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Case No. 53640-4-II

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

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RODNEY R. PARR and LINDA J. PARR, husband and wife,  
*Plaintiffs/Appellants,*

v.

HASELWOOD IMPORTS, INC., a Washington corporation; WILER  
MANAGEMENT TRUST; HASELWOOD FAMILY TRUST,  
*Defendant/Respondent*

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**RESPONDENTS' BRIEF**

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## **I. INTRODUCTION**

Appellants Rodney R. Parr and Linda J. Parr (collectively, the “Parrs”) are the former owners of a Volkswagen dealership located in Bremerton, Washington. In December 2015, they sold all their interest in the Volkswagen dealership to Respondents Haselwood Imports, Inc., Wiler Management Trust, and Haselwood Family Trust (collectively “Haselwood”). More than a year after the sale closed, Volkswagen of America, Inc. (“Volkswagen”) reached a settlement with various dealerships in connection with the emissions cheating scandal and paid a portion of this settlement to the dealership now owned by Haselwood. The Parrs now claim they are entitled to these settlement proceeds even though (i) under the parties’ contract they had no right to these payments, (ii) Volkswagen rejected Mr. Parr’s application for settlement proceeds because he no longer owned the dealership, and (iii) Mr. Parr admits he suffered no damages as a result of the scandal. The Parrs now appeal the trial court’s summary judgment dismissal of their claims.

In August 2015, one month before the emissions scandal became public, the Parrs and Haselwood executed the Purchase and Sale Agreement for the dealership (the “PSA”). Four months later, in December 2015, the sale of the dealership closed. Months after the transaction closed, in April

2016, a federal class action lawsuit was filed against Volkswagen on behalf of Volkswagen dealers in the United States (the “Dealer Class Action”).

During the spring of 2016, the Parrs’ own accountant (jointly selected by the parties) performed post-closing adjustments to the ultimate purchase price for the dealership to account for income resulting from such things as inventory and other accounts receivable that had accrued but had not been posted to the accounting records before the closing. The accountant correctly did not include any settlement payments from Volkswagen in the post-closing accounting adjustment because any settlement payments were hypothetical, contingent on many factors, and entirely uncertain in value.

The Dealer Class Action was settled in October 2016. In December 2016, more than a year after the sale of the dealership closed, the dealership now owned by the Haselwoods (“Haselwood VW”) began receiving payments from Volkswagen relating to the settlement of the Dealer Class Action. In total, Haselwood VW received \$1.4 million in settlement from Volkswagen. The Parrs filed the instant action asserting claims for breach of contract and an accounting. They contend that, pursuant to the PSA, they are entitled to the entire amount of the settlement payments made to Haselwood VW.

The trial court granted summary judgment in favor of Haselwood and dismissed the Parrs' complaint in its entirety. Haselwood's motion for summary judgment involved the interpretation of a clear and unambiguous agreement which, as a matter of law, was properly adjudicated by the trial court. The PSA clearly and unambiguously provided for an adjustment to the purchase price for income that had accrued to the Parrs *before the closing*. The VW settlement payments accrued to Haselwood VW long after the transaction closed. The Dealer Class Action was filed months after the close of the dealership transaction. And the eventual settlement payments, were speculative, uncertain in value, contingent on a number of factors, and entirely hypothetical up until they were actually paid. Under any cogent interpretation of the PSA, the settlement payments did not *accrue* until they were paid in December 2016 – more than a year after the sale closed. Accordingly, as demonstrated below, the trial court's order granting summary judgment should be affirmed. Additionally, the trial court's separate order granting Haselwood its reasonable attorneys' fees and costs, as the prevailing party, should also be affirmed.

## **II. STATEMENT OF THE CASE**

### **A. The Purchase and Sale Agreement**

The Parrs own multiple car dealerships in the Bremerton, Washington area. Clerk's Papers ("CP"), 51-52. Prior to December 2015,

one of their dealerships was a Volkswagen dealership. *Id.*, 52. In early 2015, Mr. Parr began efforts to sell the Volkswagen dealership (the “Dealership”). *Id.*, 54-55.

Eric “Rick” Wiler and the Haselwood family also own several car dealerships in the Bremerton area. Mr. Wiler expressed interest in purchasing the Dealership. On August 5, 2015, after some negotiation, Messrs. Parr and Wiler entered into the PSA pursuant to which the Parrs agreed to sell all of their ownership in the Dealership to Mr. Wiler. CP, 77-187.

The transaction was structured as a sale of all the shares in the business rather than as an asset purchase because Mr. Parr did not want to wait to wind down the business and for all outstanding warranty issues to be resolved before the final purchase price was determined. CP, 56. The purchase price consisted generally of the tangible assets of the business as well as the goodwill associated with the business. *Id.*, 92-98 (PSA, § 2.1). The goodwill of the Dealership was valued at \$2,250,000 based on a multiple of five times the annual profits of the Dealership. *Id.*, 95 (PSA, § 2.1.2(a)).

The PSA provided the sale would close after three months to allow Mr. Wiler to conduct due diligence. CP, 109-124 (PSA, Article 9). Following the closing, the parties agreed that the Parrs’ accounting firm,

Peterson Sullivan LLP (“Peterson Sullivan”), would calculate the value of the current inventory and other dealership assets and perform a final reconciliation to determine the ultimate purchase price. *Id.*, 115 (PSA, § 10.7.2). Specifically, Section 10.7.2 of the PSA provided:

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 Dealership 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] shall determine the necessary adjustments to the purchase price of the Dealerships as a result of these items of income and expense. The amounts 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.

