

1994

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

G & K SERVICES, INC., a
Corporation,

Plaintiff/Appellee,

vs.

PACIFIC BAY BAKING COMPANY,
a Utah Corporation,

Defendant/Appellant.

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

ARGUMENT PRIORITY 15

OPENING BRIEF OF DEFENDANT/APPELLANT
PACIFIC BAY BAKING COMPANY

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

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UTAH COURT OF APPEALS
BRIEF

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Utah Court of Appeals

MAY 18 1994

PARTIES TO THIS APPEAL

Pacific Bay Baking Company ("Pacific Bay"), a corporation, is the defendant/appellant. G&K Services, Inc. ("G&K"), a corporation, is the plaintiff/appellee. There are no other parties to this appeal.

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III. JURISDICTIONAL STATEMENT

This is an appeal from a portion of a circuit court judgment which resolved all claims between the parties, and from the court's denial of a motion to reconsider. Rule 54(b) is not at issue.

Pacific Bay timely filed its notice of appeal following the trial court's denial of its motion to reconsider. This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(d).

IV. STATEMENT OF ISSUES ON APPEAL AND STANDARD OF REVIEW

This is an appeal over attorney's fees.

G&K sued Pacific Bay for its alleged failure to make payments on a lease, and for liquidated damages arising from Pacific Bay's alleged premature termination of the contract. After it stipulated to a partial judgment at the outset of trial, Pacific Bay prevailed on the claim which was actually tried. However, the trial court awarded fees to G&K alone under the parties' contract.

A. ISSUES

1. Did the trial court err in finding the "net judgment rule" dispositive of this case?
2. Did the trial court err in not awarding Pacific Bay any fees, when Pacific Bay defeated G&K on the only claim tried, and the parties' contract provided that fees would be awarded to the successful party?
3. Did the trial court err by deciding that Pacific Bay would be adequately compensated for its fees if the court simply

deducted an amount from G&K's award, when the law in any event prevented G&K from recovering fees expended in its failure at trial?

4. Did the trial court err by not making specific findings of fact concerning the fees awarded to G&K?

5. If the law in Utah permits there to be only one successful party in a lawsuit, regardless of the number of discrete claims litigated therein, did the trial court err in finding that G&K was that party when Pacific Bay prevailed on the only claim tried?

B. STANDARD OF REVIEW

Pacific Bay challenges none of the trial court's factual findings, although in issue 4 Pacific Bay does challenge the trial court's failure to make adequate findings. G&K has not filed a cross-appeal.

Factual findings are not in dispute. This case thus presents a question of law: did the trial court correctly apply the law of attorney's fees to the circumstances before it?

This court reviews issues of law for correctness, affording the lower court no deference. Commercial Union Associates v. Clayton, 863 P.2d 29, 36 (Utah App. 1993). See also Barnard v. Wassermann, 855 P.2d 243, 247 (Utah 1993) (when record reveals no factual disputes, court considers whether law was correctly applied).¹

¹ Several cases refer to reviewing fee awards for an "abuse of discretion." See, e.g., Paul Mueller Co. v. Cache Valley Dairy Ass'n, 657 P.2d 1279, 1287 (Utah 1982); Quinn v. Quinn (In re Quinn), 830 P.2d 282, 285 (Utah App. 1992). These cases,
(continued...)

V. STATUTES AND RULES

There are no constitutional provisions, statutes, rules or regulations applicable to this appeal.

VI. STATEMENT OF THE CASE

A. NATURE OF THE CASE

At issue is the interpretation of a contractual attorney's fees provision.

G&K leases textiles. Pacific Bay is a bakery. G&K and Pacific Bay entered into a contract under which G&K leased to Pacific Bay sales uniforms and other work clothes. G&K ultimately sued Pacific Bay, alleging two contract claims. First, G&K alleged that Pacific Bay had terminated the contract prematurely, entitling G&K to liquidated damages. Second, G&K sought damages for Pacific Bay's alleged failure to pay for services rendered.

At the outset of trial, Pacific Bay stipulated to judgment in a sum certain on G&K's second claim, but stated it owed nothing to G&K on the liquidated damages claim and would so prove. The parties then tried the liquidated damages claim and several smaller issues involved in the open account claim.

¹(...continued)

however, almost always are directed to the issue of the award's amount. But see Stacey Properties v. Wixen, 766 P.2d 1080, 1085, 1988, cert. denied, 779 P.2d 688 (Utah 1989) ("[w]e conclude that the trial court abused its discretion" by failing to enforce fee clause of parties' contract).

Pacific Bay questions not the amount of fees awarded to G&K (except insofar as such a challenge is indicated in issue 4), but instead the trial court's application of law--to now unchallenged facts--in deciding who was entitled to an award.

At the conclusion of trial, the court found for Pacific Bay on the liquidated damages claim and on all but one of the other peripheral issues which were tried. However, stating that it felt bound to do so by the "net judgment rule" of Mountain States Broadcasting v. Neale, 783 P.2d 551 (Utah App. 1989), cert. denied, 853 P.2d 897 (1993), the court found that G&K was the "prevailing party" and thus entitled to fees since it had received an affirmative recovery through Pacific Bay's stipulation to judgment. The court declined to award Pacific Bay any fees, although it did reduce the amount of fees G&K requested.

Following trial, Pacific Bay moved for reconsideration on the fee issue. The court denied the motion without comment.

B. STATEMENT OF FACTS

Neither party has challenged the facts as found by the trial court or the legal conclusions reached by the court on G&K's contract claims. The crux of this appeal is instead the award of attorney's fees which the court made as a result of the conclusions it reached on G&K's claims. Pacific Bay will thus only briefly set forth the facts as adduced at trial.

The parties' entered into their contract on April 12, 1988. A copy of the contract is attached to the complaint, Record, p. 5, and addendum to this brief ("Addendum"), Exhibit A. Under the contract, G&K leased sales uniforms and other work clothes to Pacific Bay.

