

1986

Lloyd\'s Unlimited v. Nature\'s Way Marketing : Brief of Appellant

Utah Court of Appeals

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DOCKET NO. 860311-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

LLOYD'S UNLIMITED, a
corporation,

Plaintiff-Appellant,

vs.

NATURE'S WAY MARKETING, LTD.,
a corporation,

Defendant-Respondent.

Case No. 20928

Category No. 13b.

860311CA

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, HONORABLE DEAN E. CONDER

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Clerk, Supreme Court, Utah

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ISSUES PRESENTED FOR REVIEW

1. Were the judgment and findings of the trial court sufficiently supported by the evidence, where the trial court specifically found that the intent of the parties did not change from the handwritten agreement to the typewritten agreement, although the terms thereof were materially different, and where there were undisputed evidence and stipulations prior to and during trial that both parties intended that commissions be paid, if at all, according to the rate structure alleged by the plaintiff?

2. Was defendant estopped from asserting and did the trial court err at trial in considering and admitting evidence that the applicable rate structure was other than that alleged by plaintiff, (a) where defendant had admitted (1) in its Answer, (2) in its response to Plaintiff's Motion For Partial Summary Judgment, (3) at the hearing on the Motion for Partial Summary Judgment and pre-trial conference, and (4) at the first day of trial that there was no dispute concerning the rate structure as alleged by plaintiff, and (b) where the trial court had previously ordered at the pre-trial settlement conference that the amounts prayed for by plaintiff would be deemed accurate unless defendant advised plaintiff prior to trial with respect to any offsets or adjustments to which defendant claimed it was entitled, and thereafter defendant

failed to so advise plaintiff.

3. Did the trial court abuse its discretion in denying plaintiff's motion for an order granting it leave to file an amended complaint to conform to the evidence and to assert a cause of action for reformation of the typewritten agreement, where the defendant had previously admitted that the rate structure alleged by plaintiff was accurate and that there was no real dispute as to the amount of the debt, if any, but thereafter nevertheless raised a dispute concerning both the rate structure and the amount of the debt on the second day of trial?

4. Did the trial court err in failing (a) to find that a mutual mistake between the parties had occurred because the rate structure contained in the typewritten agreement did not accurately embody the intentions of both parties to the contract and (b) to reform the contract to accurately reflect the parties' true understanding?

5. Did the trial court err in finding the handwritten agreement executed by the parties contained a commission rate structure at the rate of .35¢ rather than the rate of 35¢?

6. Did the trial court err in failing to award plaintiff its costs of depositions and service of subpoena on defendant's president for his deposition when said depositions were

taken in good faith and the costs thereof necessarily incurred for the preparation of plaintiff's case and the subpoena was reasonably considered by plaintiff to be necessary in light of defendant's prior failures to cooperate in providing discovery absent a court order.

STATEMENT OF THE CASE

A. Nature of the Case.

This is an action based upon breach of contract for recovery of commissions due plaintiff Lloyd's Unlimited ("Lloyd's") by defendant Nature's Way Marketing Ltd. ("Nature's Way") for all product sold by defendant to a third party, Yurika Foods Corporation ("Yurika"), in consideration of Lloyd's efforts in inducing Yurika to market the product handled by Nature's Way. In connection therewith, Lloyd's sought a formal accounting from Nature's Way with respect to the products sold to Yurika by Nature's Way by which the amount of the commission owed to Lloyd's could be ascertained. Defendant Nature's Way counterclaimed against Lloyd's for the sum of \$7,500.00 arguing that Lloyd's agreed to pay to Nature's Way one-half of any commissions or payments Lloyd's received from Yurika.

B. Course of Proceedings and Disposition in Lower Court.

Plaintiff filed its Complaint against Defendant on

August 19, 1983. (R. 2-4A) Defendant was served on September 17, 1983 with the Summons and Complaint. (R. 5-7)

Soon after the Complaint was served upon Nature's Way, plaintiff's counsel was contacted by Bert R. Wonnacott, Esquire, to discuss the possibility of resolving the matter. Subsequently, plaintiff's counsel was contacted by Kay M. Lewis ("Lewis"), to discuss the possibility of settlement. In early November, 1983, Lloyd's counsel prepared a First Set of Interrogatories and Request for Production of Documents and served the same upon Lewis in an effort to obtain some sort of reasonable accounting from Nature's Way so that Lloyd's could adequately discuss and explore the possibility of settlement. (R. 53-61 and 8-16)

Despite Lewis' efforts, Nature's Way failed and refused to submit any answers to the interrogatories or respond to the request for production of documents and Lloyd's was forced to file a motion to compel discovery and for appropriate sanctions with an accompanying memorandum on April 2, 1984. (R. 17-23) On April 9, 1984, Lloyd's counsel set the motion to compel and for sanctions for hearing before the lower court on April 24, 1984. (R. 24-25) Thereafter, Lewis withdrew as counsel for defendant on April 12, 1984 prior to the date of the hearing. (R. 26)

Because of Lewis' withdrawal prior to the hearing,

plaintiff moved for and obtained an order on April 18, 1984, directing Nature's Way to appoint new counsel to represent it in the action prior to the hearing on Lloyd's motion to compel discovery and for sanctions. This order was mailed directly to defendant and its prior counsel. (R. 27-29)

Plaintiff's motion to compel discovery and for sanctions came for hearing before the trial court as scheduled on April 24, 1984, and defendant failed to appear. In connection with the hearing, the Court entered an order on May 22, 1984, compelling defendant to fully respond to the interrogatories and requests for production on or before June 1, 1984 and awarding Lloyd's the sum of \$150.00 as and for attorney's fees. (R. 35-37) In addition to its being mailed to defendant's prior counsel, the Order Compelling Discovery and Awarding Attorney's Fees was personally served upon defendant. (R. 48-51)

On June 1, 1984, present counsel for Nature's Way entered an appearance on its behalf. (R. 38) In connection with counsel's appearance for Nature's Way, they sought and obtained an ex parte order extending the time in which Nature's Way could respond to discovery to and including June 15, 1984. (R. 45-47)

Nature's Way answered Lloyd's Complaint and counterclaimed against Lloyd's on October 12, 1984. (R.

71-77).

On January 7, 1985, Plaintiff filed a Motion for Partial Summary Judgment together with an accompanying memorandum and affidavit seeking partial summary judgment for certain commissions due Lloyd's on sales made by Nature's Way to Yurika during the period from August 1, 1982 through February 23, 1984. The amount sought by plaintiff was the sum of \$31,545.64, which sum included interest on the commissions as of December 1, 1984. (R. 105-129) Plaintiff's Motion for Partial Summary Judgment was heard before the lower court on January 22, 1985. On that date, the Court found that there was some ambiguity in the agreement upon which this action is based and denied the motion. (R. 142-144) An order reflecting the Court's denial of the partial summary judgment was entered by the Court on January 31, 1985. (R. 170-172)

Thereafter, the case came on for trial before the Honorable Dean E. Conder, sitting without a jury, on February 25 and 26, 1985. After both sides rested, the Court took the matter under advisement and directed counsel to submit post-trial memoranda. (R. 177-178)

After the trial hereof and prior to the Court's ruling thereon, plaintiff moved the Court on March 8, 1985 for an order allowing it leave to file an amended complaint seeking reformation of the commission rates schedule contained in the

parties' agreement. (R. 180-181) The motion for leave to file an amended complaint was accompanied by a memorandum. (R. 218-222) The motion for leave to file an amended complaint was heard by the Court at the same time as Lloyd's and Nature's Way's post-trial memoranda and other related documents were considered by it. (R. 182-217)

One day after the filing of both parties' post-trial memoranda and Lloyd's Motion for Leave to File an Amended complaint, Nature's Way filed an affidavit of Lynn Burningham, its response to Lloyd's post-trial memorandum, and its memorandum opposing the motion for leave to file an amended complaint. (R. 225-251) Thereafter, plaintiff filed its post-trial reply memorandum and defendant filed its response to plaintiff's post-trial reply memorandum. (R. 252-264)

Because of the numerous memoranda, motions, and Affidavit of Lynn Burningham, which affidavit Lloyd's moved to strike (R. 265-267), on March 19, 1985 plaintiff set the matters for hearing before the Court on March 26, 1985. (R. 272-273) After scheduling this hearing, the parties received a minute entry from the Court dated March 19, 1985, awarding plaintiff judgment in the sum of \$416.25 plus costs. (R. 271) At the hearing on March 26, 1985, the Court denied Lloyd's motion for leave to file an amended complaint and struck the Affidavit of Lynn Burningham. The Court took the remaining

issues under advisement and treated the parties' argument on the memorandum decision as a motion by the plaintiff to adjust its March 19, 1985 decision, which motion was denied by the Court on April 8, 1985. (R. 307-308)

On May 2, 1985, plaintiff submitted directly to the Honorable Dean E. Conder, its proposed Findings of Fact and Conclusions of Law and Judgment, Memorandum of Costs and Disbursements, Order Denying Leave to File Amended Complaint and Order Striking Affidavit of Lynn Burningham. (R. 371-373, 337-340) Several of these pleadings were misplaced by the Court. Nature's Way did not file any objection to the two proposed orders, but objected to Plaintiff's proposed findings and conclusions and memorandum of costs. Accordingly, on May 6 and 7, 1985, defendant submitted its own proposed Findings of Fact and Conclusions of Law to the Court, together with its Motion to Have the Bill of Costs Taxed by the Court. (R. 317-328) These two documents were also misplaced by the Court. Thereafter, a hearing was scheduled and held before the Honorable Dean E. Conder on June 11, 1985, for the determination by the Court of the issues between the parties as to the findings of fact and conclusions of law and the amount of costs to be awarded plaintiff.

