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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

RODNEY R. PARR and LINDA J. PARR, husband and wife,

Appellants/Plaintiffs,

v.

HASELWOOD IMPORTS, INC., a Washington corporation; WILER
MANAGEMENT TRUST; HASELWOOD FAMILY TRUST,

Respondents/Defendants.

BRIEF OF APPELLANTS

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I. INTRODUCTION

In December 2015, the Plaintiffs sold two automobile dealerships, including one that sold Volkswagen vehicles, to the Defendants. To facilitate the sale of the dealerships and to provide for the continuous operation of the dealerships through the sale, the parties to the transaction agreed that income earned and expenses incurred prior to closing, but received by the dealership after closing, would affect the sale price of the dealership through post-closing adjustments. For example, income that was earned prior to closing, but received by the dealership after closing, would increase the sale price of the dealership for the benefit of the Plaintiffs, while expenses incurred before closing, but received after closing, would decrease the sales price for the benefit of the Defendants. Following this process, the parties made several post-closing adjustments in the months after closing.

Approximately three months before closing, Volkswagen of America, Inc. admitted that it had installed devices on its vehicles to evade clean air emission standards on some of its vehicles. Approximately four months after closing, a class action lawsuit was filed against Volkswagen. The class action was brought on behalf of dealers who sold Volkswagen vehicles as of September 18, 2015 (when the Plaintiffs owned the dealership at issue here.) In the class action, the plaintiffs alleged claims related to the

emission deception, but they also alleged several non-emission related claims as well. These claims alleged improper conduct by Volkswagen, including illegal pricing, improper vehicle allocation schemes and coercion to use a Volkswagen-owned credit company. These claims accrued in the years before the class action lawsuit was filed, when the Plaintiffs owned the dealership.

When the class action was settled in 2016, the Defendants received approximately \$1.4 million from Volkswagen in exchange for releasing all claims against Volkswagen—claims that accrued when the Plaintiffs owned the dealership. When the Plaintiffs learned of the settlement payments, they requested these funds be treated as income in accordance with the post-closing adjustments provided for in the purchase and sale agreement. As income accrued before closing but received by the dealership after closing, the Volkswagen settlement payments rightfully belong to the Plaintiffs. The Defendants, however, refused to transfer the settlement payments to the Plaintiffs.

The Plaintiffs filed suit, alleging breach of contract and seeking an accounting of the settlement payments. The superior court subsequently granted the Defendants' motion for summary judgment, dismissed the Plaintiffs' claims as a matter of law, and awarded the Defendants their attorneys fees and costs. Because genuine issues of material fact exist

regarding whether the Defendants breached the contract and as to whether the Volkswagen settlement payments constitute income that rightfully belongs to the Plaintiffs, the superior court's orders granting summary judgment and awarding attorneys' fees and costs to the Defendants should be reversed.

II. ASSIGNMENTS OF ERROR

1. The superior court erred when it granted Defendants' motion for summary judgment on May 21, 2019, dismissing Plaintiffs' claims for breach of contract and an accounting, and declaring Defendants as the prevailing parties in the litigation.

2. The superior court erred when it granted Defendants' motion for attorneys' fees and costs on July 26, 2019.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1) Whether the superior court erred in summarily dismissing, as a matter of law, Plaintiffs' breach of contract claim because genuine issues of material facts exist regarding whether the Defendants' breached their contract with the Plaintiffs. (Assignment of Error 1)

2) Whether the superior court erred in summarily dismissing, as a matter of law, Plaintiffs' breach of contract claim because a genuine issue of material fact exists as to whether the settlement payments received

by the Defendants constitute income that rightfully belongs to the Plaintiffs under the terms of the contract between the parties. (Assignment of Error 1)

3) Whether the superior court erred in summarily dismissing, as a matter of law, Plaintiffs' claim for an Accounting because genuine issues of material facts exist as to whether the Defendants' breached their contract with the Plaintiffs, and because determining the exact amount owed by Defendants is complicated and the Defendants refused to render an accounting of this amount. (Assignment of Error 1)

4) Whether the superior court erred in determining that the Defendants were the prevailing party entitled to an award of attorneys' fees and costs when genuine issues of material facts exist as to whether the Defendants breached their contract with the Plaintiffs. (Assignment of Error 1 & 2)

IV. STATEMENT OF THE CASE

A. The Contract for the Sale of the Automobile Dealerships

Rodney and Linda Parr owned a Volkswagen and Hyundai dealership (Parr Imports, Inc.) and a Ford and Mazda dealership (Parr Ford, Inc.), which they successfully operated for many years in Bremerton, Washington. Clerk's Papers (CP) 51-54. In early 2015, Mr. Parr decided it was time for him to retire and to sell both dealerships. CP 54-55. In

July 2015, Eric “Rick” Wiler made an offer to purchase the dealerships. CP 56; 77.

