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DIVISION II

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STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

RONALD GARNER and MARILYN GARNER, husband and wife,

Appellants,

v.

THE ESTATE OF JOLYN HAMILTON,

Respondent.

BRIEF OF RESPONDENT/RESPONSE TO APPELLANTS' OPENING
BRIEF

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I.
ASSIGNMENTS OF ERROR

COMES NOW, the Respondent, The Estate of Jolyn Hamilton, hereinafter collectively referred to as “Hamilton” by and through their counsel of record, Kristina A. Driessen, and herewith submits their Response to Appellants, Ronald Garner and Marilyn Garner, husband and wife, hereinafter collectively referred to as “Garner”, by and through their counsel of record, Michael W. Johns.

Hamilton has also Cross-Appealed. The Opening Brief for Cross Appellant is not included within this Brief. Both Garner and Hamilton ordered transcripts of the trial. However, Garner ordered simply the testimony of Garner and Hamilton, which was filed on July 8, 2010, thus, making the Appellants’ Brief due August 25, 2010. Hamilton ordered the entire transcript to include all of the witnesses, which was filed on September 7, 2010, thus, making the Cross Appellant’s Opening Brief due October 22, 2010.

In Garner’s Appeal, he assigns error to the Court’s ruling as follows:

1. Finding of Fact 10 that the net amount of accounts receivable due to the Garners as agreed at trial was \$41,025.00.

2. Finding of Fact 11 that the net unaccounted overdraft in the Garner Trucking, Inc.'s checking account at closing was \$54,000.00.
3. Finding of Fact 17(b) that The Estate of Hamilton ("Hamilton") proved damages of \$34,233.00 for Truck 201.
4. Finding of Fact 17(c) that Hamilton proved damages of \$30,912.00 for Truck 251.
5. Finding of Fact 17(d) that Hamilton proved damages of \$21,288.00 for Trailers 5517 and 5518.
6. Findings of Fact 17(e) that Hamilton proved damages of \$31,504.00 for Trailers 5521 and 5522.
7. Finding of Fact 18 that the Garners were entitled to only \$41,025.00 as the net amount of accounts receivable due after closing.
8. Conclusion of Law 1 that the Garners were only entitled to judgment against Hamilton in the amount of \$41,025.00 on their claims under the Stock Purchase Agreement.

II. **RESTATEMENT OF ISSUES**

The Appellants' Issues Pertaining to Assignments of Error are as follows:

1. Did the trial court err in finding that the net amount of accounts receivable due to the Garners was \$41,025.00, when the actual amount reflected in the summary provided by Gary Hamilton at trial was \$53,992.11? [Finding of Fact 10]

2. Did the trial court err in finding that the net unaccounted overdraft in Garner Trucking's checking account at closing was \$54,000.00, when the actual figure was \$13,245.96? [Finding of Fact 11]
3. Did the trial court err in finding that Hamilton proved damages of \$34,233.00 for Truck 201 and \$30,912.00 for Truck 251? [Finding of Fact 17(b)(c)]
4. Did the trial court err in finding that Hamilton proved damages of \$21,288.00 for Trailers 5517 and 5518 and damages of \$31,504.00 for Trailers 5521 and 5522? [Finding of Fact 17(d)(e)]
5. Did the trial court err in not determining that Hamilton had failed to mitigate its claimed damages?
6. Did the trial court err in entering judgment against the Garners in the above referenced amounts?
7. Did the trial court err in denying the Garners' motion for reconsideration?

III. RESTATEMENT OF FACTS

The Appellants in this matter are husband and wife. The Respondent is the Estate of Jolyn Hamilton. This case was filed prior to Jolyn Hamilton's death and thereafter her husband Gary Hamilton, as the Personal Representative of the Estate of Jolyn Hamilton, was substituted as Defendant.