This litigation was set in motion on December 23, 1991. On that day, G&K refused to deliver uniforms and work clothes to

Pacific Bay because Pacific Bay did not have a check ready for G&K's driver. Record, p. 270, lns. 1-15. As a result of G&K's failure to deliver, Pacific Bay procured another uniform supplier. Record, p. 329, lns. 22-23. G&K then filed its complaint, alleging that Pacific Bay had terminated the contract early and thus was obligated to pay liquidated damages under the contract. G&K also sought payment for services rendered.²

Under the contract as written, payment was required on a monthly basis. However, in its opening statement Pacific Bay stated it would prove that the contract had been modified by the parties' course of performance to permit payment on a 60 day term, that a check was not due G&K on December 23, 1991 under the contract as modified, and that G&K's refusal to deliver on that date was thus a breach of the contract which entitled Pacific Bay to look elsewhere for uniforms. Record, p. 222, lns. 4-25; p. 223, lns. 1-20.

At the outset of trial, Pacific Bay agreed that it owed G&K \$3,790.02 on account. Record, p. 226, lns. 24-25; p. 227, lns. 1-13; p. 228, lns. 3-7. Pacific Bay disputed that it owed G&K for the invoice representing the uniforms which G&K refused to

² Pacific Bay first appeared pro se. When this case was initially scheduled for trial, Pacific Bay did not appear. The court then entered a default judgment. Pacific Bay retained counsel, and moved to set aside the default on the grounds that it did not receive notice of the trial and had meritorious defenses. The trial court set aside the default, but required Pacific Bay to pay G&K's fees in opposing the motion to set aside, as well as its fees for trial preparation and appearance. Record, p. 50.

Pacific Bay does not claim that setting aside a default judgment is any great triumph. Nonetheless, G&K has now been compensated twice for its lawyers' efforts.

deliver, and disputed the last invoice received from G&K on the grounds that G&K had improperly computed depreciation for uniforms which were not returned to it. Record, p. 225, lns. 1-25; p. 226, lns 1-4. As the court noted, the trial thus "focus[ed] in" on the liquidated damages claim and the two disputed invoices at issue in the claim for payment due. Record, p. 228, lns. 8-11.

In support of its argument that the parties had modified the payment terms of the contract through their course of dealing, Pacific Bay testified that it consistently made payments on a 60 day cycle. Record, p. 324, lns. 12-16; p. 347, lns. 11-24; p. 348, lns. 1-9. While G&K testified that it warned Pacific Bay by telephone about being in arrears on the account, Record, p. 262, lns. 3-25; p. 263, lns. 9-25, Pacific Bay testified otherwise. Record, p. 354, lns. 24-25; p. 355, lns. 1-17. The trial court credited Pacific Bay's testimony on this issue and discounted that of G&K. Record, p. 387, lns. 23-25; p. 388, lns. 1-3; p. 397, lns. 24-25; p. 398, lns. 1-25; p. 399, lns. 1-5.³

Save for the (discounted) testimony concerning the warnings allegedly given Pacific Bay, the thrust of G&K's case at trial went to establishing G&K's internal concerns over the Pacific Bay account, which presumably supplied another basis for G&K's refusal to deliver uniforms absent a check. However, the trial

³ G&K also testified that a Pacific Bay check had been returned for insufficient funds, allegedly further evidencing the problems G&K claimed it had with the account. Record, p. 267, lns. 8-16. Pacific Bay's controller testified that no such check existed in Pacific Bay's files. Record, p. 349, lns. 19-25. The trial court credited Pacific Bay's testimony. Record, p. 398, lns. 4-6.

court found it peculiar that for all of G&K's testimony about the problems with Pacific Bay, G&K had adduced no written evidence at trial documenting these concerns, including any correspondence with Pacific Bay on the issue. Record, p. 386, ln. 25; p. 387, lns. 1-13; p. 398, lns. 13-25; 399, lns. 1-5.

As a result of the testimony and other evidence received at trial, the court accepted Pacific Bay's position, finding that G&K had acquiesced in a 60 day payment term, and that the parties' course of performance modified the contract to provide for such a term. Record, p. 397, lns. 5-10; lns 20-23. The court therefore found, again agreeing with Pacific Bay, that G&K terminated the contract early by demanding payment when it was not due, Record, p. 399, lns. 6-10, and that as the terminating party G&K had no claim for liquidated damages. Record, p. 339, lns. 6-10. The Court also found that G&K was not entitled to payment for the goods which G&K did not deliver, since, while G&K attempted to deliver the goods again a week following its refusal first to deliver, G&K had already breached the contract by then. Record, p. 400, ln. 25; p. 401, lns. 1-9.

At trial, the court found for G&K only on one portion of one of the disputed invoices. In particular, the court found as fact that Pacific Bay had not returned certain uniforms to G&K, and thus had been properly charged for those uniforms. Record, p. 400, lns. 16-21. However, even on this issue the court agreed with Pacific Bay that G&K had improperly depreciated the unreturned uniforms, Record, p. 383, lns. 20-25, p. 384, lns. 1-14, and that G&K was to follow the method "most beneficial

towards the defense." Id. at 384, lns. 12-14, p. 399, lns. 16-25; p. 400, lns. 1-15.

The trial court thus ruled for Pacific Bay on all but one issue which was actually tried. Most importantly, the court found for Pacific Bay on the entire liquidated damages claim, the testimony and argument on which consumes 114 pages of the reporter's transcript.⁴ The court nonetheless found that under Mountain States Broadcasting, G&K was the prevailing party in the litigation since it had received a "net judgment", and thus G&K, but not Pacific Bay, was entitled to fees under the parties' contract. Record, p. 401, lns. 19-20; p. 402, lns. 6-10, 23-25; p. 403, lns. 1-10, p. 407, lns. 1-12. Acknowledging that Pacific Bay prevailed on what the court termed "some issues", the court did reduce G&K's fee request from \$2,080.00 to \$1,450.00, stating that it was "apportioning" fees. Record, p. 403, lns. 11-25; p. 404, lns. 1-12.

