

2000

# Janet Peterson v. The Sunrider Corporation, dba Sunrider International, and Tei Fu Chen : Brief of Appellee

Utah Supreme Court

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**IN THE UTAH SUPREME COURT**

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JANET PETERSON,

Plaintiff/Appellant,

vs.

THE SUNRIDER CORPORATION,  
dba SUNRIDER INTERNATIONAL,  
and TEI FU CHEN,

Defendants/Appellees.

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Case No. 20000385SC

Priority No. 15

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**Brief of Appellee**

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On Appeal from the Fourth Judicial District Court  
For Utah County, State of Utah

Honorable James R. Taylor and Howard H. Maetani, Presiding

---

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**IN THE UTAH SUPREME COURT**

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JANET PETERSON,

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vs.

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dba SUNRIDER INTERNATIONAL,  
and TEI FU CHEN,

Defendants/Appellees.

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Case No. 20000385SC

Priority No. 15

**Statement of Jurisdiction**

The Utah Supreme Court has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2-2(3)(j).

**Statement of Issues**

Only Issues I and IV of the Plaintiff's issues are before the court. As hereinafter shown, Issues II and III were never presented to the trial court and thus not preserved for appellate review. Issues I and IV ask this court to review the propriety of the trial court's grant of Defendant's motion for summary judgment and the trial court's denial of Defendant's motion for summary judgment.

**Standard of Appellate Review**

Issues I and IV present issues of law for the court, which are reviewed for correctness. Nova Cas. Co. v. Able Const., Inc., 983 P.2d 575, 577-78 (Utah 1999).

## **Constitutional Provisions and Statutes**

U.S. Constitution Article I, § 10(1):

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts.

Utah Constitution Article I, § 18:

No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall be passed.

Utah Code Ann. § 76-6a-2(4):

Pyramid scheme means any sales device or plan under which a person gives consideration to another person in exchange for compensation or the right to receive compensation which is derived primarily from the introduction of other person into the sales device or plan rather than from the sale of goods, services, or other property.

## **Statement of the Case**

### **Nature of the Case**

This case is an appeal from an order of the Fourth Judicial District dated March 31, 2000 granting Defendants' Motion to Dismiss and Motion for Summary Judgment. The claims dismissed included breach of contract and punitive damage claims against Defendant Sunrider Corporation, and contract, tortious interference with contract, and punitive damage claims against Defendant Tei Fu Chen, a principal of Defendant Sunrider Corporation. Plaintiff appeals only the grant of summary judgment to Defendant on her contract claim. She does not challenge the dismissal of her tort and punitive damage claims.

### Course of Proceedings and Disposition Below

Plaintiff Janet Peterson filed this matter in March 1996 attempting to assert breach of contract and punitive damage claims against the Defendants. The Defendants answered and filed a Motion to Dismiss the punitive damage claims because Plaintiff had failed to plead an independent tort. At the hearing on Defendants' Motion to Dismiss, Plaintiff was granted leave to file an amended complaint.

Plaintiff subsequently filed an amended complaint wherein she alleged breach of contract and punitive damage claims against both Defendant Sunrider Corporation and its principal Defendant Tei Fu Chen. Plaintiff also asserted an "interference with contract claim" against Defendant Tei Fu Chen. As punitive damages, Plaintiff requested the greater of \$1,000,000, or 5% of Sunrider's annual gross sales from both Defendants. Lengthy discovery ensued which included the necessity of Defendants filing repeated Motions to Compel Discovery.

In January 1998, Plaintiff filed a Motion for Partial Summary Judgment on her breach of contract claim. Following receipt of Defendants' Memorandum in Opposition, she filed another Motion to Amend her complaint. She also sought leave of the court to name an expert witness even though the time for doing so had long since passed.

In April 1998, Defendants filed a Motion to Dismiss and a Motion for Summary Judgment. In a Memorandum Decision dated June 15, 1998, the Honorable Howard H. Maetani denied Plaintiff's Motion for Partial Summary Judgment but granted her Motion to Amend complaint and for leave to name an expert witness. Judge Maetani also granted Defendants' Motion to Dismiss and For Summary Judgment on all of Plaintiff's claims. Judge Maetani reduced his decision to an order which was entered on October 6, 1998.

On October 14, 1998, Plaintiff filed a Notice of Appeal. The Utah Supreme Court dismissed the appeal as being from a non final order and a remittur was issued on January 21, 1999. More than one year later when nothing had been done on the case, Defendants filed various motions including a Motion to Dismiss for failure to prosecute. Defendants' motion was denied, and eventually, on March 31, 2000, a final order dismissing Plaintiff's claims was entered. This appeal followed.

### **Statement of Facts**

1. Defendant Sunrider is a Utah Corporation which was incorporated on May 27, 1976 under the name "Naturalife International, Inc." R.1189.
2. Sunrider has always marketed various herbs, dietary supplements, skin care products and beauty aids through a multi-level marketing plan. See 1994 Business Guide, R. 730-777
3. In 1976, Plaintiff's husband made a proposal to Ken Murdock, the then president of the Company to purchase a certain distributorship, the John and Sharon Farnsworth organization. This proposal was put forward in writing, drafted by Lloyd Peterson. Ken Murdock accepted the proposal. See R.1295.

4. The 1976 writing purports to waive the “personal purchase volume (PV)”<sup>1</sup> for purposes of Plaintiff remaining a Director and receiving “overrides.” However, the writing waives nothing else. R. 1295. A copy of the 1976 writing is attached hereto as Exhibit A.
5. The 1976 writing was not intended to waive any of the requirements for Plaintiff to remain or continue as a *distributor*, as opposed to a director. See, R., 1295; Deposition of Ken Murdock R. 1019, p.21-22.
6. The 1976 writing does not define any of the terms it uses, the term “overrides” (presently called Leadership Development Bonus)<sup>2</sup> is undefined. Neither does the writing detail how any payments to Plaintiff are to be calculated, when and how they are to be paid, nor at what percentage or on how many levels. R. 1295.
7. Plaintiff conceded that the 1976 writing does not contain all the terms of the agreement. Deposition of Janet Peterson R. 1270.

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1. PV, which stands for purchase volume, and SV (sales volume) are one and the same; see Deposition of Janet Peterson R. 372; these terms generally reflect the value of products sold. *Id.*; Deposition of Kenny Jordan R. 341-342. Personal purchase or sales volume is the amount an individual is required to purchase each month. Personal group SV is the combined value of one’s down line, excluding that of qualified associate directors and above. 1994 Business Guide Intro-6, R. 775 (back of two sided page).

2. “Leadership Development Bonus is a fund available to Qualified Associate Directors and above who have one or more Qualified Associate Directors or Directors in their organization. It is calculated on 14% of total company SV. The bonus amount, which is based on a point system and paid each month, may vary according to the [the qualifying director’s] organization and total company SV.” 1994 Business Guide at Intro, R. 774-775. (Emphasis added).

8. The 1976 writing was always dependant upon Business Guides.<sup>3</sup> These guides spell out percentages and other terms of the agreement, all of which are subject to periodic change. Deposition of Janet Peterson, R. 1268-1270. Plaintiff testified that these changes occur in response to “whatever happens. And the schedules do change . . . like Sunrider changed their schedule every now and then to be a little different. NaturaLife had changed theirs.... The [rates] could change... when [Sunrider] want[s] - if they feel that things aren’t quite right, you know, like the company put from \$2,000 up to \$3,000 for their bonus volume.” Id. In fact, Mrs. Peterson testified that to determine overrides due her, “we would have to look at the Sunrider Business Guide.” R. 1268:2-10. Without reference to a Business Guide, it is impossible to determine or calculate Plaintiff’s Leadership Development Bonuses. Deposition of Kenny Jordan R.1210. The necessary formulas do not appear in the 1976 writing. Id.
9. Plaintiff has acknowledged and agreed that the terms necessary for determining her Leadership Development Bonuses did and could be changed whenever Sunrider felt “like things just weren’t quite right.” Deposition of Janet Peterson R. 1268-1270.
10. Defendant Tei Fu Chen acquired all of the stock of NaturaLife International, Inc. in a stock purchase agreement between himself and Ken Murdock dated September 24, 1982. R. 1293.

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3. The Business Guides have been known by various titles including Policy Guide (1978), New Marketing Plan (1980), The NaturaLife Marketing Plan (1981), The Sunrider Opportunity (1982), or the Business Guide and Distributor Agreement (1985-present). In 1983 and 1984, the then latest version of the marketing plan were set forth in Sunrider’s periodical called the “Sunwriter.” (See 1983 and 1984 Business Guide). For clarity and convenience, the term “Business Guide” will be used when referring to the above documents. See R. 687, 676, 673, 661, 656, 647, 630, 607, 561, 984, 905, 866, 829, and 777.

11. Following the stock purchase, Tei Fu Chen changed NaturaLife International, Inc.'s name to The Sunrider Corporation. Deposition of Paul McCabe R. 1178-1179.
12. Prior to the present action, Defendant Tei Fu Chen had never seen the 1976 writing. It did not exist in any Sunrider files. Deposition of Tei Fu Chen R. 1221, 1227-1228.
13. At the time Defendant Tei Fu Chen purchased the company's stock from Ken Murdock, the 1976 writing was not discussed. Deposition of Tei Fu Chen 1224-1225. Indeed, Ken Murdock has no recollection of ever discussing it with Defendant Tei Fu Chen and has no idea whether Sunrider's President Oi-Lin Chen was aware of it. Deposition of Ken Murdock R. 1187-1188.
14. The 1976 writing is not mentioned or disclosed in the stock purchase agreement between Defendant Tei Fu Chen and Ken Murdock. See R. 1279-1293.
15. Defendant Tei Fu Chen was not a party to the 1976 writing, nor has he ever personally assumed any obligations created by it. R. 1295; Deposition of Janet Peterson R. 1248-1252.
16. Oi-Lin Chen is and was President of Sunrider at the time of the cessation of Plaintiff's payments and was unaware of the existence of the 1976 writing at the time she made the decision to stop payments to Plaintiff. Deposition of Oi-Lin Chen R. 1235-1236.
17. Defendant Sunrider has well over fifty-thousand distributors in the United States and over a million worldwide. Deposition of Oi-Lin Chen R. 1230.
18. Sunrider uses a computer system which reviews qualifications and issues checks to individuals based upon the Business Guides. Deposition of Oi-Lin Chen, R. 1237-1238; Deposition of Ras Jeyakumar R. 1200, 1204.



19. Since at least 1989, the computer system had been “hot coded” as it related to Plaintiff so that checks were issued even though she was not qualified. Deposition of Yung Chin Chiang R. 1191-1197.
20. A random audit conducted by Sunrider’s accounting department discovered that Plaintiff was receiving payments even though she was not qualified. Deposition of Ras Jeyakumar R. 1201-1203.
21. Plaintiff’s husband, Lloyd Peterson, passed away in April, 1986. Deposition of Janet Peterson (revised) R. 1274.
22. Following the death of Mr. Peterson, Tei Fu Chen recalls being informed that Janet Peterson was having a difficult time qualifying for payments. During the same time period, the company moved from Provo, Utah to Torrance, California. Deposition of Tei Fu Chen R. 1226, 1223, 1222-1223.
23. Defendant Tei Fu Chen agreed to allow a grace period for Janet Peterson to qualify. Sunrider continued to pay Plaintiff because they “forgot” about the Janet Peterson situation. Id.
24. As president of the company, Oi-Lin Chen elected to stop payments to Plaintiff. This decision was not discussed with her husband, Tei Fu Chen. Tei Fu Chen was unaware of the decision until after this litigation was initiated. Deposition of Oi-Lin Chen R. 1233, 1239-1240; Deposition of Tei Fu Chen R. 1226.
25. As president, Oi-Lin Chen stopped payments to Plaintiff because Plaintiff was not complying with Sunrider’s qualification requirements and was neither working nor training her down line. Mrs. Chen wanted to ensure that all bonuses paid to distributors

complied with the laws regulating Multi Level Marketing. Mrs. Chen further concluded that it was unfair to other distributors who were actively working to pay Plaintiff for doing nothing. Finally it was Mrs. Chen's desire to preserve the integrity of the multilevel plan. Deposition of Oi-Lin Chen pp. 1231-1233.