On August 5, 2015, the parties entered into a Stock/Membership Units Purchase and Sale Agreement (“PSA”) for the sale of the dealerships and associated real estate, with a closing date of November 1, 2015. CP 88-187, 481-82. Subsequently, four amendments were made to the PSA (including one substituting the Defendants for Mr. Wiler as the Purchaser), and the closing date was moved to December 10, 2015. CP 158.

To facilitate the sale, and to avoid a lengthy winding-down period, the PSA called for a sale of stock as opposed to an asset sale. CP 56. Because the sale was a stock sale, the dealership would continue to operate as a continuous business, without interruption, through the closing date. CP 481-82. As a result, some expenses incurred and income earned before closing would come into the business after closing. CP 482.

For this reason, the parties inserted Section 10.7.2 into the PSA to govern how these items of income and expense would be handled after closing. CP 482. This section applies broadly to all items of income and expense:

10.7.2 The Parties recognize and agree that at Closing there will be items of income and expense which will not have been received by and/or posted in the accounting records of the Dealerships and the Real Estate Entities. **Examples of these may be contracts in transit,**

dealer rebates, factory holdbacks, accounts receivable for work performed, sales made, etc., prior to the date of Closing. Examples of expense items are such things as rebates due customers, refunds due customers, customer deposits, purchases on account received, but not yet paid, etc. **It is the intention of the Parties that the sale price of the Dealerships shall be increased by all such items of income and decreased by all such items of expense.** Accordingly, as soon as practical after Closing, Peterson Sullivan, LLP, Certified Public Accountants, Seattle, Washington, shall determine the necessary adjustments to the purchase price of the Dealerships as a result of these items of income and expense. The amount so determined shall be paid by the Party owing a net positive amount to the other by bank wire transfer within five (5) days of the determination of the net amount due.

CP 115 (emphasis added).

As stated in § 10.7.2, income allocated to a date prior to the date of closing (no matter when received) would be for the benefit of the Plaintiffs, thereby increasing the purchase price. Expenses allocated to a date prior to closing (again, no matter when received) would decrease the sale price due to the Plaintiffs. There is no time limit placed on making these adjustments.

The sale closed on December 10, 2015. CP 76. Periodically after closing, the accounting firm Peterson Sullivan, LLP would provide the parties with reports showing the amounts due to and owing from one party to the other as of the date of the report. The party owing a net difference as of the date of the report would arrange a bank wire transfer of that amount to the bank account of the other party. CP 482-83.

For example, a report received by Mr. Parr on March 4, 2016, shows that as of that date the Defendants owed the Plaintiffs \$308,454.39, and the Plaintiffs owed the Defendants \$637,019.55, for a net amount owing by the Plaintiffs of \$328,565.16. CP 483 (¶ 8). Accordingly, Mr. Parr authorized a bank wire transfer in that amount to the Defendants' bank account. CP 483 (¶ 8). Over a six-month period, the Plaintiffs ended up owing the Defendants over \$1,000,000, which was paid by wire transfers to the Defendants' bank account. CP 483 (¶ 9).

B. Volkswagen Emissions Scandal; Class Action Lawsuit; and Subsequent Settlement of All Claims.

On September 3, 2015, approximately three months before closing, Volkswagen of America, Inc. ("Volkswagen") admitted that it had installed emission "defeat devices" to evade clean air standards on some of its Volkswagen diesel automobiles. By September 18, 2015, the U.S. Environmental Protection Agency issued a Notice of Violation, and the general public became aware of this problem. CP 15, 189-94. The Defendants acknowledge they became aware of the Volkswagen scandal by September 18, 2015, almost three months prior to the closing of the sale. CP 15 (¶ 13).

On April 6, 2016, three Volkswagen dealerships filed a lawsuit for a purported class of Volkswagen dealerships in the U.S. District Court for

the Northern District of Illinois. *Napleton Orlando Imports, LLC, v. Volkswagen Group of America, Inc.*, U.S. Dist. Ct. Northern Dist. Ill. Case #1:16-cv-04071 (Apr. 6, 2016). Later that month, the case was transferred to the Northern District of California by the United States Judicial Panel on Multidistrict Litigation. See *Final Settlement Agreement*, filed Sept. 30, 2016. The Amended Complaint, Complaint, and settlement documents in *Napleton* are available at <http://www.vwdealerssettlement.com/>.

Although the settlement documents and complaints in *Napleton* were not filed with the Kitsap County Superior Court, the court considered and referenced the *Napleton* complaint and settlement documents in its order granting the Defendants' motion for summary judgment. CP 543 (n.1.). Because these documents were considered by the superior court and designated in the court's summary judgment order, they are properly part of the record on review. RAP 9.12; *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 756, 162 P.3d 1153 (2007).