In the year 2005, Garner was the owner of Garner Trucking. Garner desired to sell Garner Trucking and contracted with a Bellevue agency called Concord Ventures to market the trucking company. (March 29th RP 4, 6) The specific agent who handled the transaction was Salim Dada. (March 29th RP 8) In the year 2005, Garner contacted Hamilton several times in regard to purchasing the trucking company; each time Garner's offer was declined. (March 30th RP 30, 31)

On or about April 2006, Hamilton changed his mind and wished to purchase the company. (March 30th RP 30) Hamilton contacted Garner, who put them in touch with Salim Dada. Mr. Dada had been contracted by Garner to serve as his agent in the sale of the business. (March 29th RP 8, March 30th RP 31) When Hamilton met with Mr. Dada he was presented with a sales presentation; said presentation consisted of the history of Garner Trucking, as well as an estimation of the gross annual revenue with a listing of the top clients of Garner Trucking. Hamilton was also presented with an Asset and TRAC List for the company. (March 30th RP 34, 35, Ex. 40)

Hamilton's negotiation for the transaction and desire to purchase the business was based upon the above referenced documents. (March 31st RP 17-18) As part of Hamilton's diligence in investigating the company,

he compared the equipment list he was given to the depreciation statements of the tax returns. These matched perfectly thus, no reason to believe that the equipment was anything other than as presented by Garner. (March 30th RP 36)

These initial documents, and all subsequent documents were provided to Mr. Dada, by Garner. (March 30th RP 6, 7) Garner testified that he at all times intended to change the equipment and TRAC lease document, and in fact did so many times. However, as the Asset/TRAC List was revised by Garner and Mr. Dada, Hamilton was not provided with said documents. (March 30th RP 8) Hamilton's purchase of the company was based upon the information provided by Garner and Garner's Agent, Mr. Dada. Both Garner and Mr. Dada knew that the information was and would be changing, but neither shared that information with Hamilton. (March 30th RP 7, 8)

Thereafter, a Letter of Intent was signed on May 3, 2006, by Hamilton and May 8, 2006, by Garner. (Ex. 14.2) As per the Letter of Intent, the business was not to change. The Letter of Intent in pertinent part states as follows:

3. **a.** All equipment currently used by the company free and clear of debt obligations except the equipment on TRAC Leases (see attached Exhibit "A"). (Ex. 14.2)

b. All TRAC Leases currently on the company books shall remain as TRAC Leases post closing. (Ex. 14.2)

c. The Stockholder shall retain all cash and cash equivalent that is an excess of a liability shown on final balance sheet provided at closing. (Ex. 14.2)

7. **b.** There shall have been no material adverse change in the business, customers, suppliers, key relationships, prospect or financial performance of the company to an execution of this LOI and the closing of the transaction concentrated herein. (Ex. 14.2)

Although Exhibit A was never attached, Hamilton was lead to believe it was the equipment TRAC List that he had been given in the initial meeting with Mr. Dada. (March 30th RP 30, 35, 36, Ex. 17) When Hamilton asked Mr. Dada about additional documents and Exhibit A to the Letter of Intent, he was told he had all documents. (March 30th RP 43, 44, Ex. 17) Thus, Hamilton concluded that the original equipment list given by Mr. Dada was Exhibit A to the Letter of Intent. (March 30th RP 43, 44, Ex. 17)

At the time that Hamilton reviewed the documents of Garner Trucking, Hamilton was given a list of the TRAC Leases. However, the closing document showed 16 TRAC Leases rather than the eight that Hamilton was initially made aware. (Ex. 14) Further, another list dated June 26, 2006, showed a mere four [4] TRAC Leases. (Ex. 16) Hamilton did not get a full copy of the closing documents until on or after September 2006. (March 30th RP 40) While Garner will argue that Hamilton received a copy of the TRAC Leases at closing and consented to the same, Exhibit(s) A-D do not bear initials of either party. (Ex. 14(A-D)) Exhibit A is the equipment/TRAC List. All other documents were initialized at closing. (March 31st RP 96)

In the closing, Garner represented that there were no creditors, and all outstanding debts had been paid. (Ex. 14.2)

Shortly before the closing of the parties' transaction, Garner/Hamilton did meet with CPA Robin Nichols, to determine the net additional amount that would be due to Garner, if any, pursuant to Section 3(c) of the Letter of Intent. Although Ms. Nichols came up with an amount at that meeting, it was later changed to the amount of \$130,874.82. (Ex. 3) Hamilton did not agree to this amount, and the parties continued to negotiate. (March 30th RP 6, Exs. 4, 6, 7)

