

2006

Ivan Radman v. Flanders Corporation : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

IVAN RADMAN, et al.

Plaintiffs/Appellants,

vs.

FLANDERS CORPORATION, a North
Carolina corporation,

Defendant/Cross-Appellant.

Appellate Case No. 20060479-CA

(Trial Court Civil No. 010904483)

FLANDERS CORPORATION, a North
Carolina corporation, and FLANDERS
ACQUISITIONS, INC., a Utah
corporation,

Counterclaim and Third-Party
Plaintiffs/Cross-Appellants,

vs.

IVAN RADMAN, et al.

Counterclaim
Defendants/Appellants.

Priority No. _____

BRIEF OF APPELLANT

**APPEAL FROM THE JUDGMENT OF
THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH
JUDGE JOSEPH C. FRATTO, JR.**

DEC 13 2006

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LISTING OF PARTIES

Ivan Radman
Janet Radman
Donna Smylie
Peter Radman
Joanne Crook
Bronte Clark
Martin Radman
Jordan Radman

Plaintiffs/Appellants

vs.

Flanders Corporation
Flanders Acquisitions, Inc.

Defendants/Cross-Appellants.

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Plaintiffs Ivan Radman, Janet Radman, Donna Smylie, Peter Radman, Joanne Crook, Bronte Clark, Martin Radman, and Jordan Radman (the “Radmans”) respectfully submit their brief on appeal.

STATEMENT OF APPELLATE JURISDICTION

The Utah Court of Appeals has appellate jurisdiction over this matter pursuant to Utah Code Ann. § 78-2a-3(2)(j) (2006).

STATEMENT OF THE ISSUES

At the core of this matter is the interpretation of a written stock merger agreement between the parties. In addressing the Radmans’ claims, the trial court found that one section of the written agreement, Section 9(a), was ambiguous and required consideration of extrinsic evidence to determine the intent of the parties. Ultimately, the trial court ruled in favor of the Radmans on their claim pursuant to Section 9(a) of the Merger Agreement. However, with regard to the contractual provisions at issue in the counterclaims asserted by the defendant, the trial court made specific findings that those provisions were unambiguous. Notwithstanding these findings, the trial court allowed the defendant to introduce a substantial amount of extrinsic evidence regarding pre-merger statements allegedly made by Ivan Radman as the basis for defendant’s claims that the Radmans had breached the warranties the trial court had determined were unambiguous. The trial court then found that a breach of the warranties had occurred based upon that extrinsic evidence.

Once the trial court found that a breach had occurred based upon its acceptance and consideration of extrinsic evidence, it then recharacterized the parties’ agreement as

an asset purchase agreement (rather than a stock merger as specifically set forth in the written agreement) and awarded Flanders a return of 100% of the purchase price that the trial court determined Flanders had paid for certain electric melters that were included in the assets GFI owned and that Flanders acquired in the merger through its acquisition of GFI's stock. In making its determination, the trial court failed to allocate any value at all to significant assets that were included in the transaction. Furthermore, by recharacterizing the agreement as an asset purchase agreement, the trial court failed to hold counterclaim plaintiffs to their burden of showing whether, and by what amount, the alleged breaches of warranty had diminished the value of the GFI stock acquired by Flanders pursuant to the Merger Agreement.

Accordingly, the issues presented herein may be summarized as follows:

1. Did the trial court err in allowing extrinsic evidence to be introduced at trial regarding alleged pre-merger statements related to specific performance of certain items of equipment when no warranties or guaranties of such performance standards were included within the parties' written agreement and the trial court had specifically determined that the warranties contained within the written agreement were not ambiguous?¹

¹ This issue was preserved repeatedly at the trial level. One instance may be found at R. at 4941, pp. 21-22.

This issue is a matter of contract interpretation, which the court reviews for correctness. WebBank v. Am. Gen. Annuity Serv. Corp., 2002 UT 88, ¶¶ 18-22, 54 P.3d 1139.

2. Did the trial court err by improperly characterizing the Merger Agreement as an asset purchase agreement and determining that the entire purchase price paid by Flanders was attributable to only three individual assets?²

3. Did the trial court err by awarding damages to Flanders based on a valuation method that focused solely on the value of individual assets rather than a determination of the impact of the alleged breach of warranty on the value of the stock acquired by Flanders?³

4. Even if a correct determination of damages for Flanders' breach of warranty claims could be made based upon a valuation of specific assets, were the trial court's determinations that (a) \$1,162,528 of the purchase price was allocable to the electric melters; (b) that other equipment had no value; and (c) that the electric melters had no value clearly erroneous?⁴

² This issue first became apparent in the court's memorandum decision dated October 6, 2005, in which it apportioned the purchase price for the GFI stock to three specific assets. R. at 4296. The Radmans preserved this issue in their objections to the proposed findings of fact and conclusions of law. R. at 4613, objection to Flanders' Proposed Finding No. 54.

This issue is a matter of contract interpretation, which the Court reviews for correctness. WebBank v. Am. Gen. Annuity Serv. Corp., 2002 UT 88, ¶¶ 18-22, 54 P.3d 1139.

³ Preservation of this issue may be found at R. at 4613.

Whether the trial court applied the correct rule for measuring damages is a question of law that is reviewed for correctness. Mahana v. Onyx Acceptance Corp., 2004 UT 59, ¶ 25, 96 P.3d 893.

⁴ Preservation of this issue may be found at R. at 4614-16.

This issue presents a mixed question of law and fact. This Court reviews the trial court's factual determinations under a clearly erroneous standard. Alta Indus. Ltd. v. Hurst, 846 P.2d 1282, 1286 (Utah 1993). Questions of law are reviewed for

5. Did the trial court err when it offset Flanders' award against the Radmans' award prior to calculating pre-judgment interest on the Radmans' award when only the Radmans' award was entitled to pre-judgment interest and the awards arose at different times?⁵

6. Does the cumulative effect of the trial court's evidentiary and procedural rulings lead to a conclusion that there is a reasonable likelihood that unfairness or injustice resulted at trial?⁶

STATEMENT OF THE CASE

COURSE OF THE PROCEEDINGS

Trial of this matter occurred over the course of nine days during three different time frames: May 3-4, 2004, October 12-14, 2004 and July 19-22, 2005. Subsequent to the trial, the trial court issued a memorandum decision on October 6, 2005 and, after considering post-trial motions and briefing, a second memorandum decision dated February 10, 2006. The trial court's findings of facts and conclusions of law were

correctness. United Park City Mines Co. v. Greater Park City Co., 870 P.2d 880, 885 (Utah 1993).

5 Preservation of this issue may be found at R. at 4623.

This issue presents a question of law that the Court reviews for correctness. United Park City Mines Co. v. Greater Park City Co., 870 P.2d 880, 885 (Utah 1993).

6 The record is replete with instances in which the Radmans' counsel objected to the introduction of evidence, moved to strike testimony or evidence, and filed motions in limine to prevent the introduction of evidence. Examples may be found at R. at 4942, pp. 4-26.

The Court will not reverse on mere error but only if it is substantial and prejudicial to the extent that there is a reasonable likelihood that unfairness or injustice has resulted. Brown v. Richards, 840 P.2d 143, 149 (Utah Ct. App. 1992).

entered on April 17, 2006 and the Entry of Judgment against the Radmans for the net judgment was entered on July 3, 2006.

STATEMENT OF FACTS

1. G.F.I., Inc. (“GFI”) was a relatively small, Salt Lake City-based business involved in manufacturing and selling fiberglass and fiberglass air filters. R. at 2872.

Flanders Corporation (“Flanders”) is a publicly traded, North Carolina corporation involved in the manufacture and sale of fiberglass air filters. R. at 14, 371.
2. On November 26, 1997, and pursuant to a merger agreement dated November 1, 1997 (the “Merger Agreement”), defendant Flanders, through its subsidiary Flanders Acquisitions, acquired all of the stock of GFI from the Radmans. R. at 508–09, 521. Add. 1.
3. A recital of the Merger Agreement stated “each issued and outstanding share of G.F.I. Capital Stock (the ‘G.F.I. Capital Stock’ or ‘G.F.I. Shares’) will be converted into shares of Flanders Capital Stock (the ‘Flanders Capital Stock’).” R. at 508. Add. 1. Section 1(d) of the Merger Agreement then specifically provided that “[a]s of the Effective Time, . . . , all G.F.I. Capital Stock issued and outstanding immediately prior to the Effective Time shall be converted into validly issued, fully paid and nonassessable shares of Flanders Capital Stock” R. at 509. Add. 1.
4. Prior to the Merger Agreement, GFI was an ongoing business operation, utilizing its equipment, technology and personnel to manufacture fiberglass, which was

either incorporated into air filter products that GFI manufactured and sold, or sold in rolls to other filter manufacturers. R. at 2872.

5. In the mid-1990s, the Radmans began developing a new process for making fiberglass that utilized an electric, instead of gas, furnace to melt the glass. R. at 4860. Add. 4.
6. Up until that time, all facilities that produced fiberglass using the Modigliani system utilized gas melters. R. at 4860. Add. 4.
7. GFI possessed four major categories of equipment at the time of the merger: (1) gas melters, (2) electric melters, (3) a curing oven, and (4) filter-making machines. In addition to these major categories, GFI possessed numerous other items of equipment that were utilized as part of its ongoing business operations. A comprehensive list of the property GFI possessed can be found in the trial transcript and exhibits. R. at 4944, pp. 609–84, Add. 7; Pl. Exh. 5, pp. GFI0521–0523, Add. 5.
8. Until Flanders purchased GFI, Flanders procured the fiberglass used to manufacture its air filters from outside vendors. After acquiring GFI in November of 1997, Flanders began manufacturing a portion of its own fiberglass in-house at the GFI facility. R. at 371.
9. Flanders was still using the electric melters to produce fiberglass in July 2005 (the last phase of the evidentiary portion of the trial). R. at 4947, pp. 579-580.
10. Nearly two and one-half years after the merger, in May of 2000, Flanders requested that Ivan Radman sign a confidentiality agreement in order to protect the

technology it had received in the merger and to prevent Mr. Radman from disclosing that information to third parties. Paragraph 9 of the Confidentiality and Non-Disclosure Agreement states:

“Radman understands and acknowledges that such Confidential Information had been developed or obtained by Flanders by the investment of a significant time, effort, and expertise, and that such Confidential Information provides Flanders with a significant competitive advantage in its business.”

