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9
10 **IN THE UNITED STATES DISTRICT COURT**
11 **FOR THE DISTRICT OF ARIZONA**

12 BARRETT-JACKSON AUCTION
13 COMPANY, LLC, an Arizona limited
14 liability company; and BARRETT-
15 JACKSON US, LLC, a Delaware limited
16 liability company

17 Plaintiff,

18 vs.

19 THUMBCO, a Michigan Nominee
20 Partnership; and DAVID L.
21 CLABUESCH, an individual,

22 Defendants.

23 DAVID L. CLABUESCH,

24 Counterclaimant,

25 vs.

26 BARRETT-JACKSON AUCTION
COMPANY, LLC, an Arizona limited
liability company; and BARRETT-
JACKSON US, LLC, a Delaware limited
liability company; and JOHN DOES 1-30

NO: CV07-561-PHX-EHC

COUNTERCLAIM

1 Counter-Defendants.)
2)
3 DAVID L. CLABUESCH, a single man,)
4 Third Party Plaintiff,)
5 vs.)
6 THOMAS J. KAZAMEK and JANE DOE)
7 KAZAMEK, husband and wife; and John)
8 Does 30-60,)
9 Third Party Defendants.)

10 Defendant/Counterclaimant/Third Party Plaintiff David L. Clabuesch (“Clabuesch”)
11 having filed an Answer to the Complaint herein, now assert, files and alleges the following
12 Counterclaim.

- 13 1. Clabuesch incorporates by this reference his entire Answer to the Complaint
14 herein.
- 15 2. Barrett-Jackson Auction Company, L.L.C. is an Arizona limited liability
16 company with its principal place of business at 3020 North Scottsdale Road in Scottsdale,
17 Arizona, which is located in this judicial district. Barrett-Jackson US, L.L.C. is a Delaware
18 limited liability company with its principal place of business at 3020 North Scottsdale Road
19 in Scottsdale, Arizona, which is located in this judicial district. These two entities shall
20 hereinafter be jointly referred to as “Barrett-Jackson”.

- 21 3. David Clabuesch is an individual who resides in the State of Michigan.

1 4. ThumbCo is a Michigan Nominee Partnership with its principal place of
2 business located in the State of Michigan.

3 5. ThumbCo has assigned all its rights, claims and causes of action herein to
4 Clabuesch. Clabuesch is entitled to assert and prosecute all claims herein that might
5 otherwise belong to ThumbCo.
6

7 6. Counter-Defendants John Does 1 through 30 are persons, corporations,
8 partnerships or business entities (collectively, "persons") whose true names are not known to
9 the Counterclaimants at the present time, and whose negligent acts or omissions were a cause
10 of the injuries and damages set forth hereafter. Counterclaimants will substitute the true
11 names of such fictitiously named persons when and if they are ascertained.
12

13 7. At all times material hereto, Counter-Defendants (hereinafter collectively
14 referred to as "Barrett-Jackson") held themselves out as being especially skilled, qualified,
15 careful and diligent in the practice of automobile consignment and auctions.
16

17 8. This Court has jurisdiction over this counterclaim pursuant to 28 U.S.C. § 1332
18 because the action is between citizens of different States and the amount in controversy
19 exceeds \$75,000.00, exclusive of interest and costs. This Court also has pendant jurisdiction
20 over this counterclaim.
21

22 9. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391 because a
23 substantial part of the events or omissions giving rise to Clabuesch's claims occurred in this
24 judicial district.
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1 10. On December 5, 2006, ThumbCo entered into a Consignment Agreement
2 (attached as Exhibit 1 to the Complaint herein) with Barrett-Jackson.

3 11. Barrett-Jackson knew that the Consignment Agreement was for the benefit of
4 Clabuesch. Clabuesch is a third party beneficiary of the Consignment Agreement.
5

6 12. ThumbCo has assigned its rights, claims and causes of action under the
7 Consignment Agreement to Clabuesch.
8

9 13. The Consignment Agreement related to a six-day automobile auction in
10 Scottsdale, Arizona to be held in January 2007.