Based upon Hamilton's calculations, (Exs. 4 and 39) the amount should have been \$41,675.49. Both parties agreed the amount that Garner owed Hamilton for hauling hay should further reduce this amount. (March 31st RP 10) No agreement was made concerning the accounts receivable until later. (March 31st RP 9) Garner agreed that accounts receivable was speculative and if said amounts were not paid, then they would not be owed. (March 29th RP 22, 23, 24) Garner brought forth no evidence as to what amounts were actually paid. Hamilton testified that after detailed conversations with Garner post closing that Garner would agree to the amount of \$41,000.00 for the accounts receivable. (March 31st RP 9)

Hamilton testifies that on the day of closing, the company checking account was overdrawn in the amount \$97,000.00. (March 31st RP 58) The parties agree that per the balance sheet of June 30, 2006, that the checking account was represented to be overdrawn in the amount of \$40,674.00 (Ex. 15). On the day of closing, the account was overdrawn by \$97,000.00, which did include the amount previously disclosed (\$40,674.00), but did not include Check No. 9710 in the amount of \$43,079.01. The date of the balance sheet was June 30, 2006. (Ex. 15) The date of the closing was July 19, 2006. (Ex. 14) Check No. 9710 for the amount of \$43, 079.01 was not deducted from the Garner checking

account until July 26, 2006. (Ex. 32, Fife Commercial Bank Checking Account Register for the month July) Consequently, the amount of the overdraft on the date of closing had nothing to do with that particular check. The total amount of the overdraft, less the amount on the balance sheet, is \$56,326.00 (\$97,000.00 less \$40,674.00).

At the time of closing, Garner represented that there had been no material adverse changes in the condition of the company. If there had been changes and/or anything that would adversely affect the business, it was to be disclosed in Schedule 2.28 (Ex. 14, Schedule 2.28) Garner signed a document that stated "Since May 3, 2006, that there had been no changes in the condition of the company that will adversely affect it." (March 31st RP 35, Ex. 14.2, Schedule 2.28)

Truck 251 was purchased after the signing of the Letter of Intent and Truck 201 was not listed on the equipment list. (Exs. 14(C), (D) and 17)

Trailers 5517, 5518, 5521 and 5522 were not listed as TRAC Leases in the original equipment list and thus, should have been paid off at closing. (March 31st RP 45, 46) Garner argues that Hamilton should not be awarded his damage for failure to mitigate. However, Hamilton did attempt to mitigate his damages, but found that he was not able to sell

Trucks 251, 201 or Trailers 77 or 73 because Garner, unbeknownst to Hamilton had crossed collateralized these items making it impossible to sell one without selling them all. (March 31st RP 43)

There is however one mistake that was made in the Findings of Fact and Conclusions of Law. Finding of Fact 17(a-c) reflects payments that were multiplied by 29 months for an ultimate amount granted in damages by the Court. However, as can be seen from the actual amounts ordered, each sum is actually based upon payments of 16 months. PACCAR filed suit in the beginning of 2008, (Ex. 11) and Hamilton quit paying in December 2007. (March 29th RP 35) Inasmuch, the actual Findings should be changed to reflect 16 months rather than the 29, but the amounts themselves are accurate and based upon payment of 16 months. Hamilton testified that he had made payments on both until December 2007. (March 29th RP 35)

Garner does not assign error to Finding of Fact 17(a), which orders damages to Hamilton for Trailers 4408 and 2228. The Court found that Garner entered into a TRAC Lease dated May 10, 2006, encumbering Hamilton for \$24,308.48.

IV. **ARGUMENT**

Appellate Courts review de novo questions of law and a trial court's conclusions of law. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wash.2d 873, 880, 73 P.3d 369 (2003). Appellate Courts review of findings of fact "under a substantial evidence standard." The parties' intentions are questions of fact, while the legal consequences of such intentions are questions of law. *Pardee v. Jolly*, 163 Wash.2d 558, 566, 182 P.3d 967 (2008). "Substantial evidence is evidence that would persuade a fair-minded person of the truth of the statement asserted." *Cingular Wireless, L.L.C. v. Thurston County*, 131 Wash.App. 756, 768, 129 P.3d 300 (2006).

The Court of Appeals deferential review requires them to consider all of the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum, but exercised fact finding authority, a process that necessarily entails acceptance of the fact finder's views regarding the credibility of witnesses and weight to be given reasonable, but competing inferences. *Freeburg v. City of Seattle*, 71 Wash.App. 367, 859 P.2d 610 (1993). In the end "[a] trial court's findings of fact must justify its conclusions of law." *Hegwine v. Longview Fibre Co.*, 162 Wash.2d 340, 353, 172 P.3d 688 (2007).

