

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

DOUGLAS WARREN GORATH,

Debtor.

Case No. 04-31329-GFK
Chapter 7

SANDERSON AUTO, INC.,

Plaintiff,

vs.

DOUGLAS WARREN GORATH,

Defendant.

Adv. No. _____

COMPLAINT TO DETERMINE
DISCHARGEABILITY OF DEBT

Plaintiff, by and through its legal counsel, for its
Complaint against Defendant Douglas Gorath states and alleges as
follows:

GENERAL ALLEGATIONS

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§1334 and 157(a), Local Bankruptcy Rule 1070-1 and 11 U.S.C. §523. This matter is a core proceeding.

2. Debtor voluntarily filed for relief under Chapter 7 of the United States Bankruptcy Code on March 5, 2004.

3. Plaintiff Sanderson Auto, Inc. ("Sanderson") is a Minnesota corporation with a principal place of business located at 131 W. College Street, Albert Lea, Minnesota.

4. Sanderson is a licensed used car dealer and automobile repair service. Sanderson has been in business for over 18 years, all at the same location in Albert Lea.

5. Defendant Douglas Gorath ("Gorath") is an individual residing at 2708 8th Avenue S.W., Austin, Minnesota 55912.

6. Auto-Netics, Inc. ("Auto-Netics") d/b/a AutoNetics Superstore is believed to be a Minnesota corporation owned in part or entirely by Gorath. Auto-Netics has (or had) a registered corporate office at 316 Highway Avenue SE, Blooming Prairie, Minnesota.

7 Auto-Netics has (or had) an operating address (a showroom and car lot) at 2801 West Oakland Avenue, Austin, Minnesota.

8 Gorath is believed to be a shareholder, director, and officer of Auto-Netics. However, upon information and belief, Gorath's acts complained of herein are outside the scope of Gorath's legal authority with Auto-Netics.

THE CONSIGNMENT TRANSACTION

9. As part of Sanderson's business, it will, on occasion, sell vehicles on consignment for its customers.

10. On or about August 6, 2003, Marilyn and Philip Koprowski (the "Koprowskis") consigned their 2002 Ford Explorer (the "Vehicle") to Sanderson for sale. See Exhibit 1. The Vehicle has an identification number of 1FMZU73W92ZC17349.

11. After two months of unsuccessful attempts at selling the

Vehicle off of its lot, Sanderson employee Jeff Baumann ("Baumann") communicated with Mrs. Koprowski about the possibility of moving the Vehicle to another lot, which would give exposure to a different set of potential customers.

12. In early October of 2003, Baumann spoke with Gorath about putting the Vehicle on his lot in Austin, under an agreement of consignment and/or bailment. Gorath agreed that he would take possession of the Vehicle and attempt to sell it for Sanderson and its customer (the Koprowskis).

13. The Vehicle was delivered to Gorath in Austin on October 14, 2003. Baumann told Gorath of the required sale price of \$22,500.00, and instructed Gorath to relay any information about sales leads on the Vehicle to Sanderson.

14. Neither Sanderson nor Gorath had possession of the vehicle's title. The Vehicle's title was being held by the Koprowskis' attorney, William Hoversten, of Waseca, Minnesota. Mr. Hoversten has the authority to sign over the title through a power of attorney form. (The Koprowskis are currently in Korea.)

15. On October 16, 2003, Gorath contacted Baumann and notified him that a customer of his was coming to look at the Vehicle on October 18, 2003. Gorath indicated that the individual was a good *potential* buyer.

16. On October 20, 2003, Gorath called and notified Baumann that an offer of \$19,500.00 had been made by his customer. Baumann

told Gorath that \$19,500.00 was not enough, as the Koprowskis wanted \$22,500.00. Gorath urged Baumann to inform the Koprowskis of the offer any way. Baumann then e-mailed the Koprowskis with the offer.

17. On October 21, 2003, the Koprowskis declined the offer, and Baumann promptly notified Gorath of the Koprowskis' rejection.

18. Gorath insisted that Baumann try to "talk the Koprowskis into the sale". Gorath also indicated that he (Gorath) would find the Koprowskis a newer model replacement Explorer in the Spring for about the same price. Baumann said that he would communicate with the Koprowskis, but he again told Gorath that \$19,500.00 was not enough.

19. On October 27, 2003, Gorath phoned Baumann and informed him that his customer had now put earnest money down on the Vehicle and had taken it with her to her home in Wisconsin. Baumann told Gorath that he had no authority to enter into any such sale agreement, and he told Gorath that the vehicle needed to be returned as soon as possible to Sanderson's lot in Albert Lea.