11 14. The Consignment Agreement was a valid contract until it was breached by
12 Barrett-Jackson.
13

14 15. Under the Consignment Agreement, Barrett-Jackson held in trust a 1970
15 Plymouth Hemi-Cuda race car (hereinafter the "**RAMCHARGER**"). The **RAMCHARGER** was
16 one of the premiere vehicles featured at this auction. The **RAMCHARGER** was and is a unique
17 vehicle with a unique and unequalled history. The **RAMCHARGER** is the last **RAMCHARGERS**
18 **Team Car** ever raced, and is the only surviving **RAMCHARGERS Team Car** that has been fully
19 authenticated from the racing era spanning from 1959 to 1988.
20

21 16. The **RAMCHARGER** was also authenticated by the National Hot Rod Association
22 (NHRA) as the car which dominated the SS/DA Division from 1974 to 1988.
23

24 17. The VIN of the **RAMCHARGER** is BS23ROB159450.
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1 18. The Consignment Agreement included a covenant of good faith and fair dealing
2 which obligated Counter-Defendants (hereinafter "Barrett-Jackson") to act with honesty and
3 fairness towards ThumbCo and Clabuesch and to not seek to deprive ThumbCo or Clabuesch
4 of the entitlements and benefits of the Consignment Agreement.
5

6 19. The Consignment Agreement obligated Barrett-Jackson to use reasonable
7 efforts to obtain the highest possible sale price for the *RAMCHARGER*.
8

9 20. The auction proceedings were televised.

10 21. The sale of the *RAMCHARGER* occurred during a commercial, and therefore was
11 not broadcasted. However, upon information and belief, a videotape of the actual sale exists
12 and is in the possession of Barrett-Jackson.
13

14 22. By auctioning the *RAMCHARGER* during a commercial, Barrett-Jackson
15 prevented telephone bidders from participating in the sale of this vehicle.

16 23. Upon information and belief, the sale of the *RAMCHARGER* was completed
17 within two minutes and eleven seconds. This time included the description of this prestigious
18 vehicle before the auction of the vehicle itself. This time was substantially less than sales of
19 comparable vehicles. This time was unreasonably brief given the value and prestige of the
20 *RAMCHARGER* and the fact that one or more bidders were still attempting to make higher bids.
21

22 24. The auctioneer never stated "going once", "going twice", "fair warning" or
23 other words to that effect prior to terminating the purported sale of the *RAMCHARGER*.
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1 25. The auctioneer and auctioneer's assistants were either the employees or agents
2 of Barrett-Jackson acting within the scope of his/her authority and/or employment. Barrett-
3 Jackson is vicariously liable for the actions of these persons, as well as any other employee,
4 servants or agents.
5

6 26. All Counter-Defendants acted jointly and in concert as part of a joint enterprise.
7 Each Counter-Defendant is responsible for the actions of the other, and each is jointly and
8 severally liable for the damages herein.
9

10 27. Barrett-Jackson failed to properly select, train, supervise, monitor or otherwise
11 control its auctioneer, auctioneer's assistants, and/or other personnel working at the auction.
12

13 28. The sale of the *RAMCHARGER* ended prematurely, and while at least one bidder
14 was still attempting to make a bid. The failure to accept the higher bid(s) represents
15 negligence and/or intentional misconduct.

16 29. Clabuesch and at least one bidder immediately protested the purported sale of
17 the *RAMCHARGER* and demanded a "re-run" of the auction. Barrett-Jackson failed to re-run
18 the auction of the *RAMCHARGER*, failed to investigate, and otherwise failed to uphold its
19 contractual and fiduciary duties.
20

21 30. Barrett-Jackson promised to meet with Clabuesch to discuss his protest of the
22 purported sale, but then failed to do so. In the meantime, Barrett-Jackson wrongfully and
23 improperly released the vehicle to the purported purchaser Thomas Kazamek. Upon
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1 information and belief, Barrett-Jackson did not intend to keep its promise at the time of its
2 making.

3
4 31. The actions of Barrett-Jackson were willful, wanton and malicious and
5 represent the actions of an evil hand guided by an evil mind. Barrett-Jackson is liable for
6 punitive damages.

7
8 **Count One**
(Breach of Contract)

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10 32. Clabuesch incorporates by this reference all Paragraphs 1 through 31 of this
11 Counterclaim.

12
13 33. Barrett-Jackson breached its contractual obligations under the Consignment
14 Agreement in at least the following ways: by failing to conduct a proper and reasonable
15 auction of the *RAMCHARGER*; by failing to accept higher bids; and by failing to take proper
16 measures after the protest of the sale.