In making its award, the court stated that Pacific Bay's victory was not worth much in comparison to the stipulated judgment, Record, p. 401, lns. 24-25; p. 402, lns. 1-6, emphasized that Pacific Bay had not made an offer of judgment before trial, and noted that Pacific Bay sought to vacate the whole default judgment early on in the case, not simply the liquidated damages portion. Record, p. 402, lns. 11-22.

⁴ Record, pp. 221-224, 228-247, 251-252, 254-282, 284-299, 308-310, 322-349, 354-357, 360-367, 373-380, 381, 388-396. The remainder of the time was spent on the invoice for undelivered goods, upon which Pacific Bay prevailed, on the issue of depreciation, upon which Pacific Bay prevailed, and on the issue of which uniforms were returned, upon which G&K prevailed.

The court's decision on attorney's fees was the subject of extensive colloquy between the court and counsel, during which the point was preserved. Record, p. 371, ln. 25; p. 372, p. 373, lns. 1-8; p. 405, lns. 15-25; p. 406, p. 407, lns. 1-12.

The trial court's rulings at the conclusion of trial are summarized as follows in its findings and conclusions, at Record, p. 134 and Addendum, Exhibit B:⁵

Findings of Fact

. . .

4. For approximately three years . . . G&K continued to honor its end of the contract while accepting payments from Pacific Bay on an approximately 60-day term basis contrary to the provisions of the contract.

5. G&K's acquiescence in allowing Pacific Bay to establish a long record of payments for a term longer than specified in the contract constituted a course of performance.

. . .

6. Pacific Bay did not provide a check on December 23 or 24 because G&K prematurely demanded payment for previous services when such payment was not yet due.

CONCLUSIONS OF LAW

. . .

6. As a result of the parties' course of performance over the years 1989, 1990 and 1991, the payment terms pursuant to the contract were modified from a net-10 term where payment was due on the tenth of the next month to a net-60 day term where the amounts owing were due sixty days later. This course of performance which modified the contract under the Uniform Commercial Code, was of the nature where the defendant would pay a month's worth of invoices sixty days after the last invoice in that month. When plaintiff prematurely demanded payment on December 23rd and failed to deliver the goods it breached its contract

⁵ A copy of the judgment is included in the Addendum as Exhibit C.

with defendant, and they are not entitled to collect liquidated damages otherwise provided for in the contract.

7. However, plaintiffs are entitled as the prevailing party in this action to compensation for their attorneys' fees and costs.

Following trial, Pacific Bay filed a motion for alteration or amendment of the judgment, Record, p. 75, and supporting memorandum, id., p. 77, again arguing that it was entitled to fees for work done in defeating G&K's claim for liquidated damages, and resubmitting its affidavits, which showed that Pacific Bay's fees were devoted entirely to issues on which Pacific Bay succeeded at trial, including time spent researching the law of course of performance, drafting a trial brief, and preparing for trial. Record, pp. 87-92. After G&K responded, Record, p. 124, and Pacific Bay replied, id., p. 146, the court denied the motion without comment. Record, p. 160.

VII. SUMMARY OF ARGUMENTS

A. The trial court erroneously found that Mountain States Broadcasting Co. v. Neale supplies the rule of decision in this case.

B. Because it fully prevailed on the major contested claim at trial, Pacific Bay is entitled to its fees for the time spent in preparation for and participation at trial, regardless of whether G&K is entitled to fees.

C. G&K, like any litigant, was not entitled to fees attributable to its failure at trial. The trial court's reduction of G&K's fees as a means of acknowledging Pacific Bay's success at trial did not provide Pacific Bay that to which it is entitled, but instead only effected a reduction which under the

law was not optional. The court was obligated to award Pacific Bay fees for its success a trial, regardless of any cut made to G&K's fees.

D. The trial court erred in not making specific findings and conclusions concerning the amount of fees awarded to G&K.

E. To the extent Utah law permits there to be only one "successful party", the trial court erred in ruling that G&K was that party.

VIII. ARGUMENT

Conclusion of Law no. 6 carefully details G&K's breach of the contract. Under Conclusion of Law no. 7, "however", G&K (and implicitly, G&K alone) is entitled to fees. "However" serves its qualifying purpose well here, for the court's rulings on the substantive claim at trial is at loggerheads with its subsequent refusal to award Pacific Bay any fees.

A. The Net Judgment Rule does not Control this Case.

While it did not set them forth under separate headings in its complaint, G&K alleged two breach of contract claims against Pacific Bay. The first sought liquidated damages arising from Pacific Bay's alleged premature termination of the contract. The second demanded payment for services.

Although Pacific Bay prevailed in toto on the liquidated damages claim--the only claim tried--the trial court concluded that the "net judgment" (which was the result of a stipulation) was in G&K's favor, and thus G&K--but not Pacific Bay--was entitled to fees under Mountain States Broadcasting Co. v. Neale. On this point, the court erred as a matter of law.

In Brown v. Richards, 840 P.2d 143 (Utah App. 1992), cert. denied, 853 P.2d 897 (1993), this Court noted that the Mountain States net judgment rule is "disfavored". Id. at 155, n. 10. In Occidental/Nebraska Fed. Sav. Bank v. Mehr, 791 P.2d 217 (Utah App. 1990), the Court declined to follow the Mountain States net judgment rule on facts similar to those at bar.

In Occidental/Nebraska, the parties disputed which of two trust deed foreclosure sales was valid. The defendants argued that the first sale controlled the amount of deficiency and stipulated to that amount at trial. The plaintiff urged that the first sale was defective, and thus that the much higher deficiency established at the second sale controlled. The defendants prevailed on the "validity" issue and hence suffered judgment only in the amount to which they stipulated. The trial court awarded the defendants fees as the prevailing party. The bank appealed. This Court summarized the dispute:

Occidental contends that because a judgment was entered in its favor, it is the prevailing party in this lawsuit and should collect fees. The Mehrs, on the other hand, argue that, while a judgment was entered against them, they prevailed on the only contested issue at trial, i.e., the validity of the first trustee's sale.

