

2001

William Anthony Kraatz v. Heritage Imports, O. Brian Wilkinson, Jeff J. Wilkinson : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WILLIAM ANTHONY KRAATZ,)	
)	
Plaintiff/Appellant)	
and Cross-Appellee,)	BRIEF OF APPELLEE/
)	CROSS-APPELLANT
vs.)	
)	
HERITAGE IMPORTS, a Utah)	
corporation dba Heritage)	
Honda, O. BRYAN WILKINSON,)	Case No. 20010598-CA
and JEFF J. WILKINSON,)	
)	Priority No. 15
Defendant/Appellee)	
and Cross-Appellant.)	

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

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STATEMENT OF JURISDICTION

This Court has jurisdiction in this matter pursuant to *Utah Code Ann.* § 78-2a-3(2)(j) (1996) and Rule 42 of the *Utah Rules of Appellate Procedure*.

IDENTIFICATION OF THE PARTIES

Appellant/Cross-Appellee is Plaintiff William Anthony Kraatz, referred to as "Kraatz." Appellee and Cross-Appellant is Heritage Imports, dba Heritage Honda ("Heritage"). All claims against Defendants O. Bryan Wilkinson ("B. Wilkinson") and Jeffrey J. Wilkinson ("J.J. Wilkinson") were dismissed, and no appeal was taken from their dismissal.

STATEMENT OF THE ISSUES

Heritage has reviewed the issues raised by Kraatz, which can be summarized in the order Kraatz presented as follows:

Issue No. 1. Whether Judge Frederick was clearly erroneous and without evidentiary support in finding Kraatz is entitled to Stock Appreciation Rights of \$90,000 based upon the credible testimony of Larry H. Miller that the purchase price of Heritage was between \$3,000,000 and \$3,100,000.

Standard of Review: "To successfully attack findings of fact, a party must first marshal all the evidence in support of the trial court's findings and then demonstrate that even when viewed in the light most favorable to the findings, the

evidence is insufficient to support the findings.” *R.L. Warner v. Sirstins*, 838 P.2d 666, 669 (Utah Ct. App. 1992). “It is the trial court’s role to assess witness credibility, given its advantaged position to observe testimony first hand, and normally, we will not second guess the trial court’s findings in this regard.” *Promax Dev’t Corp. v. Mattson*, 943 P.2d 247, 255 (Utah Ct. App. 1997), *cert. denied*, 953 P.2d 449 (Utah 1997). As Kraatz noted, “[t]he appellate court will presume a trial court’s award of damages to be correct and will overturn it only if it is clearly erroneous and without reasonable support in the evidence” *Glezos v. Frontier Investments*, 896 P.2d 1230, 1235 (Utah Ct. App. 1995).

Issue No. 2. Whether Judge Frederick was clearly erroneous in refusing to award extracontractual damages to Kraatz.

Standard of Review: “[B]ecause the adequacy of a damage award is a factual question, we will not reverse the trial court’s findings unless they are clearly erroneous.” *Lysenko v. Sawaya*, 1999 UT App 31, ¶ 6, 973 P.2d 445, 447, *aff’d* 7 P.3d 783 (Utah 2000). Further, “the trial court is vested with broad discretion and the award will not be set aside unless it is manifestly unjust or indicates that the trial court neglected pertinent elements, or was unduly influenced by prejudice or other extraneous circumstances.” *O’Brien v. Rush*, 744 P.2d 306, 309 (Utah Ct. App. 1987). “Thus, we must affirm the award of damages if evidence in the record supports the award.” *Cowen & Co. v. Atlas Stock Transfer Co.*, 695 P.2d 109, 115 (Utah 1984). Further,

whether the parties have modified or amended a previously existing contract is also a question of fact. *See Colonial Pac. Leasing Corp. v. J.W.C.J.R. Corp.*, 1999 UT App 91, ¶ 27, 977 P.2d 541, 548.

Issue No. 3. Whether Judge Frederick was clearly erroneous in refusing to award a greater yearly bonus to Kraatz by rejecting the changes Kraatz's urged to accounting records regularly kept by Heritage.

Standard of Review: "[B]ecause the adequacy of a damage award is a factual question, we will not reverse the trial court's findings unless they are clearly erroneous." *Lysenko v. Sawaya*, 1999 UT App 31, ¶ 6, 973 P.2d 445, 447), *aff'd* 7 P.3d 783 (Utah 2000). Further, "the trial court is vested with broad discretion and the award will not be set aside unless it is manifestly unjust or indicates that the trial court neglected pertinent elements, or was unduly influenced by prejudice or other extraneous circumstances." *O'Brien v. Rush*, 744 P.2d 306, 309 (Utah Ct. App. 1987). "Thus, we must affirm the award of damages if evidence in the record supports the award." *Cowen & Co. v. Atlas Stock Transfer Co.*, 695 P.2d 109, 115 (Utah 1984).

Issue No. 4. Whether Judge Frederick erred by refusing to award Kraatz fees for experts who did not testify, costs for a dozen non-essential depositions and other unreasonable costs.

Standard of Review: Heritage agrees with Kraatz that the trial court's interpretation of the meaning of costs is a legal conclusion reviewed for correctness.

Chase v. Scott, 2001 UT. Ct. App. 404, ¶10, 38 P.3d 1001, 1003.

Issue No. 5. Whether Judge Frederick erred by refusing to award prejudgment interest on Kraatz's unliquidated attorney fees, costs, and uncertain damages.

Standard of Review: As Kraatz mentioned, the trial court's decision regarding entitlement to prejudgment interest is a question of law, which is reviewed for correctness. *See Cornia v. Wilcox*, 898 P.2d 1379, 1387 (Utah 1995).

Issue No. 6. Whether Judge Frederick erred in refusing to award Kraatz damages based upon an increase in the Consumer Price Index.

Standard of Review: Heritage agrees with the correctness standard set forth by Kraatz, affording the trial court no deference. *Reliance Ins. Co. v. Utah Dept. of Transp.*, 858 P.2d 1363 (Utah 1993).

CROSS-APPEAL

Heritage has filed a Cross-Appeal. The sole issue is whether the trial court abused its discretion in awarding \$432,941.36 in attorney fees to Kraatz where Kraatz only succeeded in proving one of seven causes of action against only one of three named defendants, and where he only recovered a judgment in the principal amount of \$124,118.56, after seeking \$3,507,980.00 in damages in his complaint.

Standard of Review: The standard of review for trial court's award of attorney fees is clear abuse of discretion. *See Valcarce v. Fitzgerald*, 961 P.2d 305, 316 (Utah 1998). A trial court abuses its discretion when it fails to apportion attorney

fees between successful and unsuccessful claims. *See Paul Mueller Company v. Cache Valley Dairy Ass'n*, 657 P.2d 1279, 1288 (Utah 1982). A court also abuses its discretion when it awards attorney fees that are excessive and not supported by the evidence. *See Dixie State Bank v. Bracken*, 764 P.2d 985, 988 (Utah 1988).

Citations to the Record where this issue was preserved in the trial court (R. 4635-4641; 5059, p. 19-20).

STATEMENT OF THE CASE

Kraatz filed a complaint against Heritage on or about January 21, 1993, alleging causes of action for (1) breach of contract against Heritage, (2) breach of the duty of good faith & fair dealing against Heritage, (3) alter ego against B. Wilkinson, (4) inducement of breach against B. Wilkinson, (5) interference with prospective business relationship against B. Wilkinson, (6) inducement of breach against J.J. Wilkinson, and (7) inference with prospective business relationship against J.J. Wilkinson. (R. 1-19; 4978-79). A four-day bench trial commenced before the Honorable J. Dennis Frederick on August 27, 1996. The trial court entered Findings of Fact and Conclusions of Law on or about October 28th, 1996, for no cause of action against Kraatz. Kraatz appealed that decision to this Court, which reversed and remanded for "a determination of Kraatz's damages under the contract, including reasonable attorney fees." See Memorandum Decision, p. 4 (1999 UT App 070). ("Memo Decision").

The trial court's Amended Findings of Fact and Conclusions of Law re: Liability

and Damages were entered April 30, 2001, and the Judgment was entered June 29, 2001, awarding Kraatz \$621,717.17 as follows:

Principal	\$124,118.56
Expert Witness Fees	35,502.09
Costs	29,155.16
Attorney Fees	<u>432,941.36</u>
 TOTAL	 \$621,717.17

Heritage's Cross-Appeal is from the award of attorney fees to Kraatz in the amount of \$432,941.36.

STATEMENT OF FACTS

I. GENERAL BACKGROUND

1. Kraatz and Heritage entered into a written Employment Agreement (the "Contract") on or about May 1990. (Ex. 38; R. 4061-72).
2. Kraatz filed a Complaint on or about January 21, 1993 (R. 1-19).
A four-day bench trial began August 30, 1996. Findings of Fact and Conclusions of Law were entered on October 28, 1996, for no cause of action against Kraatz. (R. 1681-1717).
3. Kraatz appealed to this Court, which reversed and remanded "for a determination of Kraatz's damages under the contract, including reasonable attorney fees." (Memo Decision, p. 4).
4. Counsel for Kraatz submitted an attorney fees affidavit September 25, 2000, at the time he filed Proposed Findings of Fact and Conclusions of Law,

asking for attorney fees of \$380,180.00. (R. 4335-36).

5. Kraatz's counsel filed a supplemental request for attorney fees and accompanying affidavits on or about March 19, 2001, requesting additional attorney fees of \$65,288.40 (R. 4775-4811).

II. KRAATZ INCOMPLETELY OR INCORRECTLY SET FORTH THE FOLLOWING CLAIMED FACTS¹:

A. *Lost Wages & Benefits.* Kraatz claimed Heritage did not challenge the calculations of his accountant, Bruce Wisan. At trial, Heritage challenged not only the conclusions and limit also the calculations of both Wisan and Schmitz, an expert called by Kraatz, through extensive cross-examination (e.g., 2125, 2140, 2144-2146, 2273, 2288, 2295, 2338, 2458, & 2441), through various exhibits, and through the testimony of Heritage's two accountants. (R.2177-2180, 2400-2404 & Ex. 333).

1. Profit sharing. Wisan claimed "adjustments" should be made in the accounting records regularly kept by Heritage for "two unreasonable expenses," i.e., the purchase price and the rent paid to Miller.² However, Heritage's accounting records were audited and accepted by the IRS. (R. 2179-80). Further, the Contract stated that any yearly bonus due Kraatz was to be based on the "accounting practices acceptable to and used by Company in reporting to American Honda, Incorporated."

¹ Heritage responds by designations and numbers corresponding to Kraatz's brief, pp. 8-24.

² Interestingly, Kraatz claims the benefit of Larry H. Miller's purchase of Heritage, but seeks to "adjust" any burdens.

(R. 4067). There is no evidence American Honda, Inc., objected to Heritage's accounting practices. Also, the trial court found Kraatz had access to Heritage accounting records prior to his employment with Heritage. (R. 1855, 2468 & 4996). Kraatz never objected to the accounting practices while employed at Heritage. (R. 4996).

2 & 3. Sports Mall and Country Club. The Contract provided Kraatz Sports Mall and Country Club memberships for "business use." (R. 4067; Ex. 38, Sch. "A," ¶(d) & (e)). Kraatz admitted at trial he never used the Sports Mall for business purposes. (R. 1859-60). He also admitted in the twenty-seven months he was the General Manager, he did not use the Hidden Valley membership for business use. (R. 1859). This Court's Memo Decision did not overturn or modify these Findings. Accordingly, there is no basis to support recovery.³

4. St. George Home Reimbursement. Kraatz claims he was denied payment for St. George home reimbursements. However, Kraatz admitted at trial B. Wilkinson never promised to indefinitely pay the differential between the rental of St.

³ The only basis for Kraatz's claims come outside the Contract. For instance, although he had not played golf, he expressed to his accountant his future intent to play three rounds of golf with a guest and cart each summer. (R. 2131). This statement is purely speculative and cannot support any award of damages. See *Sawyers v. FMA Leasing Co.*, 722 P.2d 773, 775 (Utah 1986) (holding damage award must be founded on rational basis and cannot be based upon speculation.). It is also hearsay, not of the type reasonably relied upon by experts. See *Utah R. Evid. R. 703*; *State v. Clayton*, 646 P.2d 723, 727 (Utah 1982).

Goerge home and the mortgage on his Salt Lake home. (R. 1859).

5-8. Additional Compensation. Kraatz re-asserts claims for annual Christmas bonus, Jazz tickets, retirement contributions, and warranty income. Kraatz fails to recognize this Court remanded for damages and attorney fees "under the contract" -- not extracontractual damages. Kraatz admitted the following at trial: (1) that Christmas bonuses were not included in his Contract (R. 1865); (2) the Jazz tickets were not included in his written Contract and B. Wilkinson determined who got Jazz tickets (R. 2142-45); (3) retirement contributions were not in his Contract (R. 1865); and (4) he did not provide any additional consideration for warranty income. (R. 1857-58).

9. Unreimbursed Health Care Costs. Kraatz fails to mention in his brief that because Heritage was never profitable under his direction, he agreed to forego non-covered health reimbursements. (R. 1837-38). Kraatz asserts he only agreed to postpone those payments. However, Heritage never became profitable under his tenure as General Manager. (Ex. 333). This Court's Memo Decision concluded extrinsic evidence urged by Heritage should not have been considered by the trial court. (P. 4). Similarly, extrinsic evidence should not now be considered in Kraatz's favor.

10. Summary of Lost Wages and Benefits. There is no record cite to Kraatz's claims J.J. Wilkinson lacked experience, or to a comparison of his duties to Kraatz. The dealership was profitable under J.J. Wilkinson's tenure following Kraatz.

(Ex. 333). Kraatz also claims Miller would have retained him as General Manager and he would have received a 10% interest in the dealership. However, Miller actually testified as follows:

Q. Okay. Now, with respect to – is there any doubt in your mind that Tony Kraatz could run Heritage Honda as a Larry Miller dealership just as well or better than J.J. Wilkinson?

* * *

A. Yeah, anywhere in the time frame he was at Heritage Honda. In fact, he and I talked about it on occasion and I would not have had any qualms about doing it. Your question was, is there any doubt in my mind, and today, yes, there is some doubt because of this conflicting information. (R. 2090-91).

Miller also testified the dealership had enough capital to allow the General Manager to run the dealership normally, and that Miller's Toyota dealership, which sells a similar product, had \$23,000 less capital than Heritage during 1992 and the Toyota dealership still made a profit (R. 2220-21).

B. *Value of Heritage Stock.* Kraatz asserts Miller testified he purchased 60% of the stock in the Heritage for between \$3,000,000 and \$3,100,000 (R. 2216), and therefore, the total value of the dealership was significantly higher. However, because of a minority discount and other factors, Miller testified he purchased the dealership for between 3 and 3.1 million dollars. (R. 2216-22). The trial court found Miller's testimony to be credible. (R. 5001 & 2466-67).

C. *Attorney Fees, Costs and Expenses.*

2. Paragraphs 25, 36 and 37 from the Affidavit of Michael N. Zundel are replete with inadmissible argument and legal conclusions. *See Capital Assets Fin. Services*, 956 P.2d 1090, 1094 (Utah Ct. App. 1998) (holding trial court must disregard an affidavit containing legal conclusions). That Heritage identified 30 potential witnesses does not warrant a deposition of all or most of those persons.

3. Expert Witness Fees. The conclusory allegations in Zundel's Affidavit do not invalidate the trial court's decision in disallowing fees for two experts who were not deposed and did not testify at trial. (R. 5002-03).

4. Pre-Judgment Interest. As addressed below, Kraatz is not entitled to claim pre-judgment interest for extracontractual and unliquidated damages.