17
18 34. Clabuesch immediately put Barrett-Jackson on notice of these breaches of
19 contract and demanded that Barrett-Jackson preserve and safeguard the *RAMCHARGER*.
20 Barrett-Jackson failed to do so and improperly released the *RAMCHARGER* to the purported
21 buyer Thomas Kazamek. This was an additional breach of contract by Barrett-Jackson.

22
23 35. These breaches of contract damaged Clabuesch in an amount to be determined
24 at trial.

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26 36. This action arises out of contract, and Clabuesch is entitled to recover its
attorneys' fees pursuant to A.R.S. § 12-341.01.

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Count Two
(Breach of Covenant of Good Faith and Fair Dealing)

37. Clabuesch incorporates by this reference Paragraphs 1 through 36 of Counterclaim.

38. Barrett-Jackson failed to uphold its obligation to act with honesty and fairness towards Clabuesch before, during and after the purported sale of the *RAMCHARGER*. The actions of Barrett-Jackson constituted a breach of the covenant of good faith and fair dealing.

39. These breaches of covenant of good faith and fair dealing damaged Clabuesch in an amount to be determined at trial.

40. This action arises out of contract, and Clabuesch is entitled to recover its attorneys' fees pursuant to A.R.S. § 12-341.01.

Count Three
(Breach of Fiduciary Duty)

41. Clabuesch incorporates by this reference Paragraphs 1-40 of this Counterclaim.

42. The actions described above constituted a breach of fiduciary duty by Barrett-Jackson.

43. These breaches of fiduciary duty damaged Clabuesch in an amount to be determined at trial.

44. Included in these damages, Barrett-Jackson is liable for surcharge.

45. Included in these damages, Barrett-Jackson is liable for punitive damages.

1 46. This action arises out of contract, and Clabuesch is entitled to recover its
2 attorneys' fees pursuant to A.R.S. § 12-341.01.

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4 **Count Four**
5 **(Conversion)**

6 47. Clabuesch incorporates by this reference Paragraphs 1-46 of this Counterclaim.

7 48. Clabuesch protested the sale of the *RAMCHARGER* and this created a duty on the
8 part of Barrett-Jackson to safeguard the *RAMCHARGER* until the parties to the purported sale
9 could resolve the protest.

10 49. Until the protest was resolved, ThumbCo and Clabuesch had the right to control
11 the *RAMCHARGER*.

12 50. Until the protest was resolved, Barrett-Jackson did not have the right to release
13 the *RAMCHARGER* to any other party.

14 51. Barrett-Jackson wrongfully released the *RAMCHARGER* to Thomas Kazamek
15 and thereby improperly interfered with ThumbCo's and Clabuesch's right to control the
16 *RAMCHARGER*.

17 52. The actions of Barrett-Jackson damaged Clabuesch in an amount to be
18 determined at trial.

19 53. This action arises out of contract, and Clabuesch is entitled to recover its
20 attorneys' fees pursuant to A.R.S. § 12-341.01.

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26 **Count Five**

(Negligence)

54. Clabuesch incorporates by this reference Paragraphs 1-53 of this Counterclaim.

55. Barrett-Jackson owed a duty of reasonable care to ThumbCo and Clabuesch.

56. Barrett-Jackson's actions before, during and after the purported sale of the *RAMCHARGER* violated its duty of reasonable care and were negligent.

57. The negligence of Barrett-Jackson proximately caused injury to Clabuesch, in an amount to be proven at trial.

58. Clabuesch demands trial by jury on all claims and Counts herein.

59. Clabuesch reserves the right to allege additional or different claims or counts as the support or bases become known through investigation and/or discovery in this matter.

WHEREFORE, Counterclaimant David L. Clabuesch prays for Judgment against Counter-Defendants, and each of them, jointly and severally, as follows:

- A. For an award of compensatory damages in an amount to be proven at trial.
- B. For an award of surcharge.
- C. For an award of punitive damages as determined by the jury.
- D. For an award of attorneys' fees.
- E. For an award of taxable costs.
- F. For any other relief deemed appropriate by the Court or by the jury.

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DATED this 16th day of April, 2007.

HOLDEN & ARMER, P.C.

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ORIGINAL filed with Clerk of Court
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