At the hearing, counsel for plaintiff and defendant were informed that the Court had misplaced the pleadings

referred to above. (R. 649-650) The Court also ruled on the outstanding issues between the parties and directed plaintiff's counsel to prepare final findings of fact and conclusions of law. (Tr. 650-666) At the request of the Court, Lloyd's counsel also submitted copies of the numerous documents which had been misplaced by the Court. (R. 333-344) Lloyd's proposed Findings of Fact and Conclusions of Law are included in the record at pages 345-352. Nature's Way's proposed Findings of Fact and Conclusions of Law were later located by the Court. The original of these findings and conclusions are contained in the record at pages 317-324 and a copy of the document is contained at pages 356-363.

After the June 11, 1985 hearing, the Court entered the Order Denying Leave to File Amended Complaint and the Order Striking the Affidavit of Lynn Burningham on June 18, 1985 (R. 337-338 and 339-340) The final Findings of Fact and Conclusions of Law and Judgment were executed by the Court on June 18, 1985, but not filed with the clerk's office until July 17, 1985. (R. 329-336; 368-370) After obtaining an extension of time in which to file an appeal, Lloyd's filed its Notice of Appeal on September 26, 1985.

C. Statement of Facts.

Lloyd's president, Lloyd R. Dowdle ("Dowdle"), and Nature's Way's president, Lynn Burningham ("Burningham") are

both experienced salesmen who spent a substantial portion of their working lives in the selling profession. (Tr. 406-408; 477-478) Dowdle and Burningham have been acquainted with and had an ongoing informal personal relationship since the early 1950's. (Tr. 408-409; 478-479)

In late 1981 and early 1982, Dowdle and Burningham were in frequent contact with each other and became generally aware of the products and sales activity each was then involved. (Id.) During the early part of 1982, Dowdle learned that Burningham had acquired the rights to market and was attempting to market a coffee extender product. (Tr. 409-411) Shortly after learning of the product, Dowdle became acquainted with Douglas Webb ("Webb") and learned that he and a number of other persons who were experienced in the sales field were in the process of starting a sales organization that would be involved in the multi-level marketing and sales on a national basis of various food products. (Tr. 411, 413-416) After meeting Webb and learning of the sales and marketing organization he and his associates were organizing, which company subsequently became Yurika Foods Corporation, Dowdle commenced discussions with Burningham concerning the possibility of having Yurika market and sell the coffee extender product. (Tr. 416-418)

Dowdle informed Burningham of the developing sales

and marketing organization which he felt would be interested in Nature's Way's product. Their discussions lead to an oral understanding that Nature's Way would pay Lloyd's a ongoing commission for all products sold to Yurika in consideration of Dowdle's efforts in inducing Yurika to market the product controlled by Nature's Way. (Tr. 418-420; 479-486) Testimony at the trial disclosed that this type of ongoing commissions paid as a finder's fee is a frequent occurrence in the sales industry. (Tr. 422, 431, 540-543; Ex. 22)

Burningham and Dowdle initially agreed that Lloyd's would receive \$1.00 for every pound of coffee extender product sold to Yurika. (Tr. 418-420; 453, 573, 593) Following the confirmation of their oral understanding, Dowdle introduced Burningham to Webb and other principals of Yurika, which introduction lead to an agreement between Nature's Way and Yurika on April 24, 1982, whereby Yurika became the exclusive sales and marketing representative for Nature's Way for the coffee extender product. (Tr. 422-423, 452-455, 494-499, 556-562, 592-593; Ex. 4)

During the next several months, the parties continued their discussions in an effort to reduce their oral understanding to writing. (Tr. 423-424, 456) On or about August 11, 1982, Dowdle and Burningham met to discuss the execution of a written memorandum of their agreement. On that

date, Burningham informed Dowdle that because of the packaging and production costs, Nature's Way would be unable to pay \$1.00 per pound to Lloyd's for the product it sold to Yurika. (Tr. 425-426) On that date, the parties executed a handwritten document prepared by Dowdle (Ex 2; Tr. 424-426, 490-493), which the District Court found provided the following rate structure for commissions to be paid by Nature's Way to Lloyd's :

1 unit - 60 packets pack:	.25¢
1 unit - 2 lb. bulk pack:	.35¢
1 unit - 5 lb. bulk pack:	50¢
1 unit - 37 lb. bulk pack:	\$1.00

(R. 329-336)

Lloyd's claims that the 2 lb. bulk pack commission rate on the handwritten agreement is 35¢ and not .35¢ and that the lower court erred in its interpretation of this portion of the commission schedule. (Ex. 2)

Dowdle also testified that he made a mistake in writing the rate structure in the handwritten agreement and that the parties intended that the rates to be paid were as follows:

1 unit - 60 packets pack:	\$.25
1 unit - 2 lb. bulk pack:	.35
1 unit - 5 lb. bulk pack:	.50
1 unit - 37 lb. bulk pack:	1.00

(Tr. 633-634)

Shortly thereafter, the handwritten agreement was reproduced in typewritten form. (Tr. 427-428, 493-494) The

commission schedule of the typewritten version, however, was ambiguously or erroneously prepared as follows:

1 unit - 60 packets pack:	.25¢
1 unit - 2 lb. bulk pack:	.35¢
1 unit - 5 lb. bulk pack:	.50¢
1 unit - 37 lb. bulk pack:	\$1.00

(Ex. 3) The typewritten agreement was executed by the parties on August 16, 1982.

At the time the handwritten and typewritten agreements were executed, the parties erroneously assumed that all of the coffee extender product sold by Nature's Way to Yurika would be marketed in units consisting of 60 packet packs, 2 lb. packs, 5 lb. packs, and 37 lb. bulk packs. Subsequently, Nature's Way marketed the product to Yurika in other size units. (Ex. 6 and 24-26, R. 332-333)

On the date the typewritten agreement was executed, Nature's Way delivered to Lloyd's a check in the amount of \$500.00 for commissions earned by Lloyd's on sales by Nature's Way to Yurika from April 24, 1982 through August 1, 1982. (Exhibit 11, Tr. 426-427, 493-494) This sum was paid by Nature's Way to Yurika without a formal accounting as to the sales previously made to Yurika. (Id.)

Subsequent to August 1, 1982, Nature's Way sold coffee extender product to Yurika at a sales price exceeding the sum of \$625,000.00 (R. 464), but it failed to pay any further commissions to Lloyd's. Lloyd's made several efforts

to contact Nature's Way after that date to discuss the amounts due Lloyd's, but its efforts were unsuccessful. These efforts included several telephone calls, a personal letter, and a letter from Lloyd's accountant, Spencer Neilsen. (Exhibits 12, 14, Tr. 431-440, 501-506)

Because Lloyd's failed to receive any further payment from Nature's Way or any accounting as to sales made, plaintiff initiated the present action. Plaintiff alleged in its Complaint (R. 3), asserted in its Motion for Partial Summary Judgment and affidavit and memorandum in support thereof dated January 4, 1985 (R. 105-129), and claimed at all times herein and during the trial hereof, that Nature's Way was obligated to pay Lloyd's commissions based upon the following rate schedule:

1 unit - 60 packets pack:	\$.25
1 unit - 2 lb. bulk pack:	.35
1 unit - 5 lb. bulk pack:	.50
1 unit - 37 lb. bulk pack:	1.00

Nature's Way denied liability for any commissions, alleging that there was no consideration for the Agreement between the parties and that Lloyd's had failed to perform certain obligations not contained within the written agreement. (R. 71-77, 130-139, 151-169)

Until the second day of the trial, Nature's Way admitted at all times that the rate structure identified above advocated by Lloyd's ("Subject Rate Schedule") applied to any

commissions to which plaintiff was entitled if the Agreement was enforceable. This fact is clearly evident from the record herein.

For example, paragraph 5 of the plaintiff's Complaint sets forth the Subject Rate Schedule as alleged by Lloyd's. (R. 3) In Paragraph 3 of the Second Affirmative Defense of Nature's Way Answer and Counterclaim, defendant does not deny the rate schedule advocated by plaintiff, but alleges that the agreement is unenforceable because of failure of consideration. (R. 71-72) Secondly, on or about January 4, 1985, Lloyd's filed its Motion for Partial Summary Judgment whereby it sought judgment in the amount of \$31,545.60 as of December 1, 1984, for commissions owing to it by Nature's Way for sales during the period from August 1, 1982 through February 23, 1984. In Paragraph 2 of the Statement of Uncontested Facts set forth in Lloyd's Memorandum in Support of its Motion for Partial Summary Judgment of same date, Lloyd's maintained it should be paid according to the Subject Rate Schedule as alleged throughout the proceeding. (R. 118) The affidavit in support of the motion for partial summary judgment asserts the same schedule. (R. 108)

In the first paragraph of the Statement of Facts in Defendant's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment dated January 16, 1985, defendant

states:

Defendant has no objection to what plaintiff has set out as uncontested facts other than that important uncontested facts were omitted.