Id. at 221. After noting the "particular facts" of Mountain States, id., the Court of Appeals summarized Utah law on attorney's fees:

Where there was a right to attorney fees, Utah courts have allowed the party who successfully prosecuted or defended against a claim to recover the fees attributable to those claims on which the party was successful. See [Mountain States, 783 P.2d at] 566 n. 10 (reasonable fee excludes amounts attributable to issues or claims on which party otherwise entitled to fee was unsuccessful); Stacey Properties v. Wixen, 766 P.2d 1080, 1085 (Utah Ct. App. 1988) (defendant was entitled to attorney fees on the

counterclaims on which he was successful as well as for his successful defense of plaintiff's attempt to accelerate a promissory note), cert. denied, 779 P.2d 688 (Utah 1989); see also Graco Fishing & Rental Tools, Inc. v. Ironwood Exploration, Inc. 766 P.2d 1074, 1080 (Utah 1988) (grant of attorney fees was remanded for a determination of only those fees attributable to the pursuit of successful claims).

Noting 1) that the defendants had stipulated before trial that they owed the bank \$7,300 (the deficiency from the first sale), and 2) that the trial itself thus centered on the issue of which sale was valid, the court held that fees and costs had properly been awarded to the defendants since they prevailed on the "only contested issue at trial", i.e., whether the deficiency would be based on first or second sale. Id. at 221-222.

Pacific Bay agreed at the outset of trial that it owed G&K a certain amount, but no more. Pacific Bay then defeated G&K on the only contested claim tried. Mountain States does not control this case.

B. Regardless of Whether G&K is Entitled to Fees, Pacific Bay is Entitled to Fees for Successfully Defending Against G&K's Claim for Liquidated Damages.

Under Occidental, a party is not disenfranchised from receiving fees simply because its success is measured by the extent of a claim defeated rather than a judgment received. While Occidental does not specifically address the issue, a defendant (such as Pacific Bay) remains entitled to fees for a successful defense against a claim even when the plaintiff prevails on a different claim.

Modern rules of procedure permit liberal joinder of claims. Utah.R.Civ.P. 18. Thus, multiple-claim actions are today the rule. Cf. Elder v. Triax Co., 740 P.2d 1320, 1322 (Utah 1987)

(discussing rigid terminology and limitations at common law governing counterclaim practice).

A party may prevail on some but not all claims alleged. When this occurs, each party is awarded fees commensurate with its success. See Trayner v. Cushing, 688 P.2d 856, 858 (Utah 1984) (per curiam) (where each party was successful on one or more points and unsuccessful on others, the trial court erred in applying "net judgment" rule to award fees only to plaintiffs)⁶; Brown v. Richards, supra, 840 P.2d at 154, n.10 (dicta; "both parties are entitled to fees when both parties are successful in enforcing different provisions of a contract against the other").

Citing Elder v. Triax Co., supra, 740 P.2d 1320, 1321-22 (Utah 1987), Mountain States itself left open the opportunity for an award of fees when each party prevails on different claims, albeit in the context of claim versus counterclaim. Mountain States, 783 P.2d at 556 n. 8.

In Triax, the plaintiff, a prime contractor, sued a subcontractor under a contract which provided for fees. The subcontractor denied liability and asserted permissive counterclaims arising from different contracts between the parties.

The subcontractor further argued that the prime was not entitled to fees until the sub's counterclaim was resolved, citing several older cases which hold that fees under a note cannot be awarded until counterclaims are resolved, since only

⁶ Brown cites Trayner (along with two other cases) as being in conflict with the net judgment rule of Mountain States. Brown, 840 P.2d at 154 n. 10.

then would accounts between the parties be settled. 740 P.2d at 1321. The Utah Supreme Court disagreed, noting that these cases made sense only because early pleading rules required a "counterclaim" both to arise from the same transaction as the affirmative claim and to diminish or defeat the affirmative claim. Id. at 1322. Echoing Holmes' dictum, the court concluded that historical terminology alone was the only justification for denying the plaintiff fees pending resolution of unrelated counterclaims, since such counterclaims would not affect the plaintiff's claim. Id.

Triax thus indicates that success or failure at litigation-- and thus fees--may be apportioned among discrete claims, although the case dealt with counterclaims. In a case nearly identical on its issues to the one at bar, the Washington Court of Appeals has recently taken the next step, addressing the question of who is entitled to fees when the plaintiff has alleged more than one claim but no counterclaim is raised.

In Marassi v. Lau, 859 P.2d 605 (Wash. App. 1993), the plaintiffs dismissed 5 of the 12 claims of their complaint prior to trial, and then received an affirmative judgment on 2 of the 7 claims tried. 859 P.2d at 606. Although Dynasty, the defendant, thus successfully defended against the five remaining claims, the court awarded fees to the plaintiffs as the "prevailing party" under the parties' contract. Id. The appellate court reversed.

The court first noted that under the general rules governing fee awards, a "prevailing party" normally is one who receives an affirmative judgment, and that if neither party

wholly prevails then the party who "substantially prevails" is entitled to fees. 859 P.2d at 606-07. However, "[t]hese general principles, . . . do not address situations in which a defendant has not made a counterclaim for affirmative relief, but merely defends against the plaintiff's claims." Id. at 607. In particular, the court held that the "net affirmative judgment rule" or the "substantially prevailing rule" yielded neither a fair nor just result in the case before it, since Dynasty successfully defended against a majority of claims at trial. Id. at 608.

The court concluded that "when the alleged contract breaches at issue consist of several distinct and severable claims, a proportionality approach is more appropriate." Id. at 608. Under this approach, each party is entitled to fees upon those claims on which it prevailed. By awarding fees to defendants who succeed on particular claims, the courts thus serve the purposes of fee shifting: to discourage weak cases, encourage settlements, and restore a wronged party to original position. Id.

Similarly, Florida's well-developed body of law governing fees is consistent with Marassi and the developing trend of Utah law.