R. at 4947, pp. 499–501, Pl. Exh. 44. Add. 6.

11. Flanders continued to list the value of the GFI acquisition on its SEC filings for five years after the merger (valuing it at \$1,394,000, including \$547,000 of goodwill). R. at 4942, pp. 252-53 and R. at 4943, pp. 312-17, 320-26, Pl. Exh. 23, 24.
12. Flanders’ allocation of \$847,000 to tangible assets and \$547,000 to goodwill was the result of a collaboration between Ivan Radman (on behalf of GFI), Steve Clark (on behalf of Flanders), and Flanders’ accounting team. R. at 4943, p. 311.
13. Under the Merger Agreement, the Radmans’ shares in GFI were converted into shares of Flanders Capital Stock, and the Radmans received 187,502 restricted shares of Flanders Capital Stock. R. at 508–09, 536.
14. The restriction on the shares of Flanders stock provided that the Radmans could not sell them for at least one year after the date of the merger. R. at 4939, p. 14.
15. Section 9(a) of the Merger Agreement also included the following provision:

“If at the time any G.F.I. Shareholders sell any of the 187,502 shares of Flanders Capital Stock at a price below \$8.00 per share, and the average trading price for the preceding three business days of Flanders Capital Stock as listed on the NASDAQ Stock Exchange is

below \$8.00 per share, Flanders shall deliver additional restricted shares of Flanders Common Stock to such G.F.I. Shareholders in order to maintain the Market Price (the “Short Fall”), with such Short Fall shares valued at the Market Price.”

R. at 528. Add. 1.

16. When the Radmans were able to sell their shares of Flanders stock, the trading price on the NASDAQ Stock Exchange had fallen significantly below \$8.00 per share. R. at 3-4, 4870. Add. 4.

17. The Radmans notified Flanders of the Short Fall and requested that additional shares of stock be issued in order to maintain the Market Price as provided by the Merger Agreement. R. at 4, 2873, 4870. Add. 4.

18. Although Flanders did tender additional shares of Flanders capital stock to the Radmans as the result of their request that Flanders perform under the Merger Agreement, the Radmans did not believe the additional shares issued by Flanders were sufficient to fulfill Flanders’ obligation pursuant to the Merger Agreement. R. at 4-5, 4870. Add. 4.

19. On May 21, 2001, the Radmans filed their complaint in the underlying action seeking damages for Flanders’ failure to issue a sufficient number of shares of Flanders Common Stock in order to maintain the Market Price. R. at 1-9.

20. Specifically, the Radmans alleged that Flanders breached the Merger Agreement when it failed and refused to transfer to the Radmans additional shares of Flanders Common Stock to compensate the Radmans for the Short Fall between the market and selling prices of Flanders stock. R. at 323-332.

21. The trial court ruled prior to trial, in connection with a motion for summary judgment by Flanders, that Section 9(a) of the Merger Agreement was ambiguous. R. at 4939, pp. 59-60, R. at 4288-89. Add. 2.
22. Based upon the trial court's determination that Section 9(a) was ambiguous, it considered extrinsic evidence at trial on that contractual provision, and determined that the parties intended that the Radmans be issued sufficient Short Fall shares to insure that they would receive a total purchase price of \$1.5 Million. R. at 4865-71. Add. 4.
23. After determining that Flanders had breached Section 9(a) of the Merger Agreement, the trial court awarded damages in the amount of \$547,904.50 to the Radmans, based upon the parties' stipulation to that amount as the calculation of damages in the event the trial court ruled in favor of the Radmans on their claim against Flanders. R. at 2873, 4871. Add. 4.
24. Only after the Radmans filed the underlying action against Flanders did Flanders allege that the Radmans had breached the Merger Agreement. R. at 4943, p. 299. In its counterclaim, Flanders sought relief for claims of breach of contract, breach of the implied covenant of good faith and fair dealing, fraud and intentional misrepresentation, negligent misrepresentation, and unjust enrichment based upon allegations that the Radmans had breached certain warranties in the Merger Agreement. R. at 13-28.

25. Flanders' claims for fraud, intentional misrepresentation and negligent representation were based upon allegations that Ivan Radman had made statements regarding specific standards of performance of the electric melters. R. at 1116-43.
26. Prior to trial, Flanders dismissed its claims for fraud and intentional misrepresentation and negligent misrepresentation with prejudice. R. at 2869, 4939, pp. 4-5.
27. As the action progressed, there were three warranties in the Merger Agreement that became the focus of Flanders' claims against the Radmans:
- a. ¶ 3(d): Financial Statements. The financial statements contained in the unaudited tax returns of G.F.I. for the years ended June 30, 1994, June 30 1995, and June 30, 1996, which are attached hereto as Schedule 3(d) to the Disclosure Schedule attached hereto as Exhibit B (the "Disclosure Schedule"), fairly present the financial condition of G.F.I. as at the dates described therein. R. at 513. Add. 1.
 - b. ¶ 3(h): Assets. Except as set forth on the Disclosure Schedule, G.F.I. owns, possesses and controls and has good and marketable title to all of its assets, free and clear of any mortgage, lien, claim, defect, charge, encumbrance and right of third parties. Such assets are in good operating condition and repair, ordinary wear and tear excepted, and conform to applicable ordinances, regulations, building, zoning and other laws and directives. G.F.I. enjoys exclusive, peaceful and undisturbed possession under all equipment and other leases to which it is a party. All such leases are identified on the Disclosure Schedules, are valid and enforceable in accordance with their terms, and no party thereto is in default thereunder. R. at 513. Add. 1.
 - c. ¶ 2(h): No Material Misstatements. The G.F.I. Shareholders have not made any material misstatement of fact or omitted to state any material fact necessary or desirable to make complete, accurate and not misleading every representation and warranty *set forth herein*. R. at 510 (emphasis added). Add. 1.
28. The Merger Agreement also contains an integration clause, which states:

“(f) Entire Agreement. This Agreement, including the exhibits and documents referred to herein which are a part hereof, contains the entire understanding of the parties hereto with respect to the subject matter contained herein and may be amended only by a written instrument executed by all parties hereto or their respective successors or assigns. ***There are no restrictions, promises, warranties, covenants, or undertakings other than those expressly set forth or referred to herein.*** Any paragraph headings or table of contents contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.”

R. at 532 (emphasis added). Add. 1.

29. The trial court made specific findings that the warranties contained within the

Merger Agreement were not ambiguous. R. at 4887, 4889. Add. 4.

30. In finding that the warranty contained within ¶ 3(h) of the Merger Agreement was

not ambiguous, the trial court stated that such section was capable of only one

reasonable interpretation and interpreted the phrase “good operating condition,

ordinary wear and tear excepted” to mean “that the equipment performs the

function expected of a similar piece of equipment in the industry to the standards

of the industry, modified to take into account the effects of the equipment’s age

and prior wear.” R. at 4889. Add. 4.

31. In spite of these specific findings, the trial court allowed extrinsic evidence to be

admitted at trial regarding pre-merger statements allegedly made by Ivan Radman

regarding specific performance standards of the electric melters. R. at 3074-92,

3778.

32. Flanders acknowledged at trial that guaranties of the specific performance standards allegedly made by Ivan Radman pre-merger were not expressly included in the Merger Agreement. R. at 4943, p. 295-296. See also R. at 504-630, Add. 1.
33. In addition to allowing the introduction of extrinsic evidence related to specific performance standards, the trial court then based its conclusion that the Radmans had breached the warranties within the Merger Agreement on such extrinsic evidence. R. at 4294. Add. 2.
34. Michael Lemmon, Flanders' damages expert, did not attempt or profess to conduct a valuation of either the GFI stock or the individual equipment, but instead assumed the value of the equipment was zero based solely on his conversations with Flanders' representatives. R. at 4945, pp. 203-04.
35. In determining the amount of damages due to Flanders as the result of the trial court's finding that the Radmans had breached the warranties in the Merger Agreement, the trial court stated that it would be pure speculation based upon the evidence introduced by Flanders at trial to try to determine what amount Flanders spent on repair of the electric melters rather than their subsequent modification and redesign. R. at 4295. Add. 2.
36. The trial court further stated that in light of the numerous modifications made to the melters, it would be next to impossible to determine if later repairs were the result of initial problems with the machines or the upgrades to the melters that were made by Flanders. R. at 4295. Add. 2.

37. The trial court then found that “even more convoluted” would be a determination of Flanders’ alleged lost profits and that, in any event, Flanders did not mitigate its damages because it chose to modify the equipment rather than repair it. Therefore, the trial court specifically found that neither the costs associated with the modifications and upgrades nor profits lost during the period of time the machines were being modified and upgraded were appropriate measures of Flanders’ damages. R. at 4295-4296. Add. 2.
38. However, the trial court then concluded that Flanders was entitled to a refund of 100% of the purchase price it “paid for machines that were not in good operating condition.” R. at 4296. Add. 2.
39. To arrive at that conclusion, the trial court determined that the entire purchase price Flanders paid to acquire the GFI stock was attributable to only three specific assets: (1) inventory (\$88,353); (2) accounts receivable (\$249,119); and (3) electric melters (\$1,162,528) (purchase price of \$1,500,000 - \$88,353 - \$249,119) and stated that there was no evidence that the other equipment that was part of the acquisition had value beyond minimal scrap value and that there was no value attributable to GFI’s “goodwill.” R. at 4296. Add. 2.
40. The trial court initially awarded the Radmans pre-judgment interest on their damages but made no award of pre-judgment interest to Flanders. R. at 4292-97.
41. Following the trial court’s October 6, 2005 Memorandum Decision, Flanders filed a motion for clarification regarding the award and calculation of pre-judgment interest on the amount of damages awarded to the Radmans. R. at 4348-50.

