retirement contributions, St. George house mortgage reimbursements, or lost profits from the sale of warranty service contracts. Therefore, Kraatz should recover pre-judgment interest on all of these amounts.

With respect to the calculation of Kraatz's contractual right to share in the profits of the enterprise over \$280,000.00 per year, the only question presented is whether the adjustments to Heritage's monthly income statements made by Kraatz's accountant should have been allowed by the trial court. The adjustments do not involve future projections or other unquantifiable or speculative determinations. The question is a simple one—are the adjustments necessary to ensure that Kraatz receives the benefit of his bargain under the contract? Once that question is answered, there is no ambiguity or uncertainty about the calculation of the amount due. Therefore, pre-judgment interest should be allowed on this item of damage.

Also, Kraatz is only asking for pre-judgment interest to be applied to the portion of his wage and benefits damages that have not been mitigated, as set out in Ex. 302. For most months, the monthly damages requested are less than Kraatz's base salary of \$8,000.00/month under his contract. Therefore, pre-judgment interest should be applied on a monthly basis to the net amount of damages after mitigation.

2. Pre-judgment Interest on Kraatz's Share of the Stock Appreciation. The evidence of the December 1992 arms-length sale by Wilkinson of 60% of the stock in Heritage for \$3 million, and Miller's offer to buy the remaining 40% for an additional \$1.2 million (R. 2199-2202) satisfy the requirements of Utah law for the accrual of pre-

judgment interest from and after December 1992. In arguing for pre-judgment interest based on the known value of Heritage's stock as of December 1992, Kraatz does not waive his claim for the value of the stock, as of September 11, 1992, when he was wrongfully discharged. At trial it was undisputed that the stock of Heritage was worth between \$194,000.00 and \$200,000.00 more in September than in December 1992, due to losses sustained by Heritage in the interim period, which decreased Heritage's book value (R. 2200, 2205).

When values are at issue, as is the case with respect to the value of the Heritage stock, Utah law requires evidence of "known standards of value." *Price-Orem Inv. Co.*, *supra*, 784 P.2d at 483. An actual arms-length sale is indisputably a "known standard of value." Miller's offer to buy the remaining 40% for \$1,200,000.00 is a "known standard" for a minimum valuation.

As of December 1992, it was clear to Heritage that Kraatz's stock appreciation rights would yield to Kraatz at least \$255,000.00 (calculated as follows: \$4,200,000.00 less \$2,500,000.00 = \$1,700,000.00 x 15% = \$255,000.00), and that at least that sum was due Kraatz at that time. As explained by the Utah Supreme Court in *Trail Mountain Coal Co. v. Utah Division of State Lands and Forestry*, 921 P.2d 1365, 1370 (Utah 1996) *cert. denied*, 519 U.S. 1142 (1997), pre-judgment interest is awarded "to compensate a party for the depreciating value of the amount owed over time and, as a corollary, deters parties from intentionally withholding an amount that is liquidated and owing."

At a minimum, Kraatz should be allowed pre-judgment interest at the rate of 10% per annum on \$255,000.00 of his \$285,000.00 claim from and after December 31, 1992.

3. Pre-judgment Interest on Kraatz's Expert Witness Fees, Costs and Expenses.

Under the Contract, Kraatz is entitled to recover "all expenses and costs incurred" by him including, but not limited to, "expert witness fees" and "deposition costs." There is no issue under the Contract of whether such costs and expenses are "reasonable," as there is with attorney fees. Heritage's obligation to pay all such costs and expenses incurred by Kraatz was mathematically certain as of the time the costs and expenses were incurred.³ In *James Constructors, Inc. v. Salt Lake City Corp.*, 888 P.2d 665, 672 (Utah App. 1994), this Court noted that pre-judgment interest on attorney fees is allowed in Utah where the reasonableness of the fees is not at issue. *See also, First Security Bank of Utah v. J.B.J. Feedyards, Inc.*, 653 P.2d 591, 600 (Utah 1982) (allowing pre-judgment interest on attorney fees awarded to prevailing party arising out of wrongful attachment of cattle).

Thus pre-judgment interest should be awarded to plaintiff on all expert witness fees, deposition costs, and other litigation expenses.