In response to a question certified to it by the United States Court of Appeals for the Eleventh Circuit, the Florida Supreme Court, in Folta v. Bolton, 493 So.2d 440 (Fla. 1986), rejected what it termed the "net winner rule" in multiple claim cases in favor determining entitlement to fees on a claim by claim basis. 493 So.2d at 442-43. Thus, the defendant was

entitled to fees expended on claims successfully defended against. Id. at 443. See also Consolidated Southern Security, Inc. v. Geniac & Assoc's., Inc., 619 So.2d 1027 (Fla. App. 1993) (trial court improperly attempted to "net out" from plaintiff's fee award the amount of time plaintiff's counsel spent on unsuccessful claim; under Folta, court should have instead accounted for time defendant spent in successful defense of the same claim); Park Lane Condominium Ass'n v. DePadua, 558 So.2d 85 (Fla. App. 1990) (trial court erred under Folta in not awarding fees on a claim by claim basis, with defendant entitled to fees for claims successfully defended against).

Triax, Brown, Marassi and Folta recognize that lawsuits are often made up of several distinct claims. Although Triax dealt with a counterclaim, Marassi and Folta take the next logical step, acknowledging that a defendant who does not counterclaim is no less entitled to fees for successfully fending off a claim than a defendant who prevails on a counterclaim.

G&K's complaint alleged two distinct contract claims. The first sought liquidated damages. The second was a claim for services rendered. These claims arose from completely different facts. Pacific Bay's stipulation at the outset of trial on the open account claim had no effect on the liquidated damages claim. The claims could have been tried separately without effect on either one.

Pacific Bay fully prevailed on the claim for liquidated damages, and was thus the "successful party" thereon. This claim consumed the majority of trial time. This is not a case where

Pacific Bay claims victory by virtue of whittling down G&K's claim for damages. Cf. Brown v. Richards, 840 P.2d at 155 (defendant does not prevail on claim if his only success is to reduce damages awarded on claim). Instead, Pacific Bay claims victory on an entire claim, and has proved G&K the wrongdoer with respect to that claim. See Brown, 840 P.2d at 155 ("It is the determination of culpability, not the amount of damages, that determines who is the prevailing party."); Marassi, 859 P.2d at 608 (permitting defendant to recover fees will discourage weak claims and restore party to its original position).

In addition to citing the net judgment rule, the trial court suggested several reasons for why it did not award Pacific Bay any fees. These reasons are irrelevant under the law.

The court believed that Pacific Bay's victory was not worth much. A claim's dollar value is not the arbiter of whether fees are to be awarded. See Brown v. Richards, 840 P.2d at 155 (trial court erred in not awarding fees to defendant for successful defense, even if the claim was only a minor part of the lawsuit).⁷

The court was also piqued at Pacific Bay for not earlier paying G&K what Pacific Bay agreed at the outset of trial that it owed. In response, Pacific Bay argued that it did not pay G&K earlier because it wished to resolve the whole dispute at once,

⁷ Neither claim of this case involved significant sums. G&K was awarded judgment on its account claim in the amount of \$4,575.21, and was denied recovery of the almost \$2,000 in liquidated damages which it sought. The trial court's characterization of Pacific Bay's success as not worth much thus appears inaccurate in light of the total amount in controversy.

including the liquidated damages claim. Record, p. 372, lns. 16-23. Pacific Bay believed it had been treated improperly by G&K (as was borne out by trial), and was not of a mind to settle a portion of the case while G&K kept up its demands for liquidated damages. Pacific Bay does not believe its behavior was unusual or unexpected for a defendant. Regardless, Pacific Bay did not curtail its right to fees by not settling up with G&K until the whole case could be resolved.

The court also indicated that its decision on fees might have been different had Pacific Bay made an offer of judgment. The court's reasoning on this latter point is unclear, since offers of judgment under Rule 68 entitle the party offering judgment to costs--but not fees--in the event additional monies are not recovered. Nelson v. Newman, 583 P.2d 601, 604 (Utah 1978). See also Marassi v. Lau, 859 P.2d at 608 n. 6 (offer of judgment rule was not at issue in case). Pacific Bay's failure to make an offer of judgment is not relevant to whether it is entitled to fees.

C. The Trial Court's Decision to Reduce G&K's Fees Rather than Award Pacific Bay Fees does not Satisfy the Law or Contract.

Acknowledging that Pacific Bay prevailed on what it termed "some issues", the court reduced G&K's fee request from \$2,080.00 to \$1,450.00, stating that it was "apportioning" fees. The court was not apportioning fees at all. Apportionment is what Pacific Bay now seeks.

G&K, like any litigant, was never entitled to fees attributable to its failure at trial. See infra, § D. By

docking G&K's fee request, the court thus did only what the law already required. What the trial court did not do, however, was award Pacific Bay the fees attributable to its success at trial on an entire claim, not simply an "issue." This was error. See Consolidated Southern Security, Inc. v. Geniac & Assoc's., Inc., 619 So.2d 1027 (Fla. App. 1993) (trial court improperly attempted to "net out" from plaintiff's fee award the amount of time plaintiff's counsel spent on unsuccessful claim; court should have instead accounted for time defendant spent in successful defense of the same claim).

Irrespective of the mandatory reduction made to G&K's request, the trial court was obligated to award Pacific Bay the fees incurred in its success at trial.

D. The Trial Court did not Make Sufficient Findings Concerning G&K's Fees.

Although the court reduced G&K's fees, it made no findings concerning the amount of fees to which G&K was properly entitled. This was error.

G&K is not entitled to fees for the time it spent unsuccessfully litigating issues.⁸ Mountain States notes that "a reasonable fee will compensate [the litigant] only for those fees necessarily incurred in resolution of issues in [the litigant's] favor, and should not include fees relating to the issues

⁸ Trayner v. Cushing, 688 P.2d 856, 858 (Utah 1984) (per curiam); Paul Mueller Co. v. Cache Valley Dairy Ass'n, 657 P.2d 1279, 1288 (Utah 1982); Stubbs v. Hemmert, 567 P.2d 168, 171 (Utah 1977); Stacey Properties v. Wixen, 766 P.2d 1080, 1085 (Utah App. 1988), cert. denied, 779 P.2d 688 (1989); Graco Fishing and Rental Tools, Inc. v. Ironwood Exploration, Inc., 766 P.2d 1074, 1079-80 (Utah 1988).

resolved in [the other litigant's] favor." 783 P.2d at 556 n.10 (emphasis added).⁹

Unlike those of Pacific Bay, G&K's labors at trial were almost completely unsuccessful. G&K is not entitled to fees for time spent at trial or in preparation for trial (and has already been paid once for such efforts).¹⁰ Although the court properly cut G&K's fees, it erroneously made no findings concerning the amount of fees to which G&K was entitled.