42. In a subsequent Memorandum Decision, dated February 10, 2006, the trial court determined that the Radmans' award was subject to offset by the award to Flanders prior to calculation of pre-judgment interest on the Radmans' award. Accordingly, because the net judgment was in favor of Flanders, the trial court determined that the Radmans were not entitled to pre-judgment interest. R. at 4674-75. Add. 3.

SUMMARY OF ARGUMENTS

1. The trial court incorrectly considered extrinsic evidence relating to pre-merger negotiations when considering Flanders' counterclaim alleging breaches of warranties found within the parties' written agreement.

The Merger Agreement between the parties contained a specific integration provision and the warranties at issue were unambiguous. Therefore, the rules of contractual interpretation required the trial court to interpret the warranties according to the ordinary and normal meaning of the terms used therein and to exclude extrinsic or parol evidence that would alter that meaning. Further, the Utah Supreme Court has already interpreted a contract provision stating that equipment was in "good condition and repair," concluding that this phrase requires a comparison to average quality of similar equipment of like age. The trial court improperly imposed guaranties of specific performance that were not found anywhere within the parties' written agreement.

2. The trial court's recharacterization of the parties' agreement as an asset purchase agreement was reversible error. The trial court's improper characterization, and subsequent allocation of the purchase price to only three of GFI's individual assets,

resulted in the trial court allowing Flanders to avoid its burden of demonstrating its damages in accordance with the method that is appropriate for a stock merger. As a result, Flanders failed to meet its burden of demonstrating with reasonable certainty the amount of damages it suffered as the result of the Radmans' alleged breach of warranty. Flanders introduced no evidence regarding a differential between the actual value of the stock at the time of the merger and the value of that stock had the warranties not been breached.

Even if the trial court did not err in concluding that the Merger Agreement was an asset purchase agreement rather than a stock for stock merger, Flanders failed to introduce evidence from which the trial court could properly calculate a differential between the actual value of the equipment delivered to Flanders at closing and the value of that same equipment had the warranties not been breached.

3. The trial court compounded its error when it determined that none of the assets involved in the transaction, other than the inventory and accounts receivable, had any value at all at the time of the merger. The trial court's decision that no other assets had value, even when the evidence is viewed in the light most favorable to the trial court's determination, is clearly erroneous. The overwhelming weight of the evidence demonstrated that Flanders received assets of significant value, continued to operate the business and utilize those assets, still believed several years after the merger that it was important to bind Ivan Radman to a confidentiality agreement to protect those assets, and continued to list the value of the assets it received, including goodwill, on its SEC filings for five years after the merger. Finally, the trial court's reliance upon extrinsic evidence

regarding Flanders' subjective intent in acquiring GFI, and statements of subjective value of the assets to Flanders, was reversible error.

4. The trial court erred in determining, in response to Flanders' post-trial motion for clarification, that the Radmans' were not entitled to pre-judgment interest on the court's award of damages in their favor prior to an offset of the award of damages to Flanders. Contrary to the trial court's ruling, however, the Radmans were entitled to pre-judgment interest because their damages were liquidated. Because Flanders was not entitled to prejudgment interest on its damages (since they were unliquidated), and the awards arose on different dates, the trial court should have calculated pre-judgment interest on the amount of the award to the Radmans prior to applying any offset.

5. The cumulative effect of the trial court's evidentiary and procedural rulings resulted in prejudice to the Radmans. The trial court improperly allowed Flanders to introduce evidence and testimony that had not been adequately or timely disclosed during discovery, allowed a non-party to be substituted as a counterclaimant at the beginning of trial, and admitted evidence regarding statements made during settlement discussions.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT CONSIDERED EXTRINSIC EVIDENCE IN DETERMINING WHETHER A BREACH OF WARRANTY HAD OCCURRED.

The trial court committed reversible error by considering extrinsic evidence regarding the parties' pre-merger negotiations related to performance standards that were never included in the parties' written agreement, in spite of a clear integration clause,

when it had specifically determined as a matter of law that the warranties actually contained in the written agreement were unambiguous.

A. The Merger Agreement Was an Integrated Agreement. The Merger Agreement contained an integration clause that required the trial court to determine the intentions of the parties based upon the language of the written agreement. Enerco, Inc. v. SOS Staffing Servs., 2002 UT 78, ¶10, 52 P.3d 1272.⁷

Specifically, the integration clause states as follows:

“(f) Entire Agreement. This Agreement, including the exhibits and documents referred to herein which are a part hereof, contains the entire understanding of the parties hereto with respect to the subject matter contained herein and may be amended only by a written instrument executed by all parties hereto or their respective successors or assigns. ***There are no restrictions, promises, warranties, covenants, or undertakings other than those expressly set forth or referred to herein.*** Any paragraph headings or table of contents contained in this Agreement

⁷ See also Ford v. American Express Fin. Advisors, Inc., 2004 UT 70, ¶ 28, 98 P.3d 15 (“Merger clauses are routinely incorporated in agreements in order to signal to the courts that the parties agree that the contract is to be considered completely integrated. A completely integrated agreement must be interpreted on its face, and thus the purpose and effect of including a merger clause is to preclude the subsequent introduction of evidence of preliminary negotiations or of side agreements in a proceeding in which a court interprets the document.”); Spears v. Warr, 2002 UT 24, ¶ 19, 44 P.3d 742 (“The general rule is that in the absence of fraud, an apparently complete and certain agreement which the parties have reduced to writing will be conclusively presumed to contain the whole agreement; and that parol evidence of contemporaneous [or prior] conversations, representations or statements will not be received for the purpose of varying or adding to the terms of the written agreement.”) (alteration in original); Union Bank v. Swenson, 707 P.2d 663, 665 (Utah 1985) (“Absent fraud or other invalidating causes, the integrity of a written contract is maintained by not admitting parol evidence to vary or contradict the terms of the writing once it is determined to be an integration. It is also maintained by applying a rebuttable presumption that a writing which on its face appears to be an integrated agreement is what it appears to be. . . . Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression.”).

are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.” R. at 532 (emphasis added). Add. 1.

Particularly in light of the existence of the integration clause and the trial court’s conclusions that the warranties were unambiguous, the trial court was required to interpret the Merger Agreement and to give meaning to its terms as a whole without the consideration of parol or extrinsic evidence.⁸

This case is a prime example why there is such a well-developed body of case law relating to the exclusion of parol evidence when interpreting an integrated written agreement. Here, based on extrinsic (and highly disputed) evidence, and in direct disregard of the integration clause which specifically stated that there had been no warranties, promises, covenants, or undertakings other than those within the four corners of the document, the trial court created and imposed specific performance guaranties that cannot be found anywhere within the Merger Agreement.

B. The Integration Clause Affects the Trial Court’s Interpretation of the Warranties Found Within the Agreement. In order to correctly interpret the warranties at issue in this case, the trial court was required to consider their meaning in light of the integration clause. “[I]t is axiomatic that a contract should be interpreted so as to harmonize all of its provisions and all of its terms, and all of its terms should be given effect if it is possible to do so.” Buehner Block Co. v. UWC Assocs., 752 P.2d 892, 895 (Utah 1988). See also Alpha Partners, Inc. v. Transamerica Inv. Mgmt., L.L.C., 2006 UT

⁸ It should be noted that Flanders dismissed with prejudice its claims for fraud and intentional misrepresentation prior to beginning the first phase of trial. R. at 2869. Accordingly, there is no claim of fraud or misrepresentation that would bring into question the issue of whether the integration clause should be given its full effect.

App 331, ¶ 23, 558 Utah Adv. Rep. 7 (“[A]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable.”) (quoting Restatement (Second) of Contracts § 203 (1981)).

Three warranties contained within the Merger Agreement were the subject of Flanders’ counterclaim. Those warranties are as follows:

1. ¶ 3(d): Financial Statements. The financial statements contained in the unaudited tax returns of G.F.I. for the years ended June 30, 1994, June 30 1995, and June 30, 1996, which are attached hereto as Schedule 3(d) to the Disclosure Schedule attached hereto as Exhibit B (the “Disclosure Schedule”), fairly present the financial condition of G.F.I. as at the dates described therein.⁹ R. at 513. Add. 1.

2. ¶ 3(h): Assets. Except as set forth on the Disclosure Schedule, G.F.I. owns, possesses and controls and has good and marketable title to all of its assets, free and clear of any mortgage, lien, claim, defect, charge, encumbrance and right of third parties. Such assets are in good operating condition and repair, ordinary wear and tear excepted, and conform to applicable ordinances, regulations, building, zoning and other laws and directives. G.F.I. enjoys exclusive, peaceful and undisturbed possession under all equipment and other leases to which it is a party. All such leases are identified on the Disclosure Schedules, are valid and enforceable in accordance with their terms, and no party thereto is in default thereunder. R. at 513. Add. 1.

3. ¶ 2(h): No Material Misstatements. The G.F.I. Shareholders have not made any material misstatement of fact or omitted to state any material fact necessary or desirable to make complete, accurate and not misleading every representation and warranty *set forth herein*. R. at 510 (emphasis added). Add. 1.