A. **The net amount of accounts receivable due to the Garners was not concretely established.**

The trial court found that the parties agreed at trial that the net accounts receivable at closing due to the Garners was \$41,025.00.

Hamilton testified that he offered \$41,000.00 and that it was his understanding that Garner had agreed to accept that amount. (March 31st RP 9) Garner also testified that he would have taken that amount. (March 31st RP 9) Thus, the Court could have reasonably found the parties had agreed.

But Hamilton testified that the amount was \$41,675.49. (Exs. 4 and 39) Both Garner and Hamilton testified at trial that if accounts receivable were not paid into Garner Trucking by customers, then there would be nothing to be owed. (March 29th RP 22-24) Garner brought forth no evidence to establish those receivable were ever collected.

Hamilton came up with the amount of \$41, 675.49 by starting with the amount that Robin Nichols had presented in their previous meeting (\$130,874.82). (Exs. 4 and 39) Hamilton then deducted two checks, one for the amount of \$41,034.76 and one for the amount of \$2,044.25, which equates to the actual amount of Check No. 9710 for the amount of \$43,079.00. (Ex. 18) Hamilton then deducted \$26,814.94, which Hamilton testified at trial appears under account number 2517 N/P #602.

(Ex. 39) Hamilton testified that this amount should be deducted because Garner had taken \$30,000.00 worth of assets, but failed to deduct the actual loans that were existing on those assets. (March 31st RP 7)

Hamilton then deducted the amount of \$6,988.76. (Exs. 4 and 9)

Hamilton testified at trial that that amount represented four trailers that were supposed to be paid off at closing. (March 31st RP 7, 8) Hamilton then deducted the amount of \$12,316.62. Hamilton testified that that was an amount that was set aside in escrow for drivers. (March 31st RP 7-9)

Hamilton presented the above numbers to Garner and approximately a week later Garner called Hamilton to agree that there had been some mistakes and that he would agree to a payment of \$41,000.00. (March 31st RP 9)

Both parties agreed that the amount of Garner's hay bill should further be deducted. (March 31st RP 10, March 29th RP 29-30) The principal balance of the hay hauling bill was \$18,899.25. (Ex. 22) Hamilton testified that all outstanding billings have interest at the rate of 18%. (March 31st RP 162) At the time of trial \$11,044.20 had been accumulated for a total of \$29,943.45. This amount deducted from Hamilton's calculations of \$41,675.49 leaves an ending balance for the accounts receivable of \$11,732.04. Again, there was no evidence

presented on the amount of the accounts receivable collected. Garner acknowledged that if the accounts receivable were paid, then he was owed the money, but accounts receivables were speculative and could not guarantee collection. (March 29th RP 22-23)

The parties, although meeting prior to closing, did not agree upon the number of the accounts receivable and thus, was not reduced to writing. Garner testified that the letters between him and Hamilton post closing were an attempt to negotiate this amount. (March 30th RP 6) In all actuality, the Stock Purchase Agreement contained a provision that would adjust the price higher or lower if the parties were not able to come to an agreement on the accounts receivable. The same agreement allowed the closing date to be extended so that the sums would be available for closing. (Ex. 14, March 31st RP 35)

In Garner's Amended Complaint, under Section 5 of the Statement of Facts, Garner contends that the parties' "Agreement provided that all accounts receivable of the company as of *July 18, 2006*, would remain the property of the Plaintiff and not be transferred to the Defendant. The Defendant therefore agreed that any such accounts receivable received by the Defendant after closing of the sale would be used to pay the liability of the company that existed as of the closing date, and to pay over to the

Plaintiff all remaining receivables in excess of such liabilities.” (CP 17-19 [July 8, 2010]) The accounts receivable is Schedule 2.10 in the Stock Purchase Agreement provided at closing dated July 18, 2006, provides that there was a mere accounts receivable amount of \$178,535.80. (Exs. 14 and 13, Schedule 2.10) The amount utilized in the meeting between Nichols, Garner and Hamilton was placed at \$283,703.74. (Exs. 2 and 15) Thus, the reality is that between June 30th and the date of closing, July 18, 2006, Garner had already received \$105,167.94 of the accounts receivable.