E. If Utah law Still Permits there to be Only One Successful Party Regardless of the Number of Claims Pled, Pacific Bay was that Party.

Under our modern rules of procedure, attorney's fees should be awarded on a claim by claim basis. Utah law is consistent with such a rule. If, however, the Court believes there can be only one successful party even in a multiple claim action, that party was Pacific Bay.

Like the defendant in Occidental/Nebraska Fed. Sav. Bank v. Mehr, Pacific Bay prevailed on the only claim actually litigated after it stipulated to an amount certain. The net judgment rule does not properly account for the posture of this case. See Mountain States, 783 P.2d 556 n. 7 (acknowledging that rule is not universally applicable).

⁹ See also Graco Fishing & Rental Tools, Inc. v. Ironwood Exploration, Inc., 766 P.2d 1074, 1080 (Utah 1988) (grant of attorney fees was remanded for a determination of only those fees attributable to the pursuit of successful claims); Brown v. Richards, 840 P.2d 143, 156 (Utah App. 1992) (trial court must make findings concerning fees attributable to claims on which party succeeded at trial). Here, none of G&K's fees are attributable to a success at trial.

¹⁰ See note 2, supra.

F. Pacific Bay is Entitled to Recover Fees on Appeal if it is Successful.

If the contract permits recovery of fees in the trial court, as a matter of law it also permits recovery of fees on appeal.

Management Services Corp. v. Development Associates, 617 P.2d 406, 409 (Utah 1980). If Pacific Bay prevails on appeal, it will thus be entitled to fees expended thereon.

IX. CONCLUSION

In denying Pacific Bay its fees, the trial court erred as a matter of law. The court's judgment on fees should be reversed.

DATED this 18th day of May, 1994.

LeBoeuf, Lamb, Greene & MacRae



Mark W. Dykes
Counsel for Pacific Bay
Baking Company

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Opening Brief of Defendant/Appellant Pacific Bay Baking Company was served this 18th day of May, 1994, by depositing same in the United States mails, first class, postage prepaid, addressed to the following:

Theodore E. Kanell
Daniel L. Steele
Hanson, Epperson & Smith
4 Triad Center, Suite 500
Salt Lake City, Utah 84180



Tab A

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DEC 20 1993

Third Circuit Court
Salt Lake Department

THEODORE E. KANELL, Bar No. 1768
DANIEL L. STEELE, Bar No. 6336
HANSON, EPPERSON & SMITH, P.C.
Attorneys for Plaintiff
4 Triad Center, Suite 500
P.O. Box 2970
Salt Lake City, Utah 84110-2970
Telephone: (801) 363-7611

IN THE THIRD CIRCUIT COURT IN AND FOR SALT LAKE COUNTY
SALT LAKE DEPARTMENT, STATE OF UTAH

G & K SERVICES, INC., a Corporation,)	JUDGMENT
)	
Plaintiff,)	
)	
v.)	Civil No. 920002083CV
)	
PACIFIC BAY BAKING, a Utah corporation,)	Judge Michael L. Hutchings
)	
Defendant.)	

The Court, having heard evidence at trial on November 2 and 3, 1993 and otherwise being fully advised in the premises following the bench trial on those dates, wherein all parties were present and represented by counsel;

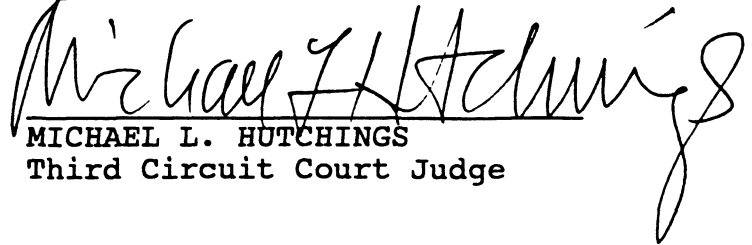
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff is awarded judgment against the defendant in the amount of \$4,575.21 as due on account, plus \$1,427.62 as prejudgment interest at the rate of 18 percent as called for in the contract between the parties, plus \$1,450.00 in reasonable attorneys' fees as provided for in the contract, plus \$93.00 in costs, for a total judgment of

Handwritten signature and date: 12/21/93

\$7,545.83. This amount is now due and payable and is further subject to post-judgment interest at the contract rate of 18 percent per annum for all amounts owing and unpaid upon entry of this judgment.

Dated this 17 day of December, 1993.

BY THE COURT:


MICHAEL L. HUTCHINGS
Third Circuit Court Judge

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing JUDGMENT was mailed, postage prepaid, this 6th day of December 1993 to the following:

Mark W. Dykes, Esq.
Attorney for Defendant
1000 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101

Ami Higgin

Tab B

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CLERK OF THE DISTRICT COURT
SALT LAKE DIVISION

THEODORE E. KANELL, Bar No. 1768
DANIEL L. STEELE, Bar No. 6336
HANSON, EPPERSON & SMITH, P.C.
Attorneys for Plaintiff
4 Triad Center, Suite 500
P.O. Box 2970
Salt Lake City, Utah 84110-2970
Telephone: (801) 363-7611

IN THE THIRD CIRCUIT COURT IN AND FOR SALT LAKE COUNTY
SALT LAKE DEPARTMENT, STATE OF UTAH

G & K SERVICES, INC., a Corporation,)	FINDINGS OF FACT AND CONCLUSIONS OF LAW (Revised)
Plaintiff,)	
v.)	Civil No. 920002083CV
PACIFIC BAY BAKING, a Utah corporation,)	Judge Michael L. Hutchings
Defendant.)	