⁹ The Radmans assert that the trial court’s finding that there was a breach of this warranty is error. However, given that the trial court correctly determined that Flanders had not met its burden of demonstrating it was damaged by such alleged breach, the trial court’s ruling regarding the breach is not discussed substantively herein. To the extent Flanders, the cross-appellant herein, challenges the trial court’s determination regarding damages stemming from this breach in its cross-appeal, the Radmans reserve the right to discuss, in response thereto, the trial court’s underlying ruling that there was a breach of this warranty.

The Merger Agreement also included the integration clause quoted in subsection A. above. Accordingly, to fulfill its obligation to harmonize and give effect to all provisions of the contract, and specifically the integration clause, the trial court was required to interpret the warranties without resorting to extrinsic evidence.¹⁰

C. The Warranties Were Unambiguous.

1. **The trial court determined that the warranties were unambiguous.**

Significantly, although the trial court made several findings of fact regarding pre-merger representations and discussions, it never made any finding of fact or conclusion of law that the warranties included within the Merger Agreement were ambiguous and required the consideration of extrinsic evidence in order to determine their meaning.¹¹

The trial court actually ruled just the opposite with regard to the warranty in Section 3(h) of the Merger Agreement:

“Based on the evidence that has been presented, the Court finds that the arguments and the evidence that have been presented from both parties demonstrate that the phrase “good operating condition, ordinary wear and tear excepted” is only capable of one reasonable interpretation and that the phrase is therefore not ambiguous.”

¹⁰ Unfortunately, it is nearly impossible to determine whether the trial court’s ruling that there was a breach of the warranties could have been made without reliance upon improper evidence because such evidence was so prolific throughout the trial.

¹¹ This differs significantly from the trial court’s consideration of extrinsic evidence with regard to the Radmans’ claim against Flanders that was separately addressed in the first phase of the trial. As to that issue, the trial court explicitly found that the specific contractual provision at issue was ambiguous before considering any extrinsic evidence. R. at 4288-89, 4865, 4872. Add. 2, 4.

R. at 4889.¹²

The trial court went on to interpret the phrase “good operating condition, ordinary wear and tear excepted” to “mean that the equipment performs the function expected of a similar piece of equipment in the industry to the standards of the industry, modified to take into account the effects of the equipment’s age and prior wear.” R. at 4889. Add.

4.¹³ Yet, in spite of its conclusions that the warranties were not ambiguous, the trial court disregarded the integration clause of the contract, freely considered extrinsic evidence regarding the parties’ alleged pre-contractual communications and negotiations, and found that the equipment was required to satisfy specific performance standards allegedly discussed in those communications despite the undisputed fact that those performance standards were never included in the parties’ written agreement.¹⁴

¹² The trial court also determined that the warranty found in Paragraph 2(h) was not ambiguous. R. at 4887. Add. 4.

¹³ The Radmans dispute the trial court’s conclusion that any such industry standard was ever established. Although witnesses for Flanders discussed their expectations and goals for the operation of the electric melters, the only witness to suggest some form of industry standard (24/7, 90%) was Buddy Mercer. R. at 4944, p. 689-90. However, Mr. Mercer also testified that he had not had any prior experience with electric melters. R. at 4944, p. 684.

It should also be noted that the trial court never found that the industry standard included specific factors related to the cost of manufacturing fiberglass, the number of employees required to operate the equipment, and other “performance” standards that it subsequently imposed upon the Radmans when finding that they had breached the warranties in the Merger Agreement.

¹⁴ At trial, the Radmans hotly disputed the veracity of Flanders’ claims regarding the Radmans’ pre-merger statements. However, this Court need not weigh the credibility of those claims because it was error as a matter of law for the trial court to admit or consider such extrinsic evidence. Nevertheless, it has never been claimed nor established that GFI’s pre-merger statements as to its own goals for operating the equipment or its own experience in operating the equipment rose to the level of a warranty that Flanders would be able to operate the equipment at the same efficiency levels that GFI believed it had achieved or would achieve--nor could such a warranty ever realistically be made, given that such results depend

Consideration of such evidence in light of a determination that the warranties were unambiguous was reversible error.

2. The trial court was required to interpret the warranties according to their plain and ordinary meaning.

When a contract's terms are clear and unambiguous, the court is to "interpret them according to their plain and ordinary meaning and extrinsic or parol evidence is generally not admissible to explain the intent of the parties." Equitable Life & Cas. Ins. Co. v. Ross, 849 P.2d 1187, 1192 (Utah Ct. App. 1993) (citing Larson v. Overland Thrift and Loan, 818 P.2d 1316, 1319 (Utah Ct. App. 1991)).

The warranty that the equipment would be in "good operating condition, ordinary wear and tear excepted" as of the date of the merger consists of terms that may be interpreted pursuant to their plain and ordinary meanings and, in fact, similar wording has already been interpreted by the Utah Supreme Court. In Utah State Medical Association v. Utah State Employees Credit Union, 655 P.2d 643 (Utah 1982), a case involving the sale of a building and equipment, the Utah Supreme Court addressed a contractual provision that certain equipment would be in "good condition and repair." The trial court in Utah State Medical Association had held that since the equipment at issue was thirteen years old, "the condition of the system should be judged in reference to similar air-conditioning systems of like age."¹⁵ Id. at 644. The Utah Supreme Court affirmed,

upon too many variables outside of the control of either of the parties. No evidence was ever presented that there was a "meeting of the minds" of the parties as to such a warranty.

¹⁵ Interestingly, there is no dispute in this matter as to the age of much of the equipment, including the gas melters, which were by no means considered "new."

holding that the thirteen-year-old air-conditioning system “was bound to show the consequences of ordinary wear and tear and reasonable deterioration.” Id. at 645. The court explained:

Generally, provisions in sales contracts that the subject of sale is in good condition are not, unless so expressed, to be construed as importing the best or exceptionally good quality, but only that the condition of the article is reasonably good, “comparing favorably with other articles of like kind, in view of the average quality of such articles.”

Id. (quoting 77 C.J.S. Sales § 324). Here, nothing in the Merger Agreement created a warranty that rises to anything greater than that interpreted by the Utah Supreme Court in Utah State Medical Association. Accordingly, absent express terms to the contrary (and here there are none), the trial court should have looked to comparable used equipment of similar age when determining whether GFI had breached the warranty regarding the condition of the equipment, and it committed reversible error when it looked beyond the clear and unambiguous terms of the Merger Agreement to impose performance standards that did not exist therein.

D. The Warranties Did Not Include Future Performance. The trial court’s reliance upon extrinsic evidence ignored the crucial fact that the Radmans made no express warranty in the parties’ written agreement as to the future condition or performance of the equipment. The warranties in the Merger Agreement do not

Testimony before the trial court indicated that items of equipment were as much as twenty years old--something of which Flanders was clearly aware when it agreed to acquire GFI’s stock. R. at 4942, pp. 267, 271-72 and R. at 4944, pp. 609-84. Add. 7. Therefore, when determining whether the warranty had been breached, the trial court was required to consider how it compared to equipment of similar age. Flanders failed to present such evidence.

guarantee future performance, but merely relate to the condition of the equipment at the time of closing of the merger.¹⁶ The Radmans warranted that, as of the date of closing, the equipment was “in good operating condition, wear and tear excepted.” The Radmans never warranted that the equipment met any specific performance standards prior to or at the time of the merger, nor did they ever warrant the condition or performance of the electric melters beyond the merger date, nor did they warrant that when Flanders began operating the business and using the fiberglass made by the facility for Flanders’ own in-house filter production, that Flanders would be able to achieve any specific performance standards.¹⁷ Had the parties bargained for such warranties (and they did not), they should have been in the Merger Agreement itself. They are simply not there.

Flanders has claimed that the only reason it entered into the Agreement was GFI’s alleged representations as to the cost of producing fiberglass with electric melters. R. at 4942, pp. 151-52, 187-88. Yet, neither Steve Clark (Flanders’ primary negotiator) nor any other witness could point to any provision within the Merger Agreement that

¹⁶ See Marvin Lumber and Cedar Co. v. PPG Indus., Inc., 223 F.3d 873, 879 (8th Cir. 2000) (explaining well-settled rule that “an express warranty of the present condition of goods without a specific reference to the future is not an explicit warranty of future performance, even if the description implies that the goods will perform a certain way in the future”); Utah State Med. Ass’n v. Utah State Employees Credit Union, 655 P.2d 643, 645 (Utah 1982) (finding that liability under contractual warranties regarding condition of real property and equipment was based on “the property as it was at the time of the contract”); Lamb v. Bangart, 525 P.2d 602 (Utah 1974) (holding that seller’s liability for breach of warranty had to be determined as of closing date, and any post-closing events affecting truth or falsity of facts warranted were not seller’s responsibility).

¹⁷ Nor is it reasonable to expect that they would do so. The Radmans had absolutely no control over numerous factors that would impact the cost of producing fiberglass, such as the cost of the raw glass, the cost of utilities, and the cost of labor.

expressly set forth the representations or statements allegedly made verbally by GFI or its representatives during the course of preliminary merger negotiations. The trial court was prohibited from reaching beyond the four corners of the Merger Agreement to create a better deal than the parties drafted for themselves. Fairbourn Commercial, Inc. v. Am. Hous. Partners, Inc., 2003 UT App 98, ¶ 14, n.1, 68 P.3d 1038 (“We will not make a better contract for the parties than they have made for themselves.”) (quoting Bakowski v. Mountain States Steel, Inc., 2002 UT 62, ¶ 19, 52 P.3d 1179).