26. In December 1994, Mrs. Chen, as president, sent Plaintiff a letter on Sunrider letterhead, informing her that her payments would be terminated. Mrs. Chen also invited Plaintiff to requalify and assured her that if she would requalify, Plaintiff's account would be reevaluated. R. 1277.
27. Defendant Sunrider markets its products through a multi-level marketing sales program. Presently, Sunrider distributors are primarily compensated in three different ways:
  - a. They buy products at wholesale and sell at retail.
  - b. They receive a group development bonus (also presently called an "override" which is different from the "overrides" referred to in the 1976 writing) on the "group" sales of personally sponsored distributors of lesser rank, limited to unqualified associate directors and below.
  - c. Once they qualify and maintain the level of a qualified Associate Director or above, they receive a "Leadership Development Bonus" on the group sales of Qualified Associated Directors and above occurring in their organization.

See 1994 Business Guide at 2-5 to 2-18, R. 752-759.

27. A set percentage of the total sales volume<sup>4</sup> of the company, 38.5%, is set aside to pay distributor compensation, including the Leadership Development Bonuses. Fourteen percent (which is included in the 38.5%) of company sales volume is apportioned to the Leadership Development Bonus Fund. Sunrider is required under the marketing plan set forth in the Business Guides to pay these percentages. Neither Sunrider nor its shareholders save money or otherwise benefit from paying one distributor versus another because Sunrider pays these set percentages irrespective of who the particular qualifying recipients of the funds are. Neither Sunrider, Tei Fu Chen nor Oi-Lin Chen have, will, or can benefit by the cessation of payments to Janet Peterson. 1994 Business Guide 2-10, 2-22, R. 750, 756. Affidavit of Ras Jeyakumar, R. 1361-1362; Deposition of Janet Peterson R. 1245-1246.
28. Plaintiff understands Sunrider does not save money by not paying her, as Sunrider is required to pay the Leadership Development Bonuses to other qualified persons and Sunrider pays out 38.5% of all company SV as compensation to its Distributors. Id.
29. Changes to the Sunrider Business Guide have occurred at least twenty times since 1976. See R. 437-984. The formulas used to calculate the Leadership Development Bonuses have undergone significant modifications over the years, both to Plaintiff's benefit and detriment. For example, in 1978 through 1980, overrides (presently referred to as Leadership Development Bonuses) were paid three levels deep, at 10% for the first level,

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4. "Sales volume" or SV is a concept used throughout the Business Guides. It is generally the retail value of a particular product, though some products have a point value for the purpose of calculating sales volume less than the retail value. Accordingly, company sales volume is a rough approximation of the Company's gross sales. See note 1, *infra*.

3% for the second level and 1% for the third level. See R. 675, 682. No mention of overrides appears in the 1981 Marketing Plan. R. 663-673. In 1982, Leadership Development Bonuses were only paid one level deep at 8%. R. 660. In 1983 and 1984, the Leadership Development Bonuses were again paid 3 levels deep, but at lower rates: 6% for the first level, 3% for the second level, and 1% for the third level. R. 641, 654. From 1985 to the present, Leadership Development Bonuses have been paid three levels deep but at an even lower rate: 6% for the first level, 2% for the second level, and 1% at the third level. R.469,512,554,600,623-624,707-708, 756,816-817, 857, 903, 898, 977, 940-941, (See 1985-present Business Guides).

30. Presently, Plaintiff has one first-level qualified director in her organization (Sharon Farnsworth). Under the 1994 Business Guide's Leadership Bonus schedule, Plaintiff, if she otherwise qualified, would be paid three levels deep at 6%, 2% and 1% respectively. R. 756 (1994 Business Guide 2-13).
31. By changing the Leadership Development Bonuses calculation from payment based upon one level (as was the case in 1982) to payments based upon three levels at the 1994 scheduled rate results in an increase of nearly *four-hundred* percent of the amount of Plaintiff's leadership development bonus. For example, using the November 1994 sales numbers and applying the 1982 Business Guide formula results in a payment of \$786.53. Payment based upon three levels, at 6%-2%-1% (the calculation in place for 1985 to present), resulted in the amount of \$3,199.47, which was actually paid to and accepted by Plaintiff. Deposition of Kenny Jordan R. 1211-1216.

32. As changes have occurred in the payment formulae, changes to the qualifications for Plaintiff to maintain her Director status have also changed, also to Plaintiff's benefit and detriment. For example, the monthly PV (presently called SV) requirements have varied as follows:
- a. In 1978, to remain a director, one was required to maintain a monthly PV of 1000, though alternate months could fall as low as 500. See R. 684;
  - b. In 1980 and 1981, PV of 1000 in any given month plus an average of 850 across 4 most recent months was required. R. 664, 675-676;
  - c. In 1982, the directorship requirement shifted again: a cumulative PV of 4000 with 1000 in the qualifying month was required. R. 660;
  - d. In 1983, this was changed to a group cumulative PV of 4000, with 1000 in the qualifying month. R. 656;
  - e. In 1984, personal SV of 100, personal group of 1000 were required. R. 638-640.
  - f. In 1985, a cumulative group SV of 8000, with 2000 group SV in qualifying month, and 1000 group SV per month was required. R. 624;
  - g. In 1986, a personal SV of 100, 8000 cumulative group SV, plus 2000 group SV was necessary. R. 600-605;
  - h. In 1987, a cumulative PV of 8000 with 2000 in the qualifying month and personal SV of 100 was required to maintain director status. R. 554-559;
  - i. In 1989, personal SV of 100, cumulative group SV of 8000 SV, plus 2000 SV in qualifying month was required. R. 977-980;

- j. In 1990, continuing through 1993, the requirements were increased to 100 personal purchase volume, cumulative personal group SV of 12,000, plus maintaining 3000 SV each month. R. 899-900, 860-861, 817,819-820;
- k. In 1994, this was modified so that directors had to reach 100 personal SV per month, 3000 personal group per month. R. 756-757.
33. Presently there are seventeen different levels of achievement under which Sunrider distributors may earn various forms of compensation. R. 755-757.<sup>5</sup>
34. Year after year, Plaintiff received the Sunrider Business Guides and reviewed them in detail to see what changes the company had made. She reviewed them when she received them, a practice that never ceased. Deposition of Janet Peterson R.1257-1258. She received the last business guide in 1994. Sunrider sent them to her. Id.; R. 1399 (Response No. 3 to Request for Admission dated 2-28-97).
35. Neither the Plaintiff nor her husband ever complained of any change to the Sunrider Business Guides. Deposition of Tei Fu Chen, See Addendum.
36. Plaintiff's distributorship (called "Company Direct") has been inactive for a period of more than one year. R. 327, 396, 1259, 1363-1365.

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5. In 1978, there were 5 levels: Distributor, Assistant Director, Director, Group Director and Senior Director. R. 683-685.

37. The 1994 Business Guide provides that “A Sunrider Distributor whose account is inactive for a period of one (1) year will be automatically terminated by Sunrider.”<sup>6</sup> R. 733 (back side of double sided page) .
38. “Company Direct” has maintained neither 100 personal SV nor personal group SV of 3000, each of which is a requirement to be a “Qualified Director.” R. 1256, Deposition of Janet Peterson; R. 223, Affidavit of Janet Peterson; R. 321, Plaintiff’s Response to Request for Admission No. 7; R. 820, 757-757.
39. The 1994 Sunrider Business Guide provides:
- E. Sales Leaders A “Sales Leader” is a Sunrider Distributor who has achieved the rank of Director or above. In order to remain a “Sales Leader,” and thus continue to qualify for those commissions, bonuses and incentives associated with the rank, a Distributor must assume the responsibilities and perform the functions of a “Sales Leader.” R. 735 (back side of two sided page).

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6. Inactivity is defined as “the absence of any wholesale purchases from Sunrider during the entire 12 month period.” R. 733, 1994 Business Guide at 3-17.

40. Plaintiff concedes she has not met the qualification of a “Sales Leader.”<sup>7</sup> R.223, Affidavit of Janet Peterson; R. 320-321, Response to Request for Admission Nos. 8-10.
41. Plaintiff testified that it would not have been difficult for her to comply with requirements associated with meeting the definition of a sales leader. R. 1243-1244, Deposition of Janet Peterson.
42. Sunrider has made some of its changes to the Business Guide in response to evolving federal and state law, statutory, common, and regulatory, regarding multi-level marketing, and in particular, laws requiring a link between compensation to distributors and the actual sale of product. R. 1181-1182, Deposition of Robert Katchen; R. 1363-1365, Affidavit of Robert Katchen).
43. The 1993 and 1994 Business Guides required all distributors to make and document at least 5 retail sales a month. R. 758,764 (back side of two sided page),793 and 820.

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7. Included among the responsibilities and functions of a “Sales Leader” are duties to:
    1. conduct periodic sales meetings, as dictated by the size and demands of the organization, for the purpose of training and motivating the Distributors in a Distributors organization. Where the personal group and sales organization is spread over a wide area, the Sales Leader will either personally travel to various central areas to hold meetings on a periodic basis, or will arrange for someone else, either his sponsor or up line sales leaders, to provide such motivational and training meetings. Physically isolated Distributors should be trained by frequent mail and telephone contact.
    2. Maintain frequent mail contact with all distributors in his or her personal group, including the publishing of sales, motivational and training meeting dates and locations, additional sales news, if any, or any other relevant information.
    3. Give advice on any promotional activities carried on by Distributors in the sales organization to assure they conform with this agreement or any other Sunrider produced promotional materials.
- R. 734-735.



44. The Company Direct account has not made and documented 5 retail sales a month. R.

1261, Deposition of Janet Peterson; R. 1363-1365, Affidavit of Robert Katchen.

45. From 1986 to 1992, the business guides contained the following language:

**Cancellation, Termination . . .** Any distributorship may be canceled by Sunrider for any violation of the Business Guide . . . Distributor Application and Agreement . . . Violations of the Sunrider Code of Ethics, Distributor Agreement, or the written policies of the company may be cause for termination.

**Exclusive Rules** This Business Guide, Sunrider Distributor Application and Agreement, and the instruments and documents referred to herein constitute the entire understanding of the parties with respect to this subject matter. The Business Guide and Distributor Agreement may be amended only by an instrument in writing signed by an authorized officer of Sunrider. Should any inconsistencies arise, the terms and conditions of this Business Guide and Distributor Agreement shall be controlling.

**Waiver** No failure of Sunrider to exercise any power given to it under this Business Guide, Distributor Application and Agreement or to insist upon strict compliance by a distributor with any obligation or provision hereunder and no customer or practice of the parties at variance with the terms hereunder shall constitute a waiver of Sunrider's right to demand exact compliance with this Business Guide and Distributor Agreement. Waiver by Sunrider can only be effected in writing by an authorized officer of Sunrider.

R. 591-592, 500-501, 966 (including back side of double sided page, 883-884 (including back side of double sided pages), 842-843 (including back side of double sided pages).

46. Similar provisions have been in place since 1993. R. 689-690, 730-733, 779, 781-782.

### **Summary of Argument**

The trial court correctly determined that Plaintiff's interpretation of her contract is for an illegal purpose given her refusal to make any efforts to conduct retail sales or to train and develop her down-line. Because Plaintiff admitted that she was not conducting retail sales or acting as a sales leader by training and promoting her down-line, the Defendants were entitled to judgment as a matter of law on Plaintiff's breach of contract claim.

Plaintiff did not preserve for appeal her claims regarding the Utah and United States Constitutional prohibitions on the impairment of contracts. Similarly, she failed to preserve for appeal her arguments about an improper retroactive application of Utah's Anti-Pyramid Act.

This court can also affirm the dismissal of Plaintiff's claims because under traditional contract construction analysis, Plaintiff was in breach of her contract because the 1976 agreement only waived the personal purchase volume requirements for receiving overrides. By its express terms, the 1976 writing said nothing about waiving personal group purchase volume requirements, meeting minimal requirements for maintaining a distributorship, conducting retail sales, or meeting the definition of a sales leader.

In addition, because Plaintiff testified that Sunrider could and had modified the Business Guides periodically, and while aware of the new requirements she had accepted monthly payments, as a matter of law, Plaintiff assented to changes set forth in the Business Guides. Because she admitted she was not meeting the new requirements, Defendants were entitled to judgment as a matter of law.

The trial court did not err in denying Plaintiff's Motion for Summary Judgment. Defendants presented sufficient evidence suggesting the 1976 agreement had been modified including Plaintiff's testimony that Defendants could modify the Business Guides whenever things weren't quite right. Plaintiff's arguments regarding the statute of frauds are not well placed because the statute of frauds is applied literally. In any event, because 1976 writing did not contain all of the required terms, any modification would not have to meet the statute of frauds either. Plaintiff could not prove her damages without either admitting that the Business Guides did modify the 1976 agreement, or without the benefit of expert testimony. At the time she filed

her Motion for Summary Judgment, Plaintiff did not have an expert witness and the time for naming one had long since passed. It was only after this omission was pointed out in Defendants Memorandum in Opposition to Summary Judgment that Plaintiff sought leave to name an expert witness. Accordingly, the trial court properly concluded Plaintiff was not entitled to judgment as a matter of law.