5. Consumer Price Index. Kraatz may have correctly stated the increase in the consumer price index. However, before that becomes relevant, Kraatz must have been entitled to such an increase. That issue is addressed under argument.

III. FACTS MARSHALED IN SUPPORT OF TRIAL COURT'S AWARD OF ATTORNEY FEES⁴

1. Kraatz purported to categorize attorney fee time and deduct

⁴ As stated in *Eggett v. Wasatch Energy Corp.*, 2001 UT App 226, ¶ 41, 29 P.3d 668, 676, *cert. granted*, 40 P.3d 1135 (Utah 2001), the party challenging the award of attorney fees must marshal all evidence introduced at trial that supports the trial court's award of attorney fees before ferreting out the fatal flaw in the evidence supporting that award. In the case at bar, there was no testimony taken regarding attorney fees. Only memoranda, affidavits and attorney timesheets were filed.

\$12,937.00 spent on claims against individuals. (R. 4336, 4743-51, 4756-59 & 4970).

Kraatz deducted other nonassessable attorney fees of \$2,754.50 from the original amount sought. (R. 4970).

2. Kraatz subsequently made the following additional deductions: \$2,778.75 for prefiling case assessment (R. 4970); \$425.00 for time spent drafting the second cause of action (R. 4745 & 4970); \$2,430.10 for 18% of pages of trial brief addressing tort claims (R. 4745 & 4971); \$451 for 3 hours of time spent by K. Linebaugh and J. Dunn observing the trial (*Id.*); \$757.71 for 1.29% of trial transcript representing 100% of Larry Don Terry's testimony (R. 4746 & 4971); \$1,769.70 for 3.01% of trial transcript representing 50% of J.J. Wilkinson's testimony (R. 4747 & 4971); \$2,882.09 for 4.9% of trial transcript representing 20% of B. Wilkinson's testimony (*Id.*); \$3,651.79 deduction for 37.70% of their proposed Findings and Conclusions. (R. 4971).

3. After oral argument on remand on March 31, 2001, Kraatz wrote the trial court and clarified he had reduced his request for attorney fees through trial to \$225,210.36, which including \$139,823.50 through appeal, prior to remand, totaled \$365,033.86. (R. 4969-71).

4. Kraatz was awarded additional post appeal attorney fees on remand of \$67,907.50, without an evidentiary hearing (R. 5002). When combined with \$365,033.86 for time spent through trial and appeal, brought the total attorney fees

awarded to \$432,941.36. Thus, the trial court awarded Kraatz all the attorney fees he requested. The award of attorney fees is based solely upon the motions and supporting memoranda, including attorney fee affidavits and timesheets. (R. 1220-1300 (redacted entries submitted to trial court), 4060-4606, 4729-4759, 4773-4810 & 5060-5125).

5. The total voluntary fee reduction conceded by Kraatz was \$30,837.64. (R. 4756 & 4970-71). This is a 6.65% reduction from Kraatz's original request for attorney fees.

IV. FACTS SHOWING TRIAL COURT'S AWARD OF ATTORNEY FEES WAS CLEARLY AN ABUSE OF DISCRETION.

1. Kraatz's complaint against Heritage, B. Wilkinson and J.J. Wilkinson alleged seven causes of action, i.e., breach of contract, breach of the duty of good faith and fair dealing, alter ego, inducement of breach (separately against each individual defendant), and interference with prospective business relationship (separately against each individual defendant). (R.1-19).

2. Kraatz succeeded on only one of his seven causes of action against only one of three defendants. (R. 5005).

3. Kraatz spent approximately 41.60 hours (\$4,596.00) researching and conducting a statistical analysis of Judge Frederick reversal rate on appeal. (R. 4458-62).

4. Kraatz did not deduct time for extracontractual damage, for which he received no recovery.

5. Kraatz did not deduct time for claims he failed to prove.
6. Kraatz did not deduct duplicative time spent by two or more attorneys.
7. Kraatz did not deduct time for attorney travel.
8. Kraatz did not deduct time for numerous attorney conferences.
9. Kraatz did not deduct excessive attorney time.
10. In 1993 after the complaint was filed, Heritage offered to pay Kraatz \$308,000 to settle this matter, which offer was rejected by Kraatz's counsel. (R. 4682, included as tab 1 of Appendix).
11. In August 1996, just prior to trial, Heritage again offered to settle this case by paying Kraatz \$325,000, which offer was also rejected. (R. 4684, included as tab 2 of Appendix).

SUMMARY OF THE ARGUMENT

Kraatz appealed many of the trial court's Amended Findings concerning damages. In doing so, Kraatz relied on the wrong standard of review for several of his arguments. Kraatz admits his claim regarding stock valuation is subject to the twin tests of clearly erroneous, after first having marshaled all the evidence. In an attempt, however, to obtain a more favorable standard of review, Kraatz couches his arguments for extracontractual damages and yearly bonuses as questions of law. As noted under Statement of the Issues above, these issues are likewise subject to clearly erroneous and

marshalling standards. His claims regarding expert fees and costs, prejudgment interest, and CPI adjustments are all simply arguments that the damages awarded were too low.

Kraatz is entitled to damages for breach of his Contract. The award made by the trial court, however, is neither clearly erroneous or unsupported by the law. The trial court's valuation of Stock Appreciation Rights should be affirmed, as it was based upon the credible testimony of Larry H. Miller, who purchased the dealership. Further, the accounting methods used by Heritage to calculate yearly bonuses were accepted by American Honda, Inc., and passed an IRS audit, and Kraatz never objected to the accounting while he was employed with Heritage. Neither finding is clearly erroneous.

Kraatz is also not entitled to extracontractual damages. This Court only remanded "for a determination of damages under the contract, including reasonable attorney fees." (Memo Decision, p.4). Further, Kraatz failed to preserve and raise most of his extracontractual claims in his first appeal. In either event, he is precluded from doing so now for the first time in his second appeal.

The trial court's award of expert witness fees should not be disturbed on appeal because the experts in question did not testify at trial. Likewise, the trial court's award for deposition costs should not be altered since these depositions were non-essential and unnecessary in prosecuting this case.

Finally, the trial court's decision denying prejudgment interest for damages that

were not liquidated or capable of calculation with mathematical certainty should not be disturbed.

As to Heritage's Cross-Appeal, the trial court awarded Kraatz all the attorney fees requested, even though Kraatz achieved only partial success on one of seven causes of action against one of three defendants. The lower court awarded him attorney fees that were three and one-half times greater than the principal damages he received. In doing so, the lower court erred because the time entries by Kraatz's counsel are excessive and unreasonable and should be reduced to a reasonable amount commensurate with the limited recovery Kraatz was awarded after twice rejecting settlement offers for more than twice the principal sum recovered.

ARGUMENT

POINT I

THE TRIAL COURT'S FINDINGS ON THE VALUE OF STOCK WERE NOT CLEARLY ERRONEOUS

Kraatz claims the trial court's findings valuing Heritage's stock at \$3,100,000 were clearly erroneous. The Contract provided:

Company and Employee hereby agree that the fair market value of Company's stock, as of the date of this Agreement, is Two Million Five Hundred Thousand Dollars (\$2,500,000.00). Said Value is hereinafter referred to as the "Initial Value." (R. 4068). (Emphasis added).

The Contract then provided upon termination without cause, Kraatz would be entitled to fifteen percent of any increase in the value of Heritage in excess of the \$2,500,000

initial valuation. (R. 4068). On remand, the trial court awarded \$90,000 to Kraatz for his Stock Appreciation Rights.

Immediately after the Contract was signed, Kraatz took over as General Manager, and during that time, Heritage had the following losses:

1990 loss of \$295,515
1991 profit of \$5,169
1992 loss of \$124,980 (Ex. 333) (R. 4984).

\$415,326.00 TOTAL LOSS DURING KRAATZ TENURE.

It is difficult to contemplate a dealership with an agreed upon fair market value of 2,500,000,⁵ which proceeds to lose \$415,326 from 1990 through 1992, could then be said to be valued at \$4,200,000 when Kraatz was terminated. B. Wilkinson testified the dealership declined 50% in net worth during Kraatz's tenure. Kraatz states on p. 35 of his Brief that the accounting records only reflect decline in net worth of 18.83%. (Kraatz Brief p.35). Whether the decline in value was 18.83% or 50%, it should be obvious Heritage did not increase in value almost \$2,000,000, as claimed by Kraatz.

⁵ Kraatz claims the agreed upon value in the Contract is not the best evidence of value. In support of this notion, Kraatz cites *Glezos v. Frontier Investments*, 896 P.2d 1230 (Utah Ct. App. 1995), and asserts the time of approximately 27 months between when the Contract was entered and when Kraatz was terminated was too attenuated to be accurate. However, in *Glezos*, this Court cited "extraneous matters" that rendered the sale price less reliable than the appraiser's opinion in that case. *Id.* at 1235. Thus, *Glezos* is distinguishable from the valuation facts in this case. Kraatz is simply trying to re-write the Contract.

The testimony at trial between Kraatz's expert, Mark Schmitz, and Larry Miller, who purchased the dealership, was conflicting. Schmitz admitted he based his valuation of more than \$4,400,000 on a subjectively determined capitalization rate of 17.5% (R. 2239), after making numerous adjustments to actual income.⁶ (R. 2238-40, 2286 & 2300). He also based his valuation on an NADA guide of "above-average" dealers, rather than actually evaluating the Heritage dealership (R. 2322).

In contrast to the subjective, poorly supported testimony from Kraatz's expert, the court heard testimony from Larry Miller, who purchased a majority interest in the dealership shortly after Kraatz was terminated. Mr. Miller testified he had purchased 30-35 dealerships at that time, and that he generally pays book value plus approximately \$2,000,000 blue sky. (R. 2217-18). The book value of Heritage at the time he purchased was \$1,100,000. (R. 2217-18). Thus, when you add \$2,000,000 for blue sky, it yields a value of \$3,100,000.

Kraatz attempts to use Mr. Miller's deposition testimony to suggest he valued the dealership at more than \$3,000,000 - \$3,100,000. However, Mr. Miller's trial testimony of \$3,000,000 - \$3,100,000 merely clarified his deposition testimony, which is entirely appropriate. *See Transilift Equipment, LTD v. Cunningham*, 360 S.E.2d

⁶ These adjustments include advertising expense, owner's compensation, rent and legal expense. (R. 2238).

183, 188 (Va. 1987) (holding “a litigant-witness has the right to explain or clarify his testimony, including previously entered deposition statements and interrogatory answers”); *Klaus v. Goetz*, 505 P.2d 726, 731 (Kan. 1973) (“Any witness may explain his deposition testimony which has been taken without the benefit of court supervision or intervention.”).

Mr. Miller purchased 60% of the stock in Heritage, leaving a minority of shareholders in the dealership. Although the minority owned 40% of the dealership, it was not a controlling interest, and not a significant factor when Miller valued the dealership. (R. 2201-02). Under the Stock Purchase Agreement (R. 4073-76), Mr. Miller only paid \$360,000 for a 60% interest. The remainder of the total purchase price was allocated to items such as a Non-Compete Agreement (Ex. 88) and a Deferred Compensation Agreement. (Ex. 86), all of which were corporation obligations to be paid from 100% of the Stock. This formed the basis for Miller’s opinion valuing the dealership at between \$3,000,000 and \$3,100,000, since the corporation paid for 100% of all other obligations and since he personally purchased 60% of the stock for only \$360,000. (R. 2216-17). This is also why Mr. Miller declared it’s not “fair to cut, paste and glue this deal and try and come up with the biggest number.” (R. 2209). As he stated repeatedly to Kraatz’s counsel, “you’re mixing apples and oranges.” (R. 2198, *see also* R. 2201 & 2209). Mr. Miller walked away from various prior deals, which can’t be reconstituted. (R. 2209-10).

Mr. Miller was clear in testifying that Heritage was not worth \$4.2 million in September of 1992. (R. 2200-02). His old discussions to purchase the remaining stock from B. Wilkinson's four children for \$300,000 each was "keeping a commitment" to B. Wilkinson which the parties had been discussing for "11 or 12 years." (R. 2201). But if "you talk about the value of the stock, I still say it comes back to 3 million." (R. 2202). Mr. Miller's personal relationship with B. Wilkinson is irrelevant to the issue of valuation. Further, the children's stock was never purchased for \$300,000 or any other sum.

Kraatz claims the dealership was attractive to Mr. Miller because it historically had expenses that were "out of whack" (R. 2084) that could be reduced. (Kraatz Brief, p. 33). Kraatz argues the accounting practices used by Heritage were improper and should be adjusted when valuing the dealership. However, the accounting methods utilized by Heritage were never challenged as unacceptable to American Honda, Inc., and furthermore, Heritage passed an IRS audit with only one minor correction of a mere \$4,000. (R. 2179-80). Finally, Kraatz never objected to the accounting while he was employed with Heritage. (R. 4996). Given the foregoing, there is no basis to adjust the accounting records, to rewrite the Contract and to artificially inflate the value of the dealership to yield Kraatz larger damages.

The trial court heard and considered the above evidence in finding the value of the dealership was consistent with Mr. Miller's testimony of a \$3,100,000. (R. 2216-

22). The court held:

Given the hotly disputed conflicts in the evidence, this Court is left, therefore, to assess the credibility of the witnesses' testimony. This has been done, and in this Court's view, the more credible, persuasive evidence is established by Larry H. Miller. (R. 5000 & 2466-67).

This Court must award deference to the trial court's finding of valuation based on credibility among conflicting testimony. *See State in Interest of C.B.*, 1999 App. 293, 989 P.2d 76,77 ("We review findings of fact for clear error, with deference given to the trial court."). There is more than sufficient evidence in the record to support and justify the trial court's decision, and there is no basis to overturn the trial court's finding on appeal as clearly erroneous.

POINT II

KRAATZ IS NOT ENTITLED TO EXTRACONTRACTUAL DAMAGES

This Court's prior decision reversed and remanded for "a determination of Kraatz's damages under the contract . . ." (Memo Decision, p.4). This Court did not remand for determination of extracontractual damages outside the Contract. In fact, in Kraatz's first appeal he asserted the Employee Handbook and benefits thereunder should have been added to the integrated Contract (Kraatz 1st Brief, p. 13, 27, 29). In his Reply Brief, he requested "remand for damages beyond his health benefits and vested stock appreciation rights." (Kraatz Reply Brief, p. 25). However, Kraatz did

not raise the other extracontractual damage issues in his first appeal that he now claims on his second appeal, e.g., Jazz tickets, warranty income and daughter's tennis lessons.

Thus, to the extent Kraatz raised claims for extracontractual damages in his first appeal, those claims are precluded from consideration on his second appeal because this Court limited the scope on remand to "damages under the contract" only. Additionally, to the extent he failed to raise those issues in his first appeal, he either failed to preserve or he waived those issues, and those claims are also precluded from consideration in a second appeal. Issues raised for the first time in the second appeal may not be considered. *See Bonaparte v. Neff*, 838 P.2d 317, 319 (Id. Ct. App. 1992) ("Because [plaintiff] raises this issue for first time in this second appeal, we may not address it."). *See also Mercantile First Na'l Bank v. Lee*, 790 S.W.2d 916, 919 (Ark. 1990) ("On second appeal, as in this case, the decision of the first appeal becomes the law of the case, and is conclusive of every question of law or fact decided in the former appeal, and also of those which may have been, but were not, presented."). This panel may not overrule the prior panel's Memo Decision, barring clear error or changed conditions. *See State v. Menzies*, 889 P.2d 393, 399, *cert. denied*, 513 U.S. 1115 (1995) (Utah 1994).