The *Napleton* lawsuit alleged not only damages stemming from the emissions scandal but also for numerous other wrongs such as Volkswagen's "illegal pricing and allocation schemes, and coercion to use Volkswagen Credit." *Napleton* Amended Complaint at ¶ 2. As stated in the original complaint, Volkswagen "abused dealers through creation of unlevel allocation and pricing, and coerced dealers into using Volkswagen's

affiliated loan company, VCI.” *Napleton* Complaint at ¶ 3. In support of the illegal pricing, allocation schemes, and coercion to use Volkswagen Credit claims, the Amended Complaint in the *Napleton* lawsuit cites conduct by Volkswagen dating to 2007 and 2013. *Napleton* Amended Comp. at 82, 85.

On October 18, 2016, the court in *Napleton* issued a preliminary approval of a settlement of claims arising as of September 18, 2015. *Order Granting Preliminary Approval of The Volkswagen-Branded Franchise Dealer Class Action Settlement Agreement and Release*, available as “Order Granting Preliminary Approval” at <http://www.vwdealerssettlement.com/>. The settlement agreement defined the class as “a nationwide class of all authorized Volkswagen dealers in the United States who, on September 18, 2015, operated a Volkswagen branded dealership pursuant to a valid Volkswagen Dealer Agreement.” *Order Granting Preliminary Approval* at 4:8-10. The settlement agreement “entitles Class Members to a cash Individual Dealer Settlement Payment” with a maximum settlement amount of \$1.208 billion. *Order Granting Preliminary Approval* at 5:4-5. The settlement agreement in *Napleton* estimated that the individual “Class Members will receive an average cash payment of \$1.85 million.” *Order Granting Preliminary Approval* at 5:5-6. The dealers received these pro-rata payments without having to establish individual damages or even submitting a claim. *Order Granting Preliminary Approval* at 6:21-7:4.

The final, approved settlement agreement confirmed the class and the payments to individual dealers. *Order Granting Final Approval of Volkswagen Branded Franchise Dealer Class Action Settlement Agreement And Release*, filed Jan. 23, 2017, at 4:7-5:3, available as “Final Approval of Settlement” at: <http://www.vwdealersettlement.com/>. The *Napleton* settlement added that Volkswagen was required to pay each Class Member directly, and that “The Settlement Payment is equal to each Class Members’ pro rata share of the Monthly Financial Assistance Payments that Volkswagen paid to Eligible Dealers in November 2015.” Final Approval of Settlement at 5:3-6..

In exchange for these payments, Class Members are required to release their claims, including all claims for monetary damages “arising before the Effective Date” of the settlement agreement that relate to “allocation complaints or irregularities,” the method that Volkswagen uses to measure the sales and service performance or objectives of its Volkswagen-branded franchise dealers, and all discrimination or coercion claims “related in any way to the sale, incentivization or use of VCI wholesale and retail financing product.” Settlement Agreement at 7:16-24. Thus, the settlement and release are intended, in large part, to address claims stemming from Volkswagen’s actions prior to the April 2016 complaint and going back several years. *Napleton* Amended Compl. at 82,

85. Indeed, the settlement requires that class members be Volkswagen dealerships as of September 18, 2015.

In February 2017, Mr. Parr received a telephone call from Chris Russell, CPA, the managing partner of Peterson Sullivan, LLP. CP 483 (¶ 10) Mr. Russell told him that Volkswagen was paying a settlement to dealers as of September 18, 2015, and that it had established a website for payment. He suggested Mr. Parr look into that matter, as he might be entitled to the payments from Volkswagen. *Id.*

When Mr. Parr checked the website it confirmed that a class action lawsuit had been filed on behalf of Volkswagen dealerships as of September 18, 2015. CP 483. It further confirmed on October 18, 2016, the court approved a settlement for claims arising as of September 18, 2015. Therefore, in February 2017, Mr. Parr filled out the forms provided in the Volkswagen website to claim the settlement amount due as of September 18, 2015. CP 483. In mid-March, 2017, he received a letter from Volkswagen which verified that the settlement amounts were for dealers who owned a Volkswagen dealership on September 18, 2015. CP 484 (¶13); 515. The letter further stated that Parr Imports, Inc. was the authorized dealer as of September 18, 2015. CP 484 (¶13); 515.

However, the letter stated Volkswagen would not pay the money directly to Mr. Parr because the settlement proceeds were payable to the

dealership. CP 515. The letter further stated that Volkswagen had already sent payment to “Parr VW, now known as Haselwood Volkswagen of Bremerton.” CP 515. The letter concluded by telling Mr. Parr that if he believed he was entitled to the settlement amount he should address that issue with the Defendants. *Id.*

Indeed, the Defendants acknowledge that they received \$1,432,732.85 in settlement payments from Volkswagen. CP 34 (9:3-5); CP 207. The Defendants received half of that amount on December 16, 2016, and the remainder in monthly payments. CP 34 (9:4-5); CP 207.