*Id.* The purpose of Section 10.7.2 was to identify and account only for items that accrued prior to the closing of the sale. CP, 538 (Russell Dep. Tr. at 37:3-16).

The PSA also required the Parrs to make certain representations and warranties about the status of the business. Among other things, the Parrs represented and warranted that:

- “The Books and Records accurately state the financial condition of the Dealerships and the Real Estate Entities, and have been prepared in accordance with generally accepted accounting principles, consistently applied. CP, 104 (PSA, § 4.5).
- “[S]ince January 1, 2015 there had not been any: (a) event or condition of any character materially and adversely affecting the financial condition, business, assets, or prospects of the Dealerships ... [or] (c) other event or condition of any character that might reasonably have a material and adverse effect on the financial condition, business, assets or prospects of the Dealerships ...” *Id.*, 104 (PSA, § 4.5).
- There was no misrepresentation or omission of a material fact in the PSA or Operative Agreements. *Id.*, 106 (PSA, § 4.13).

The Parrs promised to give “prompt written notice of any change in any of the information contained in the representations and warranties ... prior to the Closing Date.” *Id.*, 110 (PSA, § 6.2.2).

The PSA also contains an attorneys’ fees provision that provides “[i]n any action brought to enforce any provision of this document, the prevailing party shall be entitled to receive from the other party all reasonable costs and reasonable attorneys’ fees incurred by the prevailing party.” CP, 121 (PSA, § 13.9).

## **B. The Volkswagen Emissions Scandal**

On September 18, 2015, just over a month after the parties executed the PSA, the United States Environmental Protection Agency issued a public Notice of Violation to Volkswagen Group of America, Inc. alleging that Volkswagen had engaged in a scheme to defeat the emissions control

systems in certain vehicles manufactured by Volkswagen (the “Emissions Scandal”). CP, 189-194. Mr. Parr admits the Notice of Violation was the first time he became aware of the Emission Scandal and that when the PSA was signed in August 2015, the “emissions scandal was not an issue.” CP, 63-65.

Following the revelation of the Emission Scandal, the Volkswagen brand suffered a significant loss in value. CP, 196 (Sox, R., February 2017, *VW Dealership Settlement Nearing Completion*, digitaldealer.com [noting that “franchise values plummet[ed] to a close to zero goodwill multiple” as a result of the Volkswagen emission scandal]). In October 2015, in recognition of the loss of trust from customers and harm that would be suffered by its dealers, Volkswagen began issuing monthly payments of between \$20,000-40,000 to all of its dealers to help them respond to operational and customer needs.<sup>1</sup>

**C. The Parties Closed the Transaction and the Parrs’ Accountant Did Not Include Any Post-Closing Adjustment for Settlement Payments**

On December 10, 2015, the parties executed the Closing Memorandum and agreement to consummate the sale of the dealerships to Haselwood (the “Closing”). The Closing Memorandum memorialized the

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<sup>1</sup> See *In re: Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prod. Liab. Litig.*, 229 F. Supp. 3d 1052, 1059 (N.D. Cal. 2017) (describing monthly assistance payments made by Volkswagen in late 2015).

“transfer[] of all of the issued and outstanding shares of stock to [Haselwood].” CP, 80 (Closing Memo., subsection u). Mr. Parr did not notify Mr. Wiler of any material changes relating to the dealership at any time before the Closing. CP, 72-73 (Parr Dep. Tr. at 93:24-94:21). Mr. Wiler also did not attempt to re-negotiate the terms of the PSA based on the disclosure and effect of the Emissions Scandal. CP, 74 (Parr Dep. Tr. at 96:6-16). Mr. Parr unquestionably sold the Dealership at the height of the market. Industry valuations following the disclosure of the Emissions Scandal noted that the standard goodwill multiple was “plummeting to close to zero.” CP, 196 (Sox, R., February 2017, *VW Dealership Settlement Nearing Completion*, digitaldealer.com).

Significantly, Mr. Parr admits that neither he nor the Dealership (when he still owned it) suffered any losses from the Emissions Scandal. CP, 70 (Parr Dep. Tr. at 91:8-17). Rather, he personally benefitted from the scandal because people purchased cars from him without knowing the truth about the emissions defeat device that was installed in the cars:

Q. ... you benefited by people bought this diesel not knowing the truth about the [emission defeat] device, correct?

A. Correct.

Q. ... And that was money that got put into your pocket, correct?

A. Correct.

CP, 71 (Parr Dep. Tr. at 92:3-9).

During the six months following the December 10, 2015 Closing, Peterson Sullivan, the accounting firm selected by the Parrs, completed its reconciliation accounting pursuant to the terms of the PSA to determine the ultimate purchase price. On April 6, 2016, a group of Volkswagen dealers filed a class action complaint against Volkswagen seeking compensation for the alleged fraud associated with the Emissions Scandal (“Dealer Class Action”). *See In re: Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prod. Liab. Litig.*, 2016 WL 6091259, at \*2 (N.D. Cal. Oct. 18, 2016) (chronicling the procedural history of the Dealer Class Action). Peterson Sullivan was aware of the Dealer Class Action and the hypothetical potential for settlement at some point in the future. When calculating the ultimate purchase price, Peterson Sullivan did not include any accounting for settlement payments that may later have been paid by Volkswagen as a result of the Dealer Class Action. Significantly, Mr. Parr knew these potential payments were not included in the ultimate purchase price and yet agrees with Peterson Sullivan’s accounting, and has no complaint about the work they performed:

Q: They [Peterson Sullivan] ... did not include this contingent claim against VW as [an] accounts receivable, correct?