(R. 130)

The facts which Nature's Way disputes in its response to Plaintiff's Motion for Partial Summary Judgment have nothing to do with the rate schedule alleged by plaintiff that formed the basis of the parties' agreement. (R. 130-132) The entire focus of defendant's objection to the Motion for Partial Summary Judgment was that the Agreement was unenforceable because of a failure of consideration. (R. 130-139; 151-154)

The amount prayed for in Lloyd's Motion for Partial Summary Judgment was based upon calculations made by Thomas V. Chamberlain, C.P.A., based upon the per unit rates contained in the Subject Rate Schedule. In connection with its Motion for Partial Summary Judgment, Lloyd's filed an affidavit of Chamberlain dated December 20, 1984, containing two exhibits setting forth a summary of computations of commissions due plaintiff during that period based upon the Subject Rate Schedule. At the hearing on said motion on January 22, 1985, which was attended by Burningham, Nature's Way stipulated that the amounts computed by Chamberlain based upon the commission schedule asserted by Lloyd's were true and correct and agreed that the only determination that the Court needed to make at

the hearing was whether the agreement between the parties was enforceable as a matter of law. (Appendix C, R. 105-139) Based upon that stipulation, the Motion for Partial Summary Judgment was argued. The Court thereafter found that there was some ambiguity in the Agreement and denied the partial summary judgment motion. (R. 142, 144)

The commission rate schedule asserted by plaintiff was specifically agreed as the parties agreement by Burningham in his deposition taken on September 5, 1984. During his deposition, Burningham was asked several questions about the typewritten agreement including specifically the rate of commissions his corporation owed to Lloyd's had it followed the terms of the Agreement. In answer to Lloyd's counsel's question, Burningham agreed that had he made payment, the payments would have been commissions at 35¢ for the 2 lb. bulk pack and 50¢ for the 5 lb. bulk pack. (R. 208-209)

Furthermore, the Court ordered at the hearing on January 22, 1985, pursuant to the stipulation of counsel thereat, that "[t]he amounts prayed for in Plaintiff's Motion for Partial Summary Judgment shall be deemed accurate unless defendant advises plaintiff prior to the trial hereof of any facts, documents or information upon which defendant intends to rely with respect to any offsets or adjustments in said amount to which defendant claims it is entitled." (Appendix "C")

This order entitled Order Governing Discovery was served upon counsel for Nature's Way on or about January 29, 1985 and no objection was filed thereto. (R. 173-175)

For some unknown reason, the Order Governing Discovery was never executed by the Court although the parties complied with the provisions of paragraphs 1 and 2 of the Order and Nature's Way failed to advise plaintiff prior to the trial of any adjustments to which it claims it was entitled. (R. 145-149 and Appendix "B")

Nature's Way also stipulated at trial that if the agreement was enforceable that the amounts alleged by plaintiff pursuant to the Subject Rate Schedule were accurate. (Tr. 404, 412-413, 430, 459-461)

On the second day of trial, Nature's Way claimed for the first time that the commissions should be based specifically upon the typewritten agreement and not upon the Subject Rate Schedule. (Tr. 577-579) Shortly after the trial thereof and before any ruling the Court, plaintiff sought leave to file an Amended Complaint to conform to the prior stipulations and record and evidence at trial and to seek reformation of the typewritten agreement based upon a scrivener's error and mutual mistake, which motion was denied by the Court. (R. 180-181, 218-222, 337-338, 341-342, Appendix "D")

After receiving post-trial memoranda from both par-

ties, (R. 190-199, 200-217, 230-246, 252-258, 259-264, 268-270) the lower court ruled that Lloyd's was entitled to a commission on the products sold by Nature's Way to Yurika, but awarded its commissions based strictly upon the rate structure set forth in the typewritten agreement in the total amount of \$416.25, together with costs in the amount of \$138.77. (R. 271, 368-370) Plaintiff sought additional costs from Nature's Way which were not awarded by the lower court. (R. 371-373, 325-328, 309-313, Tr. 649-666)

SUMMARY OF ARGUMENT

Even when viewed in a light most favorable to the Court below, the trial court's findings of fact are not sufficiently supported by the evidence. In this regard, the trial court specifically found the intent of the parties did not change from the dates of execution of the handwritten agreement and the typewritten agreement, although the terms thereof are materially different, and there were undisputed evidence and stipulations prior to and during the trial that both parties intended that the commissions be paid, if at all, according to the rate structure alleged by plaintiff.

The defendant should have been estopped from asserting and the trial court erred in considering and/or admitting evidence that the applicable rate structure was other than that alleged by plaintiff because the defendant had admitted (1) in

its Answer, (2) in its response to Plaintiff's Motion for Partial Summary Judgment, (3) at the hearing at the Motion for Partial Summary Judgment and Pre-Trial Settlement Conference, and (4) at the first day of trial, that there was no dispute concerning the rate structure as alleged by plaintiff.

Additionally, the trial court had previously ordered at the pre-trial settlement conference that the amounts prayed for by plaintiff would be deemed accurate unless defendant advised plaintiff prior to the trial with respect to any offsets or adjustments to which it was entitled, and the defendant failed to so advise plaintiff.

The trial court abused its discretion in not allowing plaintiff to file an amended complaint to conform to the evidence and to assert a cause of action for reformation of the typewritten agreement. In this regard, the defendant had previously admitted on several occasions that the rate structure alleged by plaintiff was accurate and that there was no real dispute as to the amount of the debt, if any, but thereafter nevertheless raised the dispute concerning both the rate structure and the amount of the debt on the second day of trial.

The trial court erred in failing to find that a mutual mistake between the parties had occurred because the rate structure contained in the typewritten agreement did not accurately embody the intentions of both parties to the

contract and in failing to reform the contract to accurately reflect the parties' true understanding.

The trial court erred in finding that the handwritten agreement executed by the parties contained a commission rate structure at the rate of .35¢ rather than the rate of 35¢ as the review of the handwritten agreement readily discloses.

The trial court erred in failing to award plaintiff its costs of deposition and service of subpoena on defendant's president for his deposition when the depositions were taken in good faith and the costs thereof necessarily incurred in the preparation of plaintiff's case.

ARGUMENT

Point I

THE FINDINGS OF THE TRIAL COURT ARE NOT
SUFFICIENTLY SUPPORTED BY THE EVIDENCE
AND ARE INCONSISTENT WITH THEMSELVES
AND WITH THE CLEAR WEIGHT OF THE EVIDENCE.

Lloyd's recognizes that to mount a successful attack on the trial court's findings of fact that it must marshall all of the evidence in support of the trial court's findings and then demonstrate that the evidence is insufficient to support the findings even in the light most favorable to the court below. Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985). Lloyd's submits that even in the view most favorable to the court below, the evidence is insufficient to support the trial

court's findings. The findings of the trial court should be disturbed in this case because they are clearly against the weight of the evidence. See Janke v. Beckstead, 8 Utah 2d 247, 332 P.2d 933, 935 (1958).

Paragraphs 3 through 6 of the Findings of Fact entered by the Court are inaccurate, inconsistent, and clearly against the weight of the evidence. Dowdle testified that the original oral agreement between the parties provided for commissions to be paid at the rate of \$1.00 per pound. Although Burningham initially denied this fact (Tr. 481-482), he admitted the existence of this arrangement on cross-examination. (R. 593) This finding is also supported by the handwritten agreement (Ex. 2) and the fact that Nature's Way paid the sum of \$500.00 to Lloyd's for sales to Yurika of the coffee extender product over the initial approximate three-month period. This amount was paid without any formal accounting and at a time in which sales by Nature's Way to Yurika of the product were just beginning. The trial court also found that the parties had reached an oral understanding prior to execution of the handwritten agreement. (Tr. 643)

The clear and convincing weight of the evidence, however, does not support the Court's findings with respect to the handwritten agreement. A review of the commission rate structure of Exhibit 2, the handwritten agreement, clearly

indicates that the only unit of sale in which Dowdle placed a decimal point before the number is .25¢ for the 60 packets pack. The other categories of the commission rate schedule read 35¢, 50¢ and \$1.00.

Any reasonable and legal interpretation of the commission schedule and the testimony at the trial hereof is that both parties agreed upon commissions at the rate of 25¢, 35¢, 50¢ and \$1.00, depending upon the rate and size of the quantities sold by Nature's Way to Yurika. Dowdle testified that that was the express understanding of the parties and there was evidence before the Court that he normally wrote 25¢ as .25¢, not recognizing there was any difference. (R. 296-306)

Burningham testified that he did not specifically remember the rate structure agreed upon by the parties, but that he felt bound by the typewritten contract. (Tr. 584-490) His testimony at the second day of trial, is completely inconsistent with every position Nature's Way had taken prior to that date. As has been previously mentioned, Nature's Way admitted that the parties' intent was the rate structure alleged by and testified to by Lloyd's at every other stage of this proceeding, including in its Answer, in its response to Plaintiff's Motion for Partial Summary Judgment, at the hearing on Plaintiff's Motion for Partial Summary Judgment, in the deposition of Burningham, and on the first day of trial.

Moreover, Findings of Fact numbers 4 through 6 are inherently inconsistent and establish clear grounds for plaintiff's claim for reformation of the commission rate schedule contained in the typewritten agreement. This Court has longed recognized that:

The importance of complete, accurate and consistent findings of fact in a case tried by a judge is essential to the resolution of dispute under the proper rule of law.

Rucker v. Dalton, 598 P.2d 1336, 1338 (Utah 1979).

This principle was cited in Parks v. Zion's First National Bank, 673 P.2d 590, 601 (Utah 1983) where the Court held that the Court's findings must resolve all issues of material fact necessary to justify the conclusions of law and judgment and that failure of the Court to enter adequate findings requires the judgment to be vacated.