Garner will argue that the parties had stipulated to utilizing the June 30th balance sheet amount, but the evidence clearly shows that by the date of closing, by virtue of the documents provided by Garner, he had already collected \$105,167.94. Thus, \$105,167.94 should have been deducted from the \$130,874.82 for a total of \$73,367.86. Hamilton’s deductions from Exhibit 39, \$89,199.33 (\$41,034.76, \$2,044.25, \$26,814.94, \$6,988.76, \$12,316.62) and further reduced by the amount of the Quality Hay bill \$29,943.45, leaves a negative balance of (\$45,774.92), which is an amount that should be credited to Hamilton per the Stock Purchase Agreement that mandates that the purchase price will be adjusted higher or lower to reflect this amount. (Ex. 14.6)

B. The unaccounted overdraft in the company's checking account at closing was \$56,326.00.

The Court found in Finding of Fact 11 that Hamilton had presented evidence that there was an overdraft in the company's checking account after closing in the amount of \$97,000.00. The trial court found that the parties had accounted for \$43,000.00 of that overdraft, leaving an unaccounted overdraft of \$54,000.00. While these numbers were close to what was testified to, they are somewhat inaccurate. Hamilton testified that on the day of closing the checking account was overdrawn in the amount of \$97,000.00. (March 31st RP 58) By the following Monday, there was \$150,000.00 overdrawn. (March 31st RP 58)

The parties agreed per the balance sheet of June 30, 2006, that the checking account was represented to be overdrawn in the amount of \$40,674.00. (Ex. 15) On the day of closing, the account was overdrawn by \$97,000.00, which did include the amount previously disclosed (\$40,674.00), but did not include Check No. 9710 in the amount of \$43,079.01. The date of the balance sheet was June 30, 2006. (Ex. 15) The date of the closing was July 19, 2006. (Ex. 14) Check No. 9710 for the amount of \$43,079.01 was not deducted from Garner Trucking's checking account until July 26, 2006. (Ex. 32, Fife Commercial Bank Checking Account Register for the month July) Consequently, the amount

of the overdraft on the date of closing had nothing to do with that particular check. The total amount of the overdraft, less the amount on the balance sheet, is \$56,326.00 (\$97,000.00 less \$40, 674.00).

While Mr. Hamilton deducted the \$43,079.01 from the accounts receivable, that check is not what made the checking account overdrawn in the amount of \$97,000.00. Thus, the Court concluded that it should not be further deducted to reduce the amount of the overdraft. The evidence demonstrated that Check No. 9710 was not deposited into the account for an additional seven days. Thus, Hamilton testifying that the following Monday the checking account was overdrawn by \$150,000.00, still didn't account for Check No. 9710 in the amount of \$43,079.01.

C. Hamilton proved his damages and any attempt to mitigate those damages where precluded by acts from Garner.

On the original equipment list given by Garner to Mr. Dada, who ultimately provided it to Hamilton, Trucks 201 and 205 were not listed. (March 30th RP 35, Ex. 17) Garner testified that as he updated the equipment list, he neither gave copies to Hamilton nor did he instruct anyone else to give those to Hamilton on his behalf. (March 30th RP 7-8) Garner further testified that by placing an asset on a TRAC Lease, it would require Garner Trucking (i.e. Hamilton) to make additional monthly

payment). Garner also acknowledged that a TRAC Lease could not be paid off early so that Hamilton was thereafter obligated. (March 29th RP 84)

The Letter of Intent, which was included in the Stock Purchase Agreement, specified that all TRAC Leases currently on the company's books shall remain as TRAC Leases post closing. (Ex. 14.2) The Letter of Intent references an Exhibit A. Hamilton believed the equipment listing given to him originally by Mr. Dada was Exhibit A. (Ex. 17) At no time when Garner was updating this list, did he provide it to Hamilton. (March 30th RP 7-8)

Ultimately, there were 16 TRAC Leases rather than the eight that Hamilton had initially been made aware. (Ex. 14) Two of said TRAC Leases were Trucks 201 and 251. (Ex. 14(C) and (D)) Truck 201 did not appear on Exhibit 17. Thus, the Court concluded that it was not disclosed and Hamilton was entitled to the damages therefrom. Truck 251 was placed upon a TRAC Lease on May 5, 2006. (Ex. 14(D)) This was in direct violation of the Letter of Intent that was signed on May 3rd by Hamilton and May 8th by Garner. Pursuant to the Letter of Intent, Garner was to make no material adverse changes to the business and in fact, Garner at closing signed and agreed "There are no changes in ownership

or events that are materially adverse to the company since the date of May 3, 2006. (Ex. 14, Schedule 2.9)