A: Correct.

Q: ... you don't have any complaint about the accounting that Peterson Sullivan did here, do you?

A: No.

Q: ... you agree with the accounting they did, correct?

A: Yes.

CP, 61 (Parr Dep. Tr. at 46:5-15).

**D. The Settlement Was Approved and Haselwood VW Received a First Settlement Payment More than One Year After the Parrs Sold the Business**

On October 18, 2016, more than ten months after the Closing, the United States District Court for the Northern District of California granted preliminary approval for a settlement agreement of the Dealer Class Action ("Dealer Class Action Settlement"). *In re: Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 2016 WL 6091259, at \*13-14. Under the terms of the Dealer Class Action Settlement, dealers who executed a release of their claims were eligible for a portion of the total settlement amount, to be determined based on geographic coverage of the dealership. *Id.* at \*3-6.

On November 7, 2016, Mr. Wiler, on behalf of Haselwood VW,<sup>2</sup> executed the release and submitted its application for settlement payments pursuant to the Dealer Class Action Settlement. CP, 202-207 (Haselwood VW Executed Release). On December 19, 2016, more than one year after Closing, pursuant to the terms of the Dealer Class Action Settlement, Haselwood VW received the first 50% of the total \$1,432,732.85 settlement payment due to Haselwood VW. CP, 209 (Receipt of Funds). Haselwood VW received the remainder of the payments in monthly increments. (The settlement payments received by Haselwood VW are collectively referred to herein as the “VW Settlement Payments”).

**E. Volkswagen Rejected the Parrs’ Application for Settlement Payments**

On February 7, 2017, Mr. Parr similarly executed a release and sent it to the Dealer Class Action settlement administrator in an attempt to claim for himself settlement proceeds on behalf of the dealership that he sold. CP, 211-228 (Parr Executed Release). On March 9, 2017, Volkswagen responded to Mr. Parr, rejecting his claim for settlement payment. CP, 230. Volkswagen stated that the release executed by Mr. Parr was invalid because he “did not have authority to execute the Release on behalf of Parr

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<sup>2</sup> Following the Closing, as required by Section 2.1.2(m) of the PSA, Mr. Wiler changed the name of the dealership to “Haselwood Volkswagen of Bremerton.” CP, 98 (PSA, § 2.1.2(m)).

Volkswagen” as a result of the sale of the dealership on December 10, 2015 in which Mr. Parr sold “all shares of stock in Parr Volkswagen” to Mr. Wiler. *Id.* Volkswagen also noted that the applicable class consisted of Volkswagen *dealers* in the United States who, on September 18, 2015, operated a dealership. As a *former shareholder* of a dealership, Mr. Parr had “no claims to any of the settlement funds owed to the authorized dealership.” *Id.*

#### **F. Procedural History**

On September 6, 2017, the Parris filed their complaint against Haselwood alleging claims for breach of contract and an accounting. The Parris allege that, pursuant to the terms of the PSA, they are owed the entire amount of the \$1.4 million settlement paid to Haselwood VW as a result of the Emissions Scandal. CP, 1-7. On October 30, 2017, Haselwood answered the complaint and filed counterclaims against the Parris for reformation due to mutual mistake, breach of contract, and breach of the implied covenant of good faith and fair dealing. CP, 8-19.

On April 19, 2019, following discovery relating to the Parris’ claims and Haselwood’s counterclaims, Haselwood filed its Motion for Summary Judgment (the “Motion”). CP, 24-372. On May 21, 2019, after briefing by the parties and oral argument by counsel, the trial court entered an order granting summary judgment in favor of Haselwood and dismissing the

Parrs' claims with prejudice ("May 21 Order"). CP, 542-545. The trial court also found that the Parrs could not have fulfilled the requirements of the terms of the Dealer Class Action settlement and were not eligible to receive settlement funds. CP, 543-44, n.1. It further found Haselwood to be the prevailing party, entitled to its reasonable attorneys' fees and costs, and directed Haselwood to submit a fee motion. CP, 544. On June 5, 2019, the Parrs filed their Notice of Appeal of the May 21 Order. CP, 546-552.

On June 21, 2019, Haselwood filed its Renewed Motion for Attorneys' Fees and Costs seeking \$83,126.43. Supplemental Clerk's Papers ("SCP"), 556-605. On June 28, 2019, during the hearing on the fee motion, the trial court requested a supplemental declaration from Haselwood's counsel to address whether attorney training time was included in Haselwood's fee request. TR, 19:16-20:1. On July 3, 2019, Haselwood filed the requested supplemental declaration. SCP, 647-650. On July 26, 2019, the trial court entered an order granting Haselwood's reasonable attorneys' fees and costs in the amount of \$81,396.30 and entered judgment in Haselwood's favor in the same amount ("July 26 Order"). SCP, 633-636. On August 7, 2019, the Parrs filed a Notice of Appeal of the July 26 Order. SCP, 637-643.

### **III. ARGUMENT**

#### **A. Standard of Review**

Summary judgment orders are reviewed de novo. *Titan Earthwork, LLC v. City of Fed. Way*, 200 Wn. App. 746, 751–52, 403 P.3d 884 (2017). Summary judgment is appropriate when there is no genuine issue as to any material fact and the claims may be decided as a matter of law. *Id.* A trial court’s decision may be affirmed on appeal on any basis within the record. *Titan Earthwork, LLC*, 200 Wn. App. at 751-52.