E. Paragraph 2(h) of the Merger Agreement Does Not Alter the Interpretation of the Warranties. The language contained in ¶ 2(h) of the Merger Agreement does not change the foregoing analysis. The representations and warranties made by the parties were set forth within the Merger Agreement itself, and Paragraph 2(h) relates only to the warranties *set forth therein*. Accordingly, the trial court was required to first determine what representations and warranties were set forth in the Merger Agreement (and to limit its analysis to those warranties). The only relevant warranty with regard to the equipment was that it was “in good operating condition and repair, ordinary wear and tear excepted.” Therefore, Paragraph 2(h) only relates to misstatements or omissions necessary or desirable to make complete, accurate and not misleading *that* warranty, interpreted from its plain meaning.

Statements like those upon which the trial court relied (GFI’s estimated cost of manufacturing fiberglass, the number of employees that might be required to operate the equipment, the number of fiberglass mats that might be produced in a given day, etc.) are statements about performance standards or performance goals and have no bearing on

whether the equipment was in “good operating condition” as of the date of the merger. Paragraph 2(h) cannot be read to create a “back door” through which otherwise improper extrinsic evidence can be admitted or to expand the simple warranty of “good operating condition” into an express warranty that the equipment would meet specific performance standards. To do so would render the integration clause meaningless.

The trial court erred by allowing and considering extrinsic evidence of Flanders’ subjective intent to acquire GFI only if GFI’s fiberglass manufacturing equipment could achieve certain specific performance standards and then holding the Radmans liable when the equipment failed to meet those specific performance standards that were nowhere expressed in the Merger Agreement. Long-established principles of contract interpretation require that Flanders cannot impose liability on the Radmans for breach of specific performance standards that were not expressly set forth in the Merger Agreement. Heiner v. S.J. Groves & Sons Co., 790 P.2d 107, 110 (Utah Ct. App. 1990) (“It is a long-standing rule in Utah that persons dealing at arm’s length are entitled to contract on their own terms without the intervention of the courts to relieve either party from the effects of a bad bargain. This Court will not rewrite a contract to supply terms which the parties omitted.”). If it were truly critical to Flanders that the equipment be able to perform at a particular level post-merger, then it was incumbent on Flanders to insist on including those specific performance standards in the parties’ written agreement. However, it is undisputed that the Merger Agreement warrants no such specific performance standards and it was improper for the trial court to import performance standards that did not exist in the integrated written agreement. Jones v. ERA Brokers

Cons., 2000 UT 61, ¶ 18, 6 P.3d 1129 (“We cannot now go back and do for [defendant] what it failed to do for itself,” citing cases for the principle that a court cannot rewrite an unambiguous contract or write for the parties a better contract than they wrote).¹⁸

F. Conclusion. The warranties contained in the Merger Agreement were unambiguous and should have been applied in accordance with their ordinary and plain meanings. The trial court’s consideration of and reliance upon extrinsic evidence regarding performance standards that cannot be found in the Merger Agreement is reversible error and amounts to rewriting the parties’ written agreement and holding the Radmans liable for breaches of warranties they never made.

II. THE TRIAL COURT ERRED IN ITS METHOD OF VALUATION AND ITS DETERMINATION OF DAMAGES

Even if the trial court could have found that the Radmans breached the warranties in the Merger Agreement without relying on the volumes of improperly admitted extrinsic evidence, it still committed reversible error in its method of valuation and resulting calculation of damages it awarded to Flanders. The trial court followed a multi-step path before arriving at its award of \$1,162,528 to Flanders. Initially, the trial court disregarded the fact that the Merger Agreement was, by its own express terms, a stock for stock merger. Instead, the trial court concluded that the Merger Agreement was nothing more than an asset purchase agreement. Building on that erroneous legal conclusion, the

¹⁸ It should be noted that the evidence regarding whether Ivan Radman ever made per-merger statements regarding GFI’s cost per foot to manufacture fiberglass was itself highly disputed. In fact, although Steve Clark insisted that Mr. Radman provided written spreadsheets outlining such costs, he also claimed to have “lost” the file in which all of those documents were stored and therefore could not produce them at trial. R. at 4942, pp. 151-55.

trial court determined Flanders’ measure of damages by finding (1) that it could allocate to the electric melters the entire purchase price remaining after deducting amounts attributable to accounts receivable and inventory; and (2) that the electric melters really had zero value at the date of closing.¹⁹ If the trial court’s decision at any point in this analysis is wrong, the trial court’s award of damages to Flanders must be reversed.

A. The Transaction Was a Stock for Stock Merger. The Merger Agreement between the parties was not an asset purchase agreement.²⁰ This is clear not only from the Merger Agreement itself, but also from the trial testimony, as well as statements made by Flanders’ own counsel.²¹ Initially, the Merger Agreement was correctly titled as an: “Agreement and Plan of Merger.” R. at 504. Add. 1. Furthermore, the Merger Agreement specifically provides that all outstanding shares of GFI stock would be

¹⁹ On its face, the remedy awarded to Flanders appears to be rescission given that the trial court refunded to Flanders 100% of the purchase price it attributed to the electric melters. In fact, the trial court’s award allowed Flanders to retain everything it received while simultaneously receiving a refund of the purchase price. To the extent that the award to Flanders was in essence rescission, it was in error because Flanders’ never tendered a return of the equipment. Owens v. Neymeyer, 221 P. 160, 162 (Utah 1923) (“The general rule is that where, as here, the purchaser seeks to rescind and recover back money paid on the purchase price, as a condition precedent to the right of maintaining an action the purchaser must offer to restore the possession to the seller.”).

²⁰ If this transaction were truly limited to a sale of specific goods, Flanders’ remedies may have been limited to those specifically provided for by Utah’s Uniform Commercial Code. See Utah Code Ann. § 70A-2-714(2). The Radmans may also have had additional defenses, such as Flanders’ failure to provide notice of the alleged breach within a reasonable time as required by Utah Code Ann. § 70A-2-607(3)(a). However, the need to raise these issues could not have been anticipated because, until the trial court’s post-trial memorandum decision, the Merger Agreement had never been characterized as anything other than a stock for stock merger.

²¹ D. Chad McCoy, counsel for Flanders, stated to the trial court: “The parties agree that this was a merger . . .” R. at 4939, p. 14; and “This isn’t a cash deal. It’s a stock deal.” R. at 4939, p. 50.

converted into shares of Flanders Capital Stock. R. at 508. Add. 1. Nowhere does the Merger Agreement state that it was intended for the sole purpose of acquiring specific individual assets of GFI and nowhere does it allocate the purchase price among specific assets.²² The Merger Agreement was clear and unambiguous as to the character and effect of the transaction, and the trial court's improper characterization of the merger as an asset purchase agreement is reversible error.

B. Correct Calculation of Damages Depends Upon a Correct Characterization of the Merger Agreement. The trial court's mischaracterization of the Merger Agreement as an asset purchase agreement has a significant impact upon the proper determination of the amount of damages to which Flanders may be entitled, if any. If the agreement at issue in this case were simply an asset purchase agreement, it might be appropriate to look solely to the value of the particular assets to calculate damages. However, in cases involving the valuation of shares of stock (which is what was transferred here), Utah case law makes clear that courts must consider more than a pure asset valuation of a business, and must instead consider all three components of fair value, which are asset value, market value, and investment value. Hogle v. Zinetics Med., Inc., 2002 UT 121, ¶ 18, 63 P.3d 80. Hogle is a case in which the value of stock held by dissenting shareholders was at issue. Although admittedly the instant case is not a case involving dissenting

²² The trial court made a finding that Flanders' sole purpose in acquiring GFI was to acquire the electric melters, R. at 4877, Add. 4., which is yet another example of the trial court's rulings having been influenced by improper extrinsic evidence and not based on anything found within the parties' written agreement. However, Flanders' subjective intent or purpose for acquiring GFI's stock or its assets should not be permitted to influence the determination of the value of the stock or the assets. See cases cited in Section II.C.1 and II.C.2 herein, pp. 34-35, 40-41.

shareholders, the principles regarding determination of the value of shares of stock are equally applicable. Flanders' claim that the value of what it received in the underlying transaction did not equate to what it paid in return must be evaluated in light of what was being transferred: stock, not specific assets. Therefore, the trial court erred when it did not hold Flanders to its burden of proof by requiring that Flanders prove its alleged damages through evidence relating to the impact of the alleged breaches of warranty on the value of the GFI stock acquired by Flanders in the merger.

The only evidence that was presented to the trial court by Flanders related solely to asset value.²³ This method of valuation is generally considered to be the least reliable because, absent an actual liquidation, a corporation must be valued as a going concern. Hogle, ¶ 20. See also Woodward v. Quigley, 133 N.W.2d 38, 42 (Iowa 1965) (finding that in most instances, investment value is of much greater importance than asset value); Cede & Co. v. Technicolor, Inc., 684 A.2d 289, 299 (Del. 1996) (stating that an understatement of fair value may result from failure to value company as a going concern); Elk Yarn Mills v. 514 Shares of Common Stock, 742 S.W.2d 638, 642 (Tenn. Ct. App. 1987) (noting that the overwhelming weight of authority approves valuation of the assets of the corporation as a going concern).

Further, the Utah Supreme Court stated in Oakridge Energy, Inc. v. Clifton that “courts have traditionally favored investment value . . . as the most important of the three elements” and “have observed that asset value, in and of itself, is the least reliable of the

²³ As discussed hereinafter, the testimony presented regarding asset value was legally insufficient to support the trial court's calculation of damages. See Section II.C. *infra*.

three factors in value determination.” Oakridge Energy, Inc. v. Clifton, 937 P.2d 130, 133 (Utah 1997).

If the trial court had properly treated the Merger Agreement as a stock for stock merger, and not an asset purchase agreement, it would have been required to consider the value of the stock Flanders received in light of GFI’s ongoing operation as a business enterprise and Flanders would have been required to introduce evidence regarding this type of valuation in order to meet its burden of proving its damages.²⁴ Because interpretation of a contract is a matter of law, this Court may determine that it was error for the trial court to disregard the nature of the parties’ agreement and that the correct method of valuation requires the focus to be on the value of the GFI stock and not the value of GFI’s individual assets.