4. Pre-judgment Interest on Kraatz's Attorney Fees. Kraatz is entitled to pre-judgment interest on the attorney fees awarded in this case because: (1) the Utah Court of Appeals' explanation in *James Constructors, Inc., supra*, of the Utah Supreme Court's

³Under the Contract, Heritage is liable for costs and expenses "incurred" by Kraatz. Thus, contrary to the trial court's decision (R. 5004), interest on these costs and expenses should run from the date Kraatz "incurred" them, rather than from the date Kraatz paid them. The trial court also indicated that Kraatz may not have been required to pay interest on some unpaid amounts owed to experts (R. 5004), but there is no evidence of this.

holding in *J.B.J. Feedyards, supra*, is an incorrect and overly restrictive reading of the case, and (2) as evidenced by the holding of the Utah Supreme Court in *Heslop, supra*, a strong public policy argument exists for insuring that wrongfully terminated employees receive full and fair compensation from their former employers.

Contrary to this Court's 1994 decision in *James Constructors, Inc.*, in 1982 the Utah Supreme Court allowed pre-judgment interest on attorney fees where the fees were incurred in having property released from a wrongful attachment. *J.B.J. Feedyards*, 653 P.2d at 597. The Supreme Court applied the Utah rule regarding pre-judgment interest, and held that pre-judgment interest would apply to attorney fee damages because the amount is "fixed as of the time of claimed damages." *Id.* at 600.

In *James Constructors, Inc.*, this Court criticized the Supreme Court's decision in *J.B.J. Feedyards* as being "without analysis." 888 P.2d at 671. However, the Supreme Court in *J.B.J. Feedyards* noted the relevant facts and expressly applied the law in determining that the attorney fees allowed by the trial court should be augmented by pre-judgment interest. Although the analysis was short, there was an analysis.

In *James Constructors*, this Court also attempted to distinguish *J.B.J. Feedyards* by stating that in the latter case "the reasonableness of the fees was not at issue." 888 P.2d at 672. To the contrary, in *J.B.J. Feedyards* the trial court considered evidence regarding attorney fees and determined that the figure of \$10,000.00 "appropriately compensated" the attorney for services for which his client was entitled to recover fees. 653 P.2d at 597. Obviously, in *J.B.J. Feedyards* a decision was made as to the reasonableness of the

attorney fees awarded. Nevertheless, the plaintiff was entitled to pre-judgment interest. Therefore, *J.B.J. Feedyards* should still be considered controlling authority by this Court, and pre-judgment interest should be calculated on the attorney fees awarded in this case.

Also, this Court awarded pre-judgment interest on attorney fees in *Campbell, Maack & Sessions v. Debry*, 2001 Ut. Ct. App. 397, 436, Utah Adv. Rep. 37. *Campbell* was a suit by a law firm to collect unpaid fees owed by a former client. One of the issues defendant attempted to raise was the reasonableness of the fees sought. 2001 Ut. Ct. App. 397, ¶¶ 10, 12. Nevertheless, this Court affirmed the award of pre-judgment interest on the attorney fees, on the basis that the trial court had sufficient information to calculate the amount of the fees with mathematical certainty as of a particular time. 2001 Ut. Ct. App. 397, ¶ 23.

Further, in *Heslop, supra*, the Utah Supreme Court analogized the vulnerable position of a wrongfully discharged employee to that of an insured wrongfully denied coverage, and therefore, on policy grounds, carved out an exception to the generally accepted American rule regarding attorney fees, and allowed such fees to be recovered as "consequential damages." 839 P.2d 840. The same rationale and public policy should be applied here to allow pre-judgment interest on the attorney fees incurred by the wrongfully terminated employee, Kraatz.

B. KRAATZ SHOULD BE AWARDED CONSEQUENTIAL DAMAGES (IN THE FORM OF INTEREST) FOR THE LOSS OF THE USE OF THE PRINCIPAL DAMAGE AWARD OVER TIME.

Kraatz should be awarded pre-judgment interest on all of his damages caused by Heritage's wrongful termination of Kraatz's employment Contract, even if this Court determines that some of these damages cannot be measured by facts and figures, or calculated with mathematical certainty. Heritage has had the use of, and opportunity to invest, money belonging to Kraatz since September 1992, when Heritage wrongfully terminated the Contract, or at times thereafter when amounts due Kraatz under the contract should have been paid. Kraatz has not had the use of, or the opportunity to invest, this money, during these periods, and has suffered consequential damages as the result.

The apparent rationale for requiring damages to be calculable with mathematical certainty before pre-judgment interest may be awarded is that, otherwise, the defendant cannot determine the amount he or she is required to pay. However, this reasoning is flawed. It does not matter whether the defendant can determine the amount of damages he or she owes. Whatever that amount is, defendant has had the benefit of the use of the money during the period between the time plaintiff's claim arose and the time judgment on that claim is entered, and plaintiff has not.