In their Opening Brief, the Parris spend considerable time arguing summary judgment was improper allegedly because there are disputed issues of material fact relating to whether Haselwood breached the PSA. *See* Opening Brief, 16-20. In the trial court, however, the Parris took the opposite position. In response to Haselwood’s Motion, the Parris conceded this dispute “is a *straightforward issue of contract interpretation.*” CP, 381 (Pls.’ Resp. to Motion at 9:21) (emphasis added). The interpretation of an unambiguous contract, as here, is a question of law and, therefore, summary judgment is appropriate. *Dice v. City of Montesano*, 131 Wn. App. 675, 684 (2006). As the Parris conceded to the trial court, the issues presented here were appropriately decided on summary judgment.

#### **B. The Volkswagen Settlement Payments Accrued to Haselwood Under the Terms of the PSA**

Pursuant to Section 10.7.2 of the PSA, the parties agreed that

Peterson Sullivan would perform a post-Closing analysis to “determine the necessary adjustments to the purchase price of the Dealerships.” CP, 115 (PSA, § 10.7.2). The adjustments were to account for “items of income and expense” not received by and/or posted in the accounting records as of the Closing. *Id.* Peterson Sullivan performed this analysis after the Closing. It properly did not include any amounts from the VW Settlement Payments in its adjustments. In fact, it would have been impossible for Peterson Sullivan to do so because any settlement amounts were entirely speculative and contingent upon a number of factors that rendered them entirely hypothetical and uncertain in value up until the time of payment more than one year *after* Closing.

In support of their Motion, Haselwood submitted the expert opinion of Drew Voth. CP, 365-372.<sup>3</sup> Based on his review of the terms of the PSA and applying generally accepted accounting principles (“GAAP”),<sup>4</sup> Mr. Voth explains that Peterson Sullivan correctly did not include the VW Settlement Payments in the post-Closing adjustments. Tellingly, even the Parrs’ expert, Michael Massey did not contest this central conclusion. CP, 455-58 (Massey Decl.). Neither the Parrs’ expert nor any other witness

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<sup>3</sup> Mr. Voth’s curriculum vitae is attached as Exhibit A to his declaration. *See* CP, 372. The Parrs did not challenge or object to his credentials as an expert witness.

<sup>4</sup> In Section 4.5 of the PSA, the parties acknowledged that the Dealerships’ books and records were prepared according to GAAP. CP, 104 (PSA, § 4.5).

supported the Parris' theory that the VW Settlement Payments accrued to the Parris under the language of the PSA.

Under GAAP, the VW Settlement Payments were a type of contingent income known as a "gain contingency." CP, 368 (Voth Decl., ¶ 8). GAAP Accounting Standards Codification 450 defines contingencies as "an existing condition, situation, or set of circumstances involving uncertainty as to possible gain to an entity that will ultimately be resolved when one or more future events occur or fail to occur." *Id.*<sup>5</sup>

The Dealer Class Action was not filed until April 16, 2016 – more than five months after the Closing on December 10, 2015. *See In re: Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 2016 WL 6091259, at \*1-\*2 (describing the procedural history of the Dealer Class Action). Even after the Dealer Class Action was filed, any settlement payment was hypothetical and contingent on many circumstances, including 1) a settlement agreement being reached by the parties; 2) approval of the settlement by the court; 3) approval of the settlement application by Volkswagen and the settlement administrator; and 4) payment of settlement proceeds. CP, 368 (Voth Decl., ¶ 8). These conditions were not met until December 19, 2016 *at the earliest*. *Id.* As a

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<sup>5</sup> Chris Russell of Peterson Sullivan, who performed the post-Closing adjustments, agrees that contingent income is not realized until it is received. CP, 536 (Russell Dep. Tr. at 34:7-14).

result, in accordance with GAAP, the VW Settlement Payments could not be recognized as income until December 19, 2016 at the earliest. *Id.*

There also is no accounting basis for treating the VW Settlement Payments as an “accounts receivable” under GAAP or the terms of the PSA. CP, 368-69 (Voth Decl., ¶¶ 8-9). Section 1.1 of the PSA defines “Accounts Receivables” as:

“[A]ll 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 (PSA, § 1.1).

Pursuant to GAAP, earnings generally occur when goods are transferred or services are rendered, no matter when cash is received. Realization occurs after income is earned, and when the amount to be exchanged can be reasonably measured and is reasonably assured to occur. Contingent income, where receipt of cash is dependent on future events, is treated differently under GAAP. Realization of contingent income does not occur until the income is actually received. CP, 369 (Voth Decl., ¶ 9). Because the VW Settlement Payments were not earned and realized under the Parrs’ ownership of the Dealership before the Closing, it was not

appropriate to record the VW Settlement Payments as a post-closing adjustment that accrued to the Parrs. CP, 369-70 (Voth Decl., ¶ 10).

**1. The VW Settlement Payments Did Not Accrue Prior to the Closing**

Significantly, the Parrs failed to submit any expert opinion that they were entitled to the VW Settlement Payments. Moreover, Mr. Parr admitted that while he knew Peterson Sullivan did not include the VW Settlement Payments in the post-Closing adjustments, he has no complaint about, and in fact, *agrees* with, the post-Closing work Peterson Sullivan performed. CP, 61 (Parr Dep. Tr. at 46:5-15). Nonetheless, the Parrs argue under the PSA, the VW Settlement Payments should be classified as income that “accrued” as of September 18, 2015. Opening Brief, 20-21.