C. There Was Insufficient Evidence to Establish the Value of the Melters.

Even if the trial court properly determined that the transaction was nothing more than an asset purchase agreement and that Flanders would be entitled to the difference between the electric melters’ value at closing and their value if they had been as warranted, there

²⁴ The trial court made a conclusory finding that GFI had no goodwill because (1) it was not operating at a profit and (2) because Flanders’ predominant purpose was to acquire the electric melters and not the ongoing business of GFI. R. at 4884. However, neither of these factors is sufficient to support such finding. See Banc One Corp. v. Comm’r, 84 T.C. 476 (1985) (“A business might possess substantial goodwill or other intangible value and yet be confronted with a substandard tangible asset base or abnormally high operating costs and thus not realize earnings in excess of a normal return on tangible assets.”); Boe v. Comm’r, 307 F.2d 339, 343 (9th Cir. 1962), *affg.* 35 T.C. 720 (1961) (“[T]he essence of good will is the expectancy of continued patronage, for whatever reason.”). Further, the testimony given at trial, by witnesses for both parties, demonstrated that Flanders continued to operate GFI after the merger, utilizing the equipment, technology, vendors, and processes it acquired in the merger. The simple fact of the matter is that Flanders made no attempt to submit evidence of valuation of GFI as a going concern at the time of the merger.

is not sufficient evidence to support the trial court's determination that those values were \$0 and \$1,162,528 respectively. While Flanders introduced expert testimony in an attempt to establish its damages, the expert did not claim to have conducted an independent valuation of the assets but instead relied solely on Flanders' representations as to their value.

1. The trial court's determination that the purchase price for the electric melters was \$1,162,528 is clearly erroneous.

In determining the amount of value to assign to electric melters if they were as warranted, the trial court determined that the only assets with value in the transaction were (1) accounts receivable, (2) inventory, and (3) the electric melters. Accordingly, the trial court began with the purchase price of \$1,500,000, and subtracted the value of accounts receivable (\$249,119) and inventory (\$88,353)²⁵ to arrive at \$1,162,528 as the value of the electric melters. While the pure arithmetic of this calculation may be correct, the trial court's determination that no other assets had any value is clearly erroneous. At its very core, this determination improperly relies upon extrinsic evidence regarding Flanders' subjective intent for purchasing GFI's stock when no such recitation of Flanders' intent was expressed in the parties' written agreement. Flanders' subjective intent is legally insufficient to support the trial court's decision.

The trial court's finding is also against the overwhelming weight of the evidence. The Radmans acknowledge that, while the trial court's choice of a methodology for

²⁵ With regard to accounts receivable and inventory, the Radmans concede that the trial court's determination of those values had a supportable basis in GFI's income tax returns.

calculating damages is a question of law, the trial court's actual calculation of damages is fact dependent, imposing a duty upon the Radmans to marshal the evidence that may have supported the trial court's determination. Therefore, in order to meet their duty to marshal the evidence, the Radmans offer the following references to the record that could be read as offering support for the trial court's determination of the value it attributed to the electric melters:²⁶

(1) Steve Clark testified on behalf of Flanders that he went through the value of certain assets with Ivan Radman, taken from the June 30, 1996 tax return for GFI. The value of the accounts receivable on such tax return was \$249,119. Steve Clark further testified that Ivan told him that the number had not changed significantly from the date of the tax return to the date of the merger. R. at 4942, p. 185-87.

(2) Steve Clark further testified on behalf of Flanders that the amount of inventory shown on the same tax return was \$88,353, and that Ivan Radman told him that the amount of inventory was about the same at the time of the merger. R. at 4942, p. 185-87.

(3) GFI's tax returns, from which the figures for accounts receivable and inventory were taken, were attached to the Merger Agreement and admitted into evidence. R. at 538-85, Add. 1; R. at 4939, p. 10.

(4) Steve Clark testified on behalf of Flanders that, putting aside the electric melters, the assets did not have value *to Flanders* beyond what is shown on the tax return. He also stated that the electric melters had no value *to Flanders*. R. at 4942, p. 251-52.²⁷

(5) Steve Clark testified that the only reason Flanders was interested in acquiring GFI was because of the electric melters. R. at 4942, p. 185.²⁷

²⁶ The trial court's determinations of value of the electric melters at the time of merger as well as the purchase price attributable to them in the transaction stem from the same body of evidence presented at trial. Therefore, the facts marshaled in this section are applicable to the discussion of whether the trial court's determination of both the minuend and the subtrahend in the court's equation are correct.

²⁷ Although this evidence is included to fulfill the Radmans' marshaling requirement, Flanders' subjective intent should not be considered in light of an integrated written agreement.

(6) Steve Clark testified on behalf of Flanders regarding repairs that were made to the melters and other equipment and the reasons why the repairs needed to be made. R. at 4943, p. 384-92.

(7) Buddy Mercer testified on behalf of Flanders regarding the condition of the equipment, including its age and Flanders' continued use or disposal thereof. R. at 4944, p. 609-84. Add. 7.

(8) Buddy Mercer testified that the gas melters and the curing oven were eventually scrapped, and were not re-sold because they had no value to anyone else. R. at 4944, p. 736-37.

(9) Flanders' expert, Michael L. Lemmon, stated that "[s]alvage value is to account for any value of the assets that they purchased at the end of the damage period. My conversations with Flanders suggested that the salvage value of the remaining assets of GFI was negligible." R. at 4945, p. 203.

(10) Michael L. Lemmon further stated that he used a value of zero for the salvage value of the assets in his calculations, although he acknowledged that he conducted no valuation himself, but instead relied upon Flanders' statements. R. at 4945, p. 204.

(11) Ivan Radman stated that his asking price for GFI was based upon the equipment, accounts receivable and inventory. R. at 4942, p. 57.

Even when viewed in the light most favorable to the trial court's ruling, this testimony is insufficient to support the trial court's calculation of damages. As previously mentioned, Flanders introduced no evidence to support a calculation as to any diminished value of the GFI stock resulting from the alleged breach of warranty, and Flanders' self-serving assertions regarding its purpose for purchasing GFI and the value of certain assets *to Flanders* are insufficient to meet its burden of proof on the issue of damages. "In interpreting unambiguous contracts, [courts] do not consider a party's subjective intent, but rather assume its intent is accurately reflected in the plain meaning of the terms used." Tom Heal Commercial Real Estate v. Overton, 2005 UT App 257, ¶

12, n. 5, 116 P.3d 965. See also Ford v. Am. Express Fin. Advisors, Inc., 2004 UT 70, ¶ 23. (“To determine [contracting] parties' intent, courts look to the parties' manifest intent, not their subjective intent.”); Ephraim Theatre Co. v. Hawk, 321 P.2d 221, 223 (“[A contract's] purpose is to reduce to writing the conditions upon which the minds of the parties have met and to fix their rights and duties in respect thereto. The intent so expressed is to be found, if possible, within the four corners of the instrument itself in accordance with the ordinary accepted meaning of the words used.”).

In an objective determination of the value of the assets Flanders received, the overwhelming weight of admissible evidence before the trial court indicated that the electric melters constituted only a small portion of the purchase price and that Flanders received numerous other assets of value.

(a) GFI had a profitable filter manufacturing business. In addition to manufacturing fiberglass, GFI also operated a filter manufacturing business and had customers to whom they sold fiberglass and filters, including three regular, paying customers who made up 90% of GFI's business. R. at 4944, p. 554-55. Bev Wilson, Flanders' own witness, stated in her deposition,²⁸ that prior to the merger, Flanders had evaluated the numbers relating to GFI's filter manufacturing operations and had found the numbers to be quite good. In fact, she stated that she “observed the filter production portion, did time studies, and found that it was extraordinarily cost effective.” R. at 2835.

²⁸ Portions of the deposition testimony of Ms. Wilson were designated by Flanders at trial. R. at 2785-2856.

(b) GFI continued as an ongoing business and continued to manufacture fiberglass. Not only did GFI continue as an ongoing business, but Flanders expanded upon the technology it received in the merger. According to Flanders' own witness, Rodney Smith, Flanders manufactured hundreds of millions of square feet of fiberglass after the merger and prior to trial. R. at 4944, p. 595-97 (detailing weekly post-merger production figures at GFI averaging over one million square feet). Even Steve Clark conceded that when Flanders set out to build additional electric melters in Salt Lake and North Carolina in 1999, Flanders was breaking even in its operation of GFI. R. at 4943, p. 318.