Furthermore, this Court's Memo Decision held "the trial court erred in considering extrinsic evidence." Kraatz cites *Berube v. Fashion Center, Ltd.*, 771 P.2d 1033, 1044 (Utah 1989) and *Heslop v. Bank of Utah*, 839 P.2d 828 (Utah 1992) when

arguing that an implied in fact contract was created to supposedly open the door for extracontractual damages. However, if extrinsic evidence cannot be used to determine whether there was cause for termination, it should not be used to attempt to show Kraatz's Contract was orally modified, creating a windfall of extracontractual damages for Kraatz.

Kraatz is claiming "subsequent compensation enhancements" for his daughter's tennis lessons, his future golfing plans, St. George home subsidies, Christmas bonuses, Jazz tickets, retirement contributions and participation in warranty service contracts. Paragraph 3.2 of the Contract, entitled "Additional Compensation," 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." (Emphasis supplied). The trial court already concluded there was no basis for any additional compensation:

Section 3.2 of the Agreement requires Plaintiff to provide additional consideration for any additional compensation Heritage, in its discretion, may provide. Plaintiff has 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. (R. 5001).

This conclusion was not invalidated or reversed by this Court's Memo Decision. In fact, as set forth above, those claims are not within the scope of this Court's remand for "a determination of Kraatz's damages under the contract."

The evidence adduced also does not support Kraatz's claims. He admitted the following at trial: B. Wilkinson never promised to indefinitely pay the differential between the rental of St. George home and the mortgage on his Salt Lake home (R. 1859); the \$500 Christmas bonus was not in his written Contract (R. 1865); the Jazz tickets were not included in his written Contract and B. Wilkinson determined who got Jazz tickets (R. 2142-45 & Ex. 38); the retirement benefit contributions were not in his written Contract (R. 1865); and Kraatz admitted he did not provide any additional consideration for warranty income. (R. 1857-58). Thus, there is no evidentiary⁷ or legal bases for these claims. Kraatz asserts in his brief there was no evidence presented that the 401(k) plan and Christmas bonuses were modified or terminated after he left. However, there was no evidence they continued unmodified. In fact, Kraatz did not

⁷ This Court's decision in the first appeal did not disturb the trial court's finding that: "Plaintiff has failed to provide sufficient evidence that the parties modified the Agreement to include any benefits, perks, or compensation not specifically stated in the Agreement." (R. 1710-11). Kraatz's claim for Christmas bonuses under Heritage's Employee Handbook ignores the trial court's conclusion, also undisturbed on appeal, that the parties intended the Contract to be integrated. Kraatz admitted there was no mention of Exhibit 135 [Employee Handbook] in the Contract, and he also admitted he did not know of the existence of the Employee Handbook at that time. (R. 1843). Also, Kraatz testified the Contract between the parties did not include the corporate policy manual. (R. 1843-44 & Ex. 135).

present any evidence on these issues at all.

Assuming, *arguendo*, there is a legal basis for any additional compensation, it was “within the discretion” of Heritage. As this Court declared, “The ordinary meaning of contract terms is often best determined through standard, non-legal dictionaries.” (Memo Decision, p. 2). Discretion is defined as follows:

Liberty of action; freedom in the exercise of judgment. *Webster’s New Int’l Comprehensive Dictionary* 365 (1999).

Any extracontractual or discretionary benefit Kraatz may have occasionally enjoyed while at Heritage ended when he was terminated. Just as Heritage had the discretion to grant additional compensation, it had the discretion to withhold it. Parties may reserve discretion in compensation in an employment Contract.

In *Namad v. Salomon, Inc.*, 147 A.D.2d 385 (N.Y. App. Div. 1989), the Employment Contract explicitly reserved “other compensation and entitlements, if any, . . . shall be at the discretion of the management.” In denying the employee’s claim for additional compensation, the *Namad* court noted, “the written employment contract explicitly reserves to management complete discretion as to the awarding of any compensation guaranteed in the employment contract itself.” *Id.* at 387. Similarly, although Kraatz may have received some of these benefits at the discretion of Heritage during his employment, such discretion may be freely withheld in the exercise of Heritage’s judgment and cannot form a basis to award additional damages claimed as an entitlement.

Also, these “subsequent compensation enhancement” claims were not reasonably foreseeable by Heritage at the time the Contract was entered into because they were discretionary and Heritage had no obligation to provide these benefits to Kraatz under the Contract.⁸ While Kraatz recognizes the foreseeability limitation, he failed to define it.

In *Ranch Homes, Inc. v. Greater Park City Corp.*, 592 P.2d 620, 624 (Utah 1979), the Utah Supreme Court held “[m]ere knowledge of possible harm is not enough; the defendant must have reason to foresee, as a probable result of the breach, the damages claimed.” Similarly, in this case Heritage could not have reasonably foreseen any liability for benefits that were not required to be given under the Contract.

It is not foreseeable under these circumstances that discretionary benefits would become entitlements to Kraatz. Not all claims for consequential damages are foreseeable or allowed. *Ranch Homes* involved the breach of a real estate option contract. The Supreme Court concluded that costs incurred by the buyer for architectural and engineering plans, managerial services, and the design of a logo and brochure were neither foreseeable nor reasonable and would not support an award of consequential damages. *Id.* at 625-66. See also *Castillo v. Atlanta Cas. Co.*, 939 P.2d

⁸ Kraatz cites *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 56 n.2 (Utah 1991) for the proposition that continued performance of services was sufficient consideration to convert the items that were dispensed with discretion by Heritage into entitlements. There is no evidence, however, that Heritage’s discretion was modified or destroyed. Thus *Brehany* adds nothing to the inquiry.

1204, 1211 (Utah Ct. App. 1997) (holding plaintiff in uninsured motorist case not entitled to lost use of vehicle even though foreseeable because they failed to establish how many days they had actual need).

Assuming *arguendo* Kraatz could show entitlement and reasonable foreseeability for his daughter's tennis lessons, Jazz tickets, Christmas bonuses, etc., he has woefully failed in his burden to show the alleged damage with the requisite specificity and certainty to recover anything. These claims are also far too speculative to support an award of damages. See *Sawyers v. FMA Leasing Co.*, 722 P.2d 773, 775 (Utah 1986) (holding damages awarded must be based rationally, not on speculation).

POINT III

KRAATZ IS NOT ENTITLED TO ADDITIONAL DAMAGES FOR EXPERT WITNESS FEES AND COSTS

Kraatz is claiming expert witness fees of \$48,186.26. The Contract provides "the defaulting party shall pay. . . reasonable attorney's fees, expert witness fees, and/or deposition costs" The word "reasonable" modifies not only attorney fees, but also "expert witness fees and/or deposition costs."

In *State v. Billings*, 242 N.W.2d 736 (Iowa 1976), the Iowa Supreme Court construed a criminal statute with grammatical construction similar to the Contract in this case. In *Billings*, the statute read as follows:

Whoever, after consenting to the use of a motor vehicle, . . .
shall, with intent to defraud, abandon such vehicle or willfully

refuse or willfully neglect to redeliver such vehicle as agreed,
shall be guilty of a felony

Id. at 737. The trial court ruled the State did not need to prove intent to defraud. However, the Iowa Supreme Court held “intent to defraud” was an element of the crime set forth above because “with intent to defraud” was set off by commas and “precedes and modifies the three verbs delineating the disjunctive means by which the crime may be committed.” *Id.* at 737. Likewise, in this case, “reasonable” precedes “expert witness fees,” is set off by commas, and precedes and modifies three nouns delineating the conjunctive means by which reasonable fees and costs shall be assessed.

Accordingly, to receive expert witness fees, Kraatz must show the fees were reasonable. *See Sinclair v. Insurance Company of North America*, 609 F. Supp. 397, 409 (E.D. Pa. 1985) (holding “charge for expert witness fees will be denied because the experts did not testify at trial, their testimony was not reasonably necessary to the prosecution of the case and neither consultant provided information that counsel could not have developed from the known information.”). In this case, Kraatz retained two experts, Walter Hall and Kent G. Schmitz, who neither testified at trial, were ever deposed or added any known quantum to the development of this case. (R. 5002). Thus, there is no reasonable basis for awarding fees for these two “experts.” (The trial court already awarded in excess of \$12,000 for Kraatz’s experts).

A significant part of Kraatz’s cost claim is for deposition and witness fees (\$13,318.79). However, Kraatz is only entitled to “reasonable” deposition costs. *See*

Board of Commissioners v. Peterson, 937 P.2d 1263, 1272 (Utah 1997). The determination of whether deposition costs are taxable is within the sound discretion of the trial court. *Id.* The general rule is “that a party may recover deposition costs as long as the trial court is persuaded that the depositions were taken in good faith and, in light of the circumstances, appeared to be essential for the development and presentation of the case.” *Id.* (Citation omitted). In *Peterson*, the Utah Supreme Court held the prevailing party was not entitled to deposition costs because they were not reasonable and necessary to the development of the case. *Id.*

Kraatz took 17 separate depositions⁹ in this case, however, only 5 of these witnesses testified at trial. B. Wilkinson (R. 1770); J.J. Wilkinson (R. 2345); L. Miller (R. 2071); J. Jensen (R. 2400); and C. Christian (R. 2161). Most of these depositions taken by Kraatz were not necessary or even helpful in prosecuting his breach of contract claim—the only cause of action on which Kraatz succeeded. For example, the depositions regarding extracontractual warranty payments were unnecessary because the Contract did not provide any such benefit. Thus, the depositions of Timothy Dunne and others from Ryan were unnecessary. Kraatz may not recover time spent by counsel in preparing for and conducting depositions that were not related to or essential for

⁹ O. Bryan Wilkinson; Jeff Wilkinson; Larry H. Miller; Jeff Jensen; Clark Christian; Helen Green; Matthew Bryan Wilkinson; Roland Fidel; Joe Ballenger; Jeff Gorringer; Andy Bresolin; Jerry Hayes; Pat Davis; Thomas LaPointe; Timothy Dunne; Michael Gibbons; Shay Curtis. The first five were the only ones to testify at trial.

development of allowed damages under the Contract against Heritage.

The award of costs sought by Kraatz must also be reasonable. In arguing for unreasonable costs, Kraatz urges that the language of the Contract means literally all expenses and costs, even when this interpretation belies the intent of the parties and the factual context in which the words are used. The word "all" as used in the Contract should not be read in a technical, limited and literal sense. Rather, the word "all" must be interpreted in the context of the parties' entire agreement so as to ascertain and give effect to such intent. *See Crestview Bowl, Inc., supra; DuBois v. Nye*, 584 P.2d 823 (Utah 1978).

In *State v. School Dist. No.1*, 348 P.2d 797 (1960), the Supreme Court of Montana was faced with a question of construction identical to the instant case. The Montana Constitution provided that:

The public free schools of the state shall be open to all children and youth between the ages of six and twenty-one years. (Emphasis added).

Id., at 800 (quoting, Const. Of Montana, Art. XI, § 7). A writ of mandamus had been sought by the parents of a young girl who, under a school board rule, had been denied admission to the first grade. The applicable rule allowed children who reached the age of six prior to November 15 of any year to be admitted to elementary school at the commencement of the fall term in September of that year. The child in question missed the cut-off date by three

days. In upholding the school board's decision denying admission, the Montana Supreme Court stated:

[W]e shall examine the wording of the Constitution and statutes to determine what was meant by the framers of the Constitution. In other words, what does the term 'all' mean? Should it be taken in its universal and omnibus sense, that is, literally all? Or rather, was it meant to be limited and qualified to conform to good reason to carry out the other purposes of the Constitution such as to have a general, uniform and thorough system of public schools?

We hold the later to be proper interpretation. * * * It would be very easy to cite examples of absurd results if such a literal interpretation were made. Statutory or constitutional construction should not lead to absurd results if a reasonable construction will avoid it. (Emphasis added).

Id. at 801. To a similar effect, see also, *Myer v. Ada County*, 293 P. 322 (Idaho 1930).

The specific language of the Contract provides the prevailing party is entitled to "costs, reasonable attorney fees, expert witness fees and/or deposition costs. . . ." Necessarily, the term "reasonable" must also apply to the term costs. Contract language must be read to harmonize provisions together. See *Elm, Inc. v. M.T. Enterprises, Inc.*, 968 P.2d 861, (Utah Ct. App. 1998), *cert. denied*, 982 P.2d 89 (Utah 1999), (holding "the contract should be read as a whole, in an attempt to harmonize and give effect to all of the contract provisions"). Moreover, Courts have the authority, if not the obligation, to imply reasonable terms when interpreting contracts. See *Coulter v. Smith, Ltd. v. Russell*, 966 P.2d 852, 858 (Utah 1998) (implying reasonable time requirement where contract failed to specify time for

performance). Finally, as Kraatz noted on page 39 of his Brief, in every contract there is an implied covenant of good faith and fair dealing. Kraatz should not recover unreasonable or unnecessary costs.

By analogy, 28 U.S.C. § 1920 permits federal courts to tax costs in favor of a prevailing party, including court reporter costs, printing costs, witness disbursements and the like. The statute does not state that an award of costs thereunder need be reasonable. Nonetheless, courts have uniformly held that costs awarded thereunder must be reasonable.

For instance, in *Ellis v. University of Kansas Med. Cntr.*, 2000 WL 1310508, p. 4 (D.Kan. 2000), decided under § 1920, the court enforced a Tenth Circuit decision denying an appellant's request for costs, quoting the appellate court as follows:

Though 10th Cir.R. 39.1 allows for the taxing of photocopy costs, Ellis has not provided any explanation as to the reasonable necessity of the photocopies nor has she provided documentation regarding those costs. Therefore, we deny Ellis' request to tax the photocopy charges.

Similarly, in this case, Kraatz has not and cannot demonstrate that the additional costs he now seeks were reasonable. For example, Kraatz over-worked this case so massively, Heritage, for example, is being asked to pay \$15,432.55 just for photocopying expenses. Was it reasonable for Kraatz to present the trial court with seven three-ring binders of potential exhibits on the first morning of trial? Of Kraatz's approximate three hundred thirty-three of proposed exhibits, only sixty-six were actually introduced into evidence.

(R. 1354-1386). Should Heritage reasonably be liable for photocopying expense for hundreds of exhibits never introduced? Innumerable other examples exist of prejudgment interest requested for unreasonable costs.

Moreover, Kraatz has also failed to categorize his costs related to his breach of contract action from those separate claims and causes of action upon which he failed to prevail. Clearly, Kraatz is not entitled to costs for claims other than breach of contract.

POINT IV

KRAATZ IS NOT ENTITLED TO ADDITIONAL DAMAGES FOR PREJUDGMENT INTEREST

Heritage admits Kraatz is entitled to prejudgment interest on his base salary, fixed yearly bonus, demonstrator automobile and health insurance premiums and unreimbursed health care costs. Kraatz's other claims for prejudgment interest are not supported by Utah law or the facts of this case. Kraatz is only entitled to prejudgment interest for damages that are complete and capable of calculation with precision as of a particular time. Kraatz is not entitled to prejudgment interest where damages are incomplete or cannot be calculated with mathematical accuracy. *See Klinger v. Kightly*, 889 P.2d 1372, 1381 (Utah Ct. App. 1995); *see also Price-Orem Inv. Co. v. Rollins, Brown & Gunnell, Inc.*, 784 P.2d 475, 482 (Utah Ct. App. 1989) (holding prejudgment interest is not allowed "where damages are incomplete or cannot be calculated with mathematical accuracy"). Furthermore, while the evidence may be

sufficient to support a damage award, a higher standard of certainty is required to sustain prejudgment interest. *See Price-Orem* 784 P.2d at 483 (Utah Ct. App. 1989) (holding “[w]hile the basis of the ‘formula’ used to determine . . . lost profits may have been sufficient for the jury to render a verdict in [Price-Orem’s] favor . . . it is too speculative to allow for the addition of prejudgment interest.”).