Relying on the definition of “accounts receivable” in Section 1.1 of the PSA, the Parrs falsely assert that the VW Settlement Payments “[were] in fact made by the franchisor (Volkswagen) to the dealership ‘as of September 18, 2015,’ when [they] owned the dealership.” Opening Brief, 20. This statement is misleading at best. Although the Parrs cling to this date as alleged support they, not Haselwood, are entitled to the VW Settlement Payments, their reliance on this date is misplaced.

The class in the Dealer Class Action consists of “authorized Volkswagen dealers in the United States on September 18, 2015.” *See In re: Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prod. Liab.*

*Litig.*, 229 F. Supp. 3d at 1058 (describing class and settlement terms). The dealership the Parrs sold to Haselwood continued to exist and remained in operation even after the Parrs sold their interest in the dealership. Despite the fact that the Parrs owned the dealership as of September 18, 2015, that dealership changed ownership and became Haselwood VW pursuant to the PSA. Therefore, contrary to the Parrs' argument, the class consisted of dealers, not owners of dealers. In fact, Volkswagen clearly and unambiguously explained this distinction to Mr. Parr when it rejected his application for settlement payment. ***“Because Volkswagen settled with and agreed to pay Volkswagen dealerships in operation as of September 18, 2015, rather than the owners of Volkswagen dealerships in operation as of September 18, 2015, you are not a class member and have no claims to any of the settlement funds owed to the authorized dealership.”*** Volkswagen CP, 230 (Volkswagen Ltr. Mar. 9, 2017 (emphasis added)).

The definition of “accounts receivable” in the PSA includes, among other things, “all other accrued monetary claims.” *See* CP, 89 (PSA, § 1.1). Pulling this language out of the definition, the Parrs further argue that because a cause of action “accrues” when a party has the right to apply to a court for relief and the claims asserted in the Dealer Class Action accrued when the Parrs owned the Dealership, the VW Settlement Payments belong to them. Opening Brief, 24-25. In an attempt to create ambiguity where

none exists, the Parrs inappropriately conflate two concepts and now, for the first time on appeal, argue that because the hypothetical *cause of action* against VW had “accrued” before Closing, any hypothetical benefits therefrom should also “accrue” to the Parrs. A summary judgment argument not made to the trial court cannot be raised for the first time on appeal. *Lemery Ins. Agency LLC v. Farmers Ins. Grp. of Companies*, 130 Wn. App. 1049 (2005) (appellate court refused to consider argument made for the first time on appeal because appellant failed to brief or argue the issue in the trial court). This new argument made for the first time on appeal should be rejected. However, even if it were considered, it is wholly without merit.

Fundamentally, the legal concept of a cause of action “accruing” is not the same as “accrued monetary claims” as referenced in the PSA. The Parrs’ deliberate attempt to merge the two is misleading. Moreover, an isolated clause from the definition of “accounts receivable” in the PSA cannot be read in a vacuum and must be read in conjunction with Section 10.7.2. Section 10.7.2 lists examples of income that would need to be reconciled post-Closing including “accounts receivable for work performed, sales made, etc., *prior to the date of Closing.*” CP, 115 (PSA, § 10.7.2) (emphasis added). These examples involve items that can be identified, verified and accounted for but not yet received as of the Closing.

Chris Russell of Peterson Sullivan, who performed the post-Closing adjustments, confirmed that the examples listed in Section 10.7.2 are things that would accrue to the seller prior to the closing under GAAP. CP, 538 (Russell Dep. Tr. 37:3-12). In contrast, a “gain contingency,” such as the VW Settlement Payments, would not.

In the PSA, the Parris represented that the accounting books and records of the Dealership were prepared in accordance with GAAP. CP 104, (PSA, § 4.5). The post-Closing adjustments constitute the accounting books and records of the Dealerships. Indeed, Section 10.7.2 states that post-Closing adjustments are needed because “at the 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 ....” CP, 115 (PSA, § 10.7.2) (emphasis added). Notwithstanding their representation that the books and records comply with GAAP, the Parris now argue that GAAP *does not* apply to the post-Closing adjustments and the accrual of income for purposes of the post-Closing adjustments has no end date. Opening Brief, 28-30. The Parris’ argument is without merit for at least two reasons:

First, the unambiguous language of Section 10.7.2 clearly provides that only items of income that should benefit the seller are those that actually “accrued” prior to Closing. In fact, Section 10.7.2 provides specific examples of items intended to be included in the post-Closing adjustments:

10.7.2. The Parties recognize and agree that at Closing there will be items of income ... which will not have been received by and/or posted in the accounting records of the Dealerships ... 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 ...*

CP, 115 (PSA, § 10.7.2) (emphasis added).

Mr. Russell testified that the examples listed in Section 10.7.2 were all items that would accrue to the Seller prior to the Closing under GAAP. CP, 538 (Russell Dep. Tr. 37:3-16). Significantly, although he is fully aware of the VW Settlement Payments,<sup>6</sup> he also testified that he is not aware of any transactions or items of income that were earned after the Closing but nonetheless accrued to the Parrs. CP, 537 (Russell Dep. Tr. at 35:5-9).

In response to Haselwood's Motion, the Parrs submitted the declaration of their expert, Michael Massey. *See* CP 455-458 (Declaration of Michael Massey ["Massey Decl."]). Importantly, Mr. Massey *does not* opine that the VW Settlement Payments actually accrued to the Parrs. And, he agrees with Mr. Voth's opinion that the VW Settlement Payments "should not be recorded on the books of the Company until December 19, 2016 when the dealership actually began receiving payments." CP, 457 (Massey Decl., ¶ 8). Mr. Massey also specifically does not contradict Mr.