(c) Flanders' own witnesses admitted that Flanders received operational equipment with value. The trial court's determination regarding value of the equipment is in direct contradiction to the testimony of Flanders' own witnesses. GFI had other operational equipment, aside from the electric melters, that was transferred to Flanders in the merger, including gas melters, R. at 4944, p. 558-59; a curing oven, id. at 563; and filter making machines, id. at 565. In addition, Flanders' witness, Buddy Mercer, testified about the value of a number of assets that Flanders received from GFI. The trial court admitted Mr. Mercer's testimony²⁹ and such testimony clearly contradicts the trial

²⁹ Counsel for the Radmans objected to Buddy Mercer being allowed to give opinion testimony about the value of assets because he had not been properly qualified as an expert, but the trial court overruled the objections and allowed the testimony. Having allowed the testimony, the trial court should not have then ignored his specific testimony that much of the equipment had value.

court's determination that the assets received by Flanders had no value.³⁰ Based solely on the individual items listed herein and simple arithmetic, Mr. Mercer indicated that he ascribed nearly \$200,000 of value to assets that were separate and apart from the electric melters.³¹

(d) Flanders allocated the purchase price on its SEC filings. Flanders itself allocated the value of GFI differently than the trial court. Flanders specifically stated in its public filings with the United States Securities Exchange Commission ("SEC") that the total of all tangible assets (including the electric melters) was only \$847,000³² and that GFI's goodwill value was \$547,000. R. at 4943, p. 310, Pl. Exh. 23,

³⁰ For example, Mr. Mercer testified that the "bolt polly splitter" was a "nice piece of equipment," R. at 4944, p. 614, in relatively new condition, *id.*, p. 658, and that it would cost between \$4,000-\$6,000 to make one; that Flanders continued to use two-inch filter assembly machines for two years after the merger, *id.*, p. 616, and said that he believed a two-inch filter machine could be built for between \$5,000 and \$6,000, *id.*, p. 646; that one-inch filter machines could be built for between \$5,000 and \$6,000, *id.*, p. 647, and that he would value the one- and two-inch filter machines between a few hundred and a few thousand dollars, *id.*, p. 650; that it would cost \$1,000 to replicate punch presses (of which Flanders received three in the merger), *id.*, p. 652; that the two forklifts Flanders received had a value of \$10,000-\$12,000 each, *id.*, p. 659-60; that Flanders still had the spot welder it received, *id.*, p. 664; that the arc welder worked, *id.*, p. 664; that it would cost approximately \$35,000 each to make a new gas melter, *id.*, p. 675, and that Flanders received four gas melters that "ran pretty regularly," *id.*, p. 675-76; that Flanders received two functional 5,000-gallon resin tanks that would cost approximately \$4,500 each to replace, *id.*, p. 677-78; and that the bulk glass baler Flanders received was in working condition and that it would cost approximately \$9,000 to buy a similar item, *id.*, p. 682-83. Add. 7.

³¹ \$6,000 for bolt polly splitter + \$5,000 for all filter assembly machines + \$3,000 (\$1,000x3) for the punch presses + \$20,000 (\$10,000x2) for forklifts + \$140,000 (\$35,000x4) for the gas melters + \$9,000 (\$4,500x2) for resin tanks + \$9,000 for glass baler = \$192,000. (Record citations contained in footnote 30 supra).

³² The valuation of certain tangible assets such as equipment for financial records is somewhat different than the value shown on tax returns, due primarily to depreciation methods. However, it should be noted that the very same tax returns from which the trial court obtained the figures it assigned to accounts receivable and inventory also showed the depreciated value of GFI's equipment as \$39,296. R. at 576, 4942, p. 186.

p. F-13. Flanders continued to include this information in their public filings until 2002, five years after the merger and well after this litigation had commenced. R. at 4942, pp. 252-53 and R. at 4943, pp. 312-17, 320-26, Pl. Exh. 23, 24.

(e) Ivan Radman only valued the electric melters at approximately \$130,000. Ivan Radman himself did not claim that the electric melters were worth \$1,162,528, even when preparing to negotiate with Flanders regarding the sale of GFI. Flanders introduced as an exhibit at trial a list of GFI's assets with Ivan Radman's handwritten estimates of value. See Add. 5. Flanders then questioned Ivan Radman regarding its contents. That testimony demonstrated that Ivan Radman attributed only approximately \$130,000 in value to the electric melters and that the remainder of the \$1.5 Million for which he was willing to sell GFI was comprised of other assets.³³

Accordingly, for the trial court to determine that the electric melters alone were purchased for \$1,162,528 was directly contrary to not only the Merger Agreement, but to GFI's assignment of value, Flanders' assignment of value, and the testimony of Flanders' witnesses. The only evidence that supports the trial court's determination is the testimony of one Flanders' witness, Steve Clark, in which he claimed that Flanders' sole purpose for acquiring GFI was to obtain the electric melters. This irrelevant testimony of subjective intent is legally insufficient to support the trial court's determination.

2. The trial court's determination that the electric melters had no value is clearly erroneous.

³³ Even if the trial court had included the \$100,000 that Ivan Radman had attributed to "development" as to the electric melters, his total would have been only \$230,000 for the electric melters. Add. 5.

In addition to the fact that the trial court incorrectly determined that the electric melters should be assigned \$1,162,528 of the purchase price, its determination that the electric melters had no actual value on the date of the merger is also against the clear weight of the evidence, even when viewed in the light most favorable to the trial court's decision. The list of evidence marshaled above is also the evidence upon which the trial court might have based its calculation of this value. However, based upon the reasons discussed both above and hereinafter, the trial court's determination cannot stand.

Initially, it should be noted that while there was a significant amount of testimony offered at trial regarding the condition of the electric melters and how often (or not) they needed repairs, there was never any credible testimony that the electric melters did not work at all.³⁴ In fact, the testimony clearly established that the electric melters worked (albeit not all the time), continued to work after the merger, and that Flanders continued to operate them and build upon their technology to create subsequent generations of similar equipment.³⁵

Further, Flanders sought to protect the technology related to the equipment it had received in the merger through a Confidentiality and Nondisclosure Agreement that Flanders requested Ivan Radman to sign in May 2000, nearly two and one-half years after the merger, and certainly well after Flanders now claims to have known that the

³⁴ Although Steve Clark claimed that they did not work, he also acknowledged that they did. R. at 4947, p. 580.

³⁵ For example, Buddy Mercer testified that the electric melters produced an average of between 4-7 pads per day in the year after the merger. R. at 4944, p. 695; Steve Clark stated that the two electric melters "were improved, repaired, made functional, and . . . are still in service . . . today." R. at 4947, p. 580.

equipment and any related intangible property it received were worthless.³⁶ The Confidentiality and Non-Disclosure Agreement, Pl. Exh. 44, references the acquisition of all of GFI's stock, "including all of its assets, including but not limited to all technology which included all confidential and proprietary information in which [GFI] held any interest or rights" and seeks to prevent Ivan Radman from disclosing such information to third parties. Pl. Exh. 44, p. 1. Add. 6.

Paragraph 9 of the Confidentiality and Non-Disclosure Agreement is particularly instructive as to Flanders' belief regarding the value of what it received:

"Radman understands and acknowledges that such Confidential Information had been developed or obtained by Flanders by the investment of a significant time, effort and expertise, and that such Confidential Information provides Flanders with a significant competitive advantage in its business."

Pl. Exh. 44, p. 5-6. Add. 6.

If Flanders truly believed that it had received nothing of value as a result of the merger, it is highly doubtful that it would, two and one-half years after the transaction occurred, spend the time, effort, or money to have a Confidentiality and Non-Disclosure Agreement drafted.

In summary, the only evidence that supports the trial court's finding that there was no value attributable to any of the assets acquired (other than accounts receivable and inventory) is the testimony of Steve Clark as to Flanders' subjective intent in purchasing GFI (which is found nowhere within the parties' written agreement) and the subjective

³⁶ Given that the trial court considered Flanders' subjective belief (albeit improperly so) as to the value it received in the underlying transaction, such statements should be weighed against Flanders' own actions.

value of the assets *to Flanders*. Just as subjective intent does not control the interpretation of the Merger Agreement, subjective value cannot be the determining factor of Flanders' damages. See Hogle, ¶ 17 (The "fair value" of stock "is not measured by any unique benefits that will accrue to the acquiring corporation, any more than the compensable value of property taken by eminent domain is measured by its special value to the condemnor. Indeed, the appraisal proceeding is not at all concerned with the losses to the particular dissenting shareholders or with the benefits derived by the particular acquiring corporation in the merger, except as those losses and benefits would be reflected in the price that would be bargained out in a completely free market between any willing buyer and any willing seller in the absence of the merger.") (citations omitted).

D. Conclusion. The trial court erred in one or more steps of its determination of the damages awarded to Flanders. Its method of valuation is incorrect as a matter of law and its determination of the value assigned to the melters was clearly erroneous. Its decision must, therefore, be reversed.

III. THE RADMANS WERE ENTITLED TO A CALCULATION OF PRE-JUDGMENT INTEREST PRIOR TO OFFSET OF FLANDERS' AWARD

The trial court erred in determining that an offset of Flanders' award against the Radman's award was required prior to calculating pre-judgment interest on the Radmans' award. This result is contrary to Utah law, which requires only that principal awards offset each other when both awards are entitled to prejudgment interest, and both awards arise at the same time. None of these factors exists here. Flanders is not entitled to pre-

judgment interest on its award, and the parties' awards arise on different dates.

Therefore, the Radmans are entitled to pre-judgment interest on their award before Flanders' offset is applied.

A. The Radmans' Award Was Liquidated and Qualified for Prejudgment Interest. "Where the damage is complete and the amount of loss fixed as of a particular time, and that loss can be measured by facts and figures, interest should be allowed from that time and not from the date of the judgment." Price-Orem Inv. Co. v. Rollins, Brown & Gunnell, 784 P.2d 475, 482 (Utah Ct. App. 1989). Here, not only were the Radmans' damages fixed and able to be measured by facts and figures, the parties actually stipulated to their amount before trial. Accordingly, the Radmans were entitled to pre-judgment interest on the trial court's award of damages on its claims against Flanders.³⁷

B. The Award to Flanders Was Not Liquidated and Did Not Qualify for Pre-judgment Interest. "On the other hand, where damages are incomplete or cannot be calculated with mathematical accuracy . . . the amount of the damage must be ascertained and assessed by the trier of the fact at the trial, and in such cases prejudgment interest is not allowed." Id. Flanders' damages were not sufficiently complete or subject to calculation to be entitled to pre-judgment interest and the trial court did not award pre-judgment interest to Flanders. R. at 4292-97.

³⁷ The trial court specifically awarded the Radmans pre-judgment interest, R. at 4292, and counsel for Flanders conceded that, standing alone, the award to the Radmans was an amount sufficiently certain and fixed in time as to meet the requirement for pre-judgment interest. R. at 4949, p. 9.