Furthermore, Eric Wiler acknowledged on behalf of the dealership that the dealership was receiving the payments from Volkswagen in settlement of five separate and distinct claims asserted by the dealerships, all of which predated the closing date. CP 202-06. The settled claims for which the dealership received the payments from Volkswagen included the following:

(1) all claims related in any way to the TDI Matter; (2) all claims related in any way to VWGoA’s previously announced goals or objectives for U.S. sales volume growth, including any claims related in any way to incentives and other support payments or programs from VWGoA to any Volkswagen-branded franchise dealer related to such goals and any volume shortfall; (3) all claims for monetary damages arising before the Effective Date of the Franchise Dealer Class Agreement that relate in any

way to allocation complaints or irregularities (but allocations may be asserted by any dealer as a defense to a franchise termination by VWGoA); (4) all claims for monetary damages arising before the Effective Date of the Franchise Dealer Class Agreement that relate in any way to the method upon which VWGoA measures the sales and service performance of its Volkswagen-branded franchise dealers (but the method upon which VWGoA measures the sales and service performance may be asserted by any Volkswagen-branded franchise dealer as a defense to a franchise termination by VWGoA); and (5) all discrimination or coercion claims arising before the Effective Date of the Franchise Dealer Class Agreement related in any way to the sale, incentivization or use of VCI wholesale and retain financing products (collectively the “Released Claims”).

See Individual Release of Claims, CP 203.

Mr. Parr, through his attorney, subsequently requested that the payments received by the Defendants for the Volkswagen settlement be sent to Mr. Parr, in accordance with the PSA. CP 484 (¶15). The Defendants refused. *Id.* Accordingly, Mr. and Mrs. Parr filed suit to enforce the terms of the PSA.

C. The Plaintiffs’ Lawsuit

On September 6, 2017, the Plaintiffs filed their Complaint for Breach of Contract and an Accounting against the Defendants. In their Complaint, the Plaintiffs alleged that the Defendants’ failure to forward payments from the Volkswagen class action settlement for damages incurred as of September 18, 2015 constituted a breach of the PSA. CP 6.

The Plaintiffs further alleged they did not know the exact amounts received by the Defendants and, accordingly, asked the court to require the Defendants to make an accounting of all amounts they have received and will receive in the future in payment for or settlement of the Volkswagen class action. CP 6.

On April 19, 2019, the Defendants moved for summary judgment claiming that “[t]here is no evidence to support Parr’s breach of contract or accounting claims.” CP 28. The Defendants also sought their attorney fees and costs under the terms of the PSA. CP 42.

On May 21, 2019, the superior court granted the Defendants’ motion for summary judgment. CP 549-51. On July 26, 2019, the superior court granted the Defendants’ motion for attorney fees and costs. Supplemental CP __.¹ The Plaintiffs have timely appealed both orders.

V. SUMMARY OF THE ARGUMENT

Section 10.7.2 of the PSA states that income allocated to a date prior to closing, no matter when received, is for the benefit of the Plaintiffs, thereby increasing the purchase price. Similarly, expenses allocated to a

¹ See Order and Judgment Granting Defendants and Counter-Plaintiffs Haselwood Imports, Inc.’s Renewed Motion for Attorneys’ Fees and Costs Pursuant to the Court’s May 21, 2019 Order, entered on July 26, 2019.

date prior to closing would decrease the sale price due to the Plaintiffs. The PSA contains no time limit on making these adjustments.

In accordance with § 10.7.2, the parties made numerous post-closing adjustments to the sale price in the months after closing. By providing for post-closing adjustments, by making adjustments to the purchase price for many months after closing, and by imposing no time limit for making these adjustments, the parties' conduct shows that income, such as the Volkswagen settlement, was to be classified as income under § 10.7.2.

In addition, the PSA defines "accounts receivable" to include monetary claims accrued as of the date of closing. The PSA adds that "liabilities" include settlements of any kind, whether known or unknown, regardless of when asserted or included. Under § 10.7.2 of the PSA, accounts receivable constitute income, income that rightfully belongs to the Plaintiffs.

The class action lawsuit against Volkswagen, brought on behalf of class members who were Volkswagen dealers as of September 18, 2015—three months before the closing date in the instant lawsuit—involved several claims that accrued while the Parris owned the dealership. In addition, the releases executed by the dealers, including the release signed by the Defendants, specifically referenced that the settlement payment was being received for claims of illegal pricing, allocation schemes, and

coercion to use Volkswagen Credit. These claims all accrued when the Parrs owned the dealership.

For this reason, the Volkswagen settlement payments constitute income that rightfully should be allocated to the Plaintiffs under § 10.7.2. At a minimum, genuine issues of material facts exist as to whether the Volkswagen settlement funds constitute income under § 10.7.2, and the failure to allocate those funds to the Plaintiffs is a breach of the PSA. Because genuine issues of material facts exist regarding whether the Defendants breached the PSA, the superior court's summary judgment order and award of attorneys' fees should be reversed.