By finding that the rate structures in the handwritten agreement and typewritten agreement were materially different and subsequently finding that the intent of the parties did not change between the dates of execution of the two agreements, the Court found in substance that there had been a mutual mistake of the parties to the agreement, but refused to allow the filing of an amended complaint by Lloyd's to reform the contract to reflect the parties' true understanding. A true and accurate copy of the proposed amended complaint attached as

an exhibit to Plaintiff's Motion for Order Granting Leave to File Amended Complaint, not an initial part of the record herein, is attached hereto as Appendix "D."

The findings and judgment of the trial court are clearly contrary to the weight of the evidence. As previously stated, the \$500.00 check delivered by Nature's Way to Lloyd's on August 16, 1982, reflected and evidenced the parties' understanding that the commissions agreed upon were 25¢, 35¢, and 50¢ per respective unit and not .25¢, .35¢, and .50¢ per unit. Furthermore, it is inconceivable and contrary to the weight of all of the evidence that the parties' agreement was based upon the express rate schedule of the typewritten agreement which, if applied, would yield commissions to Lloyd's in the principal amount of approximately \$300.00 on more than \$625,000.00 worth of sales by Nature's Way to Yurika during the two years subsequent to the date of the typewritten agreement.

The fact that the parties intended their rate commission schedule to be that as alleged by plaintiff is also clearly shown by the fact that the parties would obviously not have agreed or intended to pay only a fraction of a cent (.25¢) on some units and 50¢ and \$1.00 on other per unit sales of the same product involving only slight differences in weight and volume. The only scintilla of evidence supporting a finding that the parties intended the commission rate structures to be

a fraction of one penny is the evasive testimony of Burningham on the trial's second day in which he states he does not remember the actual rate structure agreed upon but feels bound by the typed agreement. All other evidence, including the deposition testimony of Burningham on September 5, 1984, the summary judgment hearing, the trial and hearing stipulations, order of the trial court, and language of the contracts, clearly support the rate structure as alleged by plaintiff.

Point II

DEFENDANT SHOULD BE ESTOPPED FROM ASSERTING
AND THE TRIAL COURT ERRED IN CONSIDERING
AND ADMITTING EVIDENCE THAT THE APPLICABLE
RATE STRUCTURE GOVERNING THE PARTIES' AGREEMENT
WAS OTHER THAN THAT ALLEGED BY PLAINTIFF.

The test of equitable estoppel is set forth in Koch, Inc. v. J.C. Penney Co., 534 P.2d 903, 905 (Utah 1975):

[Equitable stoppel] is conduct, by act or omission, by which one party knowingly leads another party, reasonably acting thereon, to take some course of action, which will result in his detriment or damage if the first party is permitted to repudiate or deny his conduct or representation.

This test was cited with approval in Parks v. Zion's First National Bank, 590 P.2d at 604.

In the present action, the actions of Nature's Way satisfy the test of equitable estoppel. As previously explained, Nature's Way, on numerous occasions throughout this proceeding, agreed that if the agreement between the parties

was enforceable, the commissions should be payable to Lloyd's according to the Subject Rate Schedule. This fact was admitted in defendant's Answer, in its response to Plaintiff's Motion for Partial Summary Judgment, at the hearing on Plaintiff's Motion for Partial Summary Judgment and Pre-Trial Conference, in Burningham's deposition in September, 1984, and at the first day of the trial hereof. In this regard, the trial court ruled at the Pre-Trial Settlement Conference and Motion for Partial Summary Judgment hearing that the amounts prayed for by Lloyd's would be deemed accurate unless Nature's Way advised Lloyd's prior to the trial of any offsets or adjustments to which Nature's Way claimed it was entitled. (R. 173-175) This ruling is consistent with the stipulation of the parties at the hearing and Rule 2(g) and (h), Rules of Practice of the Third Judicial District Court. (Appendix "E") At no time did Nature's Way advise Lloyd's of the discrepancy in the commission rate schedule. Lloyd's clearly relied upon the various representations and stipulations of Nature's Way to its detriment and as such Nature's Way is estopped from asserting a new claim for the first time on the second day of trial. Under the circumstances, the trial court should not have considered evidence that the applicable rate structure was other than that as alleged by Lloyd's.

POINT III

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING LLOYD'S LEAVE TO FILE AN AMENDED COMPLAINT TO CONFORM TO THE EVIDENCE AND TO ASSERT A CAUSE OF ACTION FOR REFORMATION OF THE TYPEWRITTEN AGREEMENT.

As previously mentioned, the clear weight of the evidence and testimony before the Court entitles Lloyd's to reform the typewritten agreement to conform to the evidence.

Plaintiff should be granted leave to file an amended complaint herein to conform to the evidence adduced at the trial hereof.

Utah R. Civ. P. 15(b) provides in part:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment

It is axiomatic that the Utah Rules of Civil Procedure should be liberally construed and applied so as to promote justice. Rule 1 provides that the rules "shall be liberally construed to secure the just, speedy and inexpensive determination of every action." This fundamental philosophy of liberality which supports the rules is manifest in a number of specific provisions including Rule 15(a) which specifically provides that leave to amend shall be "freely" granted when

"justice so requires." This principle is also set forth in Rule 54(c)(1), which provides for a kind of post-trial amendment by virtue of its requirement that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." (Emphasis added.)

The philosophy that each case should be decided "on its facts rather than on its pleadings," Keller v. Gerber, 114 Utah 345, 199 P.2d 562, 565 (1948), is so fundamental under Utah law that amendments to pleadings have been allowed and approved even after the trial court has filed its initial memorandum decision. See Watson v. Deseret Irrigation Co., 110 Utah 78, 69 P.2d 793 (1946).

As previously stated, defendant failed to raise any issue as to the amounts payable under the rate schedule of the contract until the second day of trial. Prior to that time, defendant and his counsel on numerous occasions before this Court and during the course of Lynn Burningham's deposition, stipulated and agreed that the commissions payable under the Agreement, should it be determined to be valid, were to be based upon 25¢, 35¢ and 50¢ and not .25¢, .35¢ and .50¢. This fact is more particularly set forth in other areas of the argument herein and by this reference made a part hereof. The testimony offered at trial and stipulations made prior to and

thereat, clearly support the relief for which plaintiff sought, leave to amend its complaint for reformation of the subject agreement.

Point IV

THE TRIAL COURT ERRED IN FAILING (A) TO
FIND A MUTUAL MISTAKE BETWEEN THE PARTIES
HAD OCCURRED AND (B) TO REFORM THE CONTRACT
TO ACCURATELY REFLECT THE PARTIES' TRUE
UNDERSTANDING.

This Court has long recognized that reformation of a written instrument is appropriate if:

(1) the instrument as written fails to conform to what both parties intended; or

(2) that the claiming party was mistaken as to its actual content and the other party knowing this mistake kept silent; or

(3) that the claiming party was mistaken as to the actual content because of fraudulent, affirmative behavior.

Jensen v. Manila Corp. of the Church of Jesus Christ of Latter-Day Saints, 565 P.2d 63, 65 (Utah 1977), citing 6 Powell on Real Property § 903 (1977)

Lloyd's recognizes that to reform a written instrument it must show a mutual mistake of the parties or a mistake on the part of one and fraud or inequitable conduct such as silence on the part of the other, as a result of which the

instrument reflects something neither party had intended or agreed to. Bown v. Loveland, 670 P.2d 292, 295 (Utah 1984). Lloyd's also recognizes that the mistake must be presented by clear and convincing evidence. Id. In Bown, this Court vacated the lower court's reformation primarily because the issue of mutual mistake was not raised in the context of the trial and the evidence failed to sustain that position.

The same test for reformation were recently cited by this Court in Briggs v. Liddell, 669 P.2d 770, 772 (Utah 1985). In that case, this Court discussed the two general reasons that a contract may be reformed:

First, if the instrument does not embody the intentions of both parties to the contract, a mutual mistake has occurred, and reformation is appropriate. Second, if one party is laboring under a mistake about a contract term and that mistake either has been induced by the other party or is known by and conceded to by the other party, then the inequitable nature of the other party's conduct will have the same operable effect as a mistake, and reformation is permissible.

Id. (Emphasis added.)

Lloyd's maintains that the commission rate of the contract should have been reformed under both reasons. First, there is compelling evidence that the instrument does not embody the intentions of both parties to the contract and that a mutual mistake has occurred. All pleadings, stipulations, testimony of the parties and the differences between the

handwritten and typewritten agreements compel the conclusion that the commission schedule agreed upon by the party was as plaintiff alleged and not as contained in the typewritten agreement. The only evidence contrary to this fact is the testimony of Burningham on the trial's second day in which Burningham believes that the commissions as agreed upon by the parties were whatever was specified in the typewritten contract.

In any event, the overwhelming weight of the evidence satisfies the second theory of reformation. As noted in Briggs, supra, if one party (Lloyd's) is laboring under a mistake about a contract term and the mistake is known by or conceded to by the other party (Nature's Way), then the inequitable nature of Nature's Way's actions has the same operable effect as a mistake. 659 P.2d at 772. In this regard, it is clear that Lloyd's was laboring under a mistake about the commission rate schedule. Dowdle testified that any ambiguity or error was a result of his mistaken belief that the handwritten and typewritten agreements accurately reflected the parties' intent and understanding that the per unit rates were 25¢, 35¢, 50¢ and \$1.00. (Tr. 633-634 and R. 293-306)

Assuming, arguendo, that Burningham did not have the same mistaken belief as Dowdle, the inequitable nature of his conduct in knowing and conceding to the commission schedule

alleged by plaintiff must by law have the same operative effect as a mistake. This fact is readily apparent from the deposition testimony, summary judgment and pre-trial conference hearing, trial stipulations, Order Governing Discovery, and testimony of Burningham at the trial hereof, all of which were relied upon by Dowdle.