C. The Awards Arose at Different Times. There was no evidence at trial of any specific date on which Flanders delivered its shares to the Radmans. Nevertheless, the Radmans accept for purposes of argument only that the closing date for the Merger Agreement (November 26, 1997) was the date upon which the Radmans allegedly breached the warranties in the Merger Agreement. Flanders' breach of Section 9(a) of the Merger Agreement occurred on April 27, 1999, R. at 4291, clearly establishing that the claims did not arise at the same time.

D. It was Improper to Offset the Awards Prior to Calculating Pre-Judgment Interest in Favor of the Radmans. Utah case law indicates that awards are to be offset prior to calculating pre-judgment interest when the claims arise at the same time, and both are entitled to pre-judgment interest. Richard Barton Enters., Inc. v. Tsern, 928 P.2d 368 (Utah 1996) (offsets should be deducted before interest is calculated when an interest bearing award arises at the same time as the offsets); Brown v. Richards, 840 P.2d 143 (offset of awards appropriate when both parties are entitled to pre-judgment interest). Here, these factors are not present. Therefore, the trial court erred when it did not calculate pre-judgment interest on the Radmans' award prior to offsetting the award to Flanders. The trial court's decision to conduct an offset prior to calculating pre-judgment interest in favor of the Radmans should be reversed.³⁸

³⁸ The trial court actually initially determined that it would award pre-judgment interest to the Radmans, R. at 4292. Add. 2. But in its subsequent memorandum decision, the trial court declined to calculate the interest based on its incorrect interpretation of the net judgment rule. R. at 4673-78. Add. 3.

IV. THE CUMULATIVE EFFECT OF THE TRIAL COURT'S ERRONEOUS EVIDENTIARY AND PROCEDURAL RULINGS RESULTED IN PREJUDICE TO THE RADMANS AT TRIAL.

The Radmans recognize that in any lawsuit of the duration as the underlying case, there are evidentiary or procedural rulings as to which a party may claim error. However, in this matter, there were numerous erroneous rulings that resulted in the cumulative effect of prejudice to the Radmans at trial. These rulings created an atmosphere in which the Radmans were placed at a significant disadvantage in preparing for and presenting their defense against Flanders' counterclaim and required them to react to evidence that was not disclosed in accordance with discovery deadlines, but which the trial court allowed Flanders to introduce at trial. While it may be true that any one particular ruling may not rise to the level requiring a reversal of the trial court's decision, when taken as a whole, "there is a reasonable likelihood that unfairness or injustice has resulted." Brown v. Richards, 840 P.2d 143, 149 (Utah Ct. App. 1992).

A. The Trial Court Allowed Flanders To Introduce Documents that Were Not Produced to the Radmans Until the Eve of the Second Phase of Trial. The purpose of the discovery obligations placed upon parties to a lawsuit by Utah Rules of Civil Procedure is to avoid trial by ambush and to remove elements of surprise or trickery. Ellis v. Gilbert, 429 P.2d 39, 40 (Utah 1967). However, in spite of Flanders' obligations to identify relevant documents in its initial disclosures pursuant to Rule 26 of the Utah Rules of Civil Procedure, and in spite of the Radmans' specific discovery requests, Flanders did not produce boxes of documents (containing cost data relating to labor, raw materials, and other costs of running the business, production data, and performance logs for the

equipment) that were clearly responsive to those requests and then literally sprung them on the Radmans on the eve of trial on Flanders' counterclaim.³⁹ The trial court's decision to allow Flanders to introduce evidence that the Radmans had not had sufficient time to review and analyze required the Radmans' counsel to spend its resources reviewing the documents that were produced at the last minute instead of focusing on the tasks necessary to adequately prepare for trial.⁴⁰

B. The Trial Court Allowed Flanders to Introduce Summaries of Documents Without Having Timely Produced Them or the Underlying Source Documents.

Similarly, the trial court allowed Flanders to introduce summary spreadsheets that Flanders claimed were supportive of its claims without requiring that Flanders produce the source documents from which the summaries were prepared, in contradiction of U.R.E. Rule 1006. The court's rulings prevented the Radmans from independently verifying the accuracy of the summaries and having its own expert witnesses evaluate whether the summaries were reliable. R. at 4942, pp. 202-12 (regarding summary produced on Oct. 9, 2004, three days before trial); R. at 4942, pp. 225-228.

³⁹ This disregard of its duty to comply with discovery requests was nothing new for Flanders. Twice before in this matter, Flanders had been sanctioned for its failure to comply with the Radmans' discovery requests. See Minute Entry dated March 19, 2002, and Order Regarding Plaintiffs' Second Motion for Sanctions, dated September 24, 2002. R. at 105-07, 252-54.

⁴⁰ While Flanders claimed that the boxes of documents were in a hidden storage area and unknown to Flanders until they happened to be discovered, testimony at trial indicated that there were documents contained within the boxes that were produced after the merger, and therefore could only have been inserted in the boxes after Flanders took possession of GFI. R. at 4943, pp. 283-84. The circumstances related to this belated production and the Radmans' objections to the use of those documents by Flanders are set forth in the Record at 4942, pp. 4-26.

C. The Trial Court Allowed Flanders to Designate Expert Witnesses Long After the Disclosure Deadline Had Passed. The trial court created another situation that impaired the Radmans' ability to properly defend against Flanders' Counterclaim when it allowed Flanders to designate Steve Clark, Rodney Smith, and Buddy Mercer as expert witnesses long after the deadline to do so had passed. R. at 4942, pp. 249-50. Again, the purpose for discovery procedures is to allow the parties to conduct an investigation into discoverable information, depose the witnesses, and generally avoid prejudicial surprise at trial. Here, Flanders again thwarted these purposes by not designating its expert witnesses in a timely manner, and the trial court's decision to allow such testimony to be offered at trial resulted in prejudice to the Radmans.

D. The Trial Court Allowed a Last Minute Substitution of a Party as Counterclaimant that Had Not Been Named as a Defendant. In their defenses to Flanders' counterclaim, the Radmans raised the issue that Flanders could not recover on its claim for damages because it was not the entity that allegedly incurred them, and that Precisionaire of Utah (the subsidiary of Flanders and successor to GFI) was not a proper counterclaimant because it had not been named as a defendant in the Radmans' complaint and had not moved to intervene. R. at 1-9, 33, 4236, 4942, pp. 17-27. In spite of the Radmans having put Flanders on notice of these defenses at the earliest stages of the litigation process, Flanders made no attempt to resolve this issue until the eve of the second stage of the trial in October 2004. At that time, it requested, and the trial court granted its request, to add Precisionaire of Utah as a counterclaimant. R. at 4942, pp. 16-27. Until the literal day of trial, the Radmans were dealing with Flanders in discovery,

motions practice, and trial preparation. The substitution of Precisionaire altered the playing field and deprived the Radmans of affirmative defenses which it had timely disclosed and upon which it was entitled to rely.

E. The Trial Court Allowed an Attorney with Flanders' Counsel's Firm to Testify as a Fact Witness About Settlement Discussions. The trial court also allowed an attorney for Flanders' law firm, Stephen Hill, to testify regarding a settlement meeting that occurred nearly three years after the merger, and then relied on that testimony to bolster its conclusion that the Radmans' made pre-merger statements regarding the performance standards of the equipment. Aside from the fact that this resulted in yet more extrinsic evidence aimed at creating warranties that do not exist in the Merger Agreement, there are two significant problems with this ruling by the trial court. First, settlement negotiations are inadmissible. Second, Mr. Hill was a partner in the firm that was acting as counsel for Flanders, raising issues of conflict of interest.

F. Conclusion. Taken as a whole, the court's rulings created an atmosphere in which the Radmans' were continually reacting to unnecessary surprise and inconvenience, the cumulative effect of which was that there was a reasonable likelihood that unfairness or injustice resulted.

V. THE RADMANS ARE ENTITLED TO ATTORNEY FEES ON APPEAL

In the event the Radmans are successful on appeal, they are entitled to an award of attorney fees incurred on appeal. Brown v. Richards, 840 P.2d 143, 156 (Utah Ct. App. 1992)) ("The general rule is that when a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal.") (citing Mgmt.

Servs. Corp. v. Dev. Assocs., 617 P.2d 406, 408-09 (Utah 1980). Therefore, the Radmans respectfully request an order granting fees incurred on appeal and a remand to the trial court to determine the appropriate amount of such award.


PRAYER FOR RELIEF

For the reasons set forth herein, the Radmans respectfully request that this Court reverse the trial court's determination that the Radmans breached the warranties contained within the Merger Agreement. In the alternative, the Radmans request this Court to reverse the trial court's award of damages and remand for a proper determination of damages attributable to the Radmans' alleged breaches.⁴¹

The Radmans also request this Court to reverse the trial court's decision that they were not entitled to pre-judgment interest due to the improper offset of the award to Flanders' prior to calculation of interest. Finally, the Radmans request an award for the attorney fees and costs they have incurred on appeal.

DATED this 13th day of December, 2006.

CHAPMAN AND CUTLER LLP

By: 
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Attorneys for Appellants

⁴¹ To the extent the trial court's award to Flanders is reversed or the issue of damages is remanded for a proper calculation, the Radmans also request that the trial court be instructed to revisit the award of attorney fees to Flanders, both with respect to whether Flanders can be considered a prevailing party and a proper calculation of allowable fees.

CERTIFICATE OF MAILING

I hereby certify that on this 13th day of December, 2006, I caused two true and correct copies of the foregoing **BRIEF OF APPELLANT AND ADDENDUM TO BRIEF OF APPELLANT** to be mailed via First Class, U.S. Mail, postage prepaid, to the following:

Jonathan O. Hafen
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