Many courts have agreed with this analysis, including the U.S. Supreme Court, as early as 1933:

It has been recognized that a distinction . . . simply as between cases of liquidated and unliquidated damages, is not a sound one. Whether the case is of the one class or the other, the

injured party has suffered a loss which may be regarded as not fully compensated if he is confined to the amount found to be recoverable as of the time of breach and nothing is added for the delay in obtaining the award of damages. Because of this fact, the rule with respect to unliquidated claims has been in evolution . . . and in the absence of legislation the courts have dealt with the question of allowing interest according to their conception of the demands of justice and practicality . . . "The disinclination to allow interest on claim of uncertain amount seems based on practice rather than theoretical grounds." 3 Williston, Contr. § 1413.

See, Funkhouser v. J.B. Preston Company, Inc., 290 U.S. 163, 168-169 (1933) (emphasis added, footnote and some citations deleted.)

Other courts agree with the U.S. Supreme Court. For example, in *State v. Phillips*, 470 P.2d 266 (Alaska 1970), the Alaska Supreme Court discussed the wisdom of an Alaskan pre-judgment interest statute, which it interpreted as not distinguishing between liquidated and unliquidated claims:

Denying interest on unliquidated damages erroneously subordinates plaintiff's interest in full compensation to a feeling that defendant should not be penalized for failing promptly to pay an uncertain amount.⁴

Id. at 273, n. 27.

Phillips also discussed that failing to award pre-judgment interest on uncertain damage amounts encourages defendants to litigate valid claims, such as plaintiff's breach of contract claims here, rather than settle them. *Id.* at 273, n. 27 and 274. Unavailability

⁴Of course Heritage is not being penalized by being required to pay pre-judgment interest on uncertain amounts it could invest, or receive interest on, until judgment is entered.

of pre-judgment interest also encourages defendants to prolong litigation, as is the case here, where Kraatz's claim was pending for over eight years prior to judgment.

In *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So.2d 212 (Fla. 1985), the Florida Supreme Court held that under Florida law, a prevailing party is entitled to pre-judgment interest on all damages (except in personal injury cases). The court noted that pre-judgment interest on uncertain amounts does not penalize the defendant, but merely makes the plaintiff whole. The verdict liquidates the amount, on which pre-judgment interest runs from the date this amount was due.

Other cases that awarded pre-judgment interest as part of damages, even where principal damage amounts may not be determinable until trial, include *Essex House v. St. Paul Fire & Marine Inc. Co.*, 404 F.Supp. 978, 995 (S.D. Ohio 1975) (noting rate of investment return defendant presumably received during pendency of litigation); *Emery v. Tilo Roofing Co. Inc.*, 195 A. 409, 412-413 (N.H. 1937) and Texas cases that have been superceded by statute. *See, Cavnar v. Quality Control Parking Inc.*, 696 S.W.2d 549 (Tex. 1985) (awarding pre-judgment interest on damages in wrongful death case); *Perry Roofing Co. v. Olcott*, 744 S.W.2d 929 (Tex. 1988) (applying *Cavnar* in awarding pre-judgment interest on uncertain damage amounts in breach of contract case) and *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 528-534 (Tex. 1998) (noting *Cavnar* line of cases superceded by statute).⁵

⁵RESTATEMENT (SECOND) OF CONTRACTS, § 354(2) would allow pre-judgment interest as part of the damages for breach of contract, "as justice requires," even where the principal amount of damages is not readily ascertainable.

The Utah Supreme Court has also recognized that pre-judgment interest is part of plaintiff's damages in a breach of contract case. In *Farnworth v. Jensen*, 217 P.2d 571 (Utah 1950) the Court explained that there are two types of interest, that provided for by contract and "moratory" interest awarded in a breach of contract case as part of plaintiff's damages for unlawful detention of money due the defendant. *Id.* at 575, quoting 30 AM.JUR. § 2, page 6. In *Farnworth* the purchaser of real estate failed to pay the principal and interest due under the purchase contract. The Court held that the purchaser was liable not only for the principal and contract rate of interest, but also for moratory interest at the legal rate on the unpaid contract interest. The Court reasoned that plaintiff's damages included the loss of the use of the contracted for interest that should have been paid. *Id.* at 576-577. *See also, Ong Int'l. (U.S.A.) v. 11th Ave Corp.*, 850 P.2d 447, 457 (Utah 1993), in which the Utah Supreme Court affirmed an award of \$87,860.00 as the reasonable rate of return on restitutionary damages, if plaintiff had invested the damage amount during the period that defendant had the use of the money.