### **Argument**

#### **I. Standard For Reviewing Summary Judgment**

Summary Judgment is proper when there are no disputes as to any material fact and the movant is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c). Once the movant has set forth facts as to which the movant asserts no genuine issue exists, and which demonstrate a failure of proof, lack of legal merit, or otherwise show an entitlement to judgment, the non-moving party “must come forward with sufficient proof to support his or her claim, particularly when that party has had an opportunity to conduct discovery.” Jensen v. IHC Hospitals, Inc., 944 P.2d 327, 339 (Utah 1997) citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

In order to come forward with sufficient facts, the non-moving party must specifically controvert the movant’s statement of facts, or those facts are deemed admitted. Utah R. Jud. Admin. 4-501. In other words, once faced with a summary judgment motion tending to demonstrate that the non-movant will not prevail, the non-movant must, on any particular claim, demonstrate the existence of facts in the record which would allow a finding in her favor on “the essential elements of his [or her] claim.” Thayne v. Beneficial Utah, Inc., 874 P.2d 120, 124 (Utah 1994).

In this case, Plaintiff failed to controvert the majority of the factual assertions contained in Defendants' Motion for Summary Judgment. In many instances, although attempting to object to them, Plaintiff cited no contrary fact in the record and no well-taken objection. In other instances, Plaintiff attempted to controvert the facts by challenging their legal significance or with the legal conclusion that the 1976 agreement "waived each and every requirement" by citing to extrinsic evidence of intent that is inadmissible under the parol evidence rule. Finally, in many instances, the portions of the record cited by Plaintiff to controvert a fact simply did not support the fact she asserted it stood for. See R. 1460-1464.

**II. Plaintiff Failed to Preserve Issues II and III and is Therefore Not Entitled to Review of Those Issues.**

Plaintiff raises two issues in her brief-in-chief which were not preserved in the record below. Issue II is a claim that the trial court retroactively applied the Utah Pyramid Scheme Act. Issue III is a claim that the trial court's ruling violates contracts clauses of the Utah and United States Constitutions. The court will search in vain for any reference, however obscure, to either issue in the record.

It is fundamental that an issue must be preserved below in order for an examination of the issue by the appellate court. The Utah Court of Appeals has summarized the requirements for preservation:

To preserve a substantive issue for appeal, a party must first raise the issue before the trial court. A matter is sufficiently raised if it is submitted to the trial court, and the court is afforded an opportunity to rule on the issue. For a court to be afforded an opportunity to rule on the issue, several requirements must be met. First, the issue must be raised in a timely fashion. To preserve a substantive issue for appeal, a party must timely bring the issue to the attention of the trial court, thus providing the court an opportunity to rule on

the issue's merits. Issues not raised in the trial court in timely fashion are deemed waived, precluding [the appellate court from considering their merit on appeal.] Second, the issue must be specifically raised such that the issue is sufficiently raised to a level of consciousness before the trial court. Third, the party must introduce to the trial court supporting evidence or relevant legal authority to support its arguments.

Hart v. Salt Lake County, 945 P.2d 125, 129-30 (Utah Ct. App. 1997)(internal citations and quotations omitted)(emphasis added). In the present case Appellant does not satisfy any of these requirements.

The issues of retroactive application of a statute and of the contract's clause claims were simply never raised before the trial court. Plaintiff's brief expressly claims that both issues II and III were preserved in the trial court record at pages 297, 1030 and 1427-28.<sup>8</sup> Plaintiff provides the selfsame citations for both issues. Page 297 of the record corresponds to page 7 of the Plaintiff's Memorandum of Points and Authorities in Support of Plaintiff's Motion for Partial Summary Judgment. At no point on that page or elsewhere in that pleading is there any mention of a claim of retroactive application of a statute or the contracts clause. Indeed, it would have been most surprising to present such an argument in Plaintiff's Memorandum in Support of her Motion for Summary Judgment since both the retroactivity argument and the contract's clause arguments are rejoinders to the Defendants' argument that the Plaintiff's contract is illegal and void. Such matters would not be found in Plaintiff's Summary Judgment memo-in-chief but only in a reply memo.

Plaintiff's citation to the record at page 1030 is similarly misplaced. Page 1030 corresponds to page 22 of Plaintiff's Reply to Defendants' memorandum in opposition to summary judgment. Again, no mention of the issue of retroactivity or the contracts clause is

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8. For the court's convenience, these pages of the record are reproduced in the Addendum.

mentioned on the cited page, nor anywhere else in that document. Pages 1427-28 correspond to pages 22 and 23 of the Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment and to Dismiss. The paragraph which spans these two pages is the only response Plaintiff makes **in any pleadings** to Defendants' argument that Plaintiff's contract is illegal. However, Plaintiff cites neither case nor statute nor does she refer to retroactivity and does not suggest that the state or federal contracts clause in any way precludes or supplants the assertions made by the Plaintiff. Plaintiff's citations to the record, far from demonstrating that these issues have been preserved for appeal, demonstrate that there has been no preservation of the issues of retroactivity or the contract clause for review.<sup>9</sup> See Rocky Mountain Thrift Stores Inc. v. Salt Lake City Corp., 887 P.2d 848, 850 (Utah 1994)(holding fact

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9. Footnote 1 of the Plaintiff's brief provides "[a] transcript of the May 18, 1998 oral arguments before the Honorable Howard H. Maetani, from which the order being appealed resulted, is not a part of the appellate record because the District Court personnel cannot locate the video tape from that date." Plaintiff/Appellant may attempt to argue that somehow these issues were raised during oral argument, and that she is now somehow prejudiced because she cannot demonstrate that fact due to the loss of the record. While Defendant does not agree that these issues were presented to the court during oral argument, Defendants observe that the Utah Rules of Appellate Procedure provide a mechanism for addressing such claims. Utah R. App. P. 11(g) provides that "[the appellant may prepare a statement of the evidence or proceedings from the best available means, including recollection. The statement shall be served on the Appellee, who may serve objections or propose amendments within ten days after service. The statement and any objections or proposed amendments shall be submitted to the trial court for settlement and approval and, as settled and approved, shall be included by the Clerk of the trial court and record on appeal." Plaintiff/Appellant has not availed herself of this procedure. She is thus precluded from arguing before this court that there is any deficiency in the record.

Moreover, even if Plaintiff had presented these issues to the trial court during oral argument, the Utah Court of Appeals has held that an argument made only during oral argument on a motion for summary judgment was not sufficiently preserved to warrant appellate review. Shire Dev. v. Frontier Investments, 799 P.2d 221, 224 (Utah Ct. App. 1990).

issues cannot be raised for first time on appeal). Nowhere in the pleadings is the word “retroactive” used; no where are any constitutional claims analyzed.

Plaintiff’s appeal is her first mention of retroactivity and contracts clause. Below, Plaintiff did not raise either issue in any specific fashion. Neither issue was brought to the trial court’s consciousness. The Court’s Memorandum Decision does not even mention either issue. Finally, neither factual nor legal authority were presented in any form to the trial court. None of the elements of Hart are met. Hart, 945 P.2d at 129-130. See also, Lane v. Messer, 731 P.2d 488, 491 (Utah 1986)(holding issues not raised in pleadings and not addressed by trial court will not be considered on appeal).

Not only has Plaintiff failed to preserve issues II and III for review by this court, she has attempted to mislead this court by giving entirely fanciful citations to the record. Utah R. App. P. 24(a)(5)(A) specifically provides that a brief must contain a citation to the record showing the place where particular issues were preserved for appeal. “[T]o permit meaningful appellate review, briefs must comply with the briefing requirements sufficiently to enable us to understand what particular errors were allegedly made, where in the record these errors can be found, and why, under applicable authorities, those errors are material ones necessitating reversal or other relief.” Burns v. Summerhayes, 927 P.2d 197, 199 (Utah Ct. App. 1996).

Recently, on two separate occasions this court has censured an attorney who misstated the record on appeal. Lieber v. ITT Hartford Ins. Center, Inc., 2000 WL 1218479, \*5-\*8 & nn.9, 10, & 14 (Utah August 29, 2000); Boice v. Marble, 1999 WL 561528, \*4 n.5 (Utah August 3, 1999). Even more than counsel’s misstatements in Lieber and Boice, Plaintiff’s references to the record mislead the court. Nowhere in the record, much less in the citations provided by the

Plaintiff are the issues of retroactivity or the contract clause ever raised. Plaintiff's argument that somehow the record citations contain these issues is unfair and prejudicial to Defendants and to the Court.

### **III. The Trial Court Correctly Concluded that Plaintiff's Contract Was Illegal.**

The trial court properly concluded that the contract Plaintiff sought to enforce was illegal under state and federal law. For the first time on appeal, Plaintiff argues that 1) the court erred in retroactively applying the Utah Pyramid Scheme Act to the 1976 agreement, 2) that the court's reasoning impairs Plaintiff's contract rights contrary to the U.S. and Utah Constitutions, and 3) that court erroneously concluded that Plaintiff's contract was illegal. These arguments will be addressed in turn.

#### **A. Plaintiff Cannot Demonstrate Any Decision Which Is In Violation of the State or Federal Contracts Clause**

Plaintiff claims, in her brief, that the trial court's conclusion that Plaintiff's contract is void under the contracts clause of both the Utah and United States Constitution.<sup>10</sup> Plaintiff failed to provide any analysis or even raise this issue before the trial court and thus we do not have the benefit of developed briefing and the trial court's view of the issue. Plaintiff's briefing before this court is similarly deficient. The Plaintiff simply cites to a single Utah case, George v. Oren Ltd. & Assoc., 672 P.2d 732 (Utah 1983), for the proposition that even if the trial court were to

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10. Plaintiff fails to show or argue any distinction between the federal and state contracts clauses. Accordingly, the court should assume that the issues are identical. Brunner v. Utah State Tax Comm'n, 945 P.2d 687, 689 n.3 (Utah 1997)(holding that failure to separately analyze state and federal constitutional claims results in analysis of federal claims only), citing, State v. Seale, 853 P.2d 862, 873 n.6 (Utah), cert. denied, 510 U.S. 865 (1993).



find that Utah's Antipyrarnid Scheme Act prohibited Plaintiff's contract, it could not be applied in this case because of the contract's clause. This reading is puerile.

Quoting George, the Plaintiff recites:

It is well settled that in the exercise of its police power, a state can enact regulations or laws reasonably necessary to secure the health, safety, morals, comfort or general welfare of the community regardless of whether such laws or regulations affect contracts incidentally, directly, or indirectly.

George, 672 P.2d at 737. The Plaintiff then simply concludes that "[e]ven if Utah Code Ann. § 76-6a-1 et seq. is a proper exercise by the State of its police power ... the trial court may not impair Mrs. Peterson's contract rights that were in existence immediately prior to [the][sic] enactment of Utah Code Ann. § 76-6a-2(4).<sup>11</sup>

As presented to the trial court, the law regarding multi-level marketing is a complex interaction of both state and federal law and has evolved over the course of many years. There is certainly no dispute that states can regulate multilevel marketing organizations even to the point of retroactively terminating contracts. See, Koscot Interplanetary, Inc. v. Draney, 530 P.2d 108, 113 (Nev. 1974)("Although [multilevel distributorship] contracts previously entered into may be effected thereby, the constitutional interdiction against the impairment of the obligation of contract does not prevent a state in the reasonable exercise of its police power from enacting laws intended to benefit the public.").

Moreover, as the trial court found, multi-level marketing law requires a distinct and tangible nexus between one's receipt of income and one's efforts in a multi-level marketing

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11. This court has also noted that "[t]he right of the Legislature to act under the police power of the state is a part of the existing law at the time of the execution of every contract, and as such becomes in contemplation of law a part of that contract." George, 672 P.2d at 738, quoting Layton v. Pan Am. Petroleum Corp., 383 P.2d 624, 627 (Okla. 1963).

program. This has been the law for decades and it pre-dates the contract upon which Plaintiff sues. In Re Koscot Interplanetary, Inc., 86 F.T.C. 1106, 1181 (1975), affirmed sub nom., Turner v. F.T.C., 580 F.2d 701 (D.C. Cir. 1978). Plaintiff's view of her contract is that she is released from any obligation to do anything. Her view of the contract is prima facie illegal under the law as it existed in 1976, and certainly as it has since developed. See. e.g., Webster v. Omnitrition Inter. Inc., 79 F.3d 776, 780-82 (9<sup>th</sup> Cir. 1996), cert. denied, 117 S.Ct. 174 (1996).