VI. ARGUMENT

A. Standard for Reviewing Summary Judgment Orders

An appellate court reviews a summary judgment order de novo and engages in the same inquiry as the trial court. *Allstate Ins. Co. v. Raynor*, 143 Wn.2d 469, 475, 21 P.3d 707 (2001). Summary judgment is appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c); *Vallandigham v. Clover Park School Dist. No. 400*, 154 Wn.2d 16, 109 P.3d 805 (2005). A material fact is one that affects the outcome of the litigation. *Hisle v. Todd Pac. Shipyards Corp.*, 151

Wn.2d 853, 861, 93 P.3d 108 (2004). All facts and reasonable inferences must be construed in the light most favorable to the nonmoving party. *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 830, 92 P.3d 243 (2004). Even if the basic facts are not disputed, “if the facts are subject to reasonable conflicting inferences, summary judgment is improper.” *Southside Tabernacle v. Church of God*, 32 Wn. App. 814, 821, 650 P.2d 231 (1982). Summary judgment should be granted only where reasonable minds could reach but one conclusion based on the facts. *LaMon v. Butler*, 112 Wn.2d 193, 197, 770 P.2d 1027 (1989).

B. Genuine Issues of Material Facts Exist Regarding Whether Defendants Breached the PSA.

A failure to perform a contractual duty constitutes a breach of contract. *TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.*, 140 Wn. App. 191, 210, 165 P.3d 1271 (2007) (citing Restatement (Second) of Contracts § 235(2) (1981)). Following a breach, “an injured party is generally entitled to those damages necessary to put that party in the same economic position it would have occupied had the breach not occurred.” *Id.* (citing *Rathke v. Roberts*, 33 Wn.2d 858, 865-66, 207 P.2d 716 (1949)).

Under Washington law, summary judgment is improper if there are material questions of fact regarding the interpretation of a contract and the

intent of the contracting parties. *Berg v. Hudesman*, 115 Wn.2d 657, 671, 801 P.2d 222 (1990). In *Berg*, for example, the Washington Supreme Court reversed the trial court's ruling granting summary judgment in a breach of contract case:

[T]he summary judgment in favor of the landlord must be reversed . . . [because] there are material questions of fact remaining as to the intent of the contracting parties and interpretation of the ground lease.

Berg, 115 Wn.2d at 671. In addition, *Berg* held that extrinsic evidence is admissible as to the entire circumstances under which a contract is made, as an aid in ascertaining the parties' intent. *Berg*, 115 Wn.2d at 667.

This process was illustrated in *Deep Water Brewing LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 248, 215 P.3d 990 (2009), *review denied*, 168 Wn.2d 1024 (2010). In the *Deep Water Brewing* case, the court confirmed that when the meaning of a contract provisions is disputed, courts read the provisions as a whole and in light of all the circumstances surrounding the contract to determine the intent of the parties. 152 Wn. App. at 248 (citation omitted). The court considers:

the subject matter and the objective of the agreement, the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of their respective interpretations.

Id. (citations omitted). When the Washington court first adopted these rules in *Berg*, it was adopting the Restatement (Second) of Contracts §§ 212,

214(c) (1981). Comment to Subsection (b) to this Restatement noted that “meaning can almost never be plain except in a context.”

For example, in *Deep Water Brewing*, a developer sought an access easement for a planned development next to Lake Chelan. The easement would cross land owned by siblings who operated a restaurant and lounge overlooking the lake. In negotiating the easement, the siblings rejected language that referred only to the view from the second-floor restaurant and not the first-floor lounge. When the city of Chelan required a dedicated right-of-way, the siblings again refused to sign until the document stated “or its lounge.” 152 Wn. App. at 239-40. The right-of-way document was omitted when the plat was recorded, and the covenants filed with the homeowners’ association allowed a 26-foot height, rather than 16 feet as originally drafted. *Id.* at 240-41.

The *Deep Water Brewing* court held that “the conduct of the parties following the agreements” was consistent with an intent to limit building heights to 16 feet, so as not to interfere with the view from either the restaurant or the lounge. *Id.* at 248. Thus, the appellate court upheld the trial court’s interpretation of the contract—after a bench trial—that the “parties intended to protect the view of the lake from both the restaurant and the lounge” and that homes in the development “that exceeded 16 feet interfered with that view.” *Id.* at 250.

Unlike *Deep Water Brewing*, there has been no trial in the case at hand. Instead, the superior court ruled that, as a matter of law, no reasonable trier of fact would find that the Volkswagen settlement payments would be classified as income under § 10.7.2 of the PSA.

As in *Berg*, however, there are genuine issues of material fact regarding the interpretation of the PSA and whether the parties intended for the Volkswagen settlement payments to be classified as income under § 10.7.2 of the PSA. There are three reasons why genuine issues of material fact sufficient to preclude summary judgment exist.