Kraatz cites *Trail Mountain Coal Co. v. Utah Division of State Land & Forestry*, 921 P.2d 1365, 1370 (Utah 1996), *cert. denied*, 519 U.S. 1142 (1997), for the general policy statement behind prejudgment interest. Heritage does not disagree with the policy of awarding prejudgment interest where the amount owing is liquidated and fixed. However, where the amount is not liquidated and fixed, and where there is conflicting testimony and uncertainty about the amount owing, prejudgment interest is not appropriate. *See James Constrs., Inc. v. Salt Lake City Corp.*, 888 P.2d 665, 671 (Utah Ct. App. 1994) (recognizing “when damages are uncertain or speculative until fixed by the factfinder, Utah courts have refused to award prejudgment interest”).

Under all these authorities, prejudgment interest is not appropriate for stock appreciation rights, yearly bonuses based on profit, subsequent compensation enhancements, attorney fees, expert witness fees or costs. Indeed, Kraatz continues to make arguments for accounting adjustments (Exs. 302 & 328) regarding the valuation

of Heritage.¹⁰ The testimony concerning yearly bonus was and still is in conflict. At trial, any amounts due for stock appreciation were unascertainable and hotly disputed.

Likewise, prejudgment interest is not appropriate for “subsequent compensation enhancements.” Even if principal damages could be awarded for these claims,¹¹ which Heritage strenuously resists, prejudgment interest is too incomplete and speculative to be calculated with mathematical accuracy. For example, Kraatz had not used the Hidden Valley Country Club for business while employed by Heritage, yet he speculates about his future intent to play three golf trips per year taking two guests and renting a cart. (Ex. 302, Wisan Work Sch. A-1.5). (R. 2131). This unsubstantiated statement of future intent is subject to the trial court’s assessment of reasonableness and credibility, as well as a determination whether such claims are wholly speculative.

Prejudgment interest cannot be claimed on attorney fees under this Court’s decision in *James Constrs., Inc. v. Salt Lake City Corp.*, 888 P.2d 665, 671 (Utah Ct. App. 1994), holding “when damages [such as attorney fees] are uncertain or speculative until fixed by the fact-finder, Utah courts have refused to award prejudgment interest.” Attorney fees are subject to a reasonableness determination

¹⁰ The Contract recognizes the uncertain nature of this calculation. It provides fair market value may be determined by mutual agreement and, if the parties are unable to agree, each shall elect one qualified business appraiser and the two shall select a third. (R. 4068-69). Until a neutral appraiser is selected and two of the three appraisers agree, fair market value at the time of the termination is uncertain.

¹¹ As the trial court determined, there was no consideration for subsequent compensation enhancement within the discretion of the Company. (R. 5001-02).

required by law in the language of the Contract. Therefore, they are not capable of calculation with mathematical certainty before fixed by the trial court.

Kraatz cites to *First Security Bank v. J.B.J. Feedyards*, 653 P.2d 591 (Utah 1982) for the proposition that prejudgment interest would apply to attorney fees because the amount is fixed as of the time of claimed damages.¹² However, that case provides no guidance regarding prejudgment interest on attorney fees. While the defendant in *J.B.J. Feedyards* was awarded \$10,000 of his \$77,000 accrued attorney fees, with prejudgment interest on the \$10,000, there is no indication how the Court assessed prejudgment interest, and whether the attorney fees were subject to a reasonableness analysis. *Id.* at 597-98, 600.

Kraatz also cites to *Campbell, Maack & Sessions v. Debry*, 2001 Ut App 397, 38 P.3d 984, in support of his claim for prejudgment interest on attorney fees. In *Debry*, the Court ordered prejudgment interest on past due attorney fees in a divorce case where the client admitted to both the trial court and this Court that the fees charged were "reasonable." *Id.* at ¶ 3, 988. Because there was no dispute as to whether the attorney fees were reasonable, and because the client delayed paying amounts clearly owed under the contract, prejudgment interest on past due attorney fees

¹² Implicit in Kraatz's argument would be the suggestion that this panel deciding his appeal should and could overrule the prior panel's decision in *James Constrs.*, denying prejudgment interest on attorney fees. However, overruling another panel's decision is only to be undertaken for clear error or changed conditions. See *State v. Menzies*, 889 P.2d 393, 399 (Utah 1994).

were awarded. *Id.* at 991. In the instant case, there is no agreement or admission that the attorney fees charged were reasonable, indeed, that is one of the major issues in the present appeal. Accordingly, unlike *Debry*, Kraatz is not entitled to prejudgment interest on attorney fees because the reasonableness of those fees is at issue.

We know from *James Constrs., Inc.* that attorney fees are not fixed and definite enough to support a prejudgment interest award until they have gone through the process of determining reasonableness. Like *James Constrs., Inc.* Kraatz's attorney fee claim is subject to a reasonableness analysis by the trier of fact, and therefore, there is no proper basis for awarding prejudgment interest, particularly where the attorney fees incurred by Kraatz were unreasonable and excessive.

Those fees could not, and in fact, are not determinable with mathematical accuracy until and unless a prior determination of reasonableness is made. Like prejudgment interest on attorney fees, the expert witness fees and costs in this case are also subject to a reasonableness determination that precludes prejudgment interest. *See* analysis of expert witness fees and costs, *supra*.

Numerous errors also exist with Kraatz's attempts at arithmetic. Prejudgment interest has been charged on expert fees from the date those fees were billed to Kraatz, rather than the dates paid. For example, the first billing from Mark D. Schmitz & Associates is dated March 12, 1996, is the very date upon which Kraatz starts to charge

prejudgment interest. (R. 4233-34). The same is true of the other experts. (See R. 4239; 4295 (Wisan); 4300-01 (Hall); 4311-12 (Schmidt)).

In fact, Hall and Schmitz's invoices are submitted "per our agreement." Kraatz has failed, however, to produce those agreements. Are any experts entitled under their agreements to prejudgment interest? If so, after what past due date does it start accruing? Bruce Wisan received monthly payments from Kraatz, yet his invoices failed to charge any interest. (R. 4241-4295). Is Heritage being asked to pay for interest when none was charged to Kraatz? Heritage should not have to pay for prejudgment interest if Kraatz is not being charged interest. See *Alvarado v. Rice*, 614 So.2d 498, 499-500 (Fla. 1993) (holding plaintiff in personal injury case who had not paid medical bills yet and was not being charged interest was not entitled to prejudgment interest for past medical expenses).

Kraatz asserts prejudgment interest begins when the obligation is "incurred." (See Kraatz Brief, p. 49, n.3). The Contract provides: "the defaulting party shall pay all expenses and costs incurred by the other party in enforcing the terms hereof. . . ." (R. 4065). However, *Webster's New Comprehensive Int'l Dictionary*, 642 (1999) defines incurred as "To meet with or become subject to, as unpleasant consequences, especially through one's own action; bring upon oneself." Because Kraatz has not proven he was charged interest on his expert fees, he is not entitled to prejudgment interest.

Interest is also being claimed for all costs. Was Kraatz obligated to pay costs? Was he obligated to pay all costs regardless of reasonableness? Was he obligated to pay interest on costs? In the Attorneys Fee Agreement ("Retainer Agreement") that Heritage has moved to become part of the record on appeal, the responsibility for the costs was transferred to Kraatz's counsel. Pertinent portions of the Retainer Agreement provide as follows:

3. The Client agrees to pay the Attorneys for the services of the Attorneys Ten Thousand Dollars (\$10,000.00) plus a contingent fee equal to one-third of any recovery, before reimbursement or deduction of out-of-pocket costs . . .

4. All out-of-pocket costs incurred by the Attorneys in prosecuting the Client's claim, including all court or agency filing fees, service of process fees, investigatory costs, deposition costs, reproduction costs, telephone tolls, travel expenses and the like, shall be recovered by Attorneys out of any recovery in addition to Attorneys' one-third contingency fee. The Attorneys agree to pay any such costs and hold Client harmless therefrom . . .

11. The Client hereby assigns to the Attorneys, to the extent of Attorneys' fees and the Attorneys' out-of-pocket cost disbursements, any recovery in favor of the Client by way of settlement, suit, administrative proceedings or otherwise and the Client hereby agrees that Attorneys may retain the Attorneys' share of such recovery. (See tab 3 of Appendix).

As part of their contingency agreement, Kraatz's counsel assumed liability for entitlement of all costs. Since Kraatz incurred no liability, he is not now entitled to prejudgment interest on any costs? *See Alvarado, supra*. By substituting themselves for Kraatz, his counsel severed the privity of contract between Kraatz and Heritage for

the payment of costs and prejudgment interest thereon. There is no privity of contract between Kraatz's counsel and Heritage. Again, why should Heritage be required to pay prejudgment interest on costs if Kraatz is not?

Furthermore, this Court issued its Memo Decision in May of 1999, yet Kraatz waited until June 2, 2000 to deliver to Heritage his Motion for Determination of Damages. A party causing delay is not entitled to prejudgment interest from the delay. In *Nielson v. Droubay*, 652 P.2d 1293, 1297 (Utah 1982), the Utah Supreme Court held:

Even assuming that interest may be awarded in cases such as this, [counterclaimant's] conduct precludes an award of interest. The trial court stated, ' . . . a substantial number of the delays, in this long-pending case were at the instance of or agreed to by the [counterclaimant].'

Finally, Kraatz cites to *Funkhouser v. J.B. Preston Company, Inc.*, 290 U.S. 163, 168-69 (1933) and the *Restatement (Second) of Contracts* § 354(2) in support of his argument for prejudgment interest. In *Funkhouser*, the issue resolved by the U.S. Supreme Court was whether a New York statute allowing prejudgment interest was constitutional. The *Funkhouser* Court ultimately concluded the statute was constitutional. It has no controlling authority in the instant case because prejudgment interest is awarded in New York by statute even where the claim is "unliquidated." Thus, *Funkhouser* is distinguishable.

Also, Kraatz's argument from the *Restatement (Second)* that prejudgment

interest should be allowed "as justice requires" is inapplicable in this case. In fact, Comment d to section 354 states such a determination should be made "in the light of all the circumstances, including any deficiencies in the performance of the injured party and any unreasonableness in the demands made by him." In this case, Kraatz's demands were unreasonable. Kraatz twice refused settlement offers prior to trial for principal amounts more than double the award he obtained from the trial court. Thus, justice requires no further prejudgment interest for Kraatz in this case.

POINT V

KRAATZ IS NOT ENTITLED TO ADDITIONAL DAMAGES FOR CONSUMER PRICE INDEX ADJUSTMENTS

Kraatz's claim for a CPI adjustment damages under *Law v. National Collegiate Athletic Ass'n*, 185 F.R.D. 324 (D. Kan. 1999) is inapplicable to this case. *Law* was a federal antitrust case that is factually dissimilar to this case. In *Law*, no prejudgment interest was permitted a private party under federal antitrust litigation in the absence of a bad faith delay. *Id.* 347. No other jurisdiction has cited to this case and no Utah Court has adopted this method of augmenting antitrust damages to a breach of contract case. The law in Utah is clear. Prejudgment interest is not allowed unless damages are sufficiently calculable with mathematical accuracy.

POINT VI

THE TRIAL COURT CLEARLY ABUSED ITS DISCRETION IN AWARDING \$432,941.36 IN ATTORNEY FEES TO KRAATZ

1. Pursuit of Extracontractual Damages. Kraatz is not entitled to attorney fees for pursuing extracontractual claims. This Court's Memo Decision "reverse[d] and remand[ed] for a determination of Kraatz's damages under the contract, including reasonable attorney fees." (Memo Decision, p. 4). In his first appeal, Kraatz addressed his claim for damages and benefits under the Employment Manual (Kraatz first brief, pp. 13, 27, 29) and in his Reply Brief he requested "damages beyond his health benefits and vested stock appreciation rights." (Kraatz Reply Brief, p. 25). The prior panel of this Court explicitly rejected those arguments and remanded "for damages under the contract"---not for a determination of damages from all theories outside the Contract. To the extent Kraatz failed to raise his other claims for extracontractual damages, he failed to preserve and waived those issues and is not entitled to appeal from an adverse decision in the trial court. *See Mercantile First Nat'l Bank*, 790 S.W.2d at 919 ("On second appeal, as in this case, the decision of the first appeal becomes the law of the case, and is conclusive of every question of law or fact decided in the former appeal, and also of those which may have been, but were not, presented."); *but see Menzies*, 889 P.2d at 399 (holding panel of court may overrule another panel for clear error or changed conditions).

Thus, Kraatz's claim for attorney fees must be reduced to account for time spent in pursuit of extracontractual claims, such as 401(k) contributions, season tickets to the Utah Jazz, annual Christmas bonuses, reimbursement for St. George home, warranty income, tennis lessons for his daughter, and private (non-business) use of the Sports Mall and Hidden Valley Country Club. Kraatz, however, never reduced his attorney fees for these extracontractual damage claims.

2. Unsuccessful Claims. Kraatz is not entitled to attorney fees for his six unsuccessful claims, including his claims against B. Wilkinson and J.J. Wilkinson. He is only entitled to attorney fees spent pursuing his sole successful claim for breach of contract against Heritage.

An award of attorney fees must distinguish between fees incurred in connection with successful and unsuccessful claims and between contractual claims and non-contractual claims. In *Foote v. Clark*, 962 P.2d 52, 55 (Utah 1998) the Utah Supreme Court held:

the party must categorize the time and fees expended for (1) successful claims for which there may be an entitlement to attorney's fees, (2) unsuccessful claims for which there would have been an entitlement to attorney's fees had the claims been successful, (3) claims for which there is no entitlement to attorney's fees. . . . Claims must also be categorized according to the various opposing parties.

Id. at 53.

Kraatz partially recognized these principles in withdrawing the following time:

\$15,691.50	Claims Against Individuals
2,778.75	Prefiling Claims Assessment
425.00	Pleading Drafting
2,430.10	Trial Brief (18 % reduction)
5,860.50	Trial Preparation & Presentation
<u>3,651.79</u>	Post Trial Proposed Findings of Fact & Conclusions of Law

\$30,837.64 TOTAL AMOUNT VOLUNTARILY WITHDRAWN (R. 4970-73).

Although Kraatz voluntarily reduced his claim for attorney fees as set forth above in small amounts (6.65 %), he did not withdraw any time for his six unsuccessful claims from his discovery and damage analysis (\$130,557.75) or his first appeal (\$139,823.50). (R. 4970-73). The time he withdrew for trial presentation was based on the number of transcript pages used for that witness. That is not a valid indicator of the proper fee reduction.

Moreover, Kraatz has not reduced his fees at all for time spent in pursuit of extracontractual damage claims. Kraatz is not entitled to receive attorney fees for time spent pursuing the unsuccessful or extracontractual claims just because he achieved limited success on one cause of action. In *Turtle Management v. Haggis Management, Inc.*, 645 P.2d 667, 671 (Utah 1982), the Utah Supreme Court held:

When a plaintiff has a substantial claim against one defendant, he should not have a free ride to assert claims against other defendants with the expectation that the target defendant will end up paying all attorney's fees, even those related to unsuccessful and perhaps frivolous claims.

Examples of time entries¹³ that should be excluded because they include time spent on unsuccessful claims, claims against individuals, or issues unrelated to the case are as follows:

12/18/92 JJD Review Employment Agreement and other materials in case file; revise complaint to reflect facts re transactions with Heritage before creation of Employment; begin to revise all causes of action. 4.00 hours, \$360.00 (R. 4345).

01/06/93 KBL Review of County Bar Cost Containment Guidelines; preparation of agenda for office conference with opposing counsel and attendance at conference; telephone conference with opposing counsel re their agreement to accept service of process. 1.50 hours, \$232.50 (R. 4348).