Moreover, the record demonstrates that Defendant terminated payments to Plaintiff in an ongoing effort to maintain compliance with multi-level marketing law. The trial court's decision regarding illegality was not merely that the Utah Pyramid Scheme Act forbade the contract, but that the law, both statutory and common, invalidated the contract. See Memorandum Decision p. 10. The contracts clause simply does not operate as a brake upon judicial actions. George, 672 P.2d at 738.

The trial court reasonably and accurately concluded that the 1976 contract was illegal based upon both statutory and common law. As judicial developments make clear, Plaintiff's contract would be an illegal pyramid scheme, at least as she would construe it. As such it is void. The contracts clause does not preclude or even effect this conclusion. Plaintiff's claim that her rights under the state or federal contracts clause have been violated is not well taken.

#### **B. There Is No Retroactivity Issue in This Case.**

Plaintiff also claims that the trial court retroactively applied Utah's anti-pyramid statute. This is simply in error. Multi-level marketing law has required for over twenty-five years that Plaintiff must engage in certain activities which connect her personal efforts to the return she is

personally receiving. In Re Koscot Interplanetary, 86 F.T.C. at 1181; In Re Amway, 93 F.T.C. 618, 716 (1979). As the trial court concluded, however, Plaintiff's claim is that she should receive the benefit of her contract without any effort on her part. See also Memorandum Decision p. 10 (concluding that such actions violate both the Utah anti-pyramid statute and In Re Amway).

Plaintiff's analysis of retroactivity demonstrates why she cannot prevail: there was no retroactive application of law; the trial court held Plaintiff to law which predated the 1976 agreement. The Utah statute is merely a latter statutory expression of the pre-existing common law and regulating law. There is no retroactivity issue here; doubtless that is why Plaintiff's brief gives it such short shrift and why the issue was not raised below. It should be rejected here.

**C. The Trial Court Properly Determined That Plaintiff's Contract Was Unenforceable and Was Therefore Correct in Granting Summary Judgment to Defendants.**

The trial court properly determined that Plaintiff's interpretation of her 1976 agreement would render it illegal under both state and federal law. Plaintiff claims that the 1976 writing gives her a right to receive monthly cash payments, irrespective of any continuing action or duty, based solely on her sponsorship of the Farnsworth's down-line. She claims this right is completely free of any obligation on her part to have retail sales or to provide any training or promotional efforts with or to her down-line.

Utah law defines a "pyramid scheme" as:

any sales device or plan under which a person gives consideration to another person in exchange for compensation or the right to receive compensation which is derived primarily from the introduction of other persons into the sales device or plan rather than from the sale of goods, services, or other property.

Utah Code Ann. § 76-6a-2(4). In State v. Hall, 905 P.2d 899, 901 (Utah Ct. App. 1995), the Utah Court of Appeals rejected a claim that this provision was ambiguous and properly noted that it prohibits any “plan under which a person gives consideration to another person in exchange for . . . the right to receive compensation *which is derived primarily from the introduction of other persons into the sales device or plan* rather than from the sale of goods, services or property.” (emphasis in original).

Multi-level marketing has a long and complex history. Often such systems were attacked as pyramid schemes, illegal securities, lotteries, deceptive trade practices, restraints on trade, or chain letters.<sup>12</sup> Ultimately, the FTC developed a series of criteria which supposedly offered a safe harbor for multi-level plans. In Re Amway Corp., 93 F.T.C. at 646 & 668.

Utah’s statutory scheme is also consistent with federal law. The Federal Trade Commission has, for over twenty-five years, defined a pyramid scheme as a system

characterized by the payment by participants of money to the company in return for which they receive (1) the right to sell a product and (2) the right to receive in return for recruiting other participants into the program rewards which are unrelated to the sale of the product to the ultimate user.

In Re Koscot Interplanetary, Inc., 86 F.T.C. at 1181. The second element of the Koscot test is the “sine qua non of a pyramid scheme.” Webster v. Omnitrition Inter., Inc., 79 F.3d at 781. This requirement predates Plaintiff’s contract, which cannot meet the Koscot test.

The Ninth Circuit - a very relevant jurisdiction given Defendant Sunrider’s relocation in 1986 to Torrance, California - has recently concluded that even a multi-level marketing company

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12. For a recent case with a discussion of what distinguishes a legitimate multi-level marketing plan from illegal pyramid schemes, see U.S. v. Gold Unlimited, Inc., 177 F.3d 472 (6<sup>th</sup> Cir. 1999).

modeled on the system approved In Re Amway can still be held liable as an illegal pyramid scheme, an illegal security, a deceptive trade practice, and a violation of the Racketeer Influenced and Corrupt Organizations Act, as well as a variety of related state claims when compensation paid to individual participants is based on recruitment or sponsorship rather than the sale of product. Webster, 79 F.3d at 782-83 (“the key to any anti-pyramiding rule . . . is that the rule must serve to tie recruitment bonuses to actual retail sales in some way”). The Webster court noted that “[t]he promise of lucrative rewards for recruiting others tends to induce participants to focus on the recruitment side of business at the expense of their retail marketing efforts.” Id. Plaintiff’s contract implicates precisely these concerns.

Defendant Sunrider’s president testified that one of the reasons for cutting off payments to Plaintiff was the concern of compliance with the law. The record is undisputed that Defendant Sunrider has modified its Business Guides to ensure that there is a relationship between the sale of product and the Leadership Development Bonuses, and therefore, Sunrider had instituted its five retail sales rule together with requiring recipients of Leadership Development Bonuses to meet the definition of a Sales Leader. Although she has admitted that it would not have been difficult to meet the definition of a “Sales Leader,” Plaintiff refused to undertake the efforts that would make her receipt of Leadership Development Bonuses related to sales and comply with the law.

Before the trial court, Plaintiff’s sole argument relating to illegality was that her commissions were based upon the sales of her down-line, and accordingly, were not violative of anti-pyramid laws. R. 1427. To the contrary, Plaintiff’s Leadership Development bonuses must be related to her personal efforts in conducting retail sales and the training and support of her

down-line. The trial court noted, “Sunrider has adopted certain requirements in recent years to comply with anti-pyramid law, and Plaintiff claims that these requirements do not apply to her. . . . It seems that Plaintiff is gaining the benefits of Sunrider’s anti-pyramid requirements while refusing to comply with the requirements herself.” R. 1576.

Accordingly, the trial court appropriately determined that “as a matter of law that receiving bonuses in a multi-marketing business is illegal when the bonuses are based only upon sponsoring of an organization, rather than upon promoting a product, selling a product, or training and supervising down-line distributors.” R. 1576. Because the record was undisputed that Plaintiff was doing none of these things, summary judgment was properly granted in this matter.

#### **IV. Given the Plain Language of the 1976 Agreement, Plaintiff Cannot Succeed on Her Contract Claim**

Plaintiff simply cannot succeed on her contract claims. It is virtually undisputed that the 1976 writing cannot constitute the entire contract between the parties. Without reference to a Business Guide, the 1976 writing is devoid of discernable meaning. Moreover, the plain language of the 1976 writing waives only a single requirement, not every requirement as Plaintiff claims. In addition, it is clear the 1976 writing was modified by subsequent Sunrider Business Guides. Finally, the Plaintiff failed to adduce evidence sufficient to sustain her burden of proving damages.

##### **A. The 1976 Writing Was Not the Whole Agreement**

Plaintiff's contract claim is premised on the 1976 writing between Lloyd Peterson (Plaintiff's deceased husband) and Ken Murdock:

I, Lloyd Peterson, do hereby offer to purchase from NaturaLife International the NaturaLife Distributors known as Sharon and John Farnsworth (husband and wife) and their sponsored organization for the sum of \$1500 (one thousand five hundred dollars). This amount will be reduced by NaturaLife International from salary due me. It is understood that this purchase will become effective at 11:49 p.m. on July 31, 1976, and from that time on, the above **Farnsworth NaturaLife organization will become first level distributors or directors as the case may be to my wife, Janet S. Peterson. It is also specified that my wife, Janet Peterson, will remain a director with the company for the purpose of receiving overrides from directors occurring to organization regardless of her personal purchase volume (PV) level.** I do understand, however, that her personal group PV for those below director level will be paid at the scheduled rate for the PV level reached each month.

/s/ Lloyd D. Peterson

The NaturaLife International company accepts the offer of Lloyd D. Peterson for the purchase of the sponsorship of John and Sharon Farnsworth and their sponsored organization as distributors and/or directors **as through they had been originally directly sponsored by Janet S. Peterson.** The purchase price and terms are approved as written in the proposal.

/s/ Ken Murdock

R. 1295(emphasis added). It is undisputed that this writing *does not constitute* the complete agreement between the parties. On its face, this document fails to define the terms "overrides" or indicate when they are to be paid, how they are to be calculated, or what requirement must be met to receive them. In fact, in the absence of a Business Guide, the agreement has absolutely no meaning.

Plaintiff herself testified as follows:

Q. Okay, Does Exhibit 1 contain all the terms of the agreement you had with NaturaLife? By that I mean, does this contain every term or obligation in the agreement that is at issue here in this litigation?

A. I don't know.

MR. Seller: That's a fair response.

- Q. (By Mr. Stevenson) That is a fair response. You testified earlier that NaturaLife had another document that would have spelled out what percentage of the volume would be an override or would be the overrides to which you would be entitled to; is that correct?
- A. Yes. I believe they had in--
- Q. There was some other document out there that spelled out what those percentages were?
- A. I believe so.
- Q. Okay. And I think you also testified that there was some other document that spelled out the scheduled rate that's referred to in Exhibit 1; is that correct?
- A. Yes.
- Q. Okay. Is it fair to say that that other document, then, also contained the terms of the agreement between Lloyd Peterson?
- A. It must have, you know. I'm not saying that--
- Q. Okay.
- A. --specifically it was exactly that, because he used those words.
- Q. Okay. Would you agree that Exhibit 1, for example, does not specify what that scheduled rate is, or what--
- A. It was a scheduled rate at that time. And--
- Q. But for us to know what the scheduled rate is, we have to look at that document; is that a fair statement?
- A. I believe he's referring to the scheduled rate as--as whatever happens. And the schedules do change.
- Q. The schedules do change?
- A. Uh-huh.
- Q. How do they change?
- A. Well, like Sunrider's changed their schedules every now and then--
- Q. Okay.
- A. --to be a little different. NaturaLife had changed theirs. But at the time of the scheduled rate or whenever that is.
- Q. Okay. So there was a document out there that changed periodically that spelled out what those rates were?
- A. Yes.
- Q. Okay. And those rates changed from time to time?
- A. **They could.**
- Q. Okay. And you testified that today under Sunrider a similar document or business guide changes from time to time?
- A. **When they want--if they feel that things aren't quite right, you know, like the company put from \$2,000 to \$3,000 for their bonus volume.**
- Q. Okay. If we wanted to determine today, for example, how to calculate an override that was due you, for example, would we have to look at the Sunrider business guide, then, to determine the scheduled rate or percentages?
- A. **I believe so, yes.**



R. 1268-1270, Deposition of Janet Peterson (emphasis added).

Accordingly, to determine the terms of her agreement, and whether it had been breached, the court must look at the 1976 writing and the most recent Sunrider Business Guide. Significantly, as Plaintiff acknowledged Sunrider “**could**” make changes to the Business Guide “**when they want--if they feel that things aren’t quite right .**” Id. (emphasis added). The 1976 writing incorporated the terms and concepts of the Business Guides.

**B. The 1976 Writing Cannot Be Understood Without Reference to the Business Guides**

Only in light of the Business Guides is the 1976 writing seen in its true context. The Business Guide sets forth duties and responsibilities of participants. By its plain terms, the 1976 writing relieves Plaintiff of but a single duty: the obligation to maintain personal purchase volume. The 1976 writing waives nothing else. In fact, Mr. Murdock’s acceptance specifically points out that Plaintiff’s relationship to the company will be “as though [Farnsworth] had been originally directly sponsored by Janet S. Peterson.” 1976 Agreement. In other words, Plaintiff is an ordinary distributor, having a sponsorship relationship to the Farnsworths, “and will remain a director of the company for the purposes of receiving overrides from directors occurring to her organization **regardless** of her personal purchase volume (PV) level.” (Emphasis added). Accordingly, the only obligation waived by the 1976 writing is the obligation to maintain personal purchase volume.