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<sup>6</sup> *See* CP 483 (Declaration of Rodney Parr at 3:16-21 [stating Chris Russell of Peterson Sullivan told him about the settlement reached in the Dealer Class Action].).

Voth's opinion that under Section 10.7.2, the VW Settlement Payments accrued to Haselwood.

The law is well settled that it is the duty of the court to declare the meaning of what is written in a contract, not what a party wishes was written. *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wn.2d 565, 571 (1996); *see also Hartford Fire Ins. Co. v. Columbia State Bank*, 183 Wn. App. 599, 609 (2014) (court refused to interpret contract to include language not found in the contract). If the Parrs' interpretation of the PSA were correct, the court would be required to impermissibly read language into the PSA and ignore language clearly present. The PSA does not state or imply that income that was impossible to calculate or receive before the Closing should nonetheless accrue to the Parrs months or even years after the Closing in December 2015.

To the contrary, the PSA and the Closing Memorandum expressly reflect the parties' understanding that the date for accrued income for post-Closing adjustments was not opened ended as the Parrs assert. For example, Section 10.7.2 expressly states that Peterson Sullivan should conduct the post-Closing adjustments "as soon as practical after the Closing." Section 11 of the Closing Memorandum also states that "[i]t is the goal of everyone that all such adjustments will be identified and made by February 15, 2016," *i.e.*, two months after the Closing. Logically, the only way that this goal

could be accomplished is if the items of income were clearly identifiable, able to be calculated and had accrued before the Closing.

Second, the parties also clearly intended for GAAP to apply to the post-Closing adjustments. Section 4.5 of the PSA expressly states that the books and records of the dealerships “have been prepared in accordance with [GAAP], consistently applied.” CP, 104 (PSA, § 4.5). Section 11 of the Closing Memorandum states “[t]he parties agree that the Dealerships’ certified public accounting firm, Peterson Sullivan, LLP, will perform a post-closing reconciliation of the assets and liabilities, income and expenses, and tax liability of the Dealerships and parties thereto ...” CP, 82 (Closing Memo., § 11). The post-Closing reconciliation was a reconciliation of the Dealerships’ accounting books and records. *See Accounting Records, Investopedia*, <https://www.investopedia.com/terms/a/accounting-records.asp> (last visited Nov. 1, 2019) (explaining that “[a]ccounting records are all of the documentation and books involved in the preparation of financial statements or records relevant to audits and financial reviews. Accounting records include records of assets and liabilities ...”). Therefore, the post-Closing reconciliation was required to be performed in accordance with GAAP. The Parrs’ assertion that the post-Closing reconciliation

performed by Peterson Sullivan was or should not have been done in accordance with GAAP has no support in the record or common sense.

Mr. Russell testified he would have raised an issue with the client if he saw anything in the post-Closing adjustments that did not accord with GAAP. CP, 533-34 (Russell Dep. Tr. at 22:22-23:3). He also unequivocally testified he is “not aware of any” transactions earned after the Closing that were nonetheless deemed to have accrued to the Parrs. CP, 537 (Russell Dep. Tr. at 35:5-9). Indeed, it would be illogical to require the Dealerships’ accounting books and records to be prepared in accordance with GAAP but not have GAAP apply to the post-Closing adjustments. The Parrs’ argument that the PSA entitles him to contingent income that accrued long after the Closing does not comply with GAAP and does not make legal or common sense.

**C. The VW Settlement Payments Accrued to the Dealership and not to the Parrs Individually**

The Parrs admit the VW Settlement Payments were intended for Volkswagen dealerships and not to any individuals. CP, 59-60, 62 (Parr Dep. Tr. at 44:10-45:1 & 59:15-17). They also admit they did not own the dealership when they submitted their application to Volkswagen to receive the VW Settlement Payments. CP, 62 (Parr Depo. Tr. at 59:15-17). They entirely fail to explain why they are entitled to payments made to the

Dealership more than a year after they relinquished all ownership.

*Significantly, Volkswagen rejected the Parris' application for settlement payments.* CP, 230 (Volkswagen Ltr. Mar. 9, 2017). Its rejection is instructive. Because the Parris transferred all of their stock in the dealership on December 10, 2015 under the PSA, the Parris<sup>7</sup> had no authority to execute the required release on behalf of Parr Volkswagen. Additionally, the class in the Dealer Class Action consists of “dealers.” Although the Parris were shareholders of an eligible dealership on September 18, 2015, the dealership entity continued to operate after they sold their shares. *Volkswagen agreed to pay Volkswagen dealerships in operation as of September 18, 2015, not the owners of Volkswagen dealerships in operation as of September 18, 2015.* *Id.* Accordingly, the Parris were not members of the class in the Dealer Class Action and were not entitled to any settlement payment.<sup>8</sup>

**D. The Purpose of the Dealer Class Action Settlement Was to Compensate Dealers for Losses Related to the Emissions Scandal**

The Dealer Class Action was brought on behalf of Volkswagen-branded dealerships to recover damages caused by the Emissions

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<sup>7</sup> Mr. Parr submitted the application and release under his name. *See* CP 211-228. Therefore, the letter from Volkswagen is addressed to him.

<sup>8</sup> In its May 21 Order, the trial court also found that the Parris could not satisfy the terms of the Dealer Class Action settlement, and thus, were not entitled to any of the settlement funds. CP, 543-44, n.1 (May 21 Order).

Scandal.<sup>9</sup> The Dealer Class Action Settlement and the VW Settlement Payments were intended to compensate dealers for losses resulting from the Emissions Scandal.