1. The PSA Dictates That the Volkswagen Settlement Payments Be Classified as Income that Rightfully Belong to the Parrs.

First, the PSA itself supports the Parrs' contention that the Volkswagen settlement payments should be classified as income. The PSA defines "Accounts Receivable" as:

all amounts due the Dealerships ... **on account of** services rendered, parts or accessories sold or delivered, used or new **vehicles sold or delivered, receivables due from the Franchisor**, and all other **accrued monetary claims** or money due the Dealerships ... **as of the Closing Date** with regard to the Business.

CP 89 (§ 1.1) (emphasis added). The Volkswagen settlement payment was in fact made by the franchisor (Volkswagen) to the dealership "as of September 18, 2015," when the Parrs owned the dealership. CP 484, 515.

Section 10.7.2 of the PSA then provides that items of income and expense not received or posted by the closing date, shall affect the sale price for the dealerships after closing. CP 115. Items of income will increase the sales price, while items of expense shall decrease the sales price. CP 115.

Similarly, “liabilities” are defined under the PSA to include:

all Indebtedness, losses, debts, liabilities, damages, obligations, taxes, claims, demands, orders, judgments and **settlements of any kind** or nature, **whether known or unknown**, fixed, accrued, absolute or contingent, liquidated or unliquidated, due or to become due, **regardless of when asserted or incurred ...**

CP 90-91 (§ 1.20) (emphasis added).

Read together, §§ 1.1, 1.20 and 10.7.2 indicate that payments that accrued as of September 18, 2015 should be allocated to the Plaintiffs even when they are posted after the Closing date. At a minimum, there are genuine issues of material fact as to whether the Volkswagen settlement payments should be allocated to the Plaintiffs under the PSA.

2. Because the Volkswagen Settlement Addressed Claims Arising Before the Closing Date, the Settlement Payments Constitute Income Under § 10.7.2 of the PSA.

In briefing and argument before the superior court, the Defendants repeatedly argued that the Volkswagen settlement was intended to compensate dealers for damages, including loss of goodwill, that occurred

after closing. CP 41-42, 517, 523-24; Report of Proceeding (RP) 31:6-32:6.

There are two problems with this argument.

First, there is no evidence that the Defendants suffered any damage from the Volkswagen scandal. On the contrary, the only evidence of damage before the court is the valuation analysis of Parr Imports, Inc. as of July 31, 2015, and November 30, 2015, prepared by the Plaintiffs' expert witness, Diane Anderson Murphy, ASA, Director of the Valuation Service Group of Moss Adams, LLP. This valuation was summarized on Page 8, Section H of her report:

The Volkswagen emissions scandal was a shock to the automotive retail industry and its effect on not only Volkswagen but also its dealer network was widely publicized. However, the effect on each dealership within the network was not consistent. We have examined the results of Parr to ascertain the effects of the emissions scandal on its goodwill from August 5, 2015 to December 10, 2015, the dates of the signing of the purchase and sale agreement and the closing of the Transaction. Based on our review of the operations of Parr we believe that the Company was minimally impacted by the VW emissions scandal. Regardless, the Company received the same proportional settlement from the OEM as other Volkswagen dealers who experienced greater damages.

CP 401.

The Defendants did not submit one scintilla of evidence to the contrary. At the very least, whether Defendants suffered any damages is a material question of fact.

Second, the Volkswagen settlement, and the complaints filed in that lawsuit, applied to several separate and distinct claims that pre-dated the emissions scandal—claims that accrued when the Parrs owned the dealership. For example, the class action lawsuit alleged damages stemming from Volkswagen’s “illegal pricing and allocation schemes, and coercion to use Volkswagen Credit.” *Napleton Amended Complaint* at ¶ 2. As stated in the original *Napleton* complaint, Volkswagen “abused dealers through creation of unlevel allocation and pricing, and coerced dealers into using Volkswagen’s affiliated loan company, VCI.” *Napleton Complaint* at ¶ 3. The claims asserted against Volkswagen for illegal pricing, allocation schemes, and coercion to use Volkswagen Credit cites conduct by Volkswagen dating to 2007 and 2013. *Napleton Amended Comp.* at 82, 85.

In addition, the releases executed by the dealers, including the release signed by Eric Wiler for Defendant Haselwood Volkswagen of Bremerton, specifically referenced the fact that the money was being received for claims of illegal pricing, allocation schemes, and coercion to use Volkswagen Credit. CP 203. This release included all claims for monetary damages “arising before the Effective Date” of the settlement agreement that relate to “allocation complaints or irregularities,” the method that Volkswagen uses to measure the sales and service performance or objectives of its Volkswagen-branded franchise dealers, and all

discrimination or coercion claims “related in any way to the sale, incentivization or use of VCI wholesale and retail financing product.” CP 203.

Thus, the settlement agreement and release of claims is clearly intended to address claims stemming from Volkswagen’s actions prior to the closing date of December 10, 2015. Indeed, the settlement requires that class members be Volkswagen dealerships as of September 18, 2015. To imply, as the Defendants do, that the Volkswagen settlement payments are solely to address emission scandal damages (and is to be allocated to the period of time after closing) is not accurate and does not reflect the totality of the class action lawsuit and settlement.