The trial, having come on regularly before this Court on November 2, 1993 from 9:30 a.m. until 12:30 p.m. and on November 3, 1993 from 2:00 p.m. to 5:00 p.m., with plaintiffs represented by Theodore E. Kanell and Daniel L. Steele of Hanson, Epperson & Smith and defendants represented by Mark Dykes and Steven Strong, and the Court having heard all evidence and being otherwise fully advised in the premises hereby enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff G & K and defendant Pacific Bay were parties to a valid contract wherein G & K was obligated to provide Pacific Bay with goods and services including uniforms and laundry and linen supplies.

2. Pacific Bay was in turn obligated to pay for these services pursuant to the terms of the contract.

3. The original terms of the contract called for net ten payment term, meaning payment for goods and services rendered would be due on the tenth of the next month.

4. For approximately three years however, G & K continued to honor its end of the contract while accepting payments from Pacific Bay on an approximately 60-day term basis contrary to the provisions of the contract.

5. G & K's acquiescence in allowing Pacific Bay to establish a long record of payments for a term longer than specified in the contract constituted a course of performance.

6. Thereafter, G & K attempted to deliver supplies to Pacific Bay on December 23 or 24 as required by the contract but since no check for payment was presented they did not deliver.

7. Pacific Bay did not provide a check on December 23 or 24 because G & K prematurely demanded payment for previous services when such payment was not yet due.

8. Thereafter defendant informed plaintiff that it had retained the services of another supplier and would no longer need

the services of G & K.

9. On January 27, 1992, plaintiff and its representatives entered the premises of the defendant and conducted an inventory search reclaiming all of its goods then in the possession of the defendant and noting all lost goods which were not returned to plaintiff. This inventory resulted in a balance of \$785.19, which represents the value of the goods lost or then in possession of the defendant and not returned less depreciation of 50 percent pursuant to the contract terms.

10. The Court finds that there is, by stipulation, owing \$3,790.02. This amount represents amounts owing for October, November and December 1991 but not including the December 24th and 31st invoices.

11. The Court finds that of the remaining invoices not stipulated to, plaintiff is entitled to recover \$785.19, which represents the depreciated amount owed on the January 27th invoice for unreturned merchandise.

12. These amounts resulted in a full amount of \$4,575.21 which Defendants owed Plaintiff.

13. Defendant has to date failed to pay the amounts due and owing for the invoices as totaled above.

14. The October invoices totalling \$1,573.90 which defendant has stipulated to owing were due for payment on or before December 28, 1991.

15. The November invoices totalling \$1,307.49 which defendant has stipulated to owing, were due for payment on or before January 27, 1992.

16. The December invoices totalling \$908.63, excepting the December 24th and 31st invoices, which defendant has stipulated to owing, were due on or before February 15, 1992.

17. Plaintiff cannot collect for the December 24th and 31st invoices because they failed to deliver the goods stated therein.

18. The January 27th amount of \$785.19 was due on or before March 29, 1992.

19. Plaintiffs were forced to initiate legal proceedings to collect these amounts and showed up at trial prepared and willing to prosecute all of its claims including the amounts stipulated to by defendant.

20. Plaintiff is entitled to interest of 18 percent per annum as provided by the contract for the stipulated amounts and for the January 27th amount. This interest shall be calculated from the modified due date forward to judgment.

21. Interest on the October amounts past due twenty-two months for a total interest rate of 33 percent comes to \$519.39.

22. Interest on the November amounts past due twenty-one months for a total interest rate of 31 1/2 percent comes to \$411.86.

23. Interest on the December amounts past due twenty months

for a total interest rate of 30 percent comes to \$272.59.

24. Interest on the January 27th invoice amounts past due nineteen months for a total interest rate of 28 1/2 percent comes to \$223.78.

CONCLUSIONS OF LAW

1. Plaintiffs are therefore entitled to an award of \$3,790.02 representing the amounts of the October, November and December invoices as stipulated to by defendant at the beginning of trial.

2. Plaintiffs are further entitled to an award of \$785.19 for the January 27th invoice outlining the inventory and goods lost or not returned by defendant to plaintiff.

3. This makes for a total amount due and owing as a result of the invoices defendant has failed to pay of \$4,575.21.

4. Plaintiffs are further entitled to an award of 18 percent interest per annum as provided for in the contract for these amounts which are past due and owing.

5. This interest as calculated on the 60-day payment term for each month totals \$1,427.62.

6. As a result of the parties' course of performance over the years 1989, 1990 and 1991, the payment terms pursuant to the contract were modified from a net-10 term where payment was due on the tenth of the next month to a net-60 day term where the amounts owing were due sixty days later. This course of performance which

modified the contract under the Uniform Commercial Code, was of the nature where defendant would pay a month's worth of invoices sixty days after the last invoice in that month. When plaintiff prematurely demanded payment on December 23rd and failed to deliver the goods it breached its contract with defendant, and they are not entitled to collect liquidated damages otherwise provided for in the contract.

7. However, plaintiffs are entitled as the prevailing party in this action to compensation for their attorneys' fees and costs.

8. This Court has determined that a reasonable award of attorneys' fees to plaintiff is \$1,450.00. This amount is reasonable and just and plaintiff as the prevailing party is entitled to these amounts.

9. Plaintiffs are further entitled to their costs of court of \$93.00 as outlined in their memorandum of costs filed herewith.

10. Plaintiffs are therefore entitled to recover from defendants a total of \$7,545.83.

11. Plaintiffs will be further entitled to post-judgment interest at 18 percent per annum as provided by the contract for all amounts not paid from the date this judgment is signed by the Court.

Dated this 17 day of December, 1993.