The equitable doctrine of reformation applies where there is no mistake about the terms of the agreement and the only mistake is in connection with reducing the parties' agreement to writing as is the case in the present action. Other jurisdictions have recognized that reformation is most appropriate in the circumstances. A scrivener's inadvertent error, or an error on the part of either party, no matter how it occurred, may be corrected. Baby Togs, Inc. v. Harold Trimming Co., 67 A.D. 2d 868, 413 N.Y.2d 393, 394 (1979).

In the case of Simons v. Federal Bar Building Corp., 275 A.2d 545 (D.C. Ct. App. 1971), a written lease was executed by the parties in which the scrivener committed a similar error to that committed by Dowdle in the present action. In that case, the figure of .015 was erroneously inserted in a contract whereas the correct figure should have been 1.5. In holding that the parties should not be bound by the strict operation of the contract the Court stated:

We believe this situation is governed by the myriad of cases granting the relief for an

obvious mistake in transposing the agreement to writing.

275 A.2d at 551.

In that case, the D.C. Court of Appeals pointed out that reformation has often been granted where the mistake has been denominated "unilateral" and in cases where the courts hold that the contract lacks mutuality even though the error resulted from the miscalculation of only one party as was the case in this action. Lloyd's urges this Court to consider the weight of the evidence to serve the purpose of the agreement as was noted by the Simons court:

Fairness will best be served by weighing the circumstances surrounding the mistake rather than the application of mechanical rules which ignore the real nature of the situation.

275 A.2d at 551.

The fact that Dowdle prepared the handwritten and typewritten agreements and made the mistake in their preparation should not bar Lloyd's from seeking or from obtaining the reformation which it seeks. This fact was noted in People v. South East National Bank of Chicago, 266 N.E.2d 778, 781 (Ill. App. Ct. 1971):

Courts in other jurisdictions have held that not all negligence will be a bar to rescission. If the mistake is natural in the conduct of business, or is not the result of culpable negligence or the neglect of some positive legal duty, rescission will be granted. Where the mistake is due to

clerical or arithmetic error the courts are nearly unanimous in granting rescission or other appropriate relief.

(Emphasis added)(citations omitted.)

In People, a subcontractor was relieved of his bid because a decimal point was inadvertently misplaced by its secretary. In noting that this mistake was not due to the lack of ordinary care and that the contractor should be given the relief from the agreement as written, the Court stated:

To penalize Kelleher [subcontractor] for the simple, honest mistake by enforcing the forfeiture provision of the contract would be unjust.

Where the conditions requisite to relief are present, equity will act in spite of a contract to avoid the unconscionable result.

(Citations omitted.)

In that case, the Court noted that the standards governing rescission were identical to that which has been adopted in Utah, but held that when the mistake was due to a clerical error, such as a misplaced decimal point as in the present case, the party making the error was entitled to appropriate relief.

This court has recognized the equitable standards set forth in People, and Simons, supra. In Hottinger v. Jensen, 684 P.2d 1271, 1273 (Utah 1984), this Court held that reformation is appropriate where the terms of the written instrument are mistaken in that they do not show the true intent and

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understanding of the parties. See also Friedman v. Development Management Group, Inc., 82 Ill. App. 3d 949, 43 N.E.2d 610, 612 (1980). In Thompson v. Smith, 620 P.2d 520 (Utah 1980), the Court approved the reformation of a real estate contract and explained that if the difference in the two agreements in that case was due to fraud or mistake then the agreement could be reformed.

The same principles are also present in the early case Sine v. Harper, 118 Utah 415, 222 P.2d 571 (1950). In Sine, this Court approved the reformation of a deed by the lower court and found that the evidence justified the finding of mutual mistake of fact. The Court also noted that "any other finding would have rendered an absurd result, absurd in the sense that the reason for the contract known to both parties would have been utterly ignored." 222 P.2d at 584. This Court also noted that the clear and convincing standard for reformation does not require that the evidence be undisputed in all details. The Court stated:

The test of clear and convincing is whether, taking the evidence as a whole, it preponderates to a convincing degree in favor of [the party seeking reformation].

Id.

The lower court found in this case that the intent of the parties did not change between the execution of the handwritten agreement and the execution of the typewritten

agreement. As such, it impliedly held that there had been a mutual mistake of fact and that the typewritten agreement did not accurately reflect the parties true understanding and that there was a clerical error in preparing both documents.

Lloyd's recognizes that its heavy burden is to marshall all of the evidence in support of the trial court's findings and then demonstrate that the evidence is insufficient to support the findings. As previously stated, the findings of the trial court are inherently inconsistent and the clear weight of all the evidence and record before this Court establishes that it was the intent of the parties that commissions be paid upon the schedule as alleged in plaintiff's Complaint and throughout this proceeding. This is the only schedule that is consistent with the \$500.00 commission paid by Nature's Way to Lloyd's prior to the execution of the typewritten agreement for the initial three month sales of its product to Yurika. Any other finding would render an absurd result completely inconsistent with the clear weight of the evidence.

Point V

THE TRIAL COURT ERRED IN FINDING THAT THE
HANDWRITTEN AGREEMENT EXECUTED BY THE
PARTIES CONTAINED A COMMISSION RATE
STRUCTURE AT THE RATE OF .35¢ RATHER THAN
THE RATE OF 35¢.

Lloyd's suggest that a close review of the commission rate schedule of Exhibit 2 clearly reveals that there is no

decimal point before the 35¢ and urged that interpretation upon the trial court. The trial court, however, found that a decimal point did exist. Lloyd's submits this finding was improper and contrary to the document itself. An interpretation that the handwritten agreement contains commissions at the rate of 35¢, 50¢ and \$1.00 is consistent with the compelling weight of the evidence at the trial hereof and adds further support to the fact that the typewritten agreement did not accurately reflect the parties' true understanding.

Point VI

THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO AWARD PLAINTIFF ITS COSTS OF DEPOSITIONS AND SERVICE OF SUBPOENA UPON NATURE'S WAY'S PRESIDENT FOR HIS DEPOSITION.

After the lower court ruled on the case, plaintiff filed its Memorandum of Costs and Disbursements pursuant to Utah R. Civ. P. 54. (R. 371-373) Included in its claim for costs, plaintiff sought the recovery for the service of a subpoena upon Burningham, the president of Nature's Way, and for the depositions of Burningham and Webb. Nature's Way objected to these costs and filed a motion to have the bill of costs taxed by the Court. (R. 325-328) On June 11, 1985, the lower court ruled on the issue of costs and denied Lloyd's right of recovery for the costs of depositions and service of subpoena. (R. 649-656)

Lloyd's submits that the Court abused its discretion in not awarding it these expenses. Under established law, the determination of whether to award the expenses of a deposition as costs is within the sound discretion of the trial court. First Security Bank of Utah, N.A. v. Wright, 521 P.2d 563, 567 (Utah 1974). In making that determination, the courts apply a two tier approach. First, whether the deposition was used at trial, and secondly whether the deposition was necessary for the preparation of the prevailing party's case. The law was recently summarized as follows:

[T]he majority of this Court has consistently held that the costs of depositions are taxable "subject to the limitation that the trial court is persuaded that they were taken in good faith and, in the light of the circumstances, appeared to be essential for the development and presentation of the case."

Highland Construction Co. v. Union Pacific Railroad Co., 683 P.2d 1042, 1051 (Utah 1984), quoting Frampton v. Wilson, 605 P.2d 771, 774 (Utah 1980).

Upon consideration of the factors outlined above, it is clear that the costs claimed by the plaintiff are proper. The defendant cannot claim that the depositions of its principal, Lynn Burningham, and Douglas Webb were not taken in good faith. Likewise, all the depositions were essential for the development and presentation of the case. Furthermore, the deposition of Mr. Burningham was used at trial in cross-

examining Mr. Burningham, and portions were read into the record. (Tr. 512) The expenses of the deposition should be awarded as costs where the deposition was used by the party during the course of the trial. Nelson v. Newman, 583 P.2d 601, 604 (Utah 1978).

The deposition of Mr. Webb was taken at a time when both parties anticipated that he would be unavailable to testify at trial. In view of the circumstances existing at the time, the taking of the deposition was necessary for the development and presentation of plaintiff's case. The expenses of the deposition therefore come clearly within the rules set forth by the Utah Supreme Court in Lawson Supply Co. v. General Plumbing & Heating, Inc., 27 Utah 2d 84, 493 P.2d 607, 609 (1972):

A test, which has been applied in determining the propriety of allowing as costs to the prevailing party the expense of a deposition taken by him, is whether the deposition was necessarily obtained in the sense that the taking of the deposition and its general content were reasonably necessary for the development of the case in the light of the situation then existing.

Based upon the foregoing, it is clear that the depositions of both Burningham and Webb were taken in good faith, and were necessary to the development and presentation of the case, and should therefore be allowed as costs.