Mr. Parr admits that neither he nor the Dealership (when he still owned it) suffered any losses from the Emissions Scandal. CP, 70 (Parr Dep. Tr. at 91:8-17). Rather, he personally benefitted from the scandal because people purchased cars from him without knowing the truth about the emissions defeat device that was installed in the cars:

Q. ... you benefited by people bought this diesel not knowing the truth about the [emission defeat] device, correct?

A. Correct.

Q. ... And that was money that got put into your pocket, correct?

A. Correct.

CP, 71 (Parr Dep. Tr. at 92:3-9).

The Parrs commissioned Moss Adams to analyze any change in the Dealership's valuation between July and December 2015, *i.e.*, when they

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<sup>9</sup> As alleged in the Dealer Class Action complaint, “[a]s a direct and foreseeable result of VW’s unlawful emissions fraud, illegal pricing and allocation schemes, and coercion to use Volkswagen Credit, VW dealers have been harmed in their business in the form of reduced sales, lost profits, cars sitting on their lots which cannot be sold, and investments in dealerships that are worth substantially less than their purchase, investment, and carrying costs.” See *Napleton Orlando Imports, LLC et al. v. Volkswagen Group of America, Inc. et al.*, Case No. 1:16-CV-04071 (N.D. Ill. Apr. 6, 2016), Dkt. 1 (Class Action Complaint, ¶ 9).

owned the Dealership and before the Closing. The Moss Adams report confirms the Parrs suffered virtually no loss from the scandal. Moss Adams concluded that during this period, the dealership was “minimally impacted” by the Emissions Scandal. CP, 401 (Moss Adams Report).<sup>10</sup>

In contrast, Haselwood suffered real harm as a result of the scandal. By the end of 2016, the goodwill multiple for Volkswagen dealerships plummeted to the bottom of its industry class. CP, 333-364 (Kerrigan Advisors, *The Blue Sky Report* (2016 Full Year Report)). In fact, some analysts noted that the goodwill multiple was “close to zero.” CP, 196 (Sox, R., February 2017, *VW Dealership Settlement Nearing Completion*, digitaldealer.com [noting that “franchise values plummet[ed] to a close to zero goodwill multiple” as a result of Volkswagen emission scandal]). Thus, after paying millions of dollars for the Dealership, in less than a year, Haselwood lost almost all the value it had paid to the Parrs.

In its decision granting final approval of the Dealer Class Action Settlement, the Northern District of California made clear that the purpose of the settlement was to compensate dealers for current and future harm caused by the Emissions Scandal. The settlement “provides [dealers] with genuine and substantial financial support to compensate them for the loss in

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<sup>10</sup> The Moss Adams report shows a decline in value of approximately \$10,000. See CP, 252 (Moss Adams Report, Conclusion of Value).

value of their dealerships ...” *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prod. Liab. Litig.*, 229 F. Supp. 3d at 1067.

The Parrs argue Haselwood failed to submit “one scintilla of evidence” that it suffered any damage from the Emissions Scandal. Opening Brief, 22. As demonstrated above, that argument is demonstrably false.<sup>11</sup> The Parrs further argue that Haselwood is not entitled to the VW Settlement Payments because some of the claims released by the Dealer Class Action Settlement pre-date the Emissions Scandal and occurred when the Parrs owned the dealership. Again, the Parrs’ argument is misplaced for at least two reasons.

First, as demonstrated above, in the Dealer Class Action Settlement, Volkswagen agreed to pay dealerships in operation as of September 18, 2015, not the shareholders of dealerships. The dealership entity remained in existence and continued to operate after the Parrs sold their shares to Haselwood. Therefore, as a matter of law, the Parrs were not members of

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<sup>11</sup> Even if Haselwood had not presented evidence showing the harm it had suffered (which it did), Mr. Parr’s testimony undercuts the Parrs’ argument that Haselwood VW (who was a member of the class in the Dealer Class Action) nonetheless was not entitled to the VW Settlement Payments:

Q: ... you’re not saying it was because I suffered harm that I’m entitled to damages?

A: No.

Q: Right? But your view is, it didn’t suffer harm because of this?

A: And a lot of other dealers didn’t suffer harm and still got the money.

CP, 70 (Parr Dep. Tr. at 91:8-14).

the class in the Dealer Class Action and have no right to the VW Settlement Payments.

Second, the Parrs again conflate the issue of the accrual of a cognizable legal claim with the accrual of income for accounting purposes. As demonstrated, the VW Settlement Payment was a “gain contingency” that did not accrue until December 2016 – more than a year after the Closing.

**E. The Parties’ Conduct Is Immaterial to the Interpretation of Section 10.7.2**

The Parrs further contend that the parties’ actions after the Closing and in the context of the PSA are admissible to show the parties’ intent. And, according to the Parrs, this conduct shows there was no time limit for the post-Closing adjustments and the VW Settlement Payments should have been classified as income belonging to the Parrs. Opening Brief, 26. They are wrong.

First, there is no need for the court to look at the parties’ conduct when the contract is clear and unambiguous. Washington follows the objective manifestation theory of contracts. Under this approach, courts are required to determine the parties’ intent by focusing on the objective manifestations of the agreement rather than on the unexpressed subjective intent of the parties. *Hearst Communications, Inc. v. Seattle Times Co.*, 154

Wn.2d 493, 503 (2005); *see also Matter of Estates of Wahl*, 99 Wn.2d 828, 831 (1983) (the intention of the parties to a written contract is normally to be ascertained from the language of the contract itself).