Despite the fact that Garner warranted that nothing had changed since May 3, 2006, Garner on May 5, 2006, bought a truck and placed it upon a TRAC Lease. (Ex. 14(D))

Hamilton testified that as part of his due diligence, he made a budget based upon the equipment list that he was given and said budget amounted to approximately \$8,800.00 per month. (March 31st RP 17, 18) Hamilton testified at trial that the additional monthly payment for Truck 201 was \$2,139.60. (March 31st RP 40-42, Ex. 14(C)) Hamilton further testified that the additional payment for Truck 251 was \$1,932.00. (March 31st RP 42, Ex. 14(D)) Garner testified that Hamilton quit paying in December 2007. (March 29th RP 35, Ex. 11) Thus, Hamilton made payments of \$2,139.60 and \$1,932.00 for Trucks 201 and 251 for a period of 16 months. The Court found this to be Hamilton's damages in light of the breach by Garner via the Letter of Intent and his failure to disclose.

Garner will argue that Hamilton didn't complain about Trucks 201 or 251. However, the evidence clearly shows the transaction occurred July 2006. The parties negotiated on their own into late January 2007, and

thereafter Garner filed suit in July 2007. (Exs. 7 and 14, CP 1-2 [July 8, 2010])

Garner argues that Hamilton failed to mitigate his damages. However, as specified above, Garner acknowledges that by placing an asset on a TRAC Lease that the lease cannot be paid off early. (March 29th RP 84) Thus, Hamilton is precluded from selling Truck 251. Hamilton was further precluded from mitigating his damages because of further actions taken by Garner in violation of the Letter of Intent. Trailers 77 and 73, although they were listed as a TRAC Lease in the equipment list given to Hamilton, any equity these trailers may have had, Garner further encumbered, contrary to the Letter of Intent, for a cross-collateralization for Trucks 201 and 251. (March 29th RP 85) Hamilton could not get himself out of debt because of the cross-collateralization. (March 31st RP 43)

Garner believes Hamilton failed to mitigate damages by making 29 months of payments when in actuality it was 16 months. (March 29th RP 35, Ex. 11) Thus, for 16 months Hamilton made payments. However, during these 16 months he was attempting to figure out what had just occurred in the business he bought and negotiating with Garner. When it became apparent that negotiations failed, Garner had filed suit against

Hamilton that he could not pay the debt that Garner had left, he stopped paying and the business was dissolved. Hamilton did not ratify Garner's breach, but rather Hamilton at all times made his concerns known in good faith and continued to negotiate even post closing.

D. The evidence at trial conclusively demonstrated that Trailers 5517, 5518, 5521 and 5522 were listed as equipment and consequently should have been paid off at closing.

In the initial equipment list given to Hamilton, Trailers 5517, 5518, 5521 and 5522 were listed as equipment and not TRAC Lease. (Ex. 17) Thus, as part of Hamilton's due diligence he determined a budget and determined if the business would be profitable based upon Exhibit 17. (March 31st RP 17-18) Many items were listed as equipment. Based upon the Stock Purchase Agreement (Section 1.6), all equipment currently used by the company were to be free and clear of debt except the equipment on the TRAC Lease. (Ex. 14) Based upon the exhibit list that Hamilton was given, he expected these items to be paid off at closing. (March 31st RP 45) Trailers 5517 and 5518 were listed as equipment on the original equipment list and thus should have been paid off. The payoff amount was \$21,288.00. (Ex. 14) Likewise for Trailers 5521 and 5522, these

• . .

were listed as equipment and should have been paid at closing. The payoff was \$31,504.00.