Pre-judgment interest is a necessary part of Kraatz's damage claim here, to make him whole as a result of the delay in receiving the principal amount of his damages. Thus, there is no principled reason for distinguishing between damages that are readily calculable and those that may not be, in awarding pre-judgment interest. Just as damages that will be incurred in the future are discounted to their present value to reflect the time value of money, pre-judgment interest must be paid on all damages incurred in the past, to also reflect the time value of money.

POINT V

TO THE EXTENT PRE-JUDGMENT INTEREST IS NOT ALLOWED, KRAATZ'S DAMAGE AWARD SHOULD BE INCREASED BY THE CONSUMER PRICE INDEX

Over eight years elapsed between the time Kraatz was wrongfully discharged and entry of Judgment. In that time, inflation diminished the purchasing power of United States currency by 20.09%. [See Consumer Price Index–Urban "CPI-U" as of 3/17/00 in R. 4606, and the applicable upward adjustment percentage to be applied based upon a rise of 28.4 points (141.3 to 169.7) in the Index.] Unless Kraatz's damages award is adjusted by an interest factor or the CPI-U, he will not be made whole by a current judgment based on 1992 dollars. In the intervening years, Heritage has had the use and enjoyment of money that rightfully should have been paid to Kraatz long ago. Thus Heritage will have been unjustly enriched at Kraatz's substantial expense, absent an upward adjustment of the final award.

In *Law v. National Collegiate Athletic Association*, 185 F.R.D. 324 (D. Kan. 1999), the federal district court ruled that where pre-judgment interest was not allowable, the plaintiffs "should receive damages which compensate not merely for the fact of nonpayment but also for any demonstrated loss of purchasing power which has resulted from the delay in payment." *Id.* at 347. Thus the court allowed a CPI adjustment of the damage award. In this case, a CPI adjustment can be easily calculated on any component of Kraatz's damages claims, which is not allowed to bear pre-judgment interest at the legal rate of 10% per annum. To do so will merely be a recognition of the indisputable fact that

a dollar today does not have the same purchasing power that it did in September of 1992, when Kraatz was wrongfully discharged and should have received the amounts to which he was entitled under the Employment Agreement.

CONCLUSION AND REQUESTED RELIEF

There is no support in the law or reasonable support in the evidence for the trial court's refusal to award Kraatz any consequential damages at all, or limit his recovery for unpaid lost stock appreciation rights by finding the value of 100% of Heritage's stock to be only \$3.1 million. This case should be remanded with instructions to the trial court to increase the damages awarded Kraatz as follows:

Item	Original Award	Increase	Total Award
Stock Appreciation Rights	\$90,00.00	\$195,000.00	\$285,000.00
401-k Contributions		8,109.04	8,109.04
Christmas Bonus		1,500.00	1,500.00
Warranty Income		119,856.51	119,856.51
Unreimbursed Health Care Costs	16,994.11	3,484.26	20,478.37
Profit Bonus	< 46,082.28 >	72,976.62	26,894.34
St. George Home Reimbursement		2,210.53	2,210.53
Country Club Membership		10,863.00	10,863.00
Sports Mall Membership		6,187.50	6,187.50
Jazz Tickets		18,898.50	18,898.50
Costs and Expenses (other than expert witness fees)	29,155.16	9,369.90	38,525.05
Expert Witness Fees	35,502.09	12,684.17	48,186.26
Base Salary	35,255.70		35,255.70
Annual Fixed Bonus	12,000.00		12,000.00
Demonstrator Auto	15,951.03		15,951.03
Attorney Fees	432,941.36		432,941.36

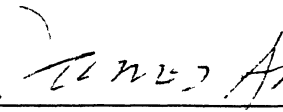
For a total damage award under the Contract in the principal amount of \$1,082,857.20.

In addition, this Court should instruct the trial court to augment the judgment by awarding pre-judgment interest on all of Kraatz's damages above, as an additional element of Kraatz's consequential damages, or in the alternative, to increase the award by the Consumer Price Index-Urban (20.09%).

Also, under the Contract Kraatz should be awarded his costs, expenses, and reasonable attorney fees incurred on this appeal, in amounts to be determined by the trial court.

DATED this 1st day of March, 2002.

PRINCE, YEATES & GELDZAHLER
A Professional Corporation

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Appellant and Cross- Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of March, 2002, I caused to be mailed two copies of the foregoing **APPELLANT'S OPENING BRIEF** to:

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