Under the 1994 Business Guide, which was the version applicable at the time her payments were stopped, the following requirements were in place:

- a. To maintain her status as a distributor and to prevent her distributorship from being terminated, the Company Direct account had to purchase some product in the preceding 12 month period.
- b. To qualify to receive commissions, all distributorships are required to do the following: i) purchase 100 SV a month, and ii) to make and document five retail sales per month.
- c. To qualify to receive Leadership Development Bonuses, a director is required to maintain the current Personal Group SV of 3,000 a month and to meet the definition of a “Sale Leader.”

R. 733-735, 756, 758. It is undisputed that Plaintiff did none of those things.

On its face, the 1976 writing only relieved Plaintiff of her obligation of personal PV for the purpose of her remaining a director. It says nothing about waiving minimum requirements imposed on distributors like purchasing product at least once a year. Even given the broadest conceivable interpretation, the 1976 writing says nothing about waiving the five retail sales a month requirement, the group sales requirement of 3,000 SV per month, or meeting the definition of a “Sales Leader.”<sup>13</sup> Accordingly, under the express terms of the 1976 agreement, Plaintiff was not relieved of other requirements.

### **C. Rules of Contract Construction Also Preclude Plaintiff’s Claim**

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13. Plaintiff testified in her deposition that it would not have been difficult to meet the requirements of being a “Sales Leader.” R. 1243-1244.

Notwithstanding this express language, Plaintiff has attempted to argue that the phrase “regardless of her personal purchase volume” actually means any and all requirements (both present and future) **for remaining a distributor and qualifying as a director**. Plaintiff should not be heard to attempt to expand the 1976 writing so far beyond its plain and specific terms.

In construing a contract, the first issue for the court to address is whether or not the contract is integrated. Bailey-Allen, Inc. v. Kurzett, 945 P.2d 180, 190-91 (Utah Ct. App. 1997). An integrated contract is a written contract which the parties intend to constitute the final written expression of their agreement. Id. Integration can be shown through an integration clause or through evidence of the parties, but it is generally a fact question.<sup>14</sup> However, there is also a presumption that a contract appearing to be complete and certain is integrated. Union Bank v. Swenson, 707 P.2d 663, 665 (Utah 1985).

There can be little dispute that the 1976 writing, together with the most recent Sunrider Business Guides, constituted the final, complete, written expression of the agreement between the parties. Pursuant to this agreement, Plaintiff is the sponsor of the Farnsworth down line “as though they had been originally directly sponsored by Janet S. Peterson” and “Janet Peterson will remain a director of the company for the purpose of receiving overrides from directors occurring to her organization regardless of her personal purchase volume (PV) level.” 1976 writing, Exhibit A.

Since the 1976 writing and the Business Guides together constitute an integrated contract, parol evidence is inadmissible to vary, modify, or supplement its terms, except to explain

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14. The 1978, 1985, 1986, 1987, 1989, 1990, 1992, 1993 and 1994 Business Guides all contained an integration or merger clause,

ambiguities. Hall v. Process Instruments & Controls, Inc., 890 P.2d 1024, 1026-27 (Utah 1995). Even as to a integrated contract, parol evidence is admissible only to supplement, but not contradict, the written expression of the agreement. Webb v. R.O.A. General, Inc., 804 P.2d 547, 551 (Utah Ct. App. 1991), quoting, Stanger v. Sentinel Life Ins. Co., 669 P.2d 1201, 1205 (Utah 1983). Plaintiff has never agreed that the 1976 writing was ambiguous in any way. Accordingly, Plaintiff cannot fairly argue that the 1976 writing waived any requirement other than personal purchase volume, now called Sales Volume. Plaintiff's interpretation does violence to the plain meaning of the 1976 writing and exposes the company to legal jeopardy.

Defendants anticipate Plaintiff will attempt to point to the deposition testimony of Ken Murdock, prior owner and operator of NaturaLife International, Inc., who expressed his understanding regarding "intent" in 1976.<sup>15</sup> Mr. Murdock's testimony is inadmissible to contradict the express terms of the 1976 agreement. In fact, if the court determines the agreement is integrated, Mr. Murdock's testimony may not even be used to supplement the express terms set forth in the 1976 writing. Webb, 804 P.2d at 551. Moreover, because Mr. Murdock's testimony conflicts with Plaintiff's testimony wherein she testified that we would look to the Sunrider Business Guide to determine her damages today, Plaintiff should be estopped from changing her position in the matter.

In light of Plaintiff's testimony that the Sunrider Business Guides constituted an essential part of the agreement and that Sunrider "**could**" change the Business Guides "**when they want--**

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15. In her Memorandum in Opposition to Defendants' Motion for Summary Judgment, Plaintiff made no attempt to respond to Defendants' analysis that the parol evidence rule barred Ken Murdock from offering extrinsic evidence to contradict the express terms of the 1976 agreement. Having completely failed to argue this point below, Plaintiff should not be permitted to address this issue for the first time on appeal.

**if they feel that things aren't quite right"**, she must prove her breach of contract case in the context of the contract she herself acknowledges. Even if Plaintiff's interpretation is given the broadest interpretation, that it somehow waived all personal PV requirements for remaining a director, Plaintiff can not fairly argue that minimum distributor purchase requirements, personal group SV requirements, Sales Leader and the five retail sales requirements were waived. Because the record is clear Plaintiff has not met these requirements, she is not entitled to receive the Leadership Development Bonuses she is suing to collect. Accordingly, the trial court properly granted Defendants' Motion for Summary Judgment.

**D. Exhibit A Has Been Superseded By The Sunrider Business Guides Through Plaintiff's Conduct.**

Implicit in Judge Maetani's ruling is the conclusion that Sunrider could impose rules to insure its marketing plan did not violate evolving law. This conclusion is consistent with a far simpler contract analysis of this case: The 1976 agreement long ago ceased to have any legal import because it was entirely superseded by the Sunrider Business Guides as they evolved and Plaintiff accepted the benefits thereof aware of the changes.

As Plaintiff has testified, Sunrider "**could**" change the Business Guides "**when they want--if they feel that things aren't quite right**". Indeed, the Business Guides have changed substantially since 1976.<sup>16</sup> For example, the number of levels upon which Leadership Development Bonuses have been paid has fluctuated between one and three. Similarly, the percentages at which the Leadership Development Bonuses are calculated has varied with a

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16. As far back as the 1978, the Business Guide expressly provided that Defendant Sunrider (Naturalife) could amend the Business guide when it sought fit. R. 679.

significant effect on Plaintiff's payments. These changes have, over time, resulted in *both* benefits and detriments to Plaintiff. Likewise, Plaintiff has had the benefit of Sunrider's overall growth and its increase in products and programs.

Plaintiff testified that she routinely reviewed the Sunrider Business Guides to keep abreast of the changes. This was a practice she never stopped. It is undisputed that when these changes were put into effect, Plaintiff made no complaint, a fact which is consistent with her testimony that Sunrider "could" make changes to its Business Guide whenever it wanted. Thus, Plaintiff has acknowledged the unilateral nature of the Sunrider Business Guides, and that Plaintiff has duly accepted all the terms in the Business Guides as she has accepted payments with the knowledge of the changes. When changes adversely affected her, she accepted diminished payments without reservation or complaint. Likewise, Plaintiff benefitted when her Leadership Development Bonuses went from being calculated one level deep at 8% to three levels deep at 6%-3%-1% resulting in more than a 400% increase.

As Plaintiff correctly argues, an offer plus acceptance, supported by consideration, results in an enforceable contract. Similarly, "the cashing or depositing of the check [by Plaintiff] is an exercise of dominion over [Defendant's] funds, **and regardless of the intention, [Plaintiff] is estopped from denying that the offer was accepted.**" 1 Corbin on Contracts § 3.21, p. 425 (1995)(emphasis added). This rule is fundamentally just: one cannot accept benefits, remain silent, and then disavow the increased burden the increase in benefits naturally brings.

In an analogous case, a man entered into employment with Bechtel Corp. His employment contract provided for certain "uplifts" to his base salary. After his employment commenced, Bechtel altered its payment scheme, substantially reducing payments and making

other modifications to the employment plan. The employee took advantage of the changes to terminate his employment early and qualify for benefits, none of which would have been available under the original contract. Following his separation from the company, he brought suit under the original contract. The trial court found that by accepting the benefits of the new contract, the employee could not claim benefits under the original contract. Like Plaintiff in the present case, the employee claimed that he never accepted the altered contract. The Utah Court of Appeals disagreed:

By continuing employment with Bechtel under the terms of the revised compensation plan without taking any action to collect the “uplifts” and without making any oral or written demand for the monies, [the employee] indicated by his conduct that he accepted Bechtel’s revised compensation plan.

\* \* \*

Most importantly, however, because the check included benefits [the employee] would not have been entitled to under the parties’ original contract, [the employee’s] negotiation of the check conclusively established [his] acceptance of the revised compensation plan. Therefore, we hold that [the employee’s] conduct in failing to demand the “uplifts” during the period of January 1, 1982 to January 31, 1983, cashing the check and accepting the benefits under the revised compensation plan constituted an accord and satisfaction.

Bench v. Bechtel Civil & Minerals, Inc., 758 P.2d 460, 461-62 (Utah Ct. App. 1988)(citations and quotations omitted) (emphasis added).

As in Bench, by accepting without protest **both increased and decreased** benefits as Defendant changed the Business Guides, Plaintiff unambiguously, “conclusively,” and as a matter of law, accepted the modified Business Guides. Id. Having accepted payments under Business Guides as they have changed since 1976, Plaintiff cannot now argue that she did not assent to the changes.

In another case, a Mr. Trembly claimed to have an employment contract which limited the manner in which he could be terminated. Sometime after he was hired, the company promulgated an employee handbook expressly reserving the right to terminate persons “at will.” Trembly was eventually terminated and he brought suit for breach of contract. The Utah Court of Appeals rejected Trembly’s argument that he had not consented to the handbook which contravened the contract he claimed existed:

[I]f an employee has knowledge of a distributed handbook that changes a condition of the employee’s employment, and the employee remains in the company’s employ, the modified conditions become part of the employee’s employment contract. Further, in this manner, an original employment contract may be modified or replaced by a subsequent unilateral contract. The employee’s retention of employment constitutes acceptance of the offer of a unilateral contract; by continuing to stay on the job, although free to leave, the employment supplies the necessary consideration for the offer.

Trembly v. Mrs. Fields Cookies, 884 P.2d 1306, 1312-13 (Utah Ct. App. 1994)(citations and quotations omitted). Trembly, like the present case, demonstrates that a prior contractual relationship may be unilaterally modified, and that accepting benefits while aware that changes had been made, without reservation, constitutes an unequivocal acceptance of all the terms.

In many respects, the instant case is far clearer than the facts in Bench or Trembly. Unlike the facts in Bench or Trembly, Plaintiff has been accepting the payments aware of the numerous changes since 1976. Moreover, unlike Bench or Trembly, Plaintiff herself acknowledges the necessity and application of the Sunrider Business Guides, and that Sunrider “could” change them whenever it wanted. By accepting continued payments, both to her detriment and benefit, with the knowledge that Sunrider had changed its Business Guides, Plaintiff accepted all the changes made in the Business Guides over the years. Accordingly,



whatever the 1976 writing may have stood for, it has been superceded by the new Business Guides, like Bench and Trembly.

Because Plaintiff has failed to qualify for leadership Development Bonuses as outlined in the 1994 Sunrider Business Guide, her breach of contract claim is unsupportable in light of her assent to changes in the agreement. Accordingly, the trial court erred by failing to grant Defendants' Summary Judgment on the basis that the 1976 agreement had been modified and or superceded.

## **VI. The Trial Court Did Not Err in Denying Plaintiff's Motion for Summary Judgment.**

The trial court made no error in denying Plaintiff's motion for partial summary judgment. She was not entitled to it. Her brief makes two points: one, that any "modification" is void under the statute of frauds and two, that the policy guides could not modify the contract. Neither point is well taken.

### **A. Plaintiff's Resort to the Statute of Frauds Is Erroneous**

Plaintiff claims that the statute of frauds bars any modifications of the 1976 writing. Plaintiff seeks refuge in Utah Code Ann. § 25-5-4(1), which provides that "every agreement that by its term is not to be performed within in one year from the making of the agreement [is void unless written and signed by the party to be charged]." Plaintiff's incantation of the statute of frauds is merely a red herring.