The Court's denial of the service of subpoena on

Burningham to insure that he appeared at his deposition is equally unsupportable. As cited in the section entitled "Course of Proceedings and Disposition in the Lower Court," defendant was served a summons and complaint in September, 1983. (R. 5-7) From October through April, 1984, Nature's Way failed to file any responsive pleading to the complaint and was represented by two separate attorneys in an effort to discuss settlement. (R. 53-61) In early November, 1983, Lloyd's served upon counsel for Nature's Way, interrogatories and documents requests in an effort to obtain some sort of accounting from Nature's Way to adequately discuss and explore the possibility of settlement. (Id. and 8-16)

For approximately six months, Lloyd's attempted to obtain information from Nature's Way pursuant to the request, but no such information was provided. In April, 1984, Lloyd's was forced to file a motion to compel discovery and for other appropriate sanctions. (R. 17-33) After Lloyd's had set the matter for hearing, Nature's Way counsel withdrew. (R. 25-26)

Plaintiff thereafter obtained an order directing Nature's Way to appoint new counsel to represent it at the hearing. (R. 27-29) Defendant failed to appear at the hearing and the Court ordered that the outstanding discovery be completed by it on or before June 1, 1984. (R. 35-37) On the very day that the discovery was due, Nature's Way retained pre-

sent counsel who obtained a two week extension to respond to discovery. (R. 38, 45-47)

Because of Lloyd's past dealings with Nature's Way and its president, Burningham, Lloyd's felt compelled to serve Burningham with a subpoena duces tecum to insure his presence at the deposition and request that he produce certain documents. Burningham was not an actual party to the proceeding and in view of Lloyd's past dealings with him the service of the subpoena was necessary.

CONCLUSION

Even when viewed in a light most favorable to the trial courts, there is insufficient evidence to support the trial court's findings and the findings are inconsistent. The Court erred in failing to find a mutual mistake had occurred and in denying plaintiff leave to file an amended complaint seeking reformation of the contract. The trial court erred in finding that the handwritten agreement contained a decimal before the 35¢. Finally, the trial court abused its discretion in not awarding plaintiff its costs of depositions and service of subpoena upon an agent of Nature's Way.

For the reasons stated herein, plaintiff requests this Court to modify the findings to conform to the overwhelming weight of the evidence, allow plaintiff to file an amended complaint, and enter a judgment against Nature's Way consistent

with the commission rate schedule as alleged by plaintiff in the amount of \$39,710.41 as of February 28, 1985. In the alternative, Lloyd's requests the court to vacate the judgment and remand the case for a new trial or, at the very least, for a trial on the issue of mutual mistake and reformation. In view of the fact that until the second day of the trial hereof all parties viewed the parties' agreement to be governed by the commission rate schedule alleged by plaintiff and plaintiff relief upon the representations and stipulations of Nature's Way, to that effect a trial with respect to the issue of whether a mistake occurred sufficient to justify reformation should be held.

DATED this 18 day of March, 1986.




KEVIN J. SUTTERFIELD

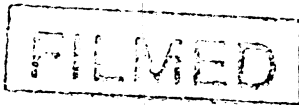
Attorney for Plaintiff-Appellant

CERTIFICATE OF MAILING

This will certify that four true and correct copies of the foregoing Brief of Appellant, Appeal from the Judgment of the Third Judicial District Court of Salt Lake County, Honorable Dean E. Conder were mailed, postage prepaid, to the following named individual at the address listed below this 18 day of March, 1986:

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Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
 STATE OF UTAH

LLOYD'S UNLIMITED, a corporation,)	
)	FINDINGS OF FACT AND
Plaintiff,)	CONCLUSIONS OF LAW
)	
vs.)	
)	
NATURE'S WAY MARKETING, LTD.,)	
a corporation,)	Civil No. C83-6058
)	
Defendant.)	(Judge Dean E. Conder)

The above-entitled matter came on regularly for trial without a jury before the Honorable Dean E. Conder of the above-entitled Court on February 25 and 26, 1985, plaintiff being present through its president, Lloyd R. Dowdle, and represented by its counsel, Ray G. Martineau and Kevin J. Sutterfield, and defendant being present through its president, Lynn R. Burningham, and represented by its counsel, Terry M. Crellin, and the Court having heard the testimony presented at the trial hereof, and having received and reviewed the exhibits submitted by the parties, having requested the parties to sub-

mit post trial memoranda and having reviewed the same, and having previously entered its minute entries dated March 19, 1985 and April 8, 1985, having heard argument of counsel with respect to the proposed Findings of Fact and Conclusions of Law on June 11, 1985, and being fully advised in the premises now hereby enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. During the spring of 1982, plaintiff's president, Lloyd R. Dowdle ("Dowdle") and defendant's president, Lynn Burningham ("Burningham") entered into an oral understanding in which defendant agreed to pay plaintiff commissions on all sales made by defendant to Yurika Foods Corporation ("Yurika") in consideration of plaintiff's efforts in acquiring Yurika to market a coffee extender product handled by defendant.

2. On or about April 24, 1982, defendant entered into an agreement with Yurika whereby Yurika became the exclusive sales and marketing representative for defendant for the coffee extender product.

3. On or about August 11, 1982, after previous oral negotiations between Dowdle and Burningham, a hand written agreement prepared by Dowdle was presented to Burningham. A discussion followed wherein the parties modified the handwritten agreement, and the modified handwritten agreement was then

signed by both parties.

4. The handwritten agreement actually executed by Dowdle and Burningham on August 11, 1982, contained the following provisions with respect to the commission schedule:

1 Unit - 60 packets pack:	.25¢
1 Unit - 2 lb. bulk pack:	.35¢
1 Unit - 5 lb. bulk pack:	50¢
1 Unit - 37 lb. bulk pack:	\$1.00

5. Dowdle thereafter caused the executed hand written agreement to be typed by his secretary and the commission schedule contained in Paragraph 1 thereof was typed as follows:

1 Unit - 60 packet pack:	.25¢
1 Unit - 2 lb. bulk pack:	.35¢
1 Unit - 5 lb. bulk pack:	.50¢
1 Unit - 37 lb. bulk pack:	\$1.00

The typewritten agreement was executed by the parties on August 16, 1982.

6. The intent of the parties with respect to the commissions to be paid by defendant to plaintiff did not change between August 11, 1982, the date of the execution of the hand written agreement and August 16, 1982, the date of execution of the typewritten agreement.

7. Paragraph 5 of the typewritten agreement contains an integration clause which states that the "Agreement con-

tains the entire understanding of the parties hereto and may not be altered, amended, modified, or discharged in any way whatsoever except by subsequent agreement in writing by all the parties hereto." The Agreement was to be effective between the parties as of August 1, 1982.

8. On August 16, 1982, defendant paid to plaintiff the amount of \$500.00 as and for commissions due plaintiff for previous sales made of the coffee saver product to Yurika by defendant from April 24, 1982 through August 1, 1982. This payment was made without a formal accounting being made as to the actual number of sales of the subject product from defendant to Yurika.

9. The number of units of the coffee saver product expressly covered by the agreement of the parties which were sold to Yurika by defendant between August 1, 1982 and February 23, 1984 ("Subject Period") was stipulated by the plaintiff and defendant as follows:

60 packets pack:	77,348 units
2 lb. pack:	16,217 units
5 lb. bulk pack:	4,564 units
37 lb. bulk pack:	0 units

10. At the time the handwritten and typewritten agreements were executed, the parties assumed that all of the coffee saver product sold by defendant to Yurika would be

marketed in units consisting of 60 packets packs, 2 lb. bulk packs, 5 lb. bulk packs and 37 lb. bulk packs. The reasonable intent and expectation of the parties was that in the event the coffee saver product was sold to Yurika and marketed by it in any other size of units, plaintiff would receive a commission from defendant on the basis of their size and weight compared to the rates of their agreement.

11. Supplemental sales of coffee saver product were made to Yurika by defendant during the Subject Period in 30 lb. bulk pack units and 30 packets pack units. The supplemental sales were closely related to the units of product recited in the typewritten agreement. Specifically, a 30 packets pack unit is exactly one-half of a 60 packets pack unit and the 30 lb. bulk pack unit is almost equal to the 37 lb. bulk pack unit.

12. The number of units of supplemental sales were stipulated by the plaintiff and defendant to be as follows:

30 packets pack:	51,444 units
30 lb. bulk pack:	18 units

13. Defendant received in excess of \$625,000.00 from Yurika for sales of the coffee extender product to Yurika during the Subject Period.

14. Dowdle agreed orally with Burningham to pay Burningham one-half of anything Dowdle would receive from

Yurika in the way of a finder's fee for putting Yurika in contact with Burningham.

15. There is insufficient evidence to indicate that Dowdle received an actual finder's fee, and as to any value any such finder's fee may have.

16. Defendant failed to pay to plaintiff any commissions or provide any accounting to plaintiff pursuant to the terms of their agreement prior to the time that the above-entitled action was filed.

17. The agreement contained no provision for the award of attorney's fees in favor of the prevailing party.

The Court having entered its Findings of Fact now makes and enters its

CONCLUSIONS OF LAW

1. The typewritten agreement is a valid, integrated and enforceable contract binding on both parties and defendant is liable for commissions in accordance with the explicit terms of the typewritten agreement.

2. The size and weight of supplemental sales of the coffee extender product made by defendant to Yurika bear a nexus to the product size and weights set forth in the typewritten agreement and defendant should be liable for commissions on (1) all sales of 30 packets pack units in an amount of one-half the commission on 60 packets pack units and (2)

all sales of 30 lb. pack units in an amount of the commission on a 37 lb. bulk pack.


3. Plaintiff should be awarded judgment against defendant for commissions due plaintiff pursuant to the express terms of the typewritten agreement from the period between August 1, 1982 and February 23, 1984 in an amount of \$272.48 together with interest at the rate of ten percent (10%) per annum thereon in an amount of \$49.16, for a total of \$321.64, and plaintiff should be awarded judgment against defendant for commissions due for the supplemental sales made by defendant to Yurika during the Subject Period in an amount of \$80.31 together with interest at the rate of ten percent (10%) per annum thereon in an amount of \$12.30, for a total of \$94.61, making a present total judgment of \$416.25, together with interest thereon at the rate of twelve percent (12%) per annum from the date hereof until paid.