BY THE COURT:

Michael L. Hutchings
MICHAEL L. HUTCHINGS
Third Circuit Court Judge

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing FINDINGS OF
FACT AND CONCLUSIONS OF LAW (Revised) were mailed, postage
prepaid, this

6th day of December, 1993 to the following:

Mark W. Dykes, Esq.
Attorney for Defendant
1000 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101

Lyni Higgins

Tab C

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CLERK OF THE DISTRICT COURT
SALT LAKE DEPARTMENT

THEODORE E. KANELL (1768)
HANSON, EPPERSON & SMITH
Attorney for Plaintiff
4 Triad Center, Suite 500
P.O. Box 2970
Salt Lake City, Utah 84110-2970
Telephone: (801) 363-7611

IN THE THIRD CIRCUIT COURT IN AND FOR SALT LAKE COUNTY
SALT LAKE DEPARTMENT, STATE OF UTAH

G & K SERVICES, INC., a
Corporation,

Plaintiff,

vs.

PACIFIC BAY BAKING, a Utah
Corporation,

Defendant.

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*
*
*
*
*

COMPLAINT

Civil No.:
Judge

92000 2083 CV

MHT

The Plaintiff, G & K Services, Inc., for complaint
against the Defendant above named alleges as follows:

1. G & K Services, Inc. is a corporation duly
authorized to do business within the State of Utah.
2. The cause of action claim hereunder arose within
the State of Utah and the Defendants operate their business in
the State of Utah.

3. On or about the 12th day of April, 1988, the Defendants entered into a Textile Leasing Service Agreement, copies of which is attached hereto and marked as Exhibit "A".

4. On or before January 7, 1992, the Defendant cancelled the Agreement mentioned above and therefore is responsible to pay liquidated damages as found in Paragraph 13 of the Agreement.

5. The Defendant has breached the agreement by their actions in cancelling the agreement prematurely. As a result of the premature cancellation, the Plaintiff is entitled to liquidated damages as spelled out by the agreement in the amount of \$1,925.96.

6. The Defendant has also breached the service agreement by failing to make payments on account when due, and is presently indebted to the Plaintiff, in the amount of \$4,090.95, for past due services rendered.

7. Pursuant to the agreement between the parties, the Defendant agreed to pay a reasonable attorney's fees and all necessary costs incurred in remedying the default. Said sums shall be proved at trial.

WHEREFORE, Plaintiff prays for judgment against the defendant as follows:

1. For liquidated damages in the amount of \$1,925.96.

2. For the amount of \$4,090.95 for past due services rendered.

3. For reasonable attorney's fees to be proven at trial.

4. For costs of Court and such other relief as the Court deems just and equitable in the premises.

DATED this 12th day of February, 1992.

HANSON, EPPERSON & SMITH



THEODORE E. KANELL
Attorney for Plaintiff

Plaintiff's Address:

1671 South 4370 West
Salt Lake City, Utah 84104



EXHIBIT "A"

TEXTILE LEASING SERVICE AGREEMENT



G & K Services

Textile Leasing Systems

APR 14 1983

13624

SERVICE AGREEMENT

10039-01

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

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

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

ITEM DESCRIPTION	NUMBER OF PERSONS	CHANGES PER WEEK	WEEKLY CHARGE PER CHANGE	TOTAL WEEKLY CHARGE
Shirts			.50	
Pants			.60	
Coveralls			1.10	
Lined Jacket			2.25	
Shop Towls			.07	
Terry/Rib Towels			.17	
42" Mop			1.95	
Grill Pad			N/A	
36" Mop			1.70	
3 x 4 Mat			2.50	
4 x 6 Mat			11.25	
Mitt			.75	
Charges will be made for preparation of additional orders, names, emblems and seasonal changeovers.				
All prices are based on 52 weeks per year service.				
TOTAL				

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

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

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

4. **Effective Date.** This Agreement takes effect as of the date of signing. For new Customers of Supplier, the estimated date of first installation is _____, 19____.

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

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

Customer Pacific Bay Baking
 Address 535 West 800 South
 City Woodcross
 State Utah Zip Code 84087
 Accepted By [Signature]
 Title Contractor
 Attach Loyd Contractor

Date 4/12/83
 Salesman's Signature [Signature]
 Accepted By [Signature]
 Title Area Manager

G & K Services

OFFICE COPY

6. Payment of Charges. Charges will be due and payable in cash at time of delivery, or, if Customer's credit is approved by Supplier, on the tenth day of the month following delivery. Delinquent accounts are subject to automatic Cash On Delivery basis. All amounts not paid when due will be subject to a service charge to be added thereto of one and one-half percent (1 1/2%) per month (18% annually) until paid in full.

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

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

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

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

ITEM DESCRIPTION	NUMBER OF PERSONS	CHANGES PER WEEK	TOTAL INVENTORY

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

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

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

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

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

16. No Warranty With Respect to Merchandise. CUSTOMER ACKNOWLEDGES THAT THE GARMENTS RENTED UNDER THIS AGREEMENT ARE FOR GENERAL PURPOSES AND ARE NOT DESIGNED OR RECOMMENDED FOR AREAS OF FLAMMABILITY OR WHEN CONTACT WITH HAZARDOUS MATERIALS OR IGNITION SOURCES IS POSSIBLE. SUPPLIER IS NOT THE MAKER OF THESE GARMENTS AND HAS NOT MADE AND DOES NOT MAKE ANY REPRESENTATION, WARRANTY OR COVENANT, EXPRESS OR IMPLIED, WITH RESPECT TO THE MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, QUALITY, SAFETY OR SUITABILITY OF THE GARMENTS FOR CUSTOMER USE, EXCEPT AS EXPRESSLY SET FORTH IN PARAGRAPH 13 OF THIS AGREEMENT.

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

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

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

20. SPECIAL INSTRUCTIONS.

THE UNDERSIGNED CUSTOMER UNDERSTANDS AND ACCEPTS THE TERMS OF THIS AGREEMENT AND AGREES TO BE BOUND BY IT.

Customer: *[Signature]*

Address: *[Handwritten Address]*

City: *[Handwritten City]*

State: *[Handwritten State]*

Zip: *[Handwritten Zip]*

Accounting: *[Handwritten Name]*

Phone: *[Handwritten Phone]*

Business: *[Handwritten Business Name]*