20. Without Sanderson's knowledge or consent (or that of the Vehicle owner), Gorath had actually "sold" the vehicle to Amy Nicole Felten. See Exhibit 2. Ms. Felten actually lives in St. Louis Park, Minnesota -- not Wisconsin.

21. Sanderson learned that this "sale" actually took place at least days prior to Gorath calling Baumann to tell him that someone

was coming to "look at" the Vehicle.

22. Sanderson was not notified of the sale, nor has it ever received any proceeds from the sale. Sanderson first saw the Sale Agreement (Exhibit 2) on November 25, 2003.

23. The Vehicle was sold without the title, which still remains in the possession of the Koprowskis' legal counsel.

24. On November 4 and 10 of 2003, Baumann contacted Gorath regarding the situation. Baumann told Gorath that the Vehicle needed to be returned, but Gorath said that that was "impossible". Baumann then told Gorath that, at a minimum, Gorath needed to immediately turn over the proceeds for the sale. Gorath said he would turn over the money "soon". Gorath repeatedly made promises that payment was forthcoming, but it never came.

25. On November 20, 2003, Baumann and Sanderson's owner (Mark Sanderson) contacted Detective Brian Krueger at the Austin Police Department, to file a police report.

26. On November 24, 2003, Gorath promised Sanderson that he would obtain a home equity loan to pay for the Vehicle. This indicated to Sanderson that Gorath's actions may have been outside Gorath's role with Auto-Netics, Inc.

27. On November 25, 2003, Detective Krueger contacted Sanderson and indicated that Gorath had promised Krueger that he (Gorath) would pay Sanderson by December 10, 2003. No payment came on December 10.

28. On December 11 and 18 of 2003, Baumann again contacted Gorath regarding payment, and again Gorath said he did not have the money. He again, however, promised to have the money "soon".

29. Despite his repeated promises, Gorath has made no further contact with Sanderson and no proceeds have been paid to either Sanderson or the Koprowskis.

30. Sanderson only stood to make roughly \$500 on the transaction, even if the vehicle was sold for the agreed upon amount of \$22,500.00.

COUNT I - INTENTIONAL FRAUD

For purposes of Count I, Plaintiff realleges and states paragraphs 1 through 29 above.

31. On or about October 7, 2003, Sanderson and Gorath and/or Auto-Netics entered into an agreement under which the Defendants agreed to try to sell the 2002 Ford Explorer. The agreed upon minimum sales amount was \$22,500.00. Gorath would be able to keep anything beyond \$22,500.00 that he obtained.

32. On October 18, 2003, Gorath sold the Vehicle. The sale was made without a title, and without Sanderson's knowledge, for \$19,500.00.

33. The Defendant was not authorized to sell the Vehicle without Sanderson's consent.

34. The Defendant failed to notify Sanderson that he had, in fact, sold the Vehicle and collected the proceeds. Instead, Gorath

told Sanderson that he had a "potential customer" identified.

35. In October and November of 2003, Gorath falsely and fraudulently, and with the intent to defraud, took the full payment for the Vehicle, intentionally mislead Sanderson about the sale, and converted 100% of the \$19,500.00 funds to his own use.

36. The non-disclosure of the sale was deceitful and was known to be deceitful at the time that the sale occurred.

37. Sanderson has suffered damages in an amount in excess of \$22,500.00, all of which were directly caused by said fraud. Plaintiff relied on Defendant to disclose the sale.

38. Gorath obtained property and money from Sanderson by the use of actual fraud in connection with the sale of the vehicle.

39. The debt owed to Sanderson by Gorath should be excepted from discharge pursuant to 11 U.S.C. 523(a)(2).

COUNT II - BREACH OF FIDUCIARY DUTY

For purposes of Count II, Plaintiff realleges and states paragraphs 1 through 39 above.

40. On or about October 14, 2003, Sanderson placed the Vehicle at the Auto-Netics lot, requiring that it be sold for \$22,500.00 or more.

41. Gorath owed Sanderson a fiduciary duty to take care of the Vehicle and deliver the proceeds from its sale to Sanderson.

42. On or about October 18, 2003, Gorath sold the vehicle for \$19,500.00. Said sale was without authorization from the owner of

the vehicle or from Sanderson.

43. Defendant has not provided the proceeds of the sale to either Sanderson or to the owners of the vehicle (the Koprowskis).