08/20/96 JJD Continue revising introduction section of trial brief; revise issues of law and burden of proof sections of trial brief; begin revising argument sections of appellate brief; receive and review draft of joint pretrial order from opposing counsel; conduct research re right to recover punitive damages for breach of contract under extraordinary circumstances; conference with MNZ and opposing counsel re case procedural matters. 8.50 hours, \$935.00 (R. 4436).

¹³ Analyzing Kraatz's time is difficult given that entries for several tasks are lumped together without apportioning time for individual tasks. See *Webb v. James*, 967 F. Supp. 320, 324 (N.D. Ill. 1997) (disallowing time entries where "multiple tasks were described for a single block of billed time—in many of those instances, where it was impossible to estimate an appropriate sum to subtract, the Court disallowed the entire amount."); *In re Wiedau's Inc.*, 78 B.R. 904, 908 (Bankr. S.D. Ill 1987) ("Each type of service should be listed with the corresponding specific time allotment. Otherwise, the Court is unable to determine whether or not the time spent on a specific task was reasonable. Therefore, services which have been lumped together are not compensable."). Thus, Kraatz's claims where the entries are lumped together should be disallowed.

08/22/96 JJD Attorney conference re case update and assignment to research whether corporate officers have privilege against tort claims; conduct research re same; draft section to trial brief discussing liability of corporate officers for tort claims; intermittent attorney conferences re case updates; conduct research re rule of contract construction to give meaning to all provisions of contract; further revise entire trial brief; review materials in case file and prepare for direct examination of L. Terry. 7.40 hours, \$814.00 (Id.).

Additional examples are included in tab 4 of the Appendix.

3. Results Obtained - Where the Award of Fees Exceeds the Principal Sum Recovered by Three and One-Half Times.

An attorney fee award must be reasonably based upon a number of factors. A trial court is not bound by the fees requested in an affidavit and the appropriateness of the requested fee must be evaluated before a reasonable fee is set.¹⁴ See *Cafferty v. Hughes*, 2002 UT. Ct. App. 105, ¶ 26, 2002 WL 534793, p.4 (Utah Ct. App. 2002).

¹⁴ It is doubtful Kraatz's counsel would have accumulated such an enormous bill if Kraatz were responsible for paying it. In *U.S. v. Self*, 814 F.Supp. 1442, 1446 (D. Utah 1992), Judge Greene also noted that lawyers bill more time against their opponents compared to what they bill a client who pays the bill. *Id.* at 1445. Since counsel's out-of-court time was many times greater than in-court time, the Court ultimately decided to reduce the attorney fees to time spent in court plus an average of 2 to 2.5 times in-court time. *Id.* 1446-47. Under this standard, Kraatz would only be entitled to attorney fees for the actual time spent in court approximately 60 hours for a (four-day bench trial plus hearings), times double that amount or 120 hours for out-of court time, for a total of 180 hours of attorney time. When multiplied by an average rate of \$175 per hour this amounts to \$31,500.00.

These factors include, but are not limited to:

the difficulty of the litigation, the efficiency of the attorneys in presenting a case, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality of similarly services, the amount involved in the case and the result obtained, and the expertise and experience of the attorneys involved.

Cabrera v. Cottrell, 694 P.2d 622, 625 (Utah 1985). See also *Dixie State Bank v. Bracken*, 764 P.2d 985, 991 (Utah 1988).

Analyzing first the results obtained, leads to the conclusion the trial court abused its discretion by awarding excessive attorney fees to Kraatz. Kraatz's complaint asked for total damages of \$3,507,980 from all named defendants, exclusive of attorney fees and costs. He ultimately succeeded on one claim against only one defendant and recovered the principal amount of \$124,118.56. His recovery is only 3.5% of his original demand. While no single factor is determinative in arriving at a reasonable fee, lack of results is certainly a highly relevant factor.

Many cases have considered the amount in controversy in determining a reasonable fee. See *Diamond D Enterprises USA, Inc. v. Steinsvaag*, 979 F.2d 14 (2d Cir.1992), *cert. denied*, 508 U.S. 951 (1993), (holding the amount in controversy in the litigation "is generally the ceiling on the fees that may be awarded pursuant to a fee-shifting clause"); *F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1250 (2d Cir.1987) (citing "general rule in New York, i.e., that it is rarely proper to award fees in an amount that exceeds the amount involved in the litigation"); *Elizabeth-*

Perkins, Inc. v. Morgan Express, Inc., 554 S.W.2d 216, 219 (Tex. Civ. App. Dallas 1977) ("We recognize also that the ultimate amount of recovery is a factor to be considered in fixing the amount of the fee.").

Further, In *Valcarce v. Fitzgerald*, 961 P.2d 305, 316-17 (Utah 1998) the Utah Supreme Court also included consideration of the Rules of Professional Responsibility in determining whether attorney fees are appropriate. Relevant portions of Rule 1.5, reads as follows:

RULE 1.5 FEES

(a) A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

- (1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) The fee customarily charged in the locality for similar legal services;
- (4) The amount involved and the results obtained;
- (5) The time limitations imposed by the client or by the circumstances;
- (6) The nature and length of the professional relationship with the client;
- (7) The experience, reputation and ability of the lawyer or lawyers performing the services; and
- (8) Whether the fee is fixed or contingent.

Utah R. Prof. Conduct 1.5 (emphasis added). Thus, the Rules of Professional Responsibility also preclude excessive fees and consider the result obtained. All authorities prompt the conclusion that only under exceptional circumstances (not

present here) should a “reasonable” attorney fee exceed the principal amount recovered.

4. Inefficiency of Counsel and Unreasonableness of Hours.

a. Time Spent Determining Judge Frederick’s Reversal Rate.

Part of the attorney fees awarded were for determining Judge Frederick’s reversal record on appeal. As near as can be determined (since nearly all of the entries include multiple tasks (*see* fn.13 *supra*)), the judgment included 41.60 hours or \$4,596 spent on efforts to ascertain Judge Frederick’s “batting average” on appeal. These efforts are unreasonable and Kraatz should not recover anything for such an endeavor.

Examples are:

09/23/96 JJD Attorney conference re. strategy for determining whether to appeal Judge Frederick’s ruling; obtain list of cases involving Judge Frederick, and begin determining how Judge Frederick rules and whether he was affirmed or reversed on appeal. 5.0 hours, \$550.00 (R. 4458).

09/24/96 JJD Continue to review cases involving Judge Frederick to determine how he ruled and whether he was affirmed or reversed on appeal; receive and review transcript of ruling. 2.80 hours, \$308.00 (R. 4458).

10/02/96 JJD Attorney conference re review of transcript of Judge Frederick’s ruling, and case strategy; determine number of decisions of Judge Frederick after bench trial which were ultimately affirmed or reversed; review cases decided by Judge Frederick involving bench trials which were either affirmed or reversed; conduct research re procedure for seeking disqualification of judge. 6.10 hours, \$671.00 (R. 4458).

Additional examples are included in tab 5 of Appendix.

In *Garden State Auto Park Pontiac GMC Truck, Inc. v. Electronic Data Systems Corp.*, 31 F.Supp.2d 378 (D.N.J. 1998), the identical issue was addressed where a party's counsel spent the comparatively paltry sum of \$519 in attorney time "researching background information and reversal rates" of judges. *Id.* at 387. The Federal District Court disallowed all attorney fees for that pursuit, holding "[p]ut simply, requiring [plaintiff] to reimburse [defendant] for time spent researching this Court's reversal rates and the backgrounds of certain Third Circuit judges is beyond the realm of reasonableness." *Id.* at 387.

b. Time Spent on Travel is Not Fully Compensable.

Kraatz's counsel spent substantial time traveling to review records and documents. Time spent travelling should not be paid at the full rate of the attorney. *See Mr. X v. New York Dept. Educ.*, 20 F. Supp.2d 561, 564 (S.D. N.Y. 1998) ("[c]ourts in this circuit generally reimburse attorneys for travel time at 50% of their hourly rates"). There are numerous time entries that include travel by Kraatz's attorneys that should be reduced as follows:

07/26/93 JJD Travel to Kinkos and compare copies of documents to originals to determine whether documents were copied correctly; bring all copies of documents back to office. 4.30 hours, \$387.00 (R. 4363).

08/25/93 JJD Travel to and from Heritage Honda and review accounts payable documents. 4.10 hours, \$369.00 (R. 4365).

08/27/93 JJD Travel to and from Heritage Honda and review accounts payable ledgers and other documents. 3.90 hours, \$351.00 (R. 4365).

Additional examples of travel time entries are included as tab 6 of the Appendix.

c. Two or More Attorneys on the Same Task.

There are many instances where two attorneys attended depositions or other matters where such attendance was duplicative and unnecessary. *See U.S. v. Self*, 818 F. Supp. 1442, 1445 (D. Utah 1992) ("Presence of multiple counsel at hearings and court proceedings often is duplicative and unnecessary. . . Excessive review of documents, motions, memoranda and the work of other counsel may represent lack of coordination among counsel or unnecessary overlap of effort for which clients ought not to be charged."). Examples of duplicative time entries are as follows:

01/13/94 KBL Attorneys conference with Kent Schmidt. .80 hours, \$124.00.

01/13/94 JJD Gather materials and prepare for conference with K. Schmidt; conference with K. Schmidt re valuation of dealership; telephone calls to T. Kraatz re arrangement of meeting between T. Kraatz and K. Schmidt. 3.10 hours, \$279.00.

01/13/94 MNZ Conference with Kent Schmidt re valuation of dealership. 3.50 hours, \$490.00 (R. 4373).

03/23/94 MNZ Prepare for and depose JJ Wilkinson. 5.8 hours, \$812.00.

03/23/94 KBL Attendance at J.J. Wilkinson deposition and related attorneys conferences. 1.3 hours, \$201.50 (R. 4382).

03/30/94 MNZ Prepare for and attend second day of deposition of JJ Wilkinson; prepare for deposition of Matt Wilkinson. 7.50 hours, \$1,050.

03/30/94 KBL Attendance at JJ Wilkinson deposition and attorneys conference re same. 4.40 hours, \$682.00 (R. 4383).

03/31/94 MNZ Prepare for and attend deposition of Matt Wilkinson. 5.0 hours, \$700.00.

03/31/94 KBL Attendance at Matt Wilkinson deposition and attorneys conference. 3.5 hours, \$542.50 (R. 4383).

04/06/94 MNZ Prepare for second day of deposition of Bry Wilkinson and take deposition. 7.70 hours, \$1,078.00.

04/06/94 KBL Attendance at B. Wilkinson deposition and attorneys related conferences. 5.30 hours, \$821.50.

04/06/94 JJD Attend and summarize testimony in deposition of B. Wilkinson; conference with M. Zundel and K. Linebaugh re deposition strategy. 5.20 hours, \$468.00 (R. 4384).

09/20/96 JJD Travel to and from and attend Judge Frederick's ruling; attorney conferences re report on ruling; attorney conference re case strategy. 1.70 hours, \$187.00.

09/20/96 WGM Attorney conference re ruling and alternatives for further action. .40 hours, \$62.00.

09/20/96 MNZ Appear at court and receive ruling; discuss ruling with client and partners. 2.6 hours, \$390.00.

09/20/96 TZ Attend ruling hearing. .70 hours, \$42.00.

09/20/96 KBL Attendance at court for ruling. .60 hours, \$99.00. (R. 4453).¹⁵

09/20/96 JMD Post mortem with MNZ. 1.30 hours, \$214.50.

Additional examples are included as tab 7 of the Appendix.

d. Time Spent in Attorney Conferences.

Kraatz's entries reveal numerous attorney conferences. However, attorneys

¹⁵ As can be seen in this group of time entries, no less than five people from Plaintiff's legal team attended Judge Frederick's ruling.

should not recover fees for such attorney conferences, as they are wasteful, duplicative and excessive. See *O'Rear v. American Family Life Assurance Co. of Columbus, Inc.*, 144 F.R.D. 410, 415 (M.D. Fla. 1992) (holding, "this court finds excessive all of the various attorney conferences"); *In re Wiedau's, Inc.*, 78 B.R. 904, 908 (Bankr. S.D. Ill. 1987) ("While some intraoffice conferences may be necessary, no more than one attorney may charge for it unless an explanation of each attorney's participation is given.").

Examples of attorney conferences billed are:

11/10/92 JJD Conference with T. Kraatz re additional factual information necessary for drafting demand letter; conference with K. Linebaugh and M. Zundel re strategy for drafting demand letter. 3.3 hours, \$280.50.

11/10/92 KBL File review and office conference with client; attorneys conference re demand letter. 3.5 hours, \$525.00.

11/10/92 MNZ Attend meeting with client re preparation of submitting demand letter. 1.5 hours, \$195.00 (R. 4338).

12/10/92 KBL Attorneys conference re form of demand letter. 2.10 hours, \$325.50.

12/10/92 MNZ Conference with K. Linebaugh and J. Devashrayee re elements of damage and substance of demand letter; revise letter. 3.0 hours, \$420.00 (R. 4341).

06/17/93 KBL Redrafting and editing papers for presentation to client; office conference with Mr. And Mrs. Kraatz agreeing on settlement approach. 3.10 hours, \$480.50.

06/17/93 MNZ Conference with K. Linebaugh re litigation and settlement strategy. 2.80 hours, \$392.00 (R. 4351).

12/30/93 JJD Conference with K. Linebaugh, M. Zundel and T. Kraatz re status of case and case strategy. 3.0 hours, \$270.00

12/30/93 KBL Attorneys conference with client re status of proof and possible settlement strategy. 3.0 hours, \$465.00.

12/30/93 MNZ Review financial information prepared by Tony and compare income statements over time to identify trends and costs of Brys participation in dealership. Conference with K. Linebaugh and J. Devashrayee re evidence to support allegations of complaints and call to Tony Kraatz re preliminary conclusions based upon my review of financial information; call to potential expert witnesses. 6.0 hours, \$840.00 (R. 4372).

02/05/94 JJD Conference with M. Zundel, T. Kraatz and C. Turner re responses to defendants first set of interrogatories, and other case strategy. 2.0 hours, \$180.00.

02/05/94 MNZ Conference with Tony Kraatz, J. Devashrayee and C. Turner re responses to discovery requests; draft additional responses to defendants interrogatories.

02/05/94 CT Conference with M. Zundel, J. Devashrayee and Tony Kraatz re discovery responses; review clients documents. 2.5 hours, \$150.00 (R. 4376).

Time spent in attorney conferences should not be awarded to Kraatz, as they were unnecessary, duplicative, and excessive. Many additional examples of attorney conferences are included in tab 8 of Appendix.

5. Rejection of Settlement Offers – For More Than Double the Principal Sum Recovered. Kraatz brought suit for \$3,507,980 in damages. (R. 19). Twice before trial, Heritage offered to settle for a principal sum exceeding by more than twice his limited recovery of \$124,118.56 principal. Defendants offered to settle this matter after filing of the complaint in 1993 for \$308,000, which offer was rejected

by letter from Kraatz's counsel. (R. 4682; tab 1 of Appendix). Shortly before trial, in August, 1996, counsel and the parties met again to discuss settlement. In that conference, Defendants' counsel made an opening settlement offer of \$325,000. (R. 4684; tab 2 of Appendix). Kraatz and his counsel, Zundel, were so insulted by this offer, they ceased further discussions, made no counter-offer and abruptly left the meeting.

In determining an award of attorney fees, prior offers of settlement should be considered. In *Greenwich Film Productions, S.A. v. DRG Records, Inc.*, 40 USPQ.2d 1223, 1996 WL 502336 (S.D.N.Y. 1996), the plaintiff prevailed in a copyright infringement case and was entitled to "reasonable attorney fee" as part the costs by statute. *Id.* at 1. The defendant offered \$30,000 to settle the matter before it was filed, and the case was later settled for \$70,000 on the eve of trial. The *Greenwich* court held that "[s]ince plaintiff's unreasonable demand [\$1,000,000] resulted in expensive litigation it would be unfair to permit plaintiff to recover the resulting costs." *Id.* The *Greenwich* court awarded plaintiff's counsel attorney fees of only \$10,000 (where \$259,188.25 in attorney fees and expenses were sought) holding:

Settlements are to be encouraged and a party to an action in which attorney's fees may be awarded should not be allowed to believe that it can reject a reasonable settlement offer and still recover the full amount of its attorney's fees if ultimately it recovers little more than the original offer.

Id. The Court also went on to state that consideration of negotiations was not a violation of Rule 408 of the *Federal Rules of Evidence* because an attorney fee determination was “another purpose” outside the purview of Rule 408. It declared:

While determining the reasonableness of a claim for attorney’s fees is not specifically mentioned as a purpose for which evidence of a settlement offer may be considered, strong public policy consideration support its admissibility for that purpose. (Citation omitted).

When considering the recovery Kraatz ultimately obtained in light of the settlement offers rejected his attorney fees were excessive. No award should be made for fees incurred after the first settlement offer was rejected.


CONCLUSION

The trial court’s Amended Findings concerning Stock Appreciation Rights, extracontractual damages and yearly bonus were not clearly erroneous. The Amended Findings on expert witness fees and costs, prejudgment interest and the CPI are well supported by the facts and no legal basis exists to reverse those awards.

The amount awarded to Kraatz for attorney fees should be reduced to more accurately reflect the results obtained, to eliminate time spent on unsuccessful claims, as well as duplicative, unreasonable and excessive time spent by counsel and to reflect his rejection soon after commencement of the litigation and again before trial of settlement offers for more than double the principal sum recovered. Finally, since Kraatz’s counsel agreed to a one-third contingency fee, attorney fees should be limited

to \$41,372.85 ($\$124,118.56 \div 1/3$).

RESPECTFULLY SUBMITTED this 6th day of May, 2002.



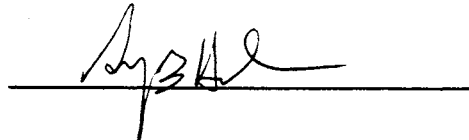
Donald J. Winder, Esq,
Gerry B. Holman, Esq.
WINDER & HASLAM, P.C.
Attorneys for Defendant/
Appellee and Cross-Appellant

CERTIFICATE OF SERVICE

I hereby certify that I caused four true and correct copies of the Brief of Appellee/Cross-Appellant and Addendum to Brief of Appellee/Cross-Appellant to be mailed, postage prepaid, this 6th day of May, 2002, to:

Kent B. Linebaugh, Esq.
JONES WALDO HOLBROOK & McDONOUGH
170 South Main, #1500
Salt Lake City, Utah 84101

Michael N. Zundel, Esq.
James A. Boevers, Esq.
PRINCE YEATES & GELDZAHLER
175 East 400 South, #900
Salt Lake City, Utah 84111
Attorneys for Plaintiff/
Appellant and Cross-Appellee.



2410\002\appeals\brief.2

Appendix 1

Heritage Appendix
Case No. 20010598-CA

1. July 15, 1993 letter re: Settlement
2. August 23, 1996 letter re: Settlement
3. Documents Produced by Kraatz at 03/21/01 Hearing on Remand, and Subject to Motion to Supplement Record filed by Heritage.
4. Attorney time entries re: Unsuccessful Claims
5. Attorney time entries re: Judge Frederick's Reversal Rate on Appeal
6. Attorney time entries re: Travel
7. Attorney time entries re: Two or More Attorneys on Same Task
8. Attorney time entries re: Attorney Conferences

Tab 1

JO A. JARDINE
CENT B. LINEBAUGH
JAMES R. BROWN
JAMES M. DUNN
NICHARD H. THORNTON
WILLIAM C. MARSDEN
MICHAEL N. ZUNDEL
JOHN N. BREMS
W. SHANE TOPHAM
JOHN S. BRADLEY
HAROLD L. REISER
L. SCOTT LEE
LAURIE S. HART
DAVID E. SMOOT
JENNIE B. HUGGINS
JEFFERY J. DEVASHRAYEE
L. SCOTT BROWN

LAW OFFICES
JARDINE, LINEBAUGH, BROWN & DUNN
A PROFESSIONAL CORPORATION

370 EAST SOUTH TEMPLE, SUITE 400

SALT LAKE CITY, UTAH 84111-290

TELEPHONE (801) 532-7700

TELECOPIER
(801) 355-7725

RECEIVED

JUL 16 1993

WINDER & HASLAM

July 15, 1993

CONFIDENTIAL SETTLEMENT MATERIALS

ALSO ADMITTED IN:
*IDAHO
*ARIZONA
*COLORADO

VIA FACSIMILE NO. 532-3706
and FIRST CLASS MAIL

Dennis V. Haslam
Winder & Haslam
175 West 200 South, #4000
Salt Lake City, Utah 84101

Re: Kraatz v. Heritage Honda, et al.

Dear Dennis:

This letter will confirm that on July 9, 1993, you orally communicated to us the Defendants' latest offer to settle the subject litigation. It is our understanding that such offer consisted of the following:

All of B. Wilkinson's interest in Lariat Holding valued at approximately	\$ 85,000
Cash in the amount of	\$175,000
24 monthly installments of \$2,000 each	\$ 48,000

We have discussed the offer with Mr. Kraatz. Please be advised that the offer is respectfully rejected. Please be further advised that Mr. Kraatz does not wish to make any counter-offer. Therefore it should be understood that none of the previous offers to settle made by any of the parties or their agents are still extant.

We believe the case should be settled, and we will never foreclose the possibility of settlement. However, we consider the Defendants' last offer to be so unrealistic that Mr. Kraatz has no alternative but to prosecute his claims. We intend to do that as quickly and efficiently as possible.

July 15, 1993
Page 2

We are not satisfied with the Defendants' responses to our interrogatories. However, that will be the subject of another letter directly to the Defendants' counsel of record. We will insist that the Defendants promptly give us complete answers to the interrogatories, and immediately upon receipt of those supplemental responses, we will commence taking depositions. In the meantime, we will begin the document inspection agreed to by the Defendants.

Even though it did not result in a settlement, we appreciate you and Mr. Miller meeting with us on June 28, 1993. We are sorry that this matter could not have been resolved at this time.

Kindest personal regards.

Very truly yours,

JARDINE, LINEBAUGH, BROWN & DUNN
A Professional Corporation

By: 
Kent B Linebaugh

KBL:ck/L/1433
cc: Anthony Kratz

Tab 2

WINDER & HASLAM
BUSINESS AND TRIAL ATTORNEYS

DENNIS V. HASLAM

SUITE 4000
175 WEST 200 SOUTH
P.O. BOX 1668
SALT LAKE CITY, UTAH 84110-1668
FAX 801 532-1706
PHONE 801 322-2222

August 23, 1996

VIA FACSIMILE
355-7725

Michael N. Zundel
JARDINE, LINEBAUGH & DUNN
370 East South Temple, Suite 400
Salt Lake City, UT 84111-1290

Re: Kraatz v. Heritage Imports
Civil No. 930900312 CN

Dear Mike:

This letter will confirm our conversation in my office on Friday, August 23, 1996 during which we discussed settlement of this case. I extended to you an offer from all of the defendants of \$325,000, in cash. You said, essentially, that the offer was not acceptable. I asked you to make a counter-proposal, and you said that you did not have one to make.

Very truly yours,


DENNIS V. HASLAM

DVH/kr

Tab 3

PRINCE, YEATES & GELDZAHLER

A PROFESSIONAL CORPORATION

LAWYERS

CITY CENTRE I, SUITE 900
175 EAST 400 SOUTH
SALT LAKE CITY, UTAH 84111
TELEPHONE (801) 524-1000
FAX (801) 524-1098
PARK CITY OFFICE
814 MAIN STREET
PARK CITY, UTAH 84060
(801) 549-7440

ROBERT M. YEATES
JON C. HEATON
JOHN P. ASHTON
RICHARD L. BLANCK
JOHN M. BRADLEY
D. JAY GAMBLE
J. RANDALL CALL
JOHN S. CHINOLUND
JAMES A. BOEVERS
DAVID K. BROADBENT
THOMAS J. ERBIN
M. DAVID ECKERSLEY
ROBERT G. WING

CARL A. BARTON
SALLY BUCK MEMINIEE
ROGER J. MCCONKIE
WILLIAM G. MARSDEN
RICHARD H. THORNTON
MICHAEL N. ZUNDEL
ALLEN SIMS
MICHAEL D. MCCULLY
THOMAS R. BARTON
CATHLEEN C. GILBERT
GLENN R. BRONSON
MATTHEW T. WIRTHLIN

OF COUNSEL
LYLE M. WARD
MARK O. VAN WAGONER
OF COUNSEL
MOYLE & DRAPER, P.C.
HARDIN A. WHITNEY
JOSEPH J. PALMER
O. WOOD MOYLE III
WAYNE G. PETTY
ROYAL I. HANSEN
F. S. PRINCE (1910-1991)
DAVID S. GELDZAHLER (1932-1994)

† REGISTERED PATENT ATTORNEY

March 2, 2000

Mr. William Anthony Kraatz
6374 So. Heughs Canyon Drive
Salt Lake City, UT 84121

Re: *Retainer of Prince, Yeates & Geldzahler and Jones, Waldo, Holbrook
& McDonough*

Dear Mr. Kraatz:

In light of the dissolution of the firm of Jardine Linebaugh & Dunn, and the subsequent association of Michael N. Zundel with Prince, Yeates & Geldzahler, and of Kent B Linebaugh with the firm of Jones, Waldo, Holbrook & McDonough, it is necessary to formalize your relationship with those law firms. We are writing this letter to you to accomplish that purpose.

As you know, before the firm of Jardine Linebaugh & Dunn dissolved, that firm was successful in prosecuting an appeal of the adverse ruling received in your case from the trial court in 1996. Shortly after the firm dissolved, we received word from the Utah Supreme Court that the Defendants' Writ of Certiorari had been denied.

In order to prosecute your case from this point forward, it is necessary to return to the trial court for an evidentiary determination of the damages due you, together with other matters such as the determination of the costs and reasonable attorneys' fees which should be added to the judgment award.

Mr. Zundel and Mr. Linebaugh are willing to continue with the prosecution of your case pursuant to the Order of Remand from the Court of Appeals. Each of their respective law firms propose to undertake your representation by assuming the burdens and obligations of the firm of Jardine Linebaugh & Dunn under your retention agreement with that firm. Costs incurred by both of these law firms, will be recovered out of any award that the trial court may enter in your favor and which is collected by you. This is the same arrangement as under your present contract with Jardine Linebaugh & Dunn.

William Anthony Kraatz

March 2, 2000

Page 2

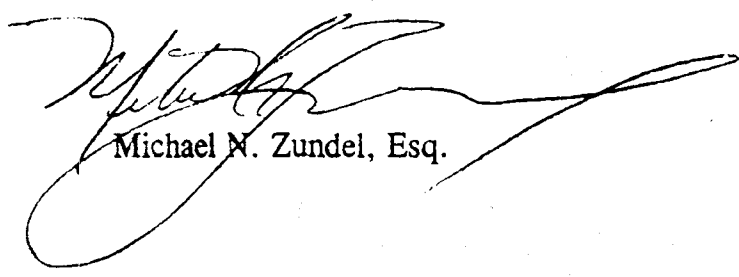
Mr. Zundel's and Mr. Linebaugh's firms will be compensated by agreement with the firm of Jardine Linebaugh & Dunn as follows: the new firms' attorneys, associates and paralegals shall bill their time and shall be entitled to receive 120% of their regular hourly rates out of that portion of the damage award and judgment which would otherwise be paid to the firm of Jardine Linebaugh & Dunn. This arrangement will not decrease your share of the amount collected from what it is under your contract with Jardine Linebaugh & Dunn.

Although the firm of Jardine Linebaugh & Dunn is in dissolution, the legal entity still exists and has a functioning board of directors for the purpose of liquidation. The three law firms have agreed to the proposal herein contained. It is important, however, that you also consent. If you do consent, please execute this letter where indicated below and return the original to me. I will see that Kent Linebaugh, on behalf of Jones, Waldo, Holbrook & McDonough, gets a copy of the letter bearing your signature.

Sincerely,

PRINCE, YEATES & GELDZAHLER

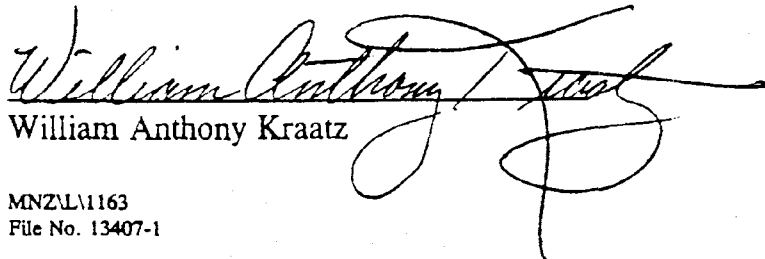
A Professional Corporation



Michael N. Zundel, Esq.

MNZ\jp

APPROVED:



William Anthony Kraatz

MNZ\1163
File No. 13407-1

KENT B. LINEBAUGH
JAMES M. DUNN
RICHARD H. THORNTON
WILLIAM G. MARSDEN
MICHAEL N. ZUNDEL
JOHN N. BREWS
WM. SHANE TOPHAM
JOHN S. BRADLEY
HAROLD L. REISER
J. SCOTT BROWN
ADAM S. AFFLECK
JOHN A. DAHLSTROM JR.
JENNIE S. JARNER
STEPHEN R. SLOAN
MICHAEL D. MAYFIELD

ALSO ADMITTED IN:
COLORADO
CALIFORNIA

LAW OFFICES OF
JARDINE LINEBAUGH & DUNN
A PROFESSIONAL CORPORATION

370 EAST SOUTH TEMPLE, SUITE 400
SALT LAKE CITY, UTAH 84111-1255
TELEPHONE (801) 532-7700

OF COUNSEL
LEO A. JARDINE

FACSIMILE
(801) 355-7725

WRITER'S DIRECT

April 2, 1999

mzundel@jldlaw.com

Mr. William Anthony Kraatz
6374 So. Heughs Canyon Drive
Salt Lake City, UT 84121

Re: *Kraatz v. Heritage Honda*

Dear Tony:

Enclosed you will find the following documents:

1. A copy of the Attorney's Fee Agreement we each signed on October 23, 1992. (It astounds me to think that this lawsuit will probably go on for more than seven years.)
2. A copy of my letter to you dated November 14, 1996, regarding the advisability of the appeal and our request to modify our fee arrangement.

Paragraph 7 of the Attorney's Fee Agreement makes clear that we agreed that the original agreement applied to one trial only and that in the event of an appeal we would negotiate in good faith a new agreement under which we would be fairly compensated.

Because of that possibility, we will want to modify the fee agreement to clarify that we receive 1/3 of the total award or the attorney's fees awarded by the Court, whichever is greater, or some other arrangements which we both agree will be fair."

April 2, 1999

Page 2

[REDACTED]

[REDACTED]

[REDACTED]

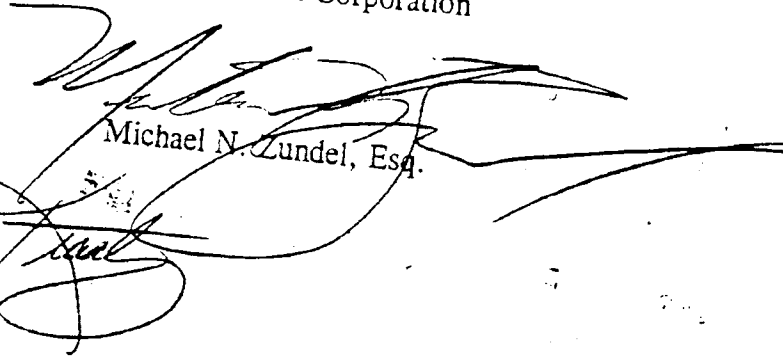
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April 2, 1999
Page 3

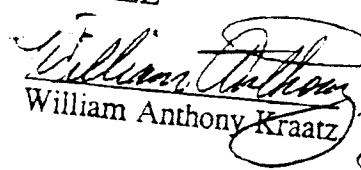
If you agree that the above modified fee arrangement is fair and appropriate please so indicate by signing the bottom of this letter where indicated and returning a copy for my file. If you have any questions or concerns, please call me. I would be happy to meet with you.

Sincerely,

JARDINE LINEBAUGH & DUNN
A Professional Corporation


Michael N. Zundel, Esq.

I AGREE


William Anthony Kraatz

MNZ/jp

Enclosure

MNZML4069
File No. 50009

ATTORNEYS FEE AGREEMENT

THIS AGREEMENT is made as of the 23rd day of October, 1992, by and between William Anthony Kraatz (the "Client"), and Michael N. Zundel and the law firm of Jardine, Linebaugh, Brown & Dunn of 370 East South Temple, Suite 400, Salt Lake City, Utah 84111 (collectively the "Attorneys").

1. The Client, in consideration of services performed and to be performed by the Attorneys for the Client, hereby retains the Attorneys to represent the Client in connection with all claims and causes of action accruing in favor of the Client as a result of the breach of Client's employment agreement by Heritage Imports, a Utah corporation, and related claims which Client may have against O. Bryan Wilkinson, individually.

2. The Client hereby authorizes the Attorneys to take whatever action the Attorneys deem advisable in prosecuting any and all claims which the Client may have against any and all persons arising out of the incident described in paragraph 1, including effecting a settlement or compromise, employing other counsel at the expense of the Attorneys, and instituting legal proceedings by way of complaint, counterclaim, crossclaim, third-party action or otherwise. It is understood and agreed that the Attorneys will consult with the Client with respect to prosecuting the Client's claim, and that any settlement or compromise of such claims shall be made only with the approval of the Client.

3. The Client agrees to pay the Attorneys for the services of the Attorneys Ten Thousand Dollars (\$10,000.00) plus a contingent fee equal to one-third of any recovery, before reimbursement or deduction of out-of-pocket costs, on the Client's claims, regardless of whether such recovery is achieved by settlement before or after commencement of suit or administrative proceedings. However, the Attorneys shall not be compensated with respect to any amounts paid to the Client as workers compensation or unemployment benefits as a matter of statutory right and without the efforts of the Attorneys. In the event of a structured settlement (that is a recovery that is payable to the Client over a period of time rather than a lump sum), then and in that event, the contingent fee to which the Attorneys will be entitled shall be equal to one-third of the present value of any such recovery. In determining the present value of any such structured settlement, the parties agree to rely upon appropriate accounting methods as determined by actuaries, economists or other experts in the field. The Attorneys' fee computed on the basis of such present value shall be due and payable at the time of such settlement.

4. All out-of-pocket costs incurred by the Attorneys in prosecuting the Client's claim, including all court or agency filing fees, service of process fees, investigatory costs, deposition costs, reproduction costs, telephone tolls, travel expenses and the like, shall be recovered by Attorneys out of any

recovery in addition to Attorneys' one-third contingency fee. The Attorneys agree to pay any such costs and hold Client harmless therefrom, except in the event of termination of Attorneys' services as hereinafter provided. The Client agrees that if all or any part of such out-of-pocket costs have been paid by another source (e.g., insurance), the Client agrees that such source will be reimbursed out of any recovery, and the Attorneys are hereby authorized to make such disbursements out of any recovery to the entities or persons entitled thereto.

5. Client agrees to hire other professionals who may be necessary to prosecute Client's claim, such as accountants or appraisers, at Client's own expense.

6. Recovery, as the term is used herein, shall mean all monetary awards, including Attorneys' fees, costs and expenses awarded by any court of competent jurisdiction or any administrative agency, as well as any special, general and punitive damages.

7. This Agreement is applicable to all proceedings through one trial. In the event an appeal and/or a second trial is necessary, the parties agree that they will negotiate in good faith a new Attorneys' fee Agreement with respect to any such additional proceedings.

8. The Client retains the right to discharge the Attorneys from prosecuting the Clients' claims at any time before settlement or trial, but in the event of such discharge, the Client shall remain obligated for payment of reasonable Attorneys' fees to the Attorneys for services performed up to the date of such discharge, based on the Attorneys' standard hourly rates, and for out-of-pocket expenses paid or incurred by Attorneys in connection with Client's claim. If this paragraph becomes applicable, then Client shall receive credit against his obligations to Attorneys for the \$10,000.00 paid in connection with the execution of this agreement.

9. The Attorneys are hereby authorized to investigate fully any claims the Client may have with respect to the incidents described above. If the Attorneys decide that it is in the Client's best interest to file a lawsuit or other legal proceeding on behalf of the Client, the Attorneys have the authority to prepare and prosecute such proceedings. However, if at any time, having made reasonable investigation and inquiry of the Client's claims, the Attorneys determine that it is not feasible or proper for the Attorneys to prosecute such claims, the Attorneys shall notify the Client of the results of such investigation in a timely fashion and may withdraw from representing the Client pursuant to this Agreement, without further compensation to the Attorneys except for payment of reasonable Attorneys' fees for services performed, based on Attorneys' standard hourly rates, and out-of-

pocket costs and disbursements previously paid or incurred. If this paragraph becomes applicable, then Client shall receive credit against his obligations to Attorneys for the \$10,000.00 paid in connection with the execution of this agreement.

10. In addition to the provisions of paragraph 9, the Attorneys may withdraw from representing the Client with respect to the subject matter of this Agreement, if in the opinion of the Attorneys, the matter should be settled or the Client is advised in writing that in the Attorneys' opinion further litigation would be detrimental to the Clients' best interest, and the Client nonetheless elects to disregard the Attorneys' opinion. Upon any such withdrawal of representation, the Attorneys shall be entitled to reasonable Attorneys' fees for services performed before the time of such withdrawal, provided however that such Attorneys' fee shall not exceed the fees that would have been due on the basis of any settlement recommended by the Attorneys. If this paragraph becomes applicable, then Client shall receive credit against his obligations to Attorneys for the \$10,000.00 paid in connection with the execution of this agreement.

11. The Client hereby assigns to the Attorneys, to the extent of Attorneys' fees and the Attorneys' out-of-pocket cost disbursements, any recovery in favor of the Client by way of settlement, suit, administrative proceedings or otherwise and the Client hereby agrees that the Attorneys may retain the Attorneys' share of such recovery. Pursuant to UTAH CODE ANN. § 78-51-41, the Attorneys have and claim a lien, securing payment of the amounts due under this agreement, on Client's cause of action and claims.

12. The Client acknowledges that the Attorneys have made no guaranty with respect to the success of any settlement negotiations, trial or appeal with respect to the Client's claims, and that all expressions by the Attorneys as to the outcome of such claims are opinions only.

13. The Client agrees to fully cooperate with the Attorneys in the investigation, preparation and prosecution of the Client's claims, and further agrees to honor the judgment of the Attorneys respecting matters of law and strategy in the prosecution of such claims for so long as the Client elects to retain the services of the Attorneys.

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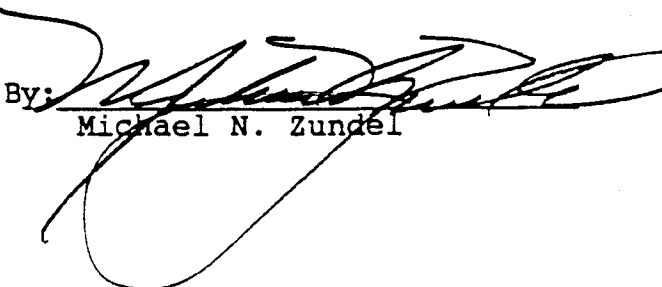
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IN WITNESS WHEREOF, the parties have executed this
Attorneys Fee Agreement as of the date first above written.

CLIENT:


William Anthony Kraatz

JARDINE, LINEBAUGH, BROWN & DUNN
A Professional Corporation

By: 
Michael N. Zundel

\MNZ\D\334

Tab 4

2(a)	01/05/93	MNZ	Review complaint redrafted by K. Linebaugh; conference with K. Linebaugh re theories of recovery and additional elements of damages.	0.75	105.00	split (R. 4346).
4	02/18/94	JJD	Review Heritage Imports v. Universal Underwriters Insurance case file at Third District Court; report results of review to K. Linebaugh.	1.70	153.00	(R. 4378).
4	03/07/94	MNZ	Call from Tony re Universal Warranty documents.	0.20	28.00	(R. 4380).
4	04/07/94	CT	Review and analyze vendor files for Bloomington, Fort-Douglas/Hidden Valley and Willowcreek Country Clubs.	3.00	180.00	
4	04/08/94	CT	Continue review and analysis of country club files.	1.00	60.00	(R. 4384).

4	03/18/96	MNZ	Conference with Don Gray and Tony Kraatz re value and penetration of sales of Ryan service contracts.	0.90	135.00
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Page 69
004422

4	05/16/96	TP	Draft letter to Tony re Volume III of his deposition; telephone conference with court reporter in Chicago to verify review of files to verify our documents; conference with MNZ re deposition and prepare for Lariat-Ryan warranties; telephone conference with Jennifer Falk re Rick Warner checks.	2.30	149.50
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R. 4426

4	05/16/96	MNZ	Conference with paralegal re deposition preparation.	0.30	45.00
---	----------	-----	--	------	-------

4	05/17/96	MNZ	Prepare for and depose Ryan Insurance (Mr. Tim Dunn) re service contracts sold by heritage Honda.	1.50	225.00	split (R. 4426).
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9	09/26/97	JBG	Complete initial draft of legal argument re misconstruction of terms refusal, include, and herein, and legal argument re applicability of handbook; office conference with M. Zundel re brief issues and re additional legal argument re trial court's use of ambiguous recital to Engraft substantive provisions on operative portions of agreement	8.60	1247.00	 (R. 4475).
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Tab 5

9	09/25/96	JJD	Telephone conference with M. Zundel; review summary of cases decided by Judge Frederick to determine how Judge Frederick ruled and which decisions were affirmed and reversed by appellate courts.	0.90	99.00
9	09/30/96	JJD	Attorney conference re report on review of Judge Frederick's cases in which he was affirmed or reversed on appeal, and case strategy.	0.30	33.00
9	10/02/96	MNZ	Conference with J.J. Devashrayee re merits of appeal.	0.70	105.00
9	10/02/96	JJD	Attorney conference re review of transcript of Judge Frederick's ruling, and case strategy; determine number of decisions of Judge Frederick after bench trial which were ultimately affirmed or reversed; review cases decided by Judge Frederick involving bench trials which were either affirmed or reversed; conduct research re procedure for seeking disqualification of judge.	6.10	671.00

Page 1

004458

9	10/03/96	MNZ	Conference with J.J. Devashrayee re statistical analysis of appeals and decisions by Judge Frederick (.5); research issues re attorney's fees and risks for loss to Tony Kraatz (.5); prepare letter to Mark Schmitz re billings (.5).	1.50	225.00
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(R. 4459).

9	10/03/96	JJD	<p>Attorney conference re report on results of research re (1) cases cited by Judge Frederick affirmed or reversed on appeal dealing only with civil cases and excluding jury verdicts and motions, and (2) procedure for challenging qualifications of Judge Frederick to continue in case; review cases decided by Judge Frederick reversed by appellate courts to determine basis for which cases were reversed; report results of review to M. Zundel; further review cases decided by Judge Frederick which were reversed by appellate courts to determine if cases were reversed where evidence introduced at trial did not support findings; conduct research re right of victorious party on contract dispute to recover attorney's fees.</p>	8.90	979.00	(R. 4459).
9	10/07/96	JJD	<p>Continue to review cases decided by Judge Frederick which were reversed on appeal to determine basis for reversal.</p>	1.20	132.00	(R. 4459).
9	10/08/96	JJD	<p>Further review cases re right of victorious party in litigation to recover attorney's fees pursuant to contract; review case law re reversal of lower court decision based on findings not conforming to evidence; complete preliminary review of all cases decided by Judge Frederick which were reversed on appeal to determine whether reversal was based on findings not conforming to evidence.</p>	5.70	627.00	(R. 4460).

9	10/09/96	JJD	Attorney conference re assignment to determine expert witness fees incurred or advanced on behalf of client in preparation for sending letter to M. Schmitz; review prebills and expert witness fee materials in case file to determine expert witness fees incurred or advanced on behalf of client, and revise letter to M. Schmitz to reflect accurate numbers; attorney conference re report on results of research re reversals by appellate court of Judge Frederick's decisions and Mr. Kraatz's potential liability for attorney's fees if unsuccessful on appeal; telephone conference with M. Zundel and S. Stoker re experience with Judge Frederick on remand of case that had been reversed by appellate court; review notes, research and other materials in case file; draft outline of office memorandum to M. Zundel memorializing results of review and research; begin drafting memorandum.	5.90	649.00
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9	10/10/96	JJD	Complete initial draft of memorandum to M. Zundel re statistics concerning Judge Frederick's record on appeal, potential liability to T. Kraatz for attorney's fees if unsuccessful on appeal, and procedure for seeking disqualification of Judge Frederick if case is remanded; shepardize cases cited in memorandum; review prebills and other materials in case file, prepare updated summary of costs incurred in case, expert witness fees advanced on behalf of T. Kraatz expert witness fees to be advanced on behalf of T. Kraatz, and amounts owing to firm by T. Kraatz; review additional case law re liability for attorney's fees to prevailing party on appeal.	4.30	473.00	(R. 4461).
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9	10/29/96	JJD	Telephone call from M. Zundel re Judge Frederick's record on appeal for last two years; conduct analysis of Judge Frederick's record on appeal for last two years and telephone call to M. Zundel re report on analysis; copy cases evidencing bench trials conducted by Judge Frederick subject to appeal; conduct research re standard of appellate review.	0.80	88.00	(R. 4462).
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9	10/29/96	JJD	Telephone call from M. Zundel re Judge Frederick's record on appeal for last two years; conduct analysis of Judge Frederick's record on appeal for last two years and telephone call to M. Zundel re report on analysis; copy cases evidencing bench trials conducted by Judge Frederick subject to appeal; conduct research re standard of appellate review.	0.80	88.00	(R. 4462).
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Tab 6

4	07/26/93	JJD	Travel to Kinkos and compare copies of documents to originals to determine whether documents were copied correctly; bring all copies of documents back to office.	4.30	387.00	(R. 4363).
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4	08/23/93	JJD	Travel to and from Heritage Honda and meet with Helen Green and counsel for Heritage Honda to discuss production of documents requested.	5.00	450.00	
4	08/24/93	JJD	Travel to and from Heritage Honda and review accounts payable documents; telephone conference with T. Kraatz re arrangement for T. Kraatz to review documents at Heritage Honda.	4.80	432.00	(R. 4365).
4	08/25/93	JJD	Travel to and from Heritage Honda and review accounts payable documents.	4.10	369.00	(R. 4365).
4	08/27/93	JJD	Travel to and from Heritage Honda and review accounts payable ledgers and other documents.	3.90	351.00	(R. 4365).
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4	08/31/93	JJD	Travel to and from Heritage Honda and continue to review accounts payable documents.	4.60	414.00	(R. 4366).
4	09/21/93	JJD	Travel to and review accounts payable documents and petty cash summaries.	4.00	360.00	(R. 4367).