Moreover, claims accrue “when the party has the right to apply to a court for relief.” *Schreiner Farms, Inc. v. Am. Tower, Inc.*, 173 Wn. App. 154, 160, 293 P.3d 407 (2013) (quotation omitted). Under this standard, the class action claims for illegal pricing, allocation schemes, coercion to use Volkswagen Credit, and regarding the emissions scandal accrued when the Parrs owned the dealerships.

Because these claims accrued when the Parrs owned the dealership, they satisfy the definition of “Accounts Receivable” under the PSA:

all amounts due the Dealerships ... on account of services rendered, parts or accessories sold or delivered, used or new vehicles sold or delivered, receivables due from the

Franchisor, and **all other accrued monetary claims** or money due the Dealerships ... as of the Closing Date with regard to the Business.

CP 89 (§ 1.1 of the PSA).

And as an account receivable, the Volkswagen settlement payments constitute income under § 10.7.2 of the PSA—income that rightly belongs to the Parrs. At a minimum, whether the Volkswagen settlement payments constitute income under § 10.7.2 is a genuine issue of material fact that warrants reversal of the court's summary judgment order.

3. The Conduct of the Parties Supports the Parrs' Contention that the Volkswagen Settlement Payments Constitute Income under § 10.7.2 of the PSA.

Under *Berg*, the parties' actions after closing, and the context of their PSA, are admissible to elucidate their intent. In this case, the parties wanted to avoid an interruption in the operation of the dealership business, while also fairly attributing income and expenses to the party operating the business at the time the income or expense accrued. Thus, the parties agreed to make post-closing adjustments to the purchase price in § 10.7.2 of the PSA, and no time limit was imposed for applying these adjustments.

Consistent with § 10.7.2, the accounting firm Peterson Sullivan, LLP would provide the parties with reports after closing showing the amounts due to and owing from one party to the other as of the date of the report. The party owing a net difference as of the date of the report would

arrange a bank wire transfer of that amount to the bank account of the other party. CP 482-83.

In accordance with § 10.7.2, both Mr. Parr and the Defendants made numerous adjustments to the purchase price for several months after closing. For example, Mr. Parr was informed on March 4, 2016 that the Defendants owed the Plaintiffs \$308,454.39, and that the Plaintiffs owed the Defendants \$637,019.55, for a net amount owing by the Plaintiffs of \$328,565.16. CP 483 (¶ 8). Mr. Parr authorized a bank wire transfer in that amount to the Defendants' bank account. CP 483 (¶ 8). Over a six-month period, the Plaintiffs paid the Defendants over \$1,000,000 by wire transfers. CP 483 (¶ 9). These payments occurred months after closing.

By providing for post-closing adjustments, by making adjustments to the purchase price for many months after closing, and by imposing no time limit for making these adjustments, the parties' conduct shows that income, such as the Volkswagen settlement, received in December 2016, was to be classified as income under § 10.7.2. At a minimum, the parties' conduct creates a genuine issue of material fact.

C. No Evidence of Damages Suffered by the Defendants

In the summary judgment hearing, the court indicated it considered the Volkswagen settlement payments to be compensation for future damages suffered by the Defendants. RP 21:25-22:13. The court's

statement ignores the fact that the settlement covered non-emission related claims, such as illegal pricing, allocation and coercion, that accrued when the Parrs owned the dealership. In addition, there is no evidence in the record of any damages suffered by the Defendants.

Although the Volkswagen scandal had an impact upon some Volkswagen dealers, it had a very minimal impact upon dealers in Washington State, including Parr Imports, Inc., as documented in the valuation analysis of the dealership conducted by Moss Adams, LLP. CP 391-450. This valuation found that the dealership “did not experience the same reported drop in sale price per VW unit during 2015 as was reported for the U.S. market as a whole” and that “the Company was minimally impacted by the VW emissions scandal.” CP 251. In addition, there is no evidence in the record of any damages actually suffered by the Defendants. To the contrary, all of the evidence in the record shows there was no significant damage to the dealership. The record is clear that Mr. Wiler and the Defendants became aware of the Volkswagen scandal almost three months before the closing date, never raised the issue and closed the sale without objection.

D. Section 10.7.2, and not GAAP, Governs the Adjustment of Income After Closing.

In support of their motion for summary judgment, the Defendants relied upon the Declaration of Drew E. Voth, CPA. CP 365-72. Mr. Voth opined that generally accepted accounting principles (“GAAP”) hold that money to be received in the future should not be entered into the books of a corporation until the corporation becomes aware the funds will be received. CP 368 (¶ 7). Mr. Voth then argued that because the corporation was not aware that the Volkswagen settlement funds would be received until December 19, 2016, generally accepted accounting principles would hold that: “Payment would not have been recorded as an accounts receivable asset until that date as well.” CP 369 (¶ 8).