44. Defendant has breached his fiduciary duty to Sanderson.

44. As a result of the breach, Sanderson has been damaged in the amount of \$22,500.00, plus interest.

45. Gorath's actions constitute defalcation while acting in a fiduciary capacity. The debt owed to Sanderson should be excepted from the Debtor's general discharge pursuant to § 523(a)(4).

WHEREFORE, Sanderson respectfully requests this Court to enter judgment in favor of Sanderson and except the indebtedness owed to Sanders from the Debtor's general discharge pursuant to 11 U.S.C. §523(a) and for such other further relief as is just and equitable.

PETERSON, SAVELKOUL, SCHLICHTING,
& BENDA, LTD.

Dated: June 15, 2004

By: _____



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CONSIGNMENT AGREEMENT

DATE: _____

CONSIGNEE
(DEALER)

Name: Sanderson Auto
Address: _____
City / State / Zip: _____
Phone: () _____

CONSIGNOR
(OWNER)

Name: Marilyn Kopinski
Address: 1217 6th Circle SE
City / State / Zip: Waseca Mn. 56093
Phone: (507) 358-4338

VEHICLE

Year 02 Make Ford Model Explorer
VIN# 1FMZU73W92ZC17349 Plate # JBG423
Odometer Reading _____ Actual () Unknown ()

INSURANCE
INFORMATION

Insurance Company: Western National
Ins. Co. Phone # 507-835-5077 Policy # 01 PAP 022877029
Above information is () Owner's Insurance () Dealer's Insurance

TERMS OF
SALE

Asking Price: 22,995
Terms of Consignment (Days) From: 8-6 To: 10-6-03
Minimum Amount Accepted by Owner: _____
Minimum Amount Accepted by Dealer: _____

IF NOT SOLD

Vehicle was Returned on: _____
Signed by Owner upon receipt of vehicle: _____

PURCHASER
INFORMATION

Name: _____
Address: _____
City: _____
Secured Party: _____
Date of Sale: _____ Selling Price \$ _____

Owner's Signature

Marilyn Young Kopinski Date of Signature 8-6-03

Dealers Signature

[Signature] Date of Signature 8-6-03

Doug G. Smith's
AutoNetics
SUPERSTORE
Auto-Netics, Inc.

2801 West Oakland Avenue
Austin, Minnesota 55912
Tel: (507) 434-4767
www.autonetics.net

Stock # 1341 Date: 10-18-03 Salesperson: Doug
Buyer Name (Last) FELTEN (First) Amy (Middle) Nicole
Co Buyer Name (Last) _____ (First) _____ (Middle) _____
Address: 7201 WALKER ST NW #430 City: ST. CLOUD, MN State: MN County: HANCOCK ZIP: 55922
Home Phone: 952-982-4279 Bus Phone: _____ Buyer DOB: 3-7-81 Co-Buyer DOB: _____
Driver D.L. #: _____ Co-Buyer D.L. #: _____
Buyers Insurance Co: American Family Policy #: 2238-688-02-70-FAA

PLEASE PRINT IN MY ORDER FOR New Used Demo Leasing Address _____

YEAR	MAKE	MODEL	BODY	TRANSMISSION	COLOR	INTERIOR
2002	FORD	EXPLODER	4DR	AT	RED	INTERIOR
VIN	1FEMZ473W922C17349	3B6423	1AD	4DR	STATE	MILLAGE

CASH PRICE OF VEHICLE	
FREIGHT	
DEALER INSTALLED OPTIONS	
<u>LIEN HOLDER</u>	

TRADE-IN DATA			
YEAR	MAKE	MODEL	BODY STYLE
VIN			
LIEN HOLDER'S NAME	<u>None</u>		
ADDRESS	<u>AUSTIN, MINN</u>		
LICENSE PLATE	STATE	EXP DATE	
MILEAGE NOW	TRANSMISSION		
DOES YOUR TRADE-IN HAVE A BRANDED TITLE OR INSURANCE SALVAGE HISTORY? YES <input type="checkbox"/> NO <input type="checkbox"/>			

POLLUTION CONTROL SYSTEM DISCLOSURE (TRADE-IN VEHICLE) In order to comply with Minnesota Statute, Section 325E.0851, no person may transfer a motor vehicle without providing a written disclosure to the transferee (buyer) certifying the condition of the pollution control system. I, the transferor (seller) hereby certifies, to the best of his/her knowledge, that the pollution control system on this vehicle, being traded in, including the restricted gasoline pipe, has not been removed, altered, or rendered inoperative.		TOTAL	<u>19,500.00</u>
Seller's Signature: <u>[Signature]</u>		LESS TRADE-IN ALLOWANCE (ON USED VEHICLE)	

DEALER'S DISCLAIMER OF WARRANTY The Dealer expressly disclaims all warranties, either express or implied on the vehicle sold, except any warranties offered and explained in Paragraphs 10 through 13 on the back of this contract. Buyer acknowledges receiving this information upon the sale and further acknowledges having read and understood the provisions on the back of this contract. Buyer's Signature: <u>[Signature]</u>		LICENSE PLATE TITLE & TRANSFER FEES LIEN RECORDING FEE TOTAL LICENSE & FEES TOTAL DOWN PAYMENT	STATE & LOCAL TAXES FEDERAL LUXURY TAX DOCUMENT ADMINISTRATIVE FEE SERVICE CONTRACT TOTAL
		TOTAL AMOUNT DUE ON DELIVERY	<u>20,806.50</u>

The front and back of this CONTRACT comprise the entire CONTRACT describing this purchase. The DEALER will not guarantee any vehicle equipment, or any other equipment or equipment of any nature. You certify that the trade-in has been estimated by dealer for the purchase of this motor vehicle. You certify that you are 18 years of age or older and acknowledge receiving a copy of this contract.

The terms of this CONTRACT were agreed upon and the CONTRACT signed in the dealership on the date noted at top of this form. If DEALER is arranging credit for YOU, this CONTRACT is not valid until a credit disclosure is made as described in Regulation Z and you have accepted the credit extended.
 NOTICE OF SALES PERSON'S LIMITED AUTHORITY: This contract is not valid unless signed and accepted by Sales Manager or other Dealership.

IMPORTANT: THIS MAY BE A BINDING CONTRACT AND YOU MAY LOSE ANY DEPOSITS IF YOU DO NOT PERFORM ACCORDING TO ITS TERMS.

Accepted by Sales Manager or Official Dealership

[Handwritten Signature]

[Handwritten Signature: Amy Jeltner]
Buyer's Signature - Accepting Terms of Contract

This ODOMETER DISCLOSURE STATEMENT and ASSIGNMENT Refers to Vehicle Being Sold

I warrant that the odometer is accurate and that you agree to the mileage upon transfer of ownership. Failure to complete or providing a false statement may result in fines and/or imprisonment.

AUTONETICS SUPERSTORE

(the owner(s) of the vehicle described below) certify the vehicle is free of all security interests.

I warrant title, and assign the registration tax and the vehicle to the person(s) named below and certify that the odometer now reads _____ (no tenths) miles and to the best of my knowledge the odometer mileage is:

- ACTUAL MILEAGE
- EXCEEDS MECHANICAL LIMITS OF ODOMETER
- NOT ACTUAL MILEAGE - WARNING ODOMETER DISCREPANCY

YEAR 2002	MAKE Ford	MODEL E350 van SVT	VEHICLE TYPE Van
VIN 1F4H2473W922C17340		LICENCE NO	LIC. EXP. DATE
TRANSFEROR'S (SELLER'S) STREET ADDRESS 2801 WEST OAKLAND AVENUE			
CITY AUSTIN		STATE MN	ZIP 55912
TRANSFEROR'S (SELLER'S) SIGNATURE (PRINT SIGNER'S NAME ALSO) <i>[Handwritten Signature]</i>			STATEMENT DATE

This ODOMETER DISCLOSURE STATEMENT and ASSIGNMENT Refers to Vehicle Being Traded In

I warrant that the odometer is accurate and that you agree to the mileage upon transfer of ownership. Failure to complete or providing a false statement may result in fines and/or imprisonment.

I warrant title, and assign the registration tax and the vehicle to the person(s) named below and certify that the odometer now reads _____ (no tenths) miles and to the best of my knowledge the odometer mileage is:

- ACTUAL MILEAGE
- EXCEEDS MECHANICAL LIMITS OF ODOMETER
- NOT ACTUAL MILEAGE - WARNING ODOMETER DISCREPANCY

YEAR	MAKE	MODEL	VEHICLE TYPE
VIN		LICENCE NO	LIC. EXP. DATE
TRANSFEROR'S (SELLER'S) STREET ADDRESS AUTONETICS SUPERSTORE			
CITY 2801 WEST OAKLAND AVENUE		STATE MN	ZIP 55912
TRANSFEROR'S (SELLER'S) SIGNATURE (PRINT SIGNER'S NAME ALSO) <i>[Handwritten Signature]</i>			STATEMENT DATE