In the trial court, the Parris repeatedly admitted that the PSA was clear and unambiguous. For example, the Parris described the dispute as “a straightforward issue of contract interpretation.” CP, 381 (Pls.’ Reply to Motion at 9:21). They also admit that the “parties’ intent in the Contract is clear ...” CP, 383 (Pls.’ Reply to Motion at 11:8). As the Parris admit, the PSA is clear and unambiguous, therefore, the Court need not consider the parties’ conduct.

Second, even if the Court were to consider the parties’ conduct, it does not show that the post-Closing adjustments could be made in perpetuity or had no fixed end date as the Parris contend. The Parris argue that because the post-Closing adjustments took almost six months to complete, the VW Settlement Payments made in December 2016 should have classified as accrued income under Section 10.7.2 of the PSA. Opening Brief, 26.

Contrary to the Parris’ argument the PSA does, in fact, fix a date for the accrual of income: “[t]he 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 ...” CP, 28

(PSA, § 10.7.2) (emphasis added); *see also* CP 82 (Closing Memo., § 11) (the parties agree to a post-closing reconciliation “as it is not possible to determine all necessary adjustments *at or prior to Closing.*”) (emphasis added). The items that were to be reconciled by the post-Closing adjustments were readily identifiable earnings from, among other things, vehicle sale transactions that occurred in the past but for which payment had not been received. CP, 369 (Voth Decl., ¶ 9).

In contrast to accrued earnings, the VW Settlement Payments were a “gain contingency” that was dependent upon the occurrence of many future events such as, among other things, the filing of the Dealer Class Action, the parties’ reaching a settlement agreement, the court approving the settlement, the settlement administrator accepting a class member’s settlement application, determining the settlement amount, and paying the dealer. CP, 368-69 (Voth Decl., ¶¶ 8-9). The undisputed facts show that these contingent events did not occur until December 19, 2016, at the earliest.

#### **F. The Parrs Abandoned their Accounting Claim**

The Parrs argue they are entitled to an accounting allegedly because “the exact amount of income properly allocated to [them] is complicated” and Haselwood has refused to disclose the total amount of the VW Settlement Payments. Opening Brief, 30.

A summary judgment argument not made to the trial court cannot be raised for the first time on appeal. *Lemery Ins. Agency LLC*, 130 Wn. App. 1049 (arguments not briefed or argument in the trial court will not be considered on appeal).

In its Motion, Haselwood expressly argued the Parrs could not maintain their claim for an accounting given Mr. Parr's admission that he had no complaint with Peterson Sullivan's post-Closing work. CP, 35 (Defs. Motion at 10, n. 33). In response to Haselwood's Motion, the Parrs made no argument whatsoever in support of their claim for an accounting. CP, 373-386. Therefore, as a matter of law, they cannot now raise their argument for the first time in this appeal.

**G. The Trial Court Properly Granted Haselwood's Reasonable Attorneys' Fees and Costs as the Prevailing Party**

Section 13.9 of the PSA provides "[i]n any action brought to enforce any provision of this document, the prevailing party shall be entitled to recover from the other party all reasonable attorneys' fees incurred by the prevailing party." CP, 121 (PSA, § 13.9).

In the May 21 Order granting summary judgment to Haselwood, the trial court also found Haselwood to be the prevailing party, entitled to its reasonable attorneys' fees and costs, and directed Haselwood to submit a fee motion. CP, 544. Haselwood submitted its fee motion, supported by

detailed billing records showing the attorneys' fees and costs incurred. The trial court entered the July 26 Order awarding Haselwood \$81,396.30 for their attorneys' fees and cost and entered judgment in Haselwood's favor in the same amount. SCP, 633-636.

After granting summary judgment in Haselwood's favor, the trial court also properly found it to be the prevailing party pursuant to section 13.9 of the PSA. Accordingly, the July 26 Order awarding Haselwood its attorneys' fees and costs should be affirmed.<sup>12</sup>

#### **IV. CONCLUSION**

In the trial court, the Parris conceded this dispute involves a straightforward issue of contract interpretation properly decided on summary judgment. Despite their protestations to the contrary on appeal, it does not involve disputed issues of material fact. Rather, the PSA clearly and unambiguously provided for post-Closing adjustments to the purchase price of the Dealership for income that had accrued before the Closing. The trial court properly granted summary judgment in favor of Haselwood. It also properly awarded Haselwood its reasonable attorneys' fees and costs as the prevailing party under the PSA. Accordingly, Haselwood

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<sup>12</sup> If this Court affirms the trial court's May 21 Order, Haselwood is also entitled to its attorneys' fees and costs incurred on this appeal. *Salvo v. Thatcher*, 128 Wn. App. 579, 587 (2005) (contract providing for attorneys' fees and costs to the prevailing party also includes reasonable attorneys' fees and costs incurred on appeal).

respectfully requests that this Court affirm the trial court's May 21 Order and the July 26 Order in their entirety.

Respectfully submitted this 6th day of November 2019.

CORR CRONIN LLP

*s/ Steven W. Fogg*

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies as follows:

1. I am employed at Corr Cronin LLP, attorneys of record for Respondents herein.

2. On this date, I caused a true and correct copy of the foregoing document to be served on the following parties:

**Attorneys for Appellants:**

James A. Krueger	<input checked="" type="checkbox"/>	Via ECF
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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: November 6, 2019, at Seattle, Washington.

s/ Christy A. Nelson  
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**CORR CRONIN MICHELSON BAUMGARDNER FOGG &**

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