First, this portion of the statute of frauds applies literally. Only contracts which by their terms could not be completed within one year are void under the statute. Heslop v. Bank of Utah, 839 P.2d 828, 836 (Utah 1992). If any contingent event could conceivably complete the contract within a year, the contract is vouchsafed against the statute of frauds. Zions Service Corp. v. Danielson, 366 P.2d 982, 985 (Utah 1961). In the present case the contract could have been completed within a year and therefore the statute of frauds did not require a writing.

Plaintiff claims that there exists a contract between her and Defendant Sunrider obligating Defendant to make payments to her on a monthly basis. When she dies, any obligation to pay dies as well. Therefore, the contract could be performed within a year, thus, the statute of frauds does not apply. Zion's Service Corp., 366 P.2d at 985; Johnson v. Johnson, 88 P. 230, 231 (Utah 1906).

Second, Plaintiff's argument simply ignores the fact that the modifications -the Business Guides- are obviously written documents. Plaintiff's acceptance of the changes -both favorable and unfavorable- wrought by the business guides was manifest by her actions. The checks together with the business guides, themselves are writings, accepted and signed by the Plaintiff. Estate Landscape & Snow Removal Specialists, Inc. v. Mountain States Tel. & Tel., 844 P.2d 322, 326 (Utah 1992); Sacramento Baseball Club, Inc. v. Great N. Baseball Co., 748 P.2d 1058, 1060 (Utah 1987). Together they form a writing which satisfies the statute of frauds, were it applicable.

**B. Without the Business Guides, the 1976 Writing Is Meaningless and Plaintiff's Claims Must Fail**

Finally, it is fatal to the Plaintiff's case to exclude the business guides as she now seems to desire. It is undisputed that the 1976 writing cannot be understood without referring to the business guides. It is incomplete on its face. "It is fundamental that the memorandum which is relied upon to satisfy the statute of frauds must contain all the essential terms and provisions of the contract." English v. Standard Optical Co., 814 P.2d 613, 616 (Utah Ct. App. 1991), citing Birdzell v. Utah Oil Refining Co., 242 P.2d 578, 580 (Utah 1952), Collett v. Goodrich, 231 P.2d 730 (Utah 1951) and Hawaiian Equipment Co. V. Eimco Corp., 207 P.2d 794 (1949). Plaintiff relies upon the 1976 writing to satisfy the statute of frauds. However, if the business guides are beyond consideration, Plaintiff cannot prove her case. Without the business guides, the 1976 writing is meaningless.

In her Motion for Summary Judgment, Plaintiff originally sought an award of damages in the amount of \$3,500 per month. This claim was based upon the amounts Plaintiff testified she had been receiving in the months before her termination. R. 299. Of course, this amount was based upon the formula for calculating Leadership Development bonuses in place at the time she

was terminated.<sup>17</sup> In addition, Plaintiff requested all future amount that would become due in a lump sum.

Plaintiff must establish, to a degree of reasonable certainty, the amount of her damages under that 1976 writing. Castillo v. Atlanta Casualty Co., 939 P.2d 1204, 1209 (Utah Ct. App. 1997). Plaintiff has adduced absolutely no evidence of what these damages would be, and of course, the 1976 agreement does not help her. Indeed, she has made no attempt whatsoever to inform the court what the 1976 writing might require. Plaintiff admits that the 1976 writing is not complete. Her memorandum makes no attempt, however, to analyze how damages should be awarded under that writing. Instead, Plaintiff claims damage under the business guides, while simultaneously professing their inapplicability.

It is fundamental that damages for breach of contract “are properly measured by the amount necessary to place the non-breaching party in as good a position as if the contract had been performed.” ProMax Dev. Co. V. Mattson, 943 P.2d 247, 258 (Utah Ct. App. 1997). Since Plaintiff claims the 1976 writing was not and could not be modified, it is incumbent upon her to prove, with reasonable certainty, what her damages would be under that contract.

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17. In her Reply Memorandum in Support of Summary Judgment, Plaintiff’s theory changed and for the first time she claimed an entitlement to damages calculated according to the 1978 Business Guide which is the last version available. Because the formula used in 1978 was at 10%-3%-1% as opposed to the 6%-2%-1% she has been receiving since 1985, the amounts would be far different than the approximate \$3,500 a month she claimed was due and owing in her complaint and in her brief in chief. As noted in the statement of facts, Leadership Development bonuses have not been calculated using the 1978 formula since 1980. On appeal, Plaintiff appears to again be seeking bonuses based upon the \$3,500 a month theory as her record cite for this claimed amount is her deposition testimony indicating this was the approximate amount she had been receiving in the months before her termination. See R.249, 299.

Instead, Plaintiff has taken the amounts Defendant paid her under the business guides and attempted to claim that amount as her damages. She can't have it both ways. Either she must present evidence -not conjecture- of her damages under the 1976 writing or she must accept the fact that she is dependent upon them.

Only if Plaintiff accepts the latter proposition -that the business guides replaced the 1976 writing- can she then proceed to demonstrate what damages would be appropriate to return to the position she would have been in. She must provide evidence demonstrating that her figure of \$3,500 per month would constitute her damages to a reasonable certainty. She has failed to present any such evidence, and the testimony of Kenny Jordan indicates that if any amount is owing, it is substantially less than the \$3,500 a month figure claimed by Plaintiff. R. 339.

Past due amounts are not the limit of Plaintiff's claims, however. Plaintiff also claims to be entitled to a lump sum award of future damages. Curiously, in asking for such a lump sum award, Plaintiff does not give a liquidated amount for such future damages. There are two reasons for this; first, Plaintiff has no way to calculate such an amount on the evidence adduced and second, Plaintiff is conflating tort damages and contract damages.

Plaintiff receives payment as a participant in a compensation plan established by Defendant. Under this plan, 14.0 % of Sunrider's company-wide SV is set aside to pay Leadership Development Bonuses in accordance with a formula that looks to the group sales of Plaintiff's downline. Accordingly, the future value of Defendant's interest in Defendant's marketing plan is inextricably connected to both Sunrider's overall company sales performance as well as the value of sales consummated by numerous individuals downline from Plaintiff.

Plaintiff has presented absolutely no evidence of the corporate performance of Defendant, has made no attempt to study its business and project into the future, nor to forecast the individual performance of those upon whom Plaintiff relies for her payments. Plaintiff has presented no evidence of likely future income from her contract; no evidence of inflation or reasonable returns on investment dollars; no information regarding the relative risk of investing in Defendant's business as opposed to other investments. She has retained no economists, accountants, stock brokers, or other experts qualified to give financial information. And yet, having failed to present any such evidence, Plaintiff demands a lump sum of future payments. Absent such information, Plaintiff's claim cannot prevail. Anesthesiologists Assocs. v. St. Benedict's Hospital, 852 P.2d 1030, 1042 (Ct. App. 1991), overruled on other grounds, 884 P.2d 1236, 1237 (Utah 1994).

Plaintiff's request for future damages is inappropriate for another reason. In effect, this is a request that the court imply an acceleration clause into the 1976 writing. This is contrary to basic contract law. In construing a contract, the court looks to the four corners of the document. Wade v. Stangl, 869 P.2d 9, 12 (Utah Ct. App. 1994); Anesthesiologists, 852 P.2d at 1035. None of the documents in question in this case, neither the 1976 writing nor any business guide contain an acceleration clause. When it is not clearly included in a contract, an acceleration clause will not be implied. Sheet Metal Workers Local #76 Credit Union v. Hufnagle, 295 N.W.2d 259, 263-64 (Minn. 1980), citing Kiewel Securities Co. v. Knutson, 211 N.W. 1 (Minn. 1926) and General Electric Credit Corp. V. Castiglione, 360 A.2d 418, 422 (N.J. Super. 1976). Absent an express acceleration clause, Plaintiff is not entitled to claim the benefits of one. Pursuant to the

Business Guides, Leadership Development Bonus payments are calculated and due only on a monthly basis. As a result, Plaintiff is not entitled to a lump sum award of future damages.

### **Conclusion**

It is undisputed that the 1976 writing has no meaning or existence without reference to the Business Guides. It is also undisputed that Plaintiff failed to comply with reasonable terms included in the Business Guide for a substantial period of time. Her failure to comply constitutes a breach justifying her termination. Equally important, it is undisputed that Plaintiff received benefits under the Business Guides and accepted adjustments to the calculation formulae under which she received both increased and decreased compensation. Having accepted these benefits, she is bound to accept the burdens attendant to the benefits.

To require any less of Plaintiff would be to force the continuance of an illegal pyramid scheme - a criminal act in Utah - upon Defendant. Illegal contracts are void. Such a contract should not be enforced upon Defendant. Finally, Plaintiff has failed to present sufficient evidence to prevail upon her claims. Absent this evidence, she cannot proceed. This court should affirm the dismissal of the Plaintiff's claims.

DATED this 26<sup>th</sup> day of December, 2000.

STEVENSON & SMITH, P.C.

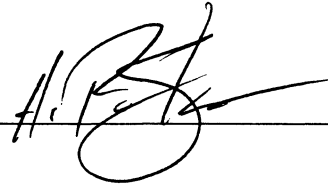
  
H. THOMAS STEVENSON

**Mailing Certificate**

I hereby certify that I caused to be mailed, postage prepaid, two true and correct copies of the foregoing brief to:

Thomas W. Seiler  
Jared L. Anderson  
Robinson, Seiler, & Glazier  
80 North 100 East  
P.O. Box 1266  
Provo, Utah 84603-1266

this 26<sup>th</sup> day of December 2000.



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## **ADDENDUM**

1. 1976 Agreement
2. June 15, 1998 Memorandum Decision
3. Excerpts of Janet Peterson Deposition
4. Excerpts of Tei Fu Chen Deposition
5. Record where Plaintiff/Appellant claims contracts clause and retroactivity issues were raised in the proceedings below.


## **Addendum 1**

1976 Agreement

I, Lloyd D. Peterson, do hereby offer to purchase from Naturalife International the Naturalife Distributors known as Sharon and John Farnsworth (husband and wife) and their sponsored organization for the sum of \$1500 (one thousand five hundred dollars). This amount will be reduced by Naturalife International from salary due me. It is understood that this purchase will become effective at 11:59 p.m. on July 31, 1976, and from that time on, the above Farnsworth Naturalife organization will become first level distributors or directors as the case may be to my wife, Janet S. Peterson. It is also specified that my wife, Janet Peterson, will remain a director with the company for the purpose of receiving overrides from directors occurring to her organization regardless of her personal purchase volume (PV) level. I do understand, however, that her personal group PV for those below director level will be paid at the scheduled rate for the PV level reached each month.

  
Lloyd D. Peterson

The Naturalife International company accepts the offer of Lloyd D. Peterson for the purchase of the sponsorship of John and Sharon Farnsworth and their sponsored organization as distributors and/or directors as though they had been originally directly sponsored by Janet S. Peterson. The purchase price and terms are approved as written in the proposal.

  
Ken Murdock

ak/48

## **Addendum 2**

June 15, 1998 Memorandum Decision

IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH

FILED  
Fourth Judicial District Court of  
Utah County, State of Utah.  
CARMA B. SMITH, Clerk  
6-15-98 Deputy

JANET PETERSON,

Plaintiff,

vs.

SUNRIDER CORP., dba SUNRIDER  
INTERNATIONAL, and TEI FU CHEN,

Defendants.

MEMORANDUM DECISION

CASE NO. 960400174

DATE: JUNE 15, 1998

JUDGE: HOWARD H. MAETANI

This matter came before the Honorable Howard H. Maetani, Fourth District Court Judge. Plaintiff filed a Motion to Amend, a Motion to Name an Expert Witness, a Motion to Strike Affidavits, a Motion to Strike Defendant's Summary Judgment Motion, and a Motion for Partial Summary Judgment. Defendant filed a Motion to Compell Discovery, and a Motion for Summary Judgment and to Dismiss. The Court heard oral arguments on these motions on May 18, 1998.

Having reviewed the filed, memoranda and exhibits submitted by both parties, heard oral arguments and being fully advised in the premises, the Court makes the following:

MEMORANDUM DECISION

I

STATEMENT OF FACTS

1. NaturaLife International, Inc. was a Utah Corporation which was incorporated on May 27, 1976.
2. The Defendant Tei Fu Chen acquired NaturaLife International, Inc. by entereing into a Stock Sale Agreement on September 24, 1982, with the sole stockholders of NaturaLife International, Inc., Kenneth A. Murdock and George T. Murdock, Jr.
3. NaturaLife International, Inc.'s name was changed to Sunrider Corporation.

4. Sunrider International is a dba of Sunrider Corporation. The same are collectively referred to herein as "Sunrider."

5. Defendant Sunrider markets its products through a multi-level marketing sales program.

6. On July 31, 1976, Lloyd D. Peterson, the deceased spouse of the Plaintiff, purchased from NaturaLife International, Inc., for and on behalf of the Plaintiff Mrs. Peterson, the NaturaLife distributors known as Sharon and John Farnsworth (husband and wife), and their sponsored organization.

7. Pursuant to a decision made by Oi-Lin Chen, President of Sunrider, the Defendant Sunrider refuses to pay any sums to Mrs. Peterson.

8. On May 3, 1995, a letter was sent to Sunrider by Mrs. Peterson's counsel by which Mrs. Peterson demanded payment from Sunrider for all past, present, and future amounts due and owing her under the 1976 purchase document executed by her deceased husband.

9. Plaintiff filed a Complaint against Defendant Sunrider on March 19, 1996.

10. Defendant filed an Answer on May 3, 1996.

11. Plaintiff filed an Amended Complaint on September 11, 1996.

12. Defendant filed an Answer to Amended Complaint and Counterclaim, October 8, 1996.

13. Plaintiff filed an Answer to Counterclaim, October 9, 1996.

14. Plaintiff filed a Motion and Memorandum for Partial Summary Judgment, January 15, 1998.

15. Defendant filed a Memorandum in Opposition to Summary Judgment and Request for Hearing, February 3, 1998.

16. Plaintiff filed a Reply to Defendant's Memorandum in Opposition to Summary Judgment, February 6, 1998.

17. Plaintiff filed a Motion and Memorandum to Amend their Complaint, February 10, 1998.

18. Plaintiff filed a Motion and Memorandum to Name an Expert Witness, February 12, 1998.

19. Defendant filed a Memorandum in Opposition to Amend, February 25, 1998.
20. Defendant filed a Memorandum in Opposition to Name an Expert Witness, March 4, 1998.
21. Defendant filed a Motion and Memorandum for Summary Judgment and to Dismiss, April 1, 1998.
22. Defendant filed a Motion and Memorandum to Compell Discovery, April 3, 1998.
23. Plaintiff filed a Motion to Strike and a Memorandum in Opposition to Defendant's Motion for Summary Judgment and to Dismiss, April 16, 1998.
24. Defendant filed a Reply Memorandum for Summary Judgment and to Dismiss, and in Opposition to Plaintiff's Motion to Strike, April 23, 1998.

## II

### ISSUES

Plaintiff argues that Sunrider has breached the Contract entered into by Plaintiff's deceased husband on her behalf by refusing to pay "commissions" on the products sold by distributors on her "down-line." Defendant argues that Plaintiff has failed to meet the requirements of a director and first-level distributor, as defined in Sunrider's Business Records, that are in addition to her personal purchase volume.

## III

### ANALYSIS

#### MOTION TO AMEND

The Court has broad discretion in granting leave to amend. Courts have liberally construed Utah R. Civ. P. 15(a) to "further the interest of justice" and to allow parties to have their claims fully adjudicated. Timm v. Dewsnup, 851 P.2d 1178, 1183 (Utah 1993). In the interest of judicial economy and having Plaintiff's claim fully adjudicated, the Court grants Plaintiff leave to amend. Plaintiff can add Oi Lin Chen as a defendant. Plaintiff can clarify that "Sunrider International" is the new name of "NaturaLife International." Plaintiff can change a typographical error in the payment termination date from December 1995 to December 1994. Defendant will be granted a fair opportunity to respond to the amended pleadings.

### MOTION TO NAME AN EXPERT WITNESS

The Court will grant Plaintiff leave to name an expert witness for the purpose of calculating damages. Rule 702 of the Utah Rules of Evidence provides that “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence . . . a witness qualified as an expert . . . may testify thereto . . . .” Clarifying the Bonus Recap Reports and other damage issues will assist the trier of fact in determining the appropriate remedy if it is found there has been a breach of contract. The expert witness will be particularly useful if the 1978 business guide is found to be the correct guide for calculating damages. Defendant has adequate time to prepare for adjudication of this issue.

### MOTION TO STRIKE AFFIDAVITS

The Court denies Plaintiff’s motion to strike the affidavits of Sharon Farnsworth, Robert Katchen, and Ras Jeyakumar. Although the affidavits may have been filed a few days late, because the Court is allowing Plaintiff to add a new party and name an expert witness, to be fair, the Court will not strike these three affidavits submitted by the Defendant. Plaintiff has adequate time to prepare for adjudication of any issues relating to these three affidavits.

### MOTION TO STRIKE DEFENDANT’S SUMMARY JUDGMENT MOTION

The Court denies Plaintiff’s motion to strike Defendant’s Summary Judgment Motion. The Mailing certificate indicates that Defendant’s motion was mailed timely on March 31, 1998. Because this motion could be served by mail, service was deemed complete upon mailing. Utah R. Civ. P. 5(b)(1).

### MOTION TO COMPEL DISCOVERY

The Court grants Defendant’s motion to compel discovery. Once again, the Court wants to be fair. Although Defendant’s interrogatories may have been broader than anticipated, because the Court is allowing Plaintiff to add a new party and call an expert witness after the discovery deadline, the Court will order Plaintiff to answer Defendant’s interrogatories in a manner that is not evasive or incomplete.



## PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Under the Utah Rules of Civil Procedure, Rule 56(a) and (b), a party against whom a claim has been made, may at any time move for a summary judgment in his favor. The motion should be granted if “. . . the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” URCP Rule 56C.

The Court denies Plaintiff's motion for partial summary judgment. Plaintiff asks the Court to grant a partial summary judgment on her first cause of action--breach of contract. Summary judgment is appropriate if Plaintiff can show no genuine issue of material facts and that Plaintiff is entitled to judgment as a matter of law, after allowing all reasonable inferences in favor of the Defendant. Estate of Covington v. Josephson, 888 P.2d 675, 677 (Utah Ct. App. 1994). In addition, “[o]nly when contract terms are complete, clear, and unambiguous can they be interpreted by the judge on a motion for summary judgment.” Webb v. R.O.A. General Inc., 804 P.2d 547 (Utah App. 1991) (quoting Colonial Leasing Co. v. Larsen Bros. Const., 731 P.2d 483 (Utah 1986)). The Court cannot summarily determine there has been a breach of contract because the terms of the contract are unclear and ambiguous.

Plaintiff contends that the 1976 writing is a valid contract because it meets the elements of proper subject matter, competent parties, offer, acceptance, and consideration. The 1976 writing may meet these requirements, however, both parties look beyond the 1976 writing to different business guides to determine payments and other contract terms. Obviously, the 1976 writing is not a completely integrated contract. There are at least two questions of material fact in dispute. First, the parties dispute which business guide should be used to supplement the 1976 writing. Second, the parties dispute whether the 1976 writing waives all Director requirements or only the requirement of personal purchase volume. Both of these facts are necessary to determine whether there has been a breach of contract.

There is a question of material fact as to which business guide should be used. Plaintiff argues that the 1978 business guide should be used because the payment schedule listed in the

1978 business guide is the same payment schedule that existed in 1976 when the 1976 writing was drafted. Defendant argues, relying upon Plaintiff's own testimony, that the current business guide should be used because even Plaintiff acknowledged that Sunrider could change its business guide unilaterally when things were not quite right. Based upon Plaintiff's testimony, it is a reasonable inference that each new business guide combines with the 1976 writing to form an integrated contract, or alternatively, each new business guide modifies the 1976 writing. Determining whether to use the 1978 or the most current business guide is unclear, and therefore is a question of fact to be decided by a fact-finder.

There is a question of material fact as to whether the 1976 writing waives all Director requirements or only the requirement of personal purchase volume. Plaintiff relies on the extrinsic evidence of Ken Murdock, one of the original parties to the contract, to show that the intent of the parties was to keep Plaintiff a Director regardless of any requirements listed in the business guides. Defendant argues that the face of the 1976 only waives the personal purchase volume requirement, not any other Director requirement. It is ambiguous whether the 1976 writing waives all Director requirements or only the requirement of personal purchase volume, and therefore is a question of fact to be determined by a fact-finder. Also, when contract interpretation must be determined by extrinsic evidence of intent, it becomes a question of fact. Records v. Briggs, 887 P.2d 864 (Utah Ct. App. 1994).

Plaintiff argues that none of the business guides could legally modify the 1976 writing because Plaintiff never agreed to the terms of the business guides, Plaintiff never received any additional consideration, and Plaintiff never signed any of the business guides. This argument puzzles the Court. Plaintiff wants the Court to treat the business guides as being non-binding but at the same time allow Plaintiff to rely on the 1978 business guide to calculate damages. If Plaintiff can rely on the 1978 business guide to show the payment schedule of the 1976 writing, based upon Plaintiff's own testimony and the face of the 1976 writing, it is not an unreasonable inference that the business guides may also contain additional requirements to the 1976 writing.

The Court cannot summarily decide there has been a breach of contract because the contract is unclear and ambiguous.

DEFENDANT'S MOTION FOR SUMMARY  
JUDGMENT AND TO DISMISS

Intentional interference with contractual relations

The Court grants Defendants motion to summarily dismiss the claim of intentional interference with contractual relations.

Plaintiff relies on the five elements of intentional interference with contractual relations listed in Model Utah Jury Instructions (MUJI). However, the case law requires more than the five elements listed in MUJI. In Soter v. Wasatch Dev. Corp., 443 P.2d 663 (Utah 1968), a case that both parties cite, the Utah Supreme Court stated that “[i]n order to establish a right to recover on such a cause of action the plaintiffs would have to show that the defendants, without justification, by some wrongful and malicious act, interfered with the plaintiffs’ right of contract, and that actual damage resulted.” Id. at 664. Also, because Tei Fu Chen is the president of Sunrider, to meet the requirement of “contract of another,” Plaintiff must show that Tei Fu Chen “acted beyond the scope of his powers or against the interests of the corporation,” Stratton v. West States Construction, 440 P.2d 117, 118 (Utah 1968).

Plaintiff argues that Tei Fu Chen acted maliciously and outside the scope of his powers as a Sunrider officer because he entered into discussions with various Sunrider employees for the purpose of terminating payments to Plaintiff. However, Plaintiff offers nothing to explain why discussing payment termination with various employees was malicious, outside the scope of Defendant’s powers, or against the interests of Sunrider. In fact, the undisputed evidence indicates that Sunrider acted justifiably in terminating Plaintiff’s payments because Plaintiff was failing to qualify, Plaintiff was failing to work or train her down line, Plaintiff’s inaction prejudiced other qualifying participants, and Sunrider wanted to comply with the law. Sunrider had nothing to gain by stopping Plaintiff’s payments. Even Plaintiff testified that Sunrider would have to pay out the same percentage amount regardless of whether Plaintiff was paid. Plaintiff started to testify that Sunrider may benefit because some of its “big people” would get more money but then retracted the statement. (See page 153-156 of the Deposition of Janet Peterson).

There are no material facts in dispute on this issue, and Defendant is entitled to

judgment as a matter of law. The Court grants Defendants motion to dismiss the claim of intentional interference with contractual relations.

#### **Breach of contract against Tei Fu Chen**

The Court grants Defendant's motion to summarily dismiss the breach of contract against Tei Fu Chen.

"As a general rule, stockholders of a corporation are not liable, as such, for any obligations of the corporation, regardless of how they were incurred." Parker v. Telegift International, Inc., 505 P.2d 301, 302 (Utah 1973) (citing 19 Am.Jur.2d, Corporations § 713). In fact, the president and major stockholders of a corporation cannot be liable for breach of contract unless they "acted beyond the scope of [their] powers or against the interests of the corporation." Stratton at 118.

Plaintiff argues that Tei Fu Chen became personally responsible for all obligations of NaturaLife, including the contract with Plaintiff, because he became the only shareholder. However, Plaintiff offers no facts or law to base this conclusion on. Just because Tei Fu Chen is the sole shareholder does not necessarily make him personally liable for the 1976 writing. It is also important to note that there are no facts indicating that Tei Fu Chen acted beyond his power, or against the interest of Sunrider (See the "intentional interference with contractual relations" section above).

There are no facts in dispute on this issue because Plaintiff has offered no evidence showing that Tei Fu Chen personally assumed liability for the 1976 writing, or that Tei Fu Chen acted outside the scope of his power. Because there are no material facts in dispute, and Defendant is entitled to judgment as a matter of law, the Court must summarily dismiss the personal liability claim against Tei Fu Chen.

#### **Punitive damages**

The Court grants Defendant's motion to summarily dismiss Plaintiff's claim of punitive damages.

Punitive damages may be awarded if there is “clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or that manifests a knowing and reckless indifference toward, and a disregard of the rights of others.” Utah Code 78-18-1. Malice can be implied from unjustifiable conduct. Branch v. Western Petroleum, Inc., 657 P.2d 267 (Utah 1982).

Plaintiff claims punitive damages against Tei Fu Chen. However, as noted above, there is no evidence showing any unjustifiable conduct, malice, or reckless indifference. The undisputed evidence indicates that Sunrider stopped payments because Plaintiff was not working and because Sunrider wanted to comply with the law. Because the tort claim of intentional interference against Tei Fu Chen has been dismissed, the prayer for punitive damages against Tei Fu Chen will also be summarily dismissed.

Plaintiff also claims punitive damages against Sunrider. Plaintiff argues that Sunrider violated its contractual duty of good faith and fair dealings. However, punitive damages are not available for a breach of contract. Jorgensen v. John Clay & Co., 660 P.2d 229, 232 (Utah 1983). Punitive damages are only available if “the breach of contract amounts to an independent tort. Jorgensen at 232. There is no tort claim against Sunrider. Therefore, the Court must summarily dismiss the claim of punitive damages against Sunrider.

#### Breach of contract against Sunrider

The Court grants Defendants motion to summarily dismiss the breach of contract claim against Sunrider.

Defendant argues that they are entitled to summary judgment because the language of the 1976 writing is plain, because Plaintiff accepted modifications, and because Plaintiff does not present sufficient evidence to show damages. However, as noted above in Plaintiff’s motion for partial summary judgment, there are material facts in dispute that must be determined by a fact-finder regarding the 1976 writing, modification, and plain language. However, the Court does grant Defendant’s motion for summary judgment on the basis of the contract being illegal.

It is undisputed that Plaintiff claims she is entitled to a leadership bonus based solely on her sponsorship of the Farnsworth organization. Plaintiff’s husband purchased the Farnsworth

organization for \$1,500. In return, Plaintiff was to receive approximately \$42,000 per year, for an infinite period of time. Plaintiff admits that she has no obligation to promote or sell a product, and no obligation to train or supervise down-line distributors. In fact, Plaintiff claims she is entitled to a leadership bonus without any obligation at all.

The Court holds as a matter of law that receiving bonuses in a multi-marketing business is illegal when the bonuses are based only upon sponsorship of an organization, rather than upon promoting a product, selling a product, or training and supervising down-line distributors. Utah Code Ann. § 76-6a-2(4) defines a pyramid scheme as “any sales device or plan under which a person gives consideration to another person in exchange for compensation or the right to receive compensation which is derived primarily from the introduction of other persons into the sales device or plan rather than from the sale of goods, services, or other property.” It seems clear that Plaintiff is receiving compensation derived primarily from the work of other people who were introduced into the Farnsworth organization. Plaintiff is expecting a bonus without selling any goods, services, or other property.

The Court realizes that Plaintiff is not recruiting people into the Farnsworth organization. What troubles the Court is that Sunrider has adopted certain requirements in recent years to comply with anti-pyramid laws, and Plaintiff claims that these requirements do not apply to her. The Court disagrees.

The Federal Trade Commission stated that to prevent a pyramid scheme, the safeguards and requirements of a multi level marketing business must “serve to prevent inventory loading and encourage retailing. In Re Amway Corp., 93 F.T.C. 618, 716 (1979). One requirement that the F.T.C. found to be important was requiring each participant to submit proof of retail sales; this rule “makes retail selling an essential part of being a distributor. In Re Amway Corp. at 716.

This case presents a unique situation. The anti-pyramid requirements of Sunrider seem to encourage sales, and prevent focusing on finding new recruits. This is exactly what anti-pyramid laws require. Plaintiff argues that her contract is not illegal because her bonus is based on sales, not recruits. Then, Plaintiff states that she does not have to comply with the new anti-pyramid requirements of Sunrider. It seems that Plaintiff is gaining the benefits of Sunrider’s anti-pyramid requirements while refusing to comply with the requirements herself. Although Sunrider

may not be operating a pyramid scheme, until Plaintiff complies with Sunrider's anti-pyramid requirements, Plaintiff's contract is for an illegal purpose. At the very least, Plaintiff must make some retail sales to qualify to receive leadership bonuses.

The Court cannot enforce an illegal contract, therefore, the Court summarily dismisses Plaintiff's claims.


#### IV DECISION

For the reasons discussed above:

1. The Court GRANTS Plaintiff's Motion to Amend.
2. The Court GRANTS Plaintiff's Motion to Name an Expert Witness.
3. The Court DENIES Plaintiff's Motion to Strike Affidavits.
4. The Court DENIES Plaintiff's Motion to Strike Defendant's Summary Judgment Motion.
5. The Court DENIES Plaintiff's Motion for Summary Judgment.
6. The Court GRANTS Defendant's Motion to Compell Discovery.
7. The Court GRANTS Defendant's Motion for Summary Judgment and to Dismiss.

Counsel for the Defendant is to prepare an Order consistent with the decision of this Court and submit it to opposing counsel for approval.

DATED at Provo, this 5 day of June, 1998.

  
**HOWARD H. MAETANI**  
Fourth District Court Judge



cc: Thomas W. Seiler  
H. Thomas Stevenson

## **Addendum 3**

### **Excerpts of Janet Peterson Deposition**



fair statement?

A. I believe he's referring to the scheduled rate as -- as whatever happens. And the schedules do change.

Q. The schedules do change?

A. Uh-huh.

Q. How do they change?

A. Well, like, Sunrider's changed their schedules every now and then --

Q. Okay.

A. -- to be a little different. NaturaLife had changed theirs. But at the time of the scheduled rate or whenever that is.

Q. Okay. So there was a document out there that changed periodically that spelled out what those rates were?

A. Yes.

Q. Okay. And those rates changed from time to time?

A. They could.

Q. Okay. And you testified that today under Sunrider a similar document or a business guide changes from time to time?

A. When they want -- if they feel that things aren't quite right, you know, like the company

correct?

A. Yes. I believe they had in --

Q. There was some other document out there  
that spelled out what those percentages were?

A. I believe so.

Q. Okay. And I think you also testified  
that there was some other document that spelled out  
the scheduled rate that's referred to in Exhibit 1;  
is that correct?

A. Yes.

Q. Okay. Is it fair to say that that other  
document, then, also contained the terms of the  
agreement between Lloyd Peterson?

A. It must have, you know. I'm not saying  
that --

Q. Okay.

A. -- specifically it was exactly that,  
because he used those words.

Q. Okay. Would you agree that Exhibit 1,  
for example, does not specify what that scheduled  
rate is, or what --

A. It was a scheduled rate at that time.

And --

Q. But for us to know what the scheduled  
rate is, we have to look at that document; is that a

put from \$2,000 up to 4--.

Q. Okay. If we wanted to determine today, for example, how to calculate an override that was due you, for example, would we have to look at the Sunrider business guide, then, to determine the scheduled rate or percentages?

A. I believe so, yes.

Q. Okay. So the business guide would spell out what that scheduled rate is?

A. Yes.

Q. Okay. Let's look at Paragraph 14 of Exhibit 2, please. Would you read that to yourself, please.

A. Uh-huh.

Q. What is your basis for claiming that you are owed by defendants approximately \$3,500 per month?

A. That's the amount that -- close to. It wasn't ever maybe exactly that amount. Sometimes it was \$4,000, maybe a little bit less, of what Company Direct had been receiving for over 12, 15 years. Well, it was less in the beginning, and it had grown. But for the last few months of this several years here, in '95, in the months there, it had been generally in that area.

2 Q. Then the other one was --

3 A. Was before.

4 Q. Was also before? Okay. You mentioned  
5 that the business guides would change from time to  
6 time, but that new incentive programs would be  
7 offered; is that correct?

8 A. There's been a lot of business guides. I  
9 think they update them every five or six months or  
10 something. Well, not that often. For a while they  
11 didn't update them, and then they would, and then --

12 Q. How would you become aware that there had  
13 been an update to the business guides?

14 A. Being Janet S. Peterson and going to the  
15 conventions and going to meetings. They were right  
16 there with me. And I bought them, I purchased them.

17 Q. You actually bought or purchased them?

18 A. Yes.

19 Q. When you received these business guides  
20 or updated business guides, would you review them in  
21 detail?

22 A. Uh-huh. Oh, yes. See what was different  
23 than before.

24 Q. Did there come a time when you ceased  
25 reviewing them, or was it a practice always to review

A. No. Always when I received them --

Q. Do you recall --

A. -- I would -- I would try to remember the different things.

Q. Do you recall when you received your last Sunrider business guide?

MR. SEILER: You mean other than through discovery?

Q. (By Mr. Stevenson) Other than through discovery. Thank you.

A. They sent me one -- I got one of Sharon's, I think, about three years ago.

Q. That would be sometime in 1994?

A. Probably. Uh-huh.

Q. Do you recall whether you received one in 1993?

A. I know they sent some. They just sent them to me. And I'm not sure. They might have.

Q. Okay. When new programs or incentive opportunities would be announced in these business guides, is it fair to say that the Company Direct line got the benefit of those new programs?

A. No. Because they never received any of that. All I received was the purchase volume of what

## **Addendum 4**

### **Excerpts of Tei Fu Chen Deposition**

1 calls for a legal conclusion.

2 A. No.

3 Q. You testified earlier about changes to  
4 the business guide. Do you recall that?

5 A. Yes.

6 Q. Has it changed a few times or a lot of  
7 times?

8 MR. SEILER: Objection. Leading.

9 A. The business guide changed a few times.

10 Q. Okay. And to your knowledge Lloyd  
11 Peterson or Janet Peterson never complained about  
12 those changes?

13 MR. SEILER: Objection. Leading and  
14 calls for a legal conclusion and outside the  
15 scope of direct.

16 A. Never.

17 Q. In answering the questions today do you  
18 understand that there's a difference between Tei Fu  
19 Chen individually and Sunrider Corporation?

20 MR. SEILER: Objection. Leading and  
21 calls for a legal conclusion.

22 A. Tei Fu Chen is myself. Sunrider is  
23 Sunrider.

24 Q. There's a difference?

25 MR. SEILER: Objection. Leading.

## **Addendum 5**

Record where Plaintiff/Appellant claims contracts clause/retroactivity issues  
were raised in the proceedings below.



FILED IN  
4TH DISTRICT COURT  
STATE OF UTAH  
UTAH COUNTY

JAN 15 5 07 PM '98

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IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

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JANET PETERSON,	)	<b>MEMORANDUM OF POINTS AND</b>
	)	<b>AUTHORITIES IN SUPPORT OF</b>
Plaintiff,	)	<b>PLAINTIFF'S MOTION FOR</b>
	)	<b>PARTIAL SUMMARY</b>
vs.	)	<b>JUDGMENT</b>
	)	
SUNRIDER CORP., dba SUNRIDER	)	
INTERNATIONAL, and TEI FU CHEN,	)	Civil No. 960400174
	)	
Defendants.	)	Judge: Howard H. Maetani

---

COMES NOW the Plaintiff, by and through her counsel of record, Thomas W. Seiler of the firm of ROBINSON, SEILER & GLAZIER, LC, and submits this Memorandum of Points and Authorities in support of Plaintiff's Motion for Summary Judgment on Plaintiff's First Cause of Action; Breach of Contract.

**UNDISPUTED FACTS**

1. NaturalLife International, Inc. was a Utah Corporation which was incorporated on May 27, 1976. (See paragraph 3 of Defendants' Answer to Amended Complaint and

The elements of valid, enforceable contract are: 1) proper subject matter; 2) competent parties; 3) offer; 4) acceptance; and 5) consideration. Neiderhauser Builders and Development Corp., v. Campbell, 824 P.2d 1193, 1197-98 (Utah App. 1992). Exhibit A is the outward manifestation of a legitimate business agreement between two competent parties. Exhibit A involves a subject matter that was proper for these two parties to be entering into contracts over. Exhibit A manifests an offer by which Lloyd Peterson offered to purchase from NaturaLife International, Inc. the NaturaLife Distributors known as Sharon and John Farnsworth, and their sponsored organizations, so that they may become first level distributors (or directors as the case may be) to Lloyd Peterson's wife, Mrs. Peterson. Lloyd Peterson's offer was accepted by Ken Murdock, who was acting on behalf of NaturaLife International, Inc. The consideration received by NaturaLife International, Inc. from Lloyd Peterