

1994

# G&K Services v. Pacific Bay Baking Company : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Theodore E. Kanell, Daniel L. Steele; Hanson, Epperson, and Smith. Attorneys for Appellee

David M. Connors, Mark W. Dykes; LeBoeuf, Lamb, Greene and MacRae. Attorneys for Appellant

---

## Recommended Citation

Brief of Appellee, *G&K Services v. Pacific Bay Baking Company*, No. 940119 (Utah Court of Appeals, 1994).  
[https://digitalcommons.law.byu.edu/byu\\_ca1/5822](https://digitalcommons.law.byu.edu/byu_ca1/5822)

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

IN THE UTAH COURT OF APPEALS

---

G & K SERVICES, INC., a  
Corporation,

Plaintiff/Appellee,

vs.

PACIFIC BAY BAKING COMPANY,  
a Utah Corporation,

Defendant/Appellant.

Appeal No. 940-119 CA  
Circuit Case No. 920001083 CV

ARGUMENT PRIORITY 15

---

BRIEF OF PLAINTIFF/APPELLEE  
G & K SERVICES, INC.

---

On Appeal from the Third Circuit Court  
of Salt Lake County  
Honorable Michael L. Hutchings

---

DAVID M. CONNORS  
MARK W. DYKES  
LeBOEUF, LAMB, GREENE & MacRAE  
136 South Main, Suite 1000  
Salt Lake City, Utah 84101

Attorneys for Appellant  
Pacific Bay Baking Company

THEODORE E. KANELL  
DANIEL L. STEELE  
HANSON, EPPERSON & SMITH  
4 Triad Center, Suite 500  
Salt Lake City, Utah 84180

Attorneys for Appellee  
G & K Services, Inc.

UTAH COURT OF APPEALS  
BRIEF

UTAH  
CLERK  
KFU  
50  
JAN  
DOCKET NO.

940119

JUL 9 1994

---

IN THE UTAH COURT OF APPEALS

---

G & K SERVICES, INC., a  
Corporation,

Plaintiff/Appellee,

vs.

PACIFIC BAY BAKING COMPANY,  
a Utah Corporation,

Defendant/Appellant.

Appeal No. 940-119 CA  
Circuit Case No. 920002083 CV

ARGUMENT PRIORITY 15

---

BRIEF OF PLAINTIFF/APPELLEE  
G & K SERVICES, INC.

---

On Appeal from the Third Circuit Court  
of Salt Lake County  
Honorable Michael L. Hutchings

---

DAVID M. CONNORS  
MARK W. DYKES  
LeBOEUF, LAMB, GREENE & MacRAE  
136 South Main, Suite 1000  
Salt Lake City, Utah 84101

Attorneys for Appellant  
Pacific Bay Baking Company

THEODORE E. KANELL  
DANIEL L. STEELE  
HANSON, EPPERSON & SMITH  
4 Triad Center, Suite 500  
Salt Lake City, Utah 84180

Attorneys for Appellee  
G & K Services, Inc.

PARTIES TO THIS APPEAL

There are only two parties to this appeal, namely Pacific Bay Baking Company (hereinafter "Pacific Bay") who is the defendant/appellant and G & K Services, Inc. (hereinafter "G & K") the plaintiff/appellee.

I. TABLE OF CONTENTS

I.	TABLE OF CONTENTS . . . . .	3
II.	TABLE OF AUTHORITIES . . . . .	4, 5
III.	JURISDICTIONAL STATEMENT . . . . .	6
IV.	STATEMENT OF ISSUES ON APPEAL AND STANDARD OF REVIEW .	6
	A. ISSUES . . . . .	6
	B. STANDARD OF REVIEW . . . . .	7
V.	STATUTES AND RULES . . . . .	8
VI.	STATEMENT OF THE CASE . . . . .	8
	A. NATURE OF THE CASE . . . . .	8
	B. STATEMENT OF FACTS . . . . .	10
VII.	SUMMARY OF ARGUMENTS . . . . .	17
VIII.	ARGUMENT . . . . .	19
	POINT I G & K WAS THE PREVAILING PARTY AND IS THEREFORE ENTITLED TO ATTORNEY'S FEES BY VIRTUE OF ITS CONTRACT WITH PACIFIC BAY . . .	19
	A. The trial court was correct in applying the net judgment rule as a starting point for determining who is the prevailing party at trial . . . . .	19
	B. The fact that Pacific Bay successfully defeated one of G & K's claims at trial and reduced other amounts claimed owing by G & K does not make Pacific Bay the prevailing party. . . . .	24
	C. The trial court made significant and adequate findings of fact supporting its award of attorney's fees to G & K. . . . .	30
	POINT II G & K IS ENTITLED TO ATTORNEY'S FEES SHOULD THIS COURT RESOLVE THIS APPEAL IN G & K's FAVOR. . . . .	36
IX.	CONCLUSION . . . . .	36

## II. TABLE OF AUTHORITIES

### STATUTES AND RULES

Utah Code Ann. § 78-2a-3(2)(d) . . . . .	6
Utah R. Civ. P. 68 . . . . .	8

### CASES

<u>Baldwin v. Burton</u> , 850 P.2d 1188 (Utah 1993) . . . . .	8, 23
<u>Blumenshine v. Battiste</u> , 869 P.2d 470 (Ala. 1994) . . . . .	28
<u>Brown v. Richards</u> , 840 P.2d 143 (Utah Ct.App.1992) 19, 24, 28, 31	
<u>Elder v. Triax Co.</u> , 740 P.2d 1320 (Utah 1987) . . . . .	27
<u>First Southwestern Financial v. Sessions</u> , 239 Ut. Adv. Rpts. 6 (Utah 1994) . . . . .	26, 27, 35
<u>Graco Fishing &amp; Rental Tools, Inc. v. Ironwood Exploration, Inc.</u> , 766 P.2d 1074 (Utah 1988) . . . . .	32-34
<u>Harrington Const. Co. v. Stephenson</u> , 636 P.2d 1034 (Utah 1981) 35	
<u>Highland Const. Co. v. Stephenson</u> , 636 P.2d 1034 (Utah 1981) . . . . .	20, 26-28
<u>Hoth v. White</u> , 799 P.2d 213 (Utah Ct. App. 1990) . . . . .	31
<u>In re: Marriage of Waters</u> , 782 P.2d 1220 (Col. Ct. App. 1989) 29	
<u>Management Services Corp. v. Development Associates</u> , 617 P.2d 406 (Utah 1980) . . . . .	36
<u>Marissi v. Lau</u> , 859 P.2d 605 (Wash. App. Div. 1 1993) . . . . .	27
<u>Mountain States Broadcasting Co. v. Neale</u> , 783 P.2d 554 (Utah Ct. App. 1989) . . . . .	19, 31, 32
<u>Occidental/Nebraska Fed. Sav. v. Mehr</u> , 791 P.2d 217 (Utah Ct. App. 1990) . . . . .	19

<u>Paul Mueller Co. v. Cache Valley Dairy Ass'n.</u> , 657 P.2d 1279 (Utah 1982) . . . . .	8, 23, 30-33, 36
<u>Quinn v. Quinn (In Re: Quinn)</u> , 830 P.2d 282 (Utah Ct. App. 1992) . . . . .	8, 23
<u>Rosenlof v. Sullivan</u> , 676 P.2d 372 (Utah 1983) . . . . .	36
<u>Schuhman v. Green River Motel</u> , 835 P.2d 992 (Utah Ct. App. 1992) . . . . .	36
<u>Stacey Properties v. Wixen</u> , 766 P.2d 1080 (Utah Ct. App. 1988) . . . . .	8, 23, 32, 33
<u>Stott v. Cervantes</u> , 595 P.2d 563 (Wash. Ct. App. 1979) . . . . .	27
<u>Stubbs v. Hemmert</u> , 567 P.2d 168 (Utah 1977) . . . . .	31, 32
<u>Trayner v. Cushing</u> , 688 P.2d 856 (Utah 1984) . . . . .	23, 31, 32
<u>Underwriters at Lloyds v. N. Am. Van Lines</u> , 829 P.2d 978 (Ok. 1992) . . . . .	28
<u>Warner v. Sirstins</u> , 838 P.2d 666 (Utah Ct. App. 1992) . . . . .	35

### III. JURISDICTIONAL STATEMENT

Pacific Bay's Appeal seeks to reverse the trial court's award of attorney's fees to G & K. That award was reduced to judgment and Pacific Bay pursued a motion to reconsider, which was denied by the trial court. This court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(d).

### IV. STATEMENT OF ISSUES ON APPEAL AND STANDARD OF REVIEW

G & K sued Pacific Bay for its failure to live up to its obligations under a contract it had with G & K Services for laundry services and linen supplies. Following trial of the matter the trial court awarded G & K a total judgment of \$7,545.83. Of that amount \$1,450.00 represented the trial court's award of attorney's fees to G & K as the prevailing party. Pacific Bay's appeal deals solely with the propriety of the trial court's attorney's fee award.

G & K takes issue with Pacific Bay's statement of issues on appeal and therefore asserts below the following issues which it believes more accurately represent the issues presented by this appeal.

#### A. ISSUES

1. Was the trial court correct in declaring G & K the prevailing party and in applying a reasoned and flexible approach in the apportionment and award of attorney's fees?



2. Was the trial court correct in declaring that Pacific Bay was not the prevailing party by virtue of G & K's net judgment and because Pacific Bay did not file an offer of judgment, conceded to judgment of approximately \$3,700.00 after the trial had begun, and otherwise required G & K to appear at trial prepared to litigate all of its claims including the amounts eventually conceded by Pacific Bay?

3. Does the fact that Pacific Bay successfully defeated only one of G & K's claims at trial and was successful in limiting the damages awarded by the trial court on two other G & K claims entitle Pacific Bay to prevailing party status and an award of attorney's fees?

4. Was the trial court's constructive award of attorney's fees to Pacific Bay in reducing G & K's attorney's fees in the amount of \$630.00 appropriate in light of the facts and the circumstances of the case?

5. Were the trial court's findings of fact sufficient to support the award of fees to G & K and the determination that G & K was the prevailing party under an abuse of discretion standard of review?

**B. STANDARD OF REVIEW**

Since Pacific Bay does not challenge the language of the contract between G & K and Pacific Bay which provides for

attorney's fees, the standard of review for contract interpretation is not applicable.

When reviewing an award of attorney's fees, this court should affirm the trial court's ruling absent an abuse of discretion. Baldwin v. Burton, 850 P.2d 1188, 1198 (Utah 1993). Paul Mueller Co. v. Cache Valley Dairy Ass'n., 657 P.2d 1279, 1287 (Utah 1982)("it is this court's policy to accord great deference to the discretionary conclusions of the trial court regarding attorney's fees); See also Quinn v. Quinn (In Re: Quinn), 830 P.2d 282, 285 (Utah Ct. App. 1992); Stacey Properties v. Wixen, 766 P.2d 1080, 1085 (Utah Ct. App. 1988).

V. STATUTES AND RULES

There are no constitutional provisions or statutes which have application to the issues in this appeal. However, Rule 68 of the Utah Rules of Civil Procedure (the offer of judgment rule) has application and will be referenced by G & K in this brief.

VI. STATEMENT OF THE CASE

A. NATURE OF THE CASE

G & K is a Utah Corporation which is in the business of providing textile and laundry services to business throughout the metropolitan Salt Lake area. Pacific Bay entered into a contract with G & K wherein G & K was obligated to provide Pacific Bay with uniforms, towels, floor mats and other linen supplies which Pacific

Bay used in its day to day business operations. Pacific Bay was in turn obligated under the contract to pay G & K for those services.

A dispute between G & K and Pacific Bay regarding the payment terms and the status of Pacific Bay's account occurred in late 1991. On February 2, 1992, G & K filed a complaint seeking to enforce the provisions of its contract with Pacific Bay and collect on what it believed were delinquent accounts. (R. 1-6).<sup>1</sup> Pacific Bay answered the complaint on March 18, 1992. (R. 10-11). On May 27, 1992, G & K filed a certificate of readiness for trial (R. 12-14) and trial was noticed and set for July 9, 1992. (R. 15).

G & K appeared at trial ready to prosecute its case on July 9, 1992, but Pacific Bay did not show. At that time the trial court awarded judgment in favor of G & K and the court's findings of fact and conclusions of law, as well as the judgment, were signed by the trial court on August 10, 1992. (R. 16-19, 39-40).

On July 31st, Pacific Bay moved to strike the judgment and restore the case to the calendar. (R. 20-27). On September 14, 1992, the trial court granted Pacific Bay's motion, but awarded costs and attorney's fees to G & K for Pacific Bay's failure to show at trial. (R. 50).

---

<sup>1</sup> For purposes of clarity G & K will refer to citations to the record by using the form (R.\_\_\_\_) and when citing to the transcript of the proceedings at trial will use the citation form (Trans.\_\_\_\_).

The Third Circuit Court, the Honorable Michael L. Hutchings presiding, conducted a trial of the matter on November 2nd and 3rd, 1993, with all parties attending.<sup>2</sup> (R. 71-74). That trial resulted in G & K obtaining a net judgment of \$6,095.83, which included interest. The trial court further awarded G & K \$1,450.00 in reasonable attorney's fees. (R. 152-153).

Following the trial Pacific Bay moved for reconsideration on of the fees awarded G & K. (R. 75-92) This motion was denied (R. 164-165) and Pacific Bay now appeals the trial court's ruling on attorney's fees.

**B. STATEMENT OF FACTS**

This appeal focuses solely on the trial court's award of attorney's fees to G & K as the prevailing party. G & K will therefore set forth only the facts which it believes are pertinent to the court's determination and award of attorney's fees to G & K.

G & K entered into a written contract with Pacific Bay on April 12, 1988. A copy of that contract is attached as Exhibit A to this brief and was likewise attached to the complaint filed by G & K. (R. p. 5). The contract obligated G & K to provide linen services to Pacific Bay and Pacific Bay was in turn obligated to

---

<sup>2</sup> G & K notes that it took almost two years, from the time it filed its complaint, for Pacific Bay to finally acknowledge that it owed G & K for services previously rendered. Only at trial did Pacific Bay acknowledge the debt owed and concede to judgment. (Trans. 228).

pay for those services. In December of 1991, G & K and Pacific Bay found themselves in a dispute regarding Pacific Bay's payment practices and the obligations of both parties under the written contract. Thereafter, the contract between G & K and Pacific Bay was terminated and on February 2, 1992, G & K filed suit in the Third Circuit Court, seeking to enforce the terms of its contract with Pacific Bay. (R. 1-6).

Specifically, G & K sought payment for services rendered in October, November and December of 1991 and likewise sought payment for uniforms and other linen supplies not returned to G & K by Pacific Bay after the termination of their contract. (R. 2).

G & K further sought interest, attorney's fees, and liquidated damages as provided for in their contract with Pacific Bay.

(R. 2). Pacific Bay filed a pro se answer on March 18, 1992.

(R. 10-11). In that answer Pacific Bay denied the validity of the contract between it and G & K and denied any agreement to pay attorney's fees and costs. (R. 10-11). Pacific Bay did, in its pro se answer, acknowledge owing G & K amounts which were past due, but alleged that they owed less than the amounts set forth in G & K's complaint. (R. 10-11).

On June 10, 1992, the trial court sent notices to all parties concerned setting trial for the matter on July 9, 1992. (R. 15). On July 9, 1992, G & K arrived at court fully prepared and ready to

prosecute its claims against Pacific Bay. However, Pacific Bay did not appear at trial so the trial court entered judgment on behalf of G & K for all damages complained for in its complaint. (R. 16-19 and 39-40).

Pacific Bay was successful in setting aside the judgment and restoring the case to calendar (R. 20-27). However, Pacific Bay was required to pay G & K's fees and costs as a result. (R. 50). Pacific Bay thereafter filed a new answer to G & K's complaint, this time through counsel. (R. 51). In that answer Pacific Bay reversed its position from its previous answer and denied owing any amounts to G & K. (R. 2, paragraphs 4, 5). One day prior to trial, Pacific Bay also filed a trial brief with the court which again failed to acknowledge any amounts owing to G & K. (R. 66-69).

The trial was commenced on November 2, 1993, before the Honorable Judge Michael Hutchings. (R. 71). Following G & K's opening statement, Pacific Bay presented its opening statement to the trial court and at that time, after the court questioned counsel for Pacific Bay on the October, November and December invoices, Pacific Bay conceded those amounts (R. 11-12) and G & K moved for judgment on those matters, which was granted by the court. (R. 13-15).

However, at the time Pacific Bay stipulated to judgment on all of the October and November invoices and part of the December invoices, it nevertheless did not concede or acquiesce on the issue of interest on those amounts pursuant to the contract, nor did it concede to attorney's fees. Id. It also did not concede on G & K's claims for lost or unreturned linen supplies, liquidated damages, and for services rendered on December 23 and December 31. Id.

G & K then presented its case and set forth evidence regarding Pacific Bay's payment history and G & K's efforts to keep Pacific Bay current with its obligations under the contract. (R. 15-103) G & K further presented evidence regarding the circumstances surrounding the termination of the contract and how G & K arrived at the appreciated amounts prayed for in its complaint by virtue of the non-returned or lost linen supplies provided to Pacific Bay. (R. 15-103). Testimony was also produced by G & K regarding the obligations under the contract, including the issue of costs and attorney's fees. At the end of G & K's case, G & K proffered the amount of attorney's fees expended in the prosecution of its claims up through that time. (R. 103-105).

Thereafter Pacific Bay presented its case in defense of the claims prosecuted by G & K. Pacific Bay presented evidence regarding its contentions that their contract with G & K which required net ten payment terms was actually modified by a course of

performance and dealing between the parties. Pacific Bay also presented evidence disputing the manner in which the depreciated amounts were calculated and specifically contested three groups of uniforms declared unreturned or lost by G & K which Pacific Bay believed had actually been returned. (R. 321-364).

Closing arguments were then entertained by the trial court and Pacific Bay at that time proffered their attorney's fees as part of their argument that they were the prevailing party and were entitled to fees. (R. 371-372).

At the conclusion of closing arguments the trial court entered its ruling. (R. 396). The court accepted Pacific Bay's course of performance defense and disallowed G & K's claim for liquidated damages by holding that G & K terminated the contract, not Pacific Bay.<sup>3</sup> (R. 397-399). The court then, in addition to the conceded amounts, granted G & K's claim for amounts attributed to the lost or unreturned linen supplies it had provided Pacific

---

<sup>3</sup> G & K believes the court erred in determining that G & K terminated the contract when G & K demanded payment from Pacific Bay for the October invoices on December 23rd. The court ruled that that demand was premature since Pacific Bay's payment was not due until the end of the month, based on the course of performance modification of the contract. (R. 397-399) Even assuming the correctness of the court's ruling on the course of performance and payment term issues the October invoices were nevertheless due during the first week of December and G & K's demand for such on December 23rd was therefore timely. G & K has chosen not to counterclaim on appeal the correctness of this ruling due to its concern over the wise and efficient use of judicial resources and the costs that would be associated with such an appeal.



Bay. The court, however, disagreed with G & K's calculation of that amount and reduced this claim by fifty percent. The court also ruled that Pacific Bay did not have to pay for the December 23 and December 31 invoices since G & K had terminated the contract. (R. 399-400). G & K's claim for past due invoices was therefore reduced accordingly.

With regard to G & K's claim of lost or unreturned items the trial court, however, did rule against Pacific Bay who had contended at trial that several pieces of linen attributable to three of Pacific Bay's employees were actually returned. The trial court accepted G & K's arguments that they were not returned and included those amounts in the award for lost and unreturned uniforms. (R. 187). The trial court also granted G & K's claim for 18% interest pursuant to the contract between the parties. (R. 401).

Thereafter the trial court entertained a lengthy discussion on the question of attorney's fees. The trial court determined that it had to make a decision as to who was the prevailing party. The trial court recognized that it ruled toward the defense on some issues (R. 401-402). However, the court found that after adding up the conceded amounts, and the additional amounts G & K recovered as a result of the trial, G & K was the prevailing party under the net judgment rule. (R. 402).

However, the trial court enumerated additional factors beyond the net judgment rule which supported its finding that G & K was the prevailing party. The trial court found it significant that no offer of judgment was made by Pacific Bay, and that they had vacated the entire judgment awarded G & K almost one and a half years previously when Pacific Bay failed to show at the first trial. (Trans. 402). The court further held that because of Pacific Bay's defense tactics, G & K was forced to come to trial, put on evidence and otherwise be fully prepared and ready to prosecute all its claims even though Pacific Bay conceded to a substantial award after trial had commenced. (R. 402).

The trial court also recognized that the judgment rule was only a starting point in determining an award of attorney's fees (R. 407), and recognized the importance of looking at other issues in the case. (Trans. 407). The trial court noted that it was utilizing a flexible and reasonable approach in awarding of attorney's fees (R. 402), and was applying an apportionment type doctrine. (R. 403). In light of these factors and because the court did recognize that Pacific Bay prevailed on some issues at trial, the court then chose to reduce the attorney's fees proffered by G & K, which totaled \$2,080.00 (R. 404), by \$630.00, thus making the total award of attorney's fees to G & K \$1,450.00. The court's total award to G & K, exclusive of the attorney's fees which are

the subject of this appeal, thus consisted of \$3,790.02 conceded by Pacific Bay at trial (Trans. p. 228), \$785.19 for unreturned or lost items including the contested White, Kilgore, and Miller amounts (Trans. p. 400; R. p. 152-153), \$93.00 in costs, and \$1,427.62 in interest pursuant to the contract. (Trans. p. 401; R. p. 152-153).

#### VII. SUMMARY OF ARGUMENTS

The trial court was correct in declaring G & K the prevailing party. In reaching this decision the court considered a host of factors in addition to the fact that G & K, apart from attorney's fees, obtained a judgment of \$6,095.83. The court thought it important that Pacific Bay had chosen, for whatever reason, to protest all of the amounts and claims sought by G & K in its complaint and had failed to file an offer of judgment. The court further found it significant that Pacific Bay had set aside a previous judgment due to its failure to show up at trial and that at that time it again indicated its decision to contest the entire amount sought by G & K.

Pacific Bay also cannot now claim to be the prevailing party by virtue of its position that they prevailed on every major contested issue at trial. Pacific Bay erroneously points to its stipulated judgment at the beginning of trial as evidence that G & K in fact did not prevail on those issues since they were

stipulated. However, such an argument ignores the defense tactics of Pacific Bay which forced G & K to expend time, effort, and attorney's fees preparing itself to present at trial evidence on every claim pled in its complaint, including the claims eventually conceded by Pacific Bay. Case law makes it clear that those stipulated amounts are amounts that should be included in a determination of who prevailed at trial even if those amounts had been conceded prior to trial, which they were not.

Furthermore, the net judgment rule is not without force in Utah nor has the net judgment rule been discarded or disregarded. In fact, Utah courts recognize the net judgment rule as a starting point and one of the factors to be considered by courts as they determine awards of attorney's fees. The trial court made it clear that there were a host of other factors besides the net judgment rule upon which it relied in awarding attorney's fees to G & K. Pacific Bay's attack focusing on the net judgment rule ignores these other factors.

Finally, Pacific Bay was constructively awarded attorney's fees when the trial court expressly reduced the attorney's fees sought by G & K in recognition of Pacific Bay's successful defense of some of the claims prosecuted by G & K at trial. There is no evidence in the record that the trial court reduced G & K's fees because they were unreasonable or unwarranted.

VIII.

ARGUMENT

POINT I

G & K WAS THE PREVAILING PARTY AND IS THEREFORE ENTITLED TO ATTORNEY'S FEES BY VIRTUE OF ITS CONTRACT WITH PACIFIC BAY.

- A. The trial court was correct in applying the net judgment rule as a starting point for determining who is the prevailing party at trial.

The trial court correctly looked to the net judgment rule as a partial guide in making the determination at trial as to who was the prevailing party. Pacific Bay's brief on this issue makes much of the alleged misfavor the net judgment rule has supposedly encountered in Utah. However, the net judgment rule is valid and recognized by Utah courts. Occidental/Nebraska Fed. Sav. v. Mehr, 791 P.2d 217, 221 (Utah Ct. App. 1990) (recognizing that the net judgment rule is "a good starting point in making determinations of which party prevailed."); Mountain States Broadcasting Co. v. Neale, 783 P.2d 554, 556 (Utah Ct. App. 1989). In addition to the net judgment rule, however, Utah courts have specifically noted the need to employ a flexible and reasoned approach in deciding on a case by case basis who is actually the prevailing party. Occidental, 791 P.2d at p. 221; See also Mountain States, 783 P.2d at n. 7; Brown v. Richards, 840 P.2d 143, 155 (Utah Ct. App. 1992)(the court should consider the circumstances of the case and other additional factors in awarding fees).

The record at trial makes it clear that the trial court utilized the net judgment rule in reaching its decision. (Trans. 402). However, the court specifically went on to recognize several factors which it believed added additional support for its determination that G & K was the prevailing party. Id. The court noted that for tactical reasons Pacific Bay had chosen not to concede or stipulate to any of the amounts owed to G & K until after the trial had commenced. (Trans. 402). The court felt this significant because G & K was forced to come to trial, put on evidence and be prepared to fully prosecute all of its claims. (Trans. 402). The court further noted that Pacific Bay had to set aside a judgment that was entered on behalf of G & K due to Pacific Bay's failure to show up at the previous trial. Id. The court believed that Pacific Bay could have, at that time, conceded the amounts clearly owing, implying that such a tactic would have saved all parties concerned, including the court, the time, effort and expense which was otherwise incurred by G and K preparing to present evidence on those amounts.<sup>4</sup> (Trans. 402). See also Highland Const. Co. v. Stephenson, 636 P.2d 1034, 1038 (Utah 1981)(An important factor in awarding fees is the fact that the

---

<sup>4</sup> Illuminative of the trial court's reasoning is the fact that Pacific Bay's pro se answers acknowledged owing amounts to G & K (R. 10-11), a position later discarded by Pacific Bay until it had succeeded in dragging G & K to court where Pacific Bay finally conceded those amounts.

plaintiff was forced to maintain an action until the defendant made payment on the debt owed.)

In recognizing the tactics employed by Pacific Bay, the trial court was presumably referring in part to statements made by counsel for Pacific Bay in closing arguments. The exchange between counsel for Pacific Bay and the trial court in this particular issue merits reproduction here in full.

MR. DYKES: I disagree on the point that since we stipulated to judgment, we are therefore not allowed the fees. All we did was agree that there was an undisputed amount owing, and I think there is a world of difference between the two. The point was that we are here litigating the issues of the last two invoice--last two invoices.

THE COURT: Of course I would just ask you why did you [not] agree to that earlier in the litigation? You made a motion to set aside a judgment that was rendered, why not, in essence, make a motion to say--move, in essence, to set aside part of the judgment, the part that is disputed, there is another part that isn't disputed.

MR. DYKES: Well your honor perhaps we should have.

THE COURT: Or you could have made an offer of judgment.

MR. DYKES: We could have, and we did engage in settlement negotiations along the line of, we don't dispute "X" number of dollars, but we never could reach a resolution on that issue. It is a fact that we don't dispute those amounts, and we thought it would save time to simply go ahead and stipulate to them.

Sometimes we hate to give up issues too early because it deprives us of bargaining strength later on, and that might have been part of the impetus behind that.

(Trans. 371-372)(emphasis added).<sup>5</sup>

This statement by counsel for Pacific Bay clearly indicates some of the reasons why Pacific Bay chose not to stipulate or concede on some of the amounts owing until after opening arguments had occurred and the trial had commenced. Pacific Bay was simply using that as a bargaining position to force G & K to consider the expense and effort they would have to go through in order to try the case on the merits. It is furthermore clear that Pacific Bay was thinking of much more than saving the trial court and G & K trial time when it conceded to owing some of the claims brought by G & K. Following the concession in Pacific Bay's opening statement (Trans. 225) counsel for defendant indicated that part of the reason he was stipulating to these amounts was to posture Pacific Bay as the prevailing party at trial and to entitle it to fees.

THE COURT: Okay. So, you're disputing the two invoices and then the liquidated damages claim?

MR. DYKES: Liquidated damages, that's--that's correct. And we would also, to the extent this becomes relevant at the end, dispute the request for attorney's fees, because it will be clear, I hope, after the

---

<sup>5</sup> G & K asserts that Pacific Bay's failure to file and offer of judgment was an important factor in the trial court's eventual award of fees to G & K. For additional discussion on this point see G & K's discussion of the Sessions case on pages 35-36 of this brief.



presentation of evidence that G & K has not prevailed under the relief they seek, but in fact, all they are entitled to is the disputed--or rather, the undisputed portion of the invoices, and indeed, in those circumstances, it is Pacific Bay, not G & K, which would be the prevailing party and therefore entitled to fees.

THE COURT: Have you made an offer of judgment in the case?

MR. DYKES: Have not, your honor. We have tried to settle and it was unavailing. (Trans. 226).

These citations to the transcript at trial make it clear the tactics Pacific Bay was utilizing in its defense of the case. Pacific Bay was clearly more interested in posturing itself on the issue of attorney's fees than in genuinely conceding the amounts owing that it knew, even when it filed its first pro se answer, were rightfully due to G & K. (R. 11).

The trial court's reliance on these factors in reaching the conclusion that G & K was the prevailing party is further supported by case law. An award of attorney's fees is placed solely within the discretion of the trial court and that discretionary standard is the standard of review governing this case. Baldwin v. Burton, 850 P.2d 1188, 1198 (Utah 1993); Paul Mueller Co. v. Cache Valley Dairy Ass'n., 657 P.2d 1279, 1287 (Utah 1982); Stacey Properties v. Wixen, 766 P.2d 1080, 1085 (Utah Ct. App. 1988); Quinn v. Quinn (In Re: Quinn), 830 P.2d 282, 285 (Utah Ct. App. 1992).

In the case of Baldwin v. Burton, 850 P.2d 1188, 1200 (Utah 1993), the Utah Supreme Court held that a factor to be included in evaluating attorney's fee awards is "the necessity of bringing an action to vindicate rights." See also Trayner v. Cushing, 688 P.2d 856, 858 (Utah 1984). Here, plaintiff was forced to initiate a lawsuit to vindicate its rights under the contract and obtain monies that were past due and owing almost two years after Pacific Bay incurred those obligations.

In short, Pacific Bay should not be allowed to profit from its creative posturing at trial, all of which was done at the expense of G & K. Counsel for G & K made this point clear at trial.

MR. STEELE: With regard to attorney's fees, your honor, there is no offer of judgment, its never been filed in this case, and we had to come here, we were prepared to dis--to go after every penny, including the stipulated amount. I don't care what they offered in terms of settlement, your honor, we had to come here to trial to get what they stipulated to at the beginning.

I wouldn't have accepted their offer, your honor, had I known they were going to turn around and hang a noose around my neck for \$2,000 - plus worth of attorney's fees. (Trans. 382).

B. The fact that Pacific Bay successfully defeated one of G & K's claims at trial and reduced other amounts claimed owing by G & K does not make Pacific Bay the prevailing party.

Pacific Bay argued in its motion for reconsideration of attorney's fees before the circuit court and again here on appeal

that it prevailed all major issues ultimately tried at court. Such an argument is pure subterfuge and is characteristic of a fish story wherein the fish that was caught becomes bigger and bigger over time as the story is told and retold. "While a reduction in the amount claimed by a plaintiff may seem a moral and financial victory for defendant, it does not make the defendant the "prevailing party" in terms of attorney's fees." Brown v. Richards, 840 P.2d 143, 155 (Utah Ct. App. 1992).

The facts pertinent to this issue are as follows. G & K was awarded judgment of over six thousand dollars at the end of trial, exclusive of the attorney's fees that were also awarded. (R. 152, 153). G & K also appeared at trial, having gone through the expense and effort to fully prepare itself to present evidence to prosecute all of its claims as set forth in its complaint. (Trans. 402). After trial had commenced and after G & K's opening statement where it set forth its intention to present evidence on each and every claim set forth in its complaint, Pacific Bay stipulated to owing over \$3,790.00. (Trans. 228). Pacific Bay later acknowledged that it refrained from removing these matters from issue prior to trial because of its interest in preserving its bargaining strength later on. (Trans. 372).

G & K was also awarded by the trial court, at the end of trial, interest in the amount of \$1,427.62 pursuant to the terms of

the contract. (Trans. 401, R. 152). The court further found in favor of G & K on the depreciated amounts prayed for in its complaint, although the court did reduce that amount, based on Pacific Bay's arguments that G & K had improperly calculated the depreciated amount, based on the terms of the contract. (R. 152, Trans. 400). The court also, as part of this depreciated amount, made a specific finding that G & K was entitled to collect for the missing or lost shirts of White, Kilgore, and Miller. (Trans. 400).

At trial, Pacific Bay specifically disputed the amounts attributable to those employees and G & K successfully presented evidence to the contrary, which the trial court accepted in making its finding. (Trans. 358-59). Thus the court's finding on the depreciated amounts resulted in judgment for G & K for \$785.19. The only claim of G & K's which the court did not grant relief for was the claim for liquidated damages.<sup>6</sup> The court based its denial of this claim on Pacific Bay's defense that the contract was modified through the course and performance of the parties and that

---

<sup>6</sup> G & K in its complaint sought all of the invoice amounts, including the December 23rd and 31st invoices, in one prayer for relief. (R. 1-2) G & K did not plead each invoice separately and instead sought relief for all invoices in a lump sum. Id. Therefore, Pacific Bay did not defeat two separate claims but instead was successful only in reducing this amount through its course of performance defense.

it was G & K who terminated the contract, not Pacific Bay. (Trans. 399).<sup>7</sup>

Pacific Bay, in spite of the fact that G & K came away from trial with a judgment of over six thousand dollars excepting attorney's fees, argues now that it was in fact the prevailing party. However, this argument is not in conformance with case law. In First Southwestern Financial v. Sessions, 239 Ut. Adv. Rpts. 6, 8 (Utah 1994), the Utah Supreme Court referenced Highland Construction Company v. Stephenson, 636 P.2d 1034 (Utah 1981) in holding that "a party in whose favor an affirmative judgment is rendered, whether or not the judgment is for less than initially sought in the complaint, is a prevailing party within the meaning of a statute awarding attorney's fees to the prevailing party." While Highland dealt with the mechanics lien statute and Sessions also dealt with a statute, the logic and reasoning behind the decision is nevertheless applicable to a contract action. Highland, 636 P.2d at 1038 (citing Stott v. Cervantes, 595 P.2d 563 (Wash. Ct. App. 1979)). Much of the case law cited in Pacific Bay's brief which would appear contrary to this assertion involves cases where defendants were found to be the prevailing party by virtue of their success in prosecuting their counterclaims at

---

<sup>7</sup> See supra n. 3.

trial.<sup>8</sup> This is particularly accurate in the case of Elder v. Triax Co., 740 P.2d 1320, 1321-22 (Utah 1987), where a counterclaimant was declared to be a prevailing party by virtue of its success in prosecuting its own counterclaims.<sup>9</sup>

Such is not the case here. Pacific Bay asserted no counterclaims and sought no damages from G & K. While Pacific Bay was successful in some of its arguments in limiting some of the damages G & K sought, such a scenario nevertheless does not entitle Pacific Bay to claim that they are the prevailing party.

In Sessions, 239 Ut. Adv. Rpts. at 8, the Utah Supreme Court recognized that just because a defendant is successful in limiting the amounts a plaintiff seeks at trial does not make that defendant a prevailing party. See also Brown, 840 P.2d at 155; Highland, 636 P.2d at 1038; Underwriters at Lloyds v. N. Am. Van Lines, 829 P.2d 978, 981 (Ok. 1992) (even though a defendant is successful in limiting a plaintiffs damages, when that success does not result in a judgment for the defendant, the defendant cannot be considered a prevailing party); Blumenshine v. Battiste, 869 P.2d 470, 474 (Ala.

---

<sup>8</sup> Pacific Bay relies heavily on the case of Marissi v. Lau, 859 P.2d 605 (Wash. App. Div. 1 1993) in support of this argument. However in Marissi the defendant counterclaimed and both parties received money judgments. Id. at 606. Thus the party with the smaller award of attorney's fees was given an offset against the fees it owed the opposing party. Id. at 608.

<sup>9</sup> See argument supra pgs. 30-36.

1994)(even though plaintiff did not prevail on every issue in the case, he succeeded on recovering significant award on the main issues and was therefore entitled to prevailing party status). Id.

Such is the case here. While Pacific Bay did successfully defeat one claim asserted by G & K and reduced the amount of damages G & K was entitled to in two other claims, G & K nevertheless prevailed at trial on the October, November, and half of the December invoice amounts. G & K further obtained its contractual interest rate, bringing its judgment, exclusive of attorney's fees to over six thousand dollars.

Furthermore, Pacific Bay would have this court believe that since conceding at the beginning of trial to almost four thousand dollars worth of G & K's claims removed those issues from trial, Pacific Bay can now characterize itself as having "fully prevailed on the major contested claim at trial . . . ". (Brief of Pacific Bay, page 13). Such an argument culls the record in its attempt to inaccurately set forth Pacific Bay as the real victor. While it is true that some of the time spent at trial dealt with issues which Pacific Bay, in part, was successful in defeating, that fact is largely the result of Pacific Bay's posturing at trial. Pacific Bay has failed to point to any case law which indicates that prevailing party status hinges on how much time at trial or how many pages of trial transcript can be allocated to the successes of

each party.<sup>10</sup> In the case of In re: Marriage of Waters, 782 P.2d 1220 (Col. Ct. App. 1989) the Colorado Court of Appeals set forth language which is very illustrative of this point.

To be a prevailing party for the purpose of an award of attorney's fees pursuant to a statute or contract, the applicant must have succeeded upon a significant issue presented by the litigation and must have achieved some of the benefits that he sought in the lawsuit. But, a party need not prevail upon the "central" issue only upon a significant one.

Id. at 1221, 1222. (emphasis added).

In short, G & K obtained a significant judgment from its efforts at trial and prevailed on significant issues therein as well. Just because G & K did not prevail on every issue and may not have even prevailed on the central issue, which encompassed the majority of the time at trial (liquidated damages) does not mean Pacific Bay was the prevailing party.<sup>11</sup>

---

<sup>10</sup> On page 11 of Pacific Bay's brief, Pacific Bay argues that much of the transcript at trial and consequently the time spent at trial dealt with issues upon which Pacific Bay prevailed. Pacific Bay even refers to the number of transcript pages which it attributes to its successes at trial by its own account, in the body of its brief, and references the same in footnote #4 of its brief. G & K asserts that this argument is irrelevant and not supported by case law.

<sup>11</sup> Without being redundant, G & K notes that the amount of time spent at trial, on issues other than the invoices which were stipulated to by Pacific Bay, was not the result of G & K's pleading or Pacific Bay's meritorious arguments, but was instead solely the result of Pacific Bay's posturing before and at the beginning of trial. It goes without saying that this posturing resulted in additional legal expense for G & K, given the fact that Pacific Bay in its original pro se answer admitted owing the



C. The trial court made significant and adequate findings of fact supporting its award of attorney's fees to G & K.

G & K acknowledges "[t]hat trial courts should make findings which explain the factors they consider relevant in making an attorney fee award, especially when they reduce the amount from that requested. Paul Mueller Co. v. Cache Valley Dairy Ass'n, 657 P.2d 1279, 1287 (Utah 1982); Hoth v. White, 799 P.2d 213, 220 (Utah App. 1990); See also Brown, 840 P.2d at 155-56.

Pacific Bay attacks the findings of fact made by the trial court in reaching its decision awarding attorney's fees to G & K. However, perusal of the transcript at trial indicates that the trial court made significant findings of fact in reaching its decision. In fact, the majority of the trial court's ruling and the discussion thereon revolved around the issue of attorney's fees, saving the remaining issues of liquidated damages, interest, lost or unreturned uniforms, and the two December invoices, minimal comment.

Pacific Bay relies heavily on several cases led by the case of Mountain States Broadcasting Co. v. Neale, 783 P.2d 551 (Utah

---

amounts eventually conceded at trial, amounts which it later denied owing in its second answer following Pacific Bay's successful motion to set aside the judgment for its own failure to attend the original trial. From the time of its answer forward, Pacific Bay did not concede owing amounts to G & K and forced G & K to assume it had to prosecute those claims at trial, which it was prepared to do.

App. 1989) in support of its argument that a litigant is entitled to an award of attorney's fees on only those issues which it has resolved in its favor at trial. Pacific Bay further argues that Mountain States stands for the corollary that a defendant to a case is also entitled to fees for areas in which it successfully prevails on at trial. (Pacific Bay's brief, page 23 and 24). Pacific Bay cites to several other cases which they argue on support to this proposition. See p. 23, footnote 8 of Pacific Bay's brief citing Trayner v. Cushing, 688 P.2d 856 (Utah 1984); Paul Mueller Co. v. Cache Valley Dairy Ass'n, 657 P.2d 1279, 1288 (Utah 1982); Stubbs v. Hemmert, 567 P.2d 168, 171 (Utah 1977); Stacey Properties v. Wixen, 766 P.2d 1080, 1085 (Utah App. 1989); Graco Fishing & Rental Tools, Inc. v. Ironwood Exploration, Inc., 766 P.2d 1074, 1079-80 (Utah 1988).

However, almost all these cases are distinguishable on the grounds that the defendants, arguing as Pacific Bay does here, that they were entitled to fees had counterclaimed against the plaintiffs and had prevailed in part at trial on those counterclaims and received money judgments.

Such occurred in Mountain States where the defendant counterclaimed, but both parties obtained some monetary relief. Mountain States, 783 P.2d at 551. In that context the court applied the net judgment rule. Id. at 557. The same occurred in

Stubbs, where the defendant counterclaimed and both parties received some monetary relief. Stubbs, 567 P.2d at 168. In Trayner, the defendant counterclaimed as well, and both parties were awarded a money judgment. The defendant in Trayner, however, recovered less money than did plaintiff and thus the amount the defendant owed to plaintiff was offset by the amount of its recovery. Trayner, 688 P.2d at 856-57. In Paul Mueller, the defendant again asserted a counterclaim. Paul Mueller Co., 657 P.2d at 1286. The entire holding by the Mueller court regarding attorney's fees focused on the amount, not the fact that one party was entitled to attorney's fees and further, focused on the fact that a counterclaim was present, and the defendant had been unsuccessful in prosecuting that counterclaim. Id. at 1288.

Stacey Properties v. Wixen, 766 P.2d 1080 (Utah App. 1988) is likewise distinguishable on these grounds. In Stacey, the defendant counterclaimed and was given an offset based on the success of some of its successful counterclaims. Id.

Finally, the Graco case, while not involving a counterclaim on the part of defendant, nevertheless is distinguishable on other grounds. In Graco, the issue was not whether or not the plaintiff was entitled to attorney's fees, but instead, whether or not the amount of attorney's fees awarded to plaintiff was reasonable. Graco, 766 P.2d at 1080. The defendant in Graco was not entitled

to an award of attorney's fees even though it successfully defeated some of plaintiff's claims. Instead, the defendant in Graco sought to reduce the amount of attorney's fees awarded to the plaintiff.

At trial and in this appeal Pacific Bay instead not only argues that G & K was not entitled to any fees (Pacific Bay brief pgs. 14, 24; Trans. p. 226, 382; R. p. 84) but further argues that Pacific Bay is actually the party entitled to the fees. However, none of the case law cited by Pacific Bay on page 23 of their brief allows for such an occurrence. The case most on point, i. e., one that does not involve a counterclaim, is Graco. The Graco court remanded to the trial court for an appropriate determination as to the award of attorney's fees and required the trial court to consider the successes defendant obtained at trial in determining the amount of fees awarded to the prevailing party. Graco 766 P.2d at 1080. In this case, the trial court made precisely those kinds of findings. The trial court reduced G & K's attorney's fee award in the amount of \$630.00 (Trans. p. 404), not because G & K's fees were not reasonably incurred in the prosecution of its action but because Pacific Bay successfully defeated one of G & K's claims at trial and successfully reduced some of the damages G & K was claiming on other items. The court's language warrants citation in full.

THE COURT: Okay. But following that flexible and reasonable approach, I'm granting attorney's fees for

the plaintiff; however, in light of the fact that the defense prevailed on some of the issues, the plaintiff will not get full attorney's fees, I'm going to reduce some of the attorney's fees in the case. You might call an apportionment-type document--doctrine, which, frankly, I subscribe to. I think its, in the case like this, is fair, it's flexible, and it is my hope that it is viewed to be reasonable, but that's what the court would do in this case. (Trans. 403).

While the court made no specific finding at how it arrived at this number other than it was doing so on the basis of Pacific Bay's partial success at trial, simple math, based on the facts contained in the record indicate that the amount the court reduced G & K's fees constitutes an amount much more than the amount of attorney's fees G & K incurred in the actual trial of the matter.<sup>12</sup>

The trial court specifically referred to Pacific Bay's failure to file an offer of judgment as an awardable found fact, mitigating in favor of an award of fees to G & K. (Trans. 371-372)(See Supra 17) In First Southwestern Financial v. Sessions, 239 Utah Adv. Rpt. 6, 8 (Utah 1994) the Utah Supreme Court considered the failure of Sessions to timely file an offer of judgment on Rule

---

<sup>12</sup> In G & K's proffer of attorney's fees, G & K presented evidence that it expended 2.5 hours in attorney's fees at the rate of \$70.00 per hour on the first day of trial, and spent and additional 2.5 hours on the second day of trial for a total of \$350.00. (Trans. p. 318). This constitutes a little more than half of the \$630.00 reduction of G & K's fees ordered by the trial court judge. (Trans. 318). One can assume that the remaining portion of the reduction is attributable to G & K's pre-trial preparation on the liquidated damage claim which was the only claim Pacific Bay was successful in dismissing in its entirety.

68 of the Utah Rules of Civil Procedure as a factor that mitigated in favor of awarding attorney's fees to other litigant. The fact that attorney's fees were awarded pursuant to a statute in the Sessions case is not an important factor upon which Sessions could be distinguished given the fact that Utah Courts have made no real distinctions between attorneys fees provided by statute and those provided by contract when both appear to be mandatory. See Warner v. Sirstins, 838 P.2d 666, 671 (Utah Ct. App. 1992); Harrington Const. Co. v. Stephenson, 636 P.2d 1034, 1038 (Utah 1981).

If this court accepts the trial court's and Pacific Bay's contention that it was entitled to recognition for the time G & K spent at trial on issues on which it did not prevail, then Pacific Bay has been compensated for almost twice that amount by virtue of the court's \$630.00 offset of G & K's fees.

Since the trial court clearly made findings of fact purporting its decision to award plaintiff attorney's fees and declare G & K the prevailing party (Trans. 402) and since this court should give great deference to the discretionary conclusions of the trial court regarding the award of attorney's fees, Paul Mueller, 657 P.2d at 1287, Pacific Bay's contentions that the court erred in making significant findings of fact is without merit.

## POINT II

### G & K IS ENTITLED TO ATTORNEY'S FEES SHOULD THIS COURT RESOLVE THIS APPEAL IN G & K'S FAVOR.

The law is clear that "a provision for payment of attorney's fees in a contract includes attorney's fees incurred by the prevailing party on appeal as well as trial." Rosenlof v. Sullivan, 676 P.2d 372, 376 (Utah 1983); Management Services Corp. v. Development Associates, 617 P.2d 406, 409 (Utah 1980) (See also Schuhman v. Green River Motel, 835 P.2d 992, 998 (Utah App. 1992)).

Should G & K prevail here on appeal, G & K respectfully requests this court to remand to the trial court for an appropriate award and determination of fees incurred by G & K in response to Pacific Bay's appeal.

IX.

### CONCLUSION

G & K requests this court to deny Pacific Bay's appeal and affirm the trial court's ruling on the attorney's fee issue. G & K further requests that this court remand this case to the trial court with an order that the trial court make an appropriate award of attorney's fees to G & K for the time and costs incurred in responding to Pacific Bay's Appeal.

DATED this 19 day of July, 1994.

HANSON, EPPERSON & SMITH


  
\_\_\_\_\_  
THEODORE E. KANELL  
DANIEL L. STEELE  
Counsel for G & K Services, Inc.

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Plaintiff/Appellee G & K Services, Inc., was hand-delivered this

19 day of July, 1994, to the following:

DAVID M. CONNORS  
MARK W. DYKES  
LeBOEUF, LAMB, GREENE & MacRAE  
136 South Main, Suite 1000  
Salt Lake City, Utah 84101

  
\_\_\_\_\_



## **ADDENDUM**

Tab A



# G&K SERVICES Textile Leasing Systems

APR 14 1989

13624

## SERVICE AGREEMENT

10039-01

THIS IS AN AGREEMENT between Pacific Bay Baking ("Customer") and G&K SERVICES, INC. ("Supplier") for the service described herein on the terms and conditions stated below and on the reverse side as though fully set forth on this side:

1. **Agreement to Supply.** Supplier agrees to supply and Customer agrees to accept exclusively from Supplier, during the term of this Agreement and any extensions or renewals hereof, all of Customer's requirements for the types of merchandise, equipment and services listed below at the prices there stated. If Customer requests additional amounts or types of merchandise, equipment or services, such additional merchandise, equipment or services will be covered by this Agreement and will be subject to the terms and conditions set forth herein.

2. **Prices.** The prices and pricing method for items listed are stated below. Minimum or flat rate charges are based upon total inventory installed and are subject to change if inventory increases or decreases. However, a decrease in the number of Customer's employees will not decrease the weekly service charge unless an employee terminates his employment and Customer returns the full number of garments issued to him.

ITEM DESCRIPTION	NUMBER OF PERSONS	CHANGES PER WEEK	WEEKLY CHARGE PER CHANGE	TOTAL WEEKLY CHARGE
Shirts			.50	
Pants			.60	
Coveralls			1.10	
Lined Jacket			2.25	
Shop Towels			.07	
Terry/Rib Towels			.17	
42" Mop			1.95	
Grill Pad			N/A	
36" Mop			1.70	
3 x 4 Mat			2.50	
4 x 6 Mat			4.25	
Mitt			.75	
<del>Charges will be made for preparation of additional orders, names, emblems and seasonal changeovers.</del>				
All prices are based on 52 weeks per year service.				
TOTAL				

### 3. Supplier's Guarantee. Supplier guarantees that it will:

- Repair and return to Customer, on the next scheduled delivery day, all garments in need of repair;
- Return all merchandise in a useable condition;
- Return all merchandise picked up for cleaning the following scheduled delivery day; and
- Deliver in one week all addmen requesting standard size and color received on a regular delivery day.

If Supplier fails to meet the guarantees listed above, Customer will be entitled to a credit equal to the weekly charge for the non-conforming item. Supplier's failure to meet the above guarantees will not entitle Customer to cancel this Agreement.

### 4. Effective Date. This Agreement takes effect as of the date of signing. For new Customers of Supplier, the estimated date of first installation is \_\_\_\_\_, 19\_\_\_\_.

5. **Price Increases.** If Supplier's costs of rendering services increase during the term of this Agreement or any renewal hereof, the prices of the services may be revised. Supplier will give Customer notice of such price changes by invoice or by statement or other written notice. Customer agrees to accept such price changes so long as the changes do not represent an increase of more than 10% in the price of services being provided for any one year period. If such price increases do exceed 10% in any one year period and Customer decides not to accept the change, Customer agrees to so notify Supplier. If Customer so notifies Supplier, Supplier may, at its sole option, either adjust the price increase or cancel this Agreement.

THE UNDERSIGNED CUSTOMER UNDERSTANDS AND ACCEPTS THE TERMS OF THE SERVICE AGREEMENT PRINTED ABOVE AND ON THE REVERSE.

Customer Pacific Bay Baking

Address 535 West 800 South

City Woodcross

State Utah Zip Code 84087

Accepted By [Signature]

Title Controller

Attest Loyd Controller

Date 4/12/89

## G & K Services

Salesman's Signature [Signature]

Accepted By [Signature]

Title Area Manager

OFFICE COPY

6 **Payment of Charges.** Charges will be due and payable in cash at time of delivery, or, if Customer's credit is approved by Supplier, within 15 days of the month following delivery. Delinquent accounts are subject to automatic Cash On Delivery basis. All amounts not paid when due will be subject to a service charge to be added thereto of one and one-half percent (1½%) per month (18% annually) until paid in full.

7 **Term of Agreement.** This Agreement will continue until a date thirty-six (36) months from the date of first installation (for new Customers) or the date Customer signs a renewal contract (for renewal Customers) (the "Expiration Date"). It will then be renewed automatically for a period of one year unless written notice of non-renewal is given by either party to the other at least sixty (60) days prior to the Expiration Date. Subsequent renewal will occur automatically on a yearly basis unless sixty (60) days written notice of non-renewal is given prior to any anniversary of the Expiration Date.

8 **Title to Merchandise.** All merchandise and equipment provided to Customer under this Agreement will remain the property of Supplier. Customer must return all merchandise when soiled to Supplier and may not permit any other person to clean or launder it. Customer will be required to pay the depreciated value of all merchandise or equipment lost or damaged beyond repair (ordinary wear and tear excepted) during the course of the agreement or not returned to Supplier at termination of the Agreement.

9 **Depreciated Value.** Depreciated value for the purpose of this Agreement will be determined by deducting from Supplier's original list price four percent (4%) per month down to a minimum of fifty percent (50%) of list price.

10 **Specially-Purchased Merchandise.** If Customer breaches this Agreement or gives notice of its termination, Customer agrees to buy, upon demand of Supplier, all of the following specially-purchased merchandise in service or held in stock by Supplier under this Agreement at a price equal to its depreciated value as defined above. Customer must pay for such merchandise within thirty (30) days of Supplier's demand.

ITEM DESCRIPTION	NUMBER OF PERSONS	CHANGES PER WEEK	TOTAL INVENTORY

11 **Interruptions of Service.** Supplier will not be liable for any interruption of Supplier's usual operations, or for delay, postponement or termination of the service provided for in this Agreement by reason of acts of God, strikes, lockouts, or other industrial disturbances, wars, blockages, riots, arrests, explosions, fires, floods, accidents to machinery or any other cause not within the control of Supplier.

12 **Customer Warranty.** Customer warrants that it is not presently under contract with any other party for the furnishing of the items of services which are the subject matter of this Agreement, and that this Agreement will not constitute or result in the breach of any contractual relationships to which Customer is a party or by which it is bound.

13 **Liquidated Damages Upon Breach.** The parties recognize and agree that if Customer should breach this Agreement or terminate this Agreement for any reason other than expressly permitted hereunder, the damages suffered by Supplier are not currently known or ascertainable. Therefore, the parties agree that in the event of such breach or wrongful termination, Customer will pay to Supplier as liquidated damages, and not as a penalty, an amount equal to forty percent (40%) of the average weekly amounts invoiced to Customer multiplied by the number of weeks remaining in the term of the Agreement, beginning with the date of breach. Such payments will be in addition to all other amounts owed by Customer to Supplier hereunder on the date of breach or wrongful termination.

14 **Change in Customer's Location.** Supplier's obligation to serve and Customer's obligation to accept service will continue even if Customer moves its business to a different location, provided that the new location is within Supplier's route delivery area. If Customer does business at more than one location, the items required at each location will be delivered to each such location. Customer may not use any items delivered to one location at any other location.

15 **Costs and Attorney's Fees.** Customer agrees to pay Supplier any costs of collection incurred by Supplier in enforcing Customer's obligations under this Agreement. If Supplier must institute a legal proceeding to collect any amount owing hereunder, then the unsuccessful party in such legal proceeding must pay to the successful party its reasonable attorneys' fees.

16 **No Warranty With Respect to Merchandise.** CUSTOMER ACKNOWLEDGES THAT THE GARMENTS RENTED UNDER THIS AGREEMENT ARE FOR GENERAL PURPOSES AND ARE NOT DESIGNED OR RECOMMENDED FOR AREAS OF FLAMMABILITY OR WHEN CONTACT WITH HAZARDOUS MATERIALS OR IGNITION SOURCES IS POSSIBLE. SUPPLIER IS NOT THE MAKER OF THESE GARMENTS AND HAS NOT MADE AND DOES NOT MAKE ANY REPRESENTATION, WARRANTY OR COVENANT EXPRESS OR IMPLIED WITH RESPECT TO THE MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, QUALITY, SAFETY OR SUITABILITY OF THE GARMENTS FOR CUSTOMER USE, EXCEPT AS EXPRESSLY SET FORTH IN PARAGRAPH 3 OF THIS AGREEMENT.

17 **Binding Agreement.** This Agreement will be binding on and for the benefit of the personal representative successors and assigns of the parties hereto.

18 **Severability.** If any provision of this Agreement is determined to be invalid by a court of competent jurisdiction, the remaining terms and conditions will remain in full force and effect.

19 **Entire Agreement.** This Agreement constitutes the entire Agreement and includes all understandings between the parties. No waivers or statements made by any representative of Supplier will be valid unless contained herein.

20 **SPECIAL INSTRUCTIONS** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_