Mr. Voth, however, fails to explain why an appropriate post-closing adjustment could not be made in December 2016, since the parties placed no time limitation on making such adjustments in the PSA. Indeed, § 10.7.2 of the PSA unequivocally provides for the inclusion of “items of income and expense which **will not have been received by and/or posted in the accounting records** of the Dealerships.” CP 115 (emphasis added)

Mr. Voth also incorrectly suggests that the accounting firm Peterson Sullivan, LLP made the decision that the Volkswagen settlement funds belonged to the Defendants. CP 367 (¶ 4), 369-70 (¶ 10). In reality, the

managing partner of Peterson Sullivan, LLP stated that the firm “was never asked, nor did [it] ever undertake to determine which of the parties to this lawsuit was entitled to any funds from Volkswagen or as a result of the class action lawsuit involving the Volkswagen diesel emissions scandal.” CP 452. In fact, it was the managing partner of Peterson Sullivan, LLP who telephoned Mr. Parr in February 2017 to let him know of the Volkswagen settlement and who suggested Mr. Parr look into the matter, as he might be able to receive that payment from Volkswagen. CP 483 (¶ 10).

Mr. Voth’s opinion also fails to acknowledge that it is § 10.7.2, and not GAAP, that governs the allocation of Volkswagen settlement payments.

As Michael Massey, CFA, CPA/ABV, stated in his declaration:

GAAP does not govern which of the parties is entitled to the VW Settlement Payment. It only determines when the payment is to be recorded on the books of the Company. It is Section 10.7.2 of the PSA that determines which of the parties is entitled to the money.

CP 457-58 (¶ 10).

Moreover, Mr. Voth ignores the claims for illegal pricing, allocation schemes, and coercion to use Volkswagen Credit that were an integral part of the Volkswagen class action lawsuit and settlement. Because these claims, as well as the Volkswagen scandal, accrued when the Parrs owned the dealership, they qualify as income under § 10.7.2.

Because genuine issues of material fact exist as to whether the Volkswagen settlement funds constitute income under § 10.7.2, summary judgment should not have been granted.

E. An Accounting Is Warranted To Determine the Amount of Income Properly Allocated to the Plaintiffs.

Because the Defendants refused to inform the Plaintiffs of the exact amount of the Volkswagen settlement funds received by the Defendants, the Plaintiffs requested an Accounting in their Complaint. CP 6. The requirements for an accounting cause of action are: (1) either a fiduciary relationship between the parties, or a complicated account that cannot be conveniently discerned in an action at law; and (2) the plaintiff has demanded an accounting from the defendant and the defendant has refused to render it. *State v. Taylor*, 58 Wn.2d 252, 262, 362 P.2d 247 (1961) (citation omitted); *Corbin v. Madison*, 12 Wn. App. 318, 327, 529 P.2d 1145 (1974). Because the amount of income properly allocated to the Plaintiffs is complicated, and because the Defendants refused to provide this information, an accounting is warranted.

F. The Superior Court's Order Granting Attorneys' Fees and Costs to the Defendants Should Be Reversed.

On July 26, 2019, the superior court granted Defendants' motion for an award of attorneys' fees and costs and ordered that judgment be taken

against the Plaintiffs. Supplemental CP __.2 Because genuine issues of material fact exist as to whether the Defendants breached their contract with the Plaintiffs, the superior court's order should be reversed.

VII. CONCLUSION

Because genuine issues of material fact exist regarding whether the Defendants breached the contract and as to whether the Volkswagen settlement payments constitute income that rightfully belongs to the Plaintiffs, the Plaintiffs request that the superior court's orders granting summary judgment and awarding attorneys' fees and costs to the Defendants be reversed. Accordingly, the Plaintiffs request that this case be remanded to the superior court for trial.

RESPECTFULLY SUBMITTED this 23rd day of September, 2019.

VANDEBERG JOHNSON &
GANDARA, LLP

By 

Daniel C. Montopoli, WSBA # 26217
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Attorneys for Appellants

² See Order and Judgment Granting Defendants and Counter-Plaintiffs Haselwood Imports, Inc.'s Renewed Motion for Attorneys' Fees and Costs Pursuant to the Court's May 21, 2019 Order, entered on July 26, 2019.

CERTIFICATE OF SERVICE

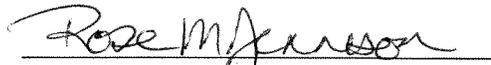
The undersigned makes the following declaration under penalty of perjury as permitted by RCW 9A.72.085.

I am a legal assistant for the firm of Vandenberg Johnson & Gandara. On the 23rd day of September, 2019, I caused to be served via email and first class mail a copy of the foregoing document to:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 23rd day of September, 2019, at Tacoma, Washington.


Rose Jennison, Legal Assistant

VANDEBERG JOHNSON & GANDARA

September 23, 2019 - 11:03 AM

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