4	09/23/93	JJD	Travel to and review documents and financial records at Heritage Honda.	3.20	288.00	
4	09/24/93	JJD	Travel to and review financial records at Heritage Honda.	4.00	360.00	(R. 4367).
4	10/06/93	JJD	Travel to Heritage Honda and review financial statements and other documents; meet with counsel for Heritage Honda and arrange for various documents to be copied.	5.40	486.00	(R. 4368).
4	10/14/93	JJD	Travel to and review general ledgers, schedules and other financial documents at Heritage Honda.	5.30	477.00	(R. 4368).
4	11/22/93	JJD	Telephone conference with T. Kraatz re status of analysis of financial statements; travel to and review documents at Heritage Honda; prepare documents for copying.	6.60	594.00	(R. 4369).
4	12/01/93	JJD	Telephone calls to and from counsel for Heritage Honda re arrangement of time to review copied documents and compare with originals; travel to and review copied documents at office of counsel for Heritage Honda.	5.00	450.00	(R. 4370).
4	12/02/93	JJD	Conference with T. Kraatz and M. Zundel re analysis of financial statements of Heritage Honda and discussion of case; travel to office of counsel for Heritage Honda and review copied documents in comparison with original documents.	6.00	540.00	
4	03/08/94	JJD	Travel to and review documents at office of B. Wilkinsons accountant.	1.90	171.00	(R. 4380).

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4	03/21/94	JJD	Travel to and review copies of documents at counsel for Heritage Honda.	1.70	153.00 (R. 4382).
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4	03/22/95	CT	Travel with MNZ to First Security Bank Operations Center to meet with Marie Chambers and to review documents assembled in response to our subpoena.	1.20	72.00 (R. 4404).
4	03/23/95	MNZ	Review documents produced by WestOne Bank; review documents produced by Key Bank.	3.00	420.00 (R. 4404).
6	07/29/96	JJD	Review research in case file and attorney conference re report on results of research; conduct additional research re (1) acquiescence, consent and condonation by employer of acts of employee, and (2) whether employer may rely on causes for discharge not originally relied on for discharge; travel to and from and review case file at Third District court; obtain copy of latest scheduling order from Judge.	7.70	847.00 (R. 4433).

Tab 7

4	03/31/94	MNZ	Prepare for and attend deposition of Matt Wilkinson	5.00	700.00	
4	03/31/94	CT	Prepare documents for use at deposition of Matthew Wilkinson; continue to index boxes of Heritage Honda documents obtained from Suiter Axland; conference with M. Zundel re preparation of exhibits for use at deposition of Bry Wilkinson; begin to assemble the documents.	4.00	240.00	
4	03/31/94	KBL	Attendance at Matt Wilkinson deposition and attorneys conference	3.50	542.50	(R. 4388).
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4	04/05/94	MNZ	Prepare for and attend third day of deposition of JJ Wilkinson; prepare for and attend first day of deposition of Bry Wilkinson.	8.00	1120.00	
4	04/05/94	KBL	Attendance at JJ and Bry depositions	5.00	775.00	(R. 4384).
4	04/20/94	MNZ	Continue deposition of Bryan Wilkinson.	7.30	1022.00	
4	04/20/94	KBL	Attendance at Bry Wilkinson's deposition; attorneys conferences re same.	6.00	930.00	(R. 4385).
4	05/11/94	MNZ	Prepare for and conduct deposition of Bryan Wilkinson	6.00	840.00	
4	05/11/94	KBL	Attendance at deposition of Bry Wilkinson	3.00	465.00	(R. 4385).

4	01/23/96	MNZ	Prepare for deposition of Helen Green (3.0); depose Helen Green (first day) (6.0).	9.00	1350.00	
4	01/23/96	KBL	Attendance at H. Green deposition; telephone conference with T. Kraatz re same portions of H. Green testimony.	1.50	240.00	
4	01/23/96	TP	Prepare for and attendance at Helen Green deposition. Make copies, locate documents, etc.	8.50	552.50	(R. 4419).
4	01/24/96	TP	Continue Helen Green deposition, assist MNZ. Make copies, review files, etc. Refile documents. Conference with MNZ. Organize boxes and indexes.	2.90	188.50	
4	01/24/96	MNZ	Prepare for second day of deposition of Helen Green (1.5); depose Ms. Green (3.0).	4.50	675.00	split (R. 4419).
4	02/06/96	MNZ	Finalize preparation for Goringe deposition (1.0); depose Mr. Goringe (5.5).	6.50	975.00	
4	02/06/96	TP	Assist MNZ and attend Jeff Goringe deposition.	5.50	357.50	(R. 4420).

4	02/21/96	MNZ	Prepare for and depose Larry Miller.	10.00	1500.00	
4	02/21/96	TP	Prepare copies for and attend Larry Miller deposition; draft cover letters to Tony Kraatz, Walter Hall and Mark Schmitz re shareholder agreement.	9.00	585.00	
4	02/21/96	KBL	File review and attendance at L. Miller deposition.	2.90	464.00	
4	02/22/96	KBL	Attorneys conference re materials for opposition to motion for summary judgment; attendance at deposition of L. Miller; attorneys conference outlining damage possibilities and numbers.	3.00	480.00	
4	02/22/96	MNZ	Prepare for and depose Larry Miller for second day (4.0); prepare for and depose Helen Green for third day (3.0) .	7.00	1050.00	split (R. 4421).
7	08/29/96	KBL	Attendance at trial.	2.10	346.50	(R. 4452).
7	08/30/96	KBL	Listen to trial (2x).	1.60	264.00	(R. 4452)
9	12/12/96	JJD	Continue to review trial transcripts and other materials in case file; continue to revise entire docketing statement.	6.40	704.00	
9	12/12/96	JJD	Continue to review findings of fact and conclusions of law entered by court; attorney conference re proposed revisions and additions to docketing statement; review transcripts of trial and further revise docketing statement.	7.50	825.00	(R. 4466).

Tab 8

4	03/08/94	KBL	Attorneys conference re deposition and production of documents schedule and strategy.	0.20	31.00	
4	03/08/94	MNZ	Conference with K. Linebaugh re depositions and prepare letter to Dennis Haslam re financial statements and deposition schedule; dictate deposition notice.	1.20	168.00	(R. 4381).
4	11/21/95	MNZ	Conference with K.B. Linebaugh re preparation of discovery order; conference call to Kent Schmidt re deposition schedule; call to Tony Kraatz re schedule of discovery and expert witnesses; prepare letter to Jennifer Falk re discovery schedule.	3.00	450.00	
4	11/21/95	KBL	Attorneys conference re scheduling and strategy, including telephone conference with K. Schmidt.	1.10	176.00	(R. 4414).

8	09/13/96	JJD	Finalize preliminary revisions to prejudgment interest response and submit to M. Zundel for review; attorney conference re proposed revisions to brief, and further revise brief and submit to M. Zundel; further revise reply brief in response to defendants' objection to attorney's fee affidavit; review draft of proposed findings of fact and conclusions of law in preparation for filing with court; conduct additional research re prejudgment interest; travel to and from and file proposed findings of fact and conclusions of law with court; organize materials in case file.	8.30	913.00	
8	09/13/96	MNZ	Finalize findings and conclusions; call from Jennifer Falk re late filing; call from Tony Kraatz re modifications and corrections; conference with K.B. Linebaugh re findings and conclusions.	7.90	1185.00	(R. 4456).

4	02/07/94	KBL	Attorneys conference re discovery strategy and in- house settlement meeting.	0.30	46.50	
4	02/07/94	JJD	Review latest revisions to responses to defendants requests for production of documents and interrogatories; conferences with C. Turner re review of documents to be produced to defendants, and revisions to responses to defendants interrogatories; conference with M. Zundel and C. Turner re same; telephone call from T. Kraatz re revisions to responses to interrogatories and arrangement of time to sign verification; conference with T. Kraatz re status of case and his revisions to responses to defendants interrogatories.	3.10	279.00	(R. 4375-76).
4	02/15/94	MNZ	Conference with K. Linebaugh and J. Devashrayee re status of case, discovery, settlement and legal theories.	3.50	490.00	
4	02/15/94	JJD	Conference with K. Linebaugh, M. Zundel and C. Turner re case strategy; conference with M. Zundel re documents which have not been produced by defendants; review notes of comparisons of documents which have been produced to document requests, and prepare list of missing documents for M. Zundel.	3.80	342.00	(R. 4377).
4	02/23/94	JJD	Telephone calls to and from counsel for Heritage Honda re arrangement of time to review documents produced by T. Kraatz and arrangement of time to review documents at office of B. Wilkinsons accountant; conference with C. Turner re confirmation of time for counsel for Heritage Honda to review documents; conference with K. Linebaugh and M. Zundel re settlement strategy and other matters.	1.00	90.00	
4	02/23/94	KBL	Attorneys conference re defendants insurance claims and our strategy; telephone conference with client re same.	0.60	93.00	(R. 4379).

3	06/02/93	MNZ	Conference with K. Linebaugh; conference call with Tony Kraatz re settlement strategy and prepare letter to Bill Prater.	0.90	126.00	
3	06/02/93	KBL	Attorneys conference and telephone conference with client re status and strategy of negotiations and discovery.	0.40	62.00	(R. 4350).
3	06/16/93	MNZ	Continue conference with Kent Linebaugh re settlement strategy.	1.20	168.00	
3	06/16/93	MNZ	Prepare for and attend meeting with Tony Kraatz, Wendy Kraatz and Kent Linebaugh re possible settlement; conference with K. Linebaugh re settlement strategy.	2.30	322.00	(R. 4351).
4	01/13/94	KBL	Attorneys conference with Kent Schmidt.	0.80	124.00	
4	01/13/94 06/04/94 06/07/94	JJD	Gather materials and prepare for conference with K. Schmidt; conference with K. Schmidt re valuation of dealership; telephone calls to T. Kraatz re arrangement of meeting between T. Kraatz and K. Schmidt.	3.10	279.00	
4	01/13/94	MNZ	Conference with Kent Schmidt re valuation of dealership.	3.50	490.00	(R. 4373).

4	04/27/93	JJD	Conference with M. Zundel re reply to defendants memorandum in opposition to motion to compel discovery; conduct research re waiver of right to object to discovery requests if such objections are not timely filed; review pleadings and other materials in case file; begin drafting reply memorandum in support of motion to compel discovery.	7.30	657.00	
4	04/27/93	MNZ	Conference with J. Devashrayee re discovery requests and response to Wilkinsons discovery.	0.80	112.00	
4	04/28/93	JJD	Conference with M. Zundel and K. Linebaugh re strategy for replying to defendants memorandum in opposition to motion to compel discovery; review pleadings, correspondence, and other materials in case file; draft affidavit of William Anthony Kraatz and begin revising same; complete draft of and begin revising reply memorandum in support of motion to compel discovery.	4.80	432.00	
4	04/28/93	KBL	Attorneys conference on discovery strategy; review of memo in support of motion to compel and memo in opposition.	0.60	93.00	(R. 4359).
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3	05/25/93	KBL	Attorneys conference re results of Tonys meeting with Larry Miller.	0.20	31.00	
3	05/25/93	MNZ	Call to Tony re settlement discussions with Larry Miller; conference with K. Linebaugh and report conversation with Tony.	1.50	210.00	(R. 4350).

1(a)	01/21/93	MNZ	Conference with K. Linebaugh re Judge Fredericks appointment to preside over the case.	0.30	42.00	
1(a)	01/21/93	KBL	Attorneys conference re advisability of requesting jury trial.	0.20	31.00	(R. 4342)
4	01/27/93	JJD	Conference with M. Zundel re strategy for interviewing witnesses to case; review Universal Warranty Company documents and other materials in case file.	1.20	108.00	
4	01/27/93	MNZ	Conference with J. Devashrayee re discovery strategy.	0.50	70.00	(R. 4356).
4	04/21/93	JJD	Conference with M. Zundel re drafting of response to amended answers to interrogatories and requests for production of documents of Heritage.	0.10	9.00	
4	04/21/93	KBL	Attorneys conference re our response to amending discovery responses.	0.20	31.00	(R. 4358).

1(a)	11/06/92	KBL	Attorney conference and telephone conference with client re merits and scheduling attorney/client conference.	0.40	60.00	—
1(a)	11/06/92	JJD	Conference with M. Zundel and K. Linebaugh re strategy for drafting demand letter.	0.20	17.00	— (R. 4338).
1(a)	11/18/92	KBL	Review of materials to check list possible causes of action; attorneys conference re same.	1.00	150.00	—
1(a)	11/18/92	JJD	Conference with K. Linebaugh re causes of action against corporation and individuals; complete draft of demand letter; begin revising same.	6.40	544.00	— (R. 4339).
1(a)	12/16/92	MNZ	Conference with Lee McCullough, Tony, Wendy, K. Linebaugh, and J. Devashrayee re history of negotiations with Wilkinson and Heritage.	1.50	210.00	— (R. 4341).
1(a)	12/16/92	KBL	Completed detailed review of C. McCulloch materials; office conference with client and L. McCulloch re background facts and intent of parties to the agreement.	2.80	434.00	(R. 4341-42).
4	01/20/93	KBL	Attorneys conference re form of discovery requests; editing requests for production.	1.30	201.50	
4	01/20/93	MNZ	Conference with K. Linebaugh re discovery requests.	0.50	70.00	(R. 4356).

9	11/18/96	JJD	Continue research re definition of "refusal," and review cases found during research; attorney conference re report on results of research; attorney conference re assignment to review trial transcripts and to begin marshaling facts in preparation for drafting appellate brief; review notes of K. Linebaugh and begin reviewing transcripts.	7.60	836.00	
9	11/18/96	MNZ	Review K.B. Linebaugh's notes and transcripts of testimony in connection with the appeal; conference with J.J. Devashrayee re same.	1.50	225.00	(R. 4464).
9	08/07/97	MNZ	Conference with J.B. Garner re interpretation of contract refusal provision and other provisions.	2.00	340.00	
9	08/07/97	JBG	Office conference with MNZ re interpretation of contract, attacking findings on appeal, and preparation of legal argument re interpretation of contract; begin review of case documents including findings of fact, conclusions of law, and plaintiffs trial brief and related cases.	2.50	362.50	(R. 4470).
9	12/11/97	MNZ	Continue revision of brief; call to Jennifer Falk; note issues in pretrial order; conference with J.B. Garner.	2.50	425.00	
9	12/11/97	JBG	Office conference with M. Zundel re additional changes to brief; review pretrial order and trial brief; continue editing brief.	6.20	899.00	(R. 4478).

9	03/27/98 75.00	MNZ	Prepare for and attend conference with K.B. Linebaugh, J.B. Garner and Sheleigh Chaikley re preparation of rebuttal brief.	5.00	850.00	
9	03/27/98	KBL	Attorneys conference re form and strategy of reply brief.	0.70	129.50	(R. 4480).
9	05/11/98	JBG	Office conference with KBL and MNZ re KBL comments and concerns regarding reply brief; begin revision of brief to incorporate KBL comments and revisions discussed in conference.	6.10	884.50	
9	05/11/98	KBL	Brief review of materials in preparation for attorneys drafting conference re reply brief; attorneys conference.	2.30	425.50	(R. 4483).
9	02/19/99	JBG	Office conference with MNZ re initial draft of response to letter of supplemental authorities.	0.30	45.00	
9	02/19/99 95.00	MNZ	Review Winder's letter to the Court re supplemental authority; consider necessity of response and conference with J.B. Garner re same.	0.50	87.50	(R. 4485).