A few days prior to closing, Mr. Dada sent to Hamilton the Stock Purchase Agreement less the detailed schedules. Hamilton contacted Mr. Dada and asked him about the schedule to be provided, to which Mr. Dada responded that he had all of the information. (March 30th RP 43, 44, Ex. 17) Mr. Hamilton concluded and logically so, that the Exhibit A to be utilized at closing was the Exhibit A that he had been given. (Ex. 17)

At the time of closing, Hamilton had no reason to believe that any of the documentation that he had previously been given had been altered. In fact, when he asked, he was told nothing changed. All items that Hamilton saw at closing were initialed. (March 31st RP 96) However, because Hamilton had questioned Mr. Dada about the documents at closing, he had no reason to believe that the documents were anything other than what he had previously been disclosed. Consequently, all documents proposed to Hamilton were signed or initialed at the time of closing. Hamilton has testified that it took him approximately six weeks to get the completed notebook documentation from Grant Anderson and that many of the schedules and/or exhibits were not present at the time of closing. (March 31st RP 96) This is consistent as Exhibits A-D to the

Purchase and Sale Agreement were not initialed by either party. (Ex. 14(A-D)) The only material exhibit is Exhibit A. Hamilton had been led to believe that the original equipment list that he had been given was going to be utilized as Exhibit A. It was not. The Court's finding of damages was the discrepancy between the Exhibit A in the final closing binder (yet not initialed by either party at the time of closing) and the original equipment list given to Mr. Hamilton.

The reality is in the original budget that Hamilton devised, he calculated that his payment for purchasing Garner Trucking would be approximately \$8,800.00. (March 31st RP 17-18) Due to the undisclosed TRAC Leases and items that were not paid off at closing, Hamilton was encumbered an additional \$8,300.00 thus, making his payments well over \$17,000.00. (March 31st RP 51) Hamilton testified had he had known of those changes, he would not have purchased the company. (March 31st RP 51) Garner will argue that these changes did not substantially change the company, but a 100% increase in debt is substantial.

V.
CONCLUSION

The Trial Court erred in finding that the net amount of the accounts receivable due to Garner is \$41,025.00 as the actual amount after deductions and giving Garner credit for those accounts receivable collected as of the date of closing would result in a negative \$45,774.92, which pursuant to the Stock Purchase Agreement should credit this amount in the purchase price in favor of Hamilton. The Trial Court further erred in finding that the net unaccounted overdraft in Garner Trucking checking account at closing was \$54,000.00, as the actual figure as testified by the parties and as the evidence demonstrated was \$56,326.00.

The Court ruled that it was clear that Garner violated the spirit and the specifics of the Letter of Intent, as well as the contract itself. Moving assets around and not paying off the liability that he is required to do, clearly Hamilton was damaged.

Correcting the errors reflected above, Hamilton's gross judgment should be:

1. Overdraft in checking \$56,326.00.
2. Accounts receivable downward deviation for price of company \$45,744.92.

3. a. Trailers 4408 and 2228: Entered into a TRAC Lease dated May 10, 2006 for Trailers 4408 and 2228. Encumbering assets for \$24,308.48. Garner did not assign error to the Court's awarded damages for Trailer 4408 and 2228 in the amount of \$24,308.48.
- b. Truck 201: May 6, 2006, Purchasing a new truck, Truck 201 contrary to Letter of Intent and Stock Purchase Agreement. Hamilton made twenty-nine (29) payments of \$2,139.60 or \$34,233.00.
- c. Truck 251: Not listed on the original Asset/TRAC List contrary to Letter of Intent, and Stock Purchase Agreement. Hamilton paid twenty-nine (29) months x monthly payment of \$1,932.01 or \$30,912.00.
- d. Trailer 5517 and 5518: Were listed as equipment that should have been paid off at closing \$21,288.00.

Gross Judgment \$212,812.40.

Garner did however establish at trial that the Promissory Note with interest amounted to \$112,596.00, which should be deducted from Hamilton's judgment for a net judgment of \$131,720.40.

Dated: September 23, 2010.

Respectfully Submitted,


KRISTINA A. DRIESSEN, WSBA #29187
Attorney for Respondent

FILED
COURT OF APPEALS
DIVISION II

10 SEP 24 PM 12:41

STATE OF WASHINGTON

BY _____
DEPUTY

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing BRIEF OF RESPONDENT/RESPONSE TO APPELLANTS' OPENING BRIEF on the following individual in the manner indicated:

Michael W. Johns
DAVIS ROBERTS & JOHNS, PLLC
7525 Pioneer Way, Suite 202
Gig Harbor, WA 98335

(X) Via Hand Delivery (ABC Legal Messengers)

SIGNED this 23rd day of September, 2010, at Auburn,
Washington.


NICOLE SYMES