4. Plaintiff should be further awarded court costs against defendant but no attorney's fees.

5. Defendant should take nothing on its counterclaim.

MADE AND ENTERED this 18 day of June, 1985.

BY THE COURT:



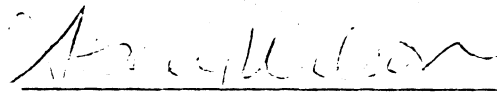
Judge Dean E. Conder



Certificate of Service

I do hereby certify that I caused to be mailed,
postage prepaid, a true and correct copy of the foregoing
Findings of Fact and Conclusions of Law to the following on
this 17th day of June, 1985:

Terry M. Crellin
M. Wayne Western
THORPE, NORTH & WESTERN
9662 South State Street
Sandy, Utah 84070



Terry M. Crellin (USB #0755)
M. Wayne Western (USB #3433)
THORPE, NORTH & WESTERN
9662 South State Street
Sandy, Utah 84070
Telephone: 566-6633

Attorneys for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY STATE OF UTAH

LLOYD'S UNLIMITED,
a corporation,

Plaintiff,

vs.

NATURE'S WAY MARKETING, LTD.,
a corporation,

Defendant.

LIST OF WITNESSES
AND EXHIBITS WHICH
DEFENDANT MAY USE

Civil No. C83-6058
(Judge Dean E. Conder)

In accordance with the instructions of the Court, the following List of Witnesses and Exhibits is being provided.

WITNESSES

1. Lynn Burningham -- will testify about negotiations with Yuriika and negotiations with plaintiff including consideration for the agreement. Mr. Lynn Burningham will also testify as to the subject matter of the Counterclaim.
2. Todd Burningham -- will testify about negotiations with plaintiff including consideration given for the agreement. Mr. Todd Burningham will also testify as to the subject matter of the Counterclaim.
3. Jack Patterson -- will testify as to attending meetings held by plaintiff and the occurrences at those meetings.

4. Max Hymas -- will testify as to the circumstances and expectations of defendant concerning the negotiations and agreement between plaintiff and defendant.
5. Ronald Cutler -- will testify as an expert concerning the amount of material shipped and delivered to Yurika and the amount of income plaintiff derived from the executive distributorship which was received from Yurika.
6. Marian Webb -- will testify about her son's and Mr. Dowdle's association and their mutual association with Yurika and Universe Foods.
7. Lloyd R. Dowdle -- will be asked questions concerning the entire subject matter of the suit, including the Counterclaim

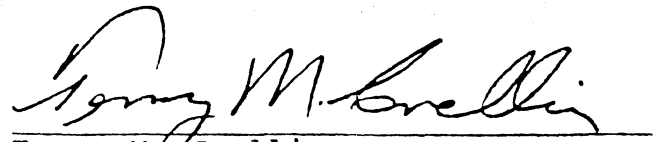
EXHIBITS

1. Hand written page showing Dowdle's expenses with respect to Yurika activities.
2. Distributor Application of Dowdle for Yurika.
3. Distributor Application of Dowdle for Universe Food
4. Yurika Foods Corp. Bonus Recap and Monthly Transaction Reports for months of April 1982 through October 1984.
5. Product Purchase Orders for orders by plaintiff from Yurika.
6. Article excerpt from May 1982 issue of Utah Holiday Magazine.
- 6a. Sales Manual Rules & Regulations Brochure of Yurika

7. Agreement between plaintiff and defendant dated August 6, 1982.
8. Check No. 720 from defendnt to plaintiff.
9. Nondisclosure Statement between defendant and Yuri!
10. Stargazer -- November 1983 "B".
11. Stargazer -- December 1983.
12. Agreement between defendant and Yurika dated April 24, 1982.

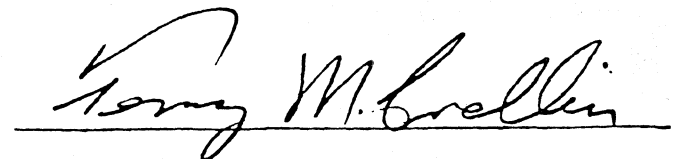
The exhibits listed as Nos. 1-7 and 10 and 11 were obtained from plaintiff, and there is no need to provide copi to plaintiff. A copy of Exhibit No. 8 is being provided plaintiff herewith. Copies of Exhibit Nos. 9 and 12 have previously been provided to plaintiff.

Dated this 25th day of January 1985.


Terry M. Crellin
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing LIST OF WITNESSES AND EXHIBITS WHICH DEFENDANT MAY USE was hand delivered to the law offices of Ray G. Martineau, 1800 Beneficial Life Tower, 36 South State Street, Salt Lake City, Utah 84111 on this 25th day of January, 1985.



KEVIN J. SUTTERFIELD (USB #3872)
 LESLIE W. SLAUGH (USB #3752)
 LAW OFFICES OF RAY G. MARTINEAU, P.C.
 1800 Beneficial Life Tower
 36 South State Street
 Salt Lake City, Utah 84111
 Telephone: (801) 538-2400

Attorneys for Plaintiff-Appellant

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
 STATE OF UTAH

LLOYD'S UNLIMITED, a)	
corporation,)	PLAINTIFF'S STATEMENT OF
)	PROCEEDINGS OF UNREPORTED
Plaintiff,)	HEARING
)	
vs.)	
)	
NATURE'S WAY MARKETING, LTD.,)	Civil No. C83-6058
a corporation,)	
)	
Defendant,)	(Judge Dean E. Conder)

Pursuant to Utah R. App. P. 11(g), Plaintiff submits the following statement as to the proceedings of the hearing held before the above-entitled Court on January 22, 1985. The grounds for the statement is that no transcript of the proceedings was made by the Court Reporter.

STATEMENT OF PROCEEDINGS

1. At the hearing on January 22, 1985, the Court considered two matters, plaintiff's Motion for Partial Summary Judgment on file herein dated January 4, 1985, and a Pre-trial

Settlement Conference pursuant to Court Order dated November 26, 1984 on file herein.

2. At the hearing, defendant, through its counsel, stipulated that there was no issue with respect to the amounts, if any, due and owing by it to plaintiff as sought in Plaintiff's Motion for Partial Summary Judgment on file herein dated January 4, 1985, pursuant to that certain Agreement between plaintiff and defendant dated August 16, 1982.

Defendant's only opposition to Plaintiff's Motion for Partial Summary Judgment was that defendant claimed the Agreement was unenforceable because there was no indication in the Agreement that any actual consideration for the contract was given by plaintiff. There was no dispute at the hearing as to the amounts prayed for by plaintiff or as to the commissions to be paid by defendant for sales defendant made to a third party. The fact that defendant did not object to the amounts prayed for by plaintiff in the event that the Agreement was enforceable is evident from Defendant's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment dated January 16, 1985, and its Supplemental Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment dated January 23, 1985, both on file herein. Plaintiff's counsel, who attended the hearing, also has a specific recollection that defendant, through its counsel, admitted that there was no

dispute as to the amounts owing under the Agreement, if the Agreement was found to be enforceable.

3. At the hearing, the Court also instructed counsel for each party to furnish to opposing counsel on or before January 25, 1985, a list of witnesses and exhibits to be relied upon in the trial of this matter. The Court also ruled that all objections to said witnesses and exhibits should be filed and served on opposing counsel on or before January 28, 1985. Furthermore, the Court ruled that the amounts prayed for in Plaintiff's Motion for Partial Summary Judgment shall be deemed accurate unless defendant advises plaintiff prior to the trial hereof of any facts, documents, or information upon which defendant intended to rely with respect to any offsets or adjustments in said amount as prayed for by plaintiff. Plaintiff's counsel has a specific recollection of this ruling and the ruling is set forth in that certain Order Governing Discovery on file herein mailed to opposing counsel on January 29, 1985. No objection to the Order Governing Discovery was filed by defendant and the fact that the parties relied upon the Court's ruling is also indicated by the List of Witnesses and Exhibits submitted by plaintiff and the List of Witnesses and Exhibits Which Defendant May Use dated January 25, 1985 on file herein.

DATED this 13 day of March, 1986,



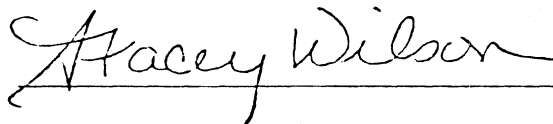
KEVIN J. SUTTERFIELD

Attorney for Plaintiff

CERTIFICATE OF MAILING

This will certify that a true and correct copy of the foregoing Plaintiff's Statement of Proceedings of Unreported Hearing was served upon the following, by mailing a copy thereof, postage prepaid, to the address listed below this 13th day of March, 1986:

Terry M. Crellin, Esq.
M. Wayne Western
THORPE, NORTH & WESTERN
9662 South State Street
Sandy, Utah 84070



RAY G. MARTINEAU (USB #2105)
KEVIN J. SUTTERFIELD (USB #3872)
1800 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 538-2400

Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

LLOYD'S UNLIMITED, a
corporation,

Plaintiff,

VS.

NATURE'S WAY MARKETING, LTD.,
a corporation,

Defendant.

AMENDED COMPLAINT

Civil No. C83-6058
(Judge Dean E. Conder)

Plaintiff complains of defendant and for causes of
action alleges:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff is a corporation duly organized, validly existing and in good standing under and by virtue of the laws of the State of Utah and has its principal place of business in Salt Lake County, State of Utah.

2. Defendant is a corporation duly organized and existing under the laws of the State of Utah and has its prin-

cipal place of business in Salt Lake County, State of Utah.

3. The venue of this action is properly laid in the above-entitled Court, pursuant to the provisions of Section 78-13-4, Utah Code Annotated, 1953, as amended and supplemented.

COUNT I

(Contract Reformation)

4. The allegations contained in Paragraphs 1 through 3 above are by this reference incorporated into and made a part of this Count I.

5. On or prior to August 1, 1982 plaintiff and defendant entered into a certain agreement ("Agreement") for the distribution, sales and marketing of a certain coffee extender product to be marketed under the names "Spring Water Mineral Brew" and "Golden Cup Coffee Saver" ("Spring Water/Golden Cup").

6. Pursuant to the terms of the Agreement defendant agreed and became obligated to pay to plaintiff a monthly commission, due and payable each month on or before twenty days following the end of the month, to which such payment related, on the net sales of Spring Water/Golden Cup computed on the following basis:

<u>Quantity Sold</u>	<u>Commission Due Lloyd's Unlimited per Unit</u>
1 unit - 60 packets pack	\$.25
1 unit - 2lb. bulk pack	.35
1 unit - 5lb. bulk pack	.50
1 unit - 37lb. bulk pack	1.00

7. The Agreement between plaintiff and defendant was reduced to a handwritten instrument on or about August 11, 1982 and to a subsequent typewritten Agreement dated on or about August 16, 1982 wherein the commissions due Lloyd's Unlimited per unit as agreed to by the parties was ambiguously or inaccurately reflected therein. Copies of said handwritten and typewritten instruments are attached hereto marked Exhibits "A" and "B" and by reference made a part hereof.

8. At the time the typewritten Agreement was executed by the parties, plaintiff and defendant had agreed and fully intended that Paragraph 1(a) thereof would read as follows:

1 unit - 60 packets pack	\$.25
1 unit - 2 lb. bulk pack	.35
1 unit - 5 lb. bulk pack	.50
1 unit - 37 lb. bulk pack	1.00

9. By reason of said ambiguity or scrivener error, plaintiff is entitled to have the Agreement between the parties

reformed by the Court to accurately reflect the parties' agreement, intent and understanding as stated above.

COUNT II

(Claims for Commissions Owing)

10. The allegations contained in Paragraphs 1 through 9 above are by this reference incorporated into and made a part of this Count II.

11. Pursuant to the terms of the Agreement defendant agreed and became obligated to pay to plaintiff a monthly commission, due and payable each month on or before twenty days following the end of the month to which such payment related, on the net sales of Spring Water/Golden Cup computed on the following basis:

<u>Quantity Sold</u>	<u>Commission Due Lloyd's Unlimited per Unit</u>
1 unit - 60 packets pack	\$.25
1 unit - 2 lb. bulk pack	.35
1 unit - 5 lb. bulk pack	.50
1 unit - 37 lb. bulk pack	1.00

12. Pursuant to the terms of the Agreement defendant agreed and became obligated to deliver to plaintiff an accounting for all Spring Water/Golden Cup sales, which accounting was to accompany any commission payment due plaintiff as above stated.

13. Pursuant to the terms of the Agreement defendant agreed and became obligated to make available for plaintiff's inspection and/or copying, at all reasonable times, any and all accounting records and all documents pertaining to defendant's sales of Spring Water/Golden Cup.

14. Plaintiff has made repeated demands upon defendant for payment of commissions due plaintiff on defendant's distribution of Spring Water/Golden Cup products, but despite said demands defendant has wholly failed, neglected and refused to pay the same or any part thereof, and said commissions for the period commencing August 1, 1982, through the date hereof are still due and owing to plaintiff, together with interest thereon at the rate of 10% per annum from the date when the same became due until paid.

15. Plaintiff has made repeated demands upon defendant for an accounting of sales that have been made and of commissions due, copies of defendant's monthly accounting records relating to the same and any and all other related documents indicating the distribution of Spring Water/Golden Cup for the period commencing August 1, 1982 through the date hereof, but despite said demands defendant has wholly failed, neglected and refused to deliver any accounting or related documents to plaintiff or to make any of such documents available for plaintiff's inspection and copying, except pursuant to discovery herein.

WHEREFORE, plaintiff prays judgment as follows:

1. Under Count I hereof for an Order of this Court reforming the typewritten executed Agreement to accurately reflect the parties' agreement, intent and understanding.

2. Under Count II hereof, for an Order requiring defendant to provide plaintiff with a proper accounting of defendant's sales and distribution of Spring Water/Golden Cup for the period commencing August 1, 1982 through the date hereof.

3. Under Count II hereof for a judgment in favor of plaintiff and against defendant for any and all sums found to be due and owing by defendant to plaintiff under and in connection with said Agreement, together with damages resulting from the breach by defendant of said Agreement.

4. For plaintiff's costs incurred herein.

5. For such other and further relief as may appear just and equitable in the premises.

RAY G. MARTINEAU
KEVIN J. SUTTERFIELD

Attorneys for Plaintiff

Certificate of Service

I do hereby certify that I caused to be mailed,
postage prepaid, a true and correct copy of the foregoing
Amended Complaint to the following on this _____ day of March,
1985:

Terry M. Crellin
M. Wayne Western
THORPE, NORTH & WESTERN
9662 South State Street
Sandy, Utah 84070

Rule 2. Law and Motion Calendar.

Rules 2.7 and 2.8 of the Rules of Practice in the District Courts and Circuit Courts of the State of Utah shall not apply to motions filed in the Third Judicial District Court.

(a) All law and motion matters will be heard by the judge assigned to the case. These matters will be set on a regular law and motion calendar as arranged with the clerk of the judge assigned to the case. Ex parte matters based upon stipulation will be presented only to the judge assigned to the case.

(b) Counsel shall contact the court and receive a date for hearing on the regular law and motion calendar, or may file a written request that the matter be resolved without hearing based upon the briefs submitted.

(c) Orders to show cause and other matters requiring written notice will be heard only after written notice, which shall be served not less than five (5) days prior to the date specified in the notice for hearing, unless the court for good cause shown shall by order shorten the time for notice hearing.

(d) Motions based upon depositions or supported thereby shall not be heard unless the depositions are filed in the clerk's office at least forty-eight (48) hours before the hearing on the said motion.

(e) Affidavits not filed within the time required by the Utah Rules of Civil Procedure shall not be received, except on stipulation of the parties or for good cause shown.

(f) All motions except uncontested or ex parte matters may be accompanied by a brief statement of points and authorities, and any affidavits relied upon in support thereof. Points and authorities supporting or opposing a motion shall not exceed five (5) pages in length, exclusive of the statement of material facts as hereinafter provided, except as waived by order of the court on ex parte application.

(g) The points and authorities in support of a dispositive motion shall begin with a section that contains a concise statement of material facts as to which the movant contends no genuine issue exists. The facts shall be stated in separate numbered sentences, and shall refer with particularity to those portions of the record upon which the movant relies.

(h) The points and authorities in opposition to a dispositive motion shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute shall be stated in separate numbered sentences, and shall refer with particularity to those portions of the record upon which the opposing party relies and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment, unless specifically controverted by the statement of the opposing party.

(i) If a memorandum of points and authorities is filed in support of a motion it must be served on the opposing party or his counsel and filed with the court no later than ten (10) days before the date set for hearing. If a reply memorandum is filed it shall be served upon the opposing party or counsel no later than five (5) days before the date of hearing.

(j) A courtesy copy of all affidavits and memoranda of points and authorities filed by counsel shall be served upon the judge hearing the matter at least forty-eight (48) hours before the date set for hearing, and shall indicate the date upon which the matter is set for hearing. Such copy shall be clearly marked as a courtesy copy, and shall not be filed with the clerk of the court.

(k) The court in civil matters on its motion or at a party's request may direct argument of any motion by telephone conference without court appearance. A verbatim record shall be made of all such telephone arguments and the rulings thereon if requested by any counsel.

le 3. Limitation on Discovery and Motions.

) The parties conducting discovery under Rules 33, 34 and 36 of the Utah Rules of Civil Procedure shall not file Interrogatories or Requests with the court, but shall file only a certificate of service stating that such Interrogatories or Requests have been served on the other parties and the date of such service.

The party serving the Interrogatories or Requests shall retain the original thereof with the original proof of service affixed to it. The party responding to Interrogatories or Requests shall serve original responses made under oath which shall be retained by the party serving the Interrogatories or Requests. Written Interrogatories or Requests and any responses thereto shall not be filed unless the court on motion and notice and for good cause shown so orders.

) Any party filing a Motion to Compel compliance with any discovery shall attach a copy of the Interrogatories, Requests or Answers at issue in such motion.

) All parties shall be entitled as a matter of right to conduct discovery proceedings in accordance with this rule. All discovery proceedings shall be completed and all depositions and other documents filed with the court no later than thirty (30) days before the date set for trial of the case. The right to conduct discovery proceedings within thirty (30) days before trial shall be in the discretion of the court. Motions to conduct discovery within thirty days before trial shall be presented to the judge assigned to the case upon notice to the other parties in the action. In exercising its discretion the court shall take into consideration the necessity and reasons for such discovery, the diligence or lack of diligence of the parties seeking such discovery, whether the permitting of such discovery will prevent the case from going to trial on the date set, or result in prejudice to any party. Nothing herein shall preclude or limit voluntary exchange of information or discovery by stipulation of the parties at any time prior to the date set for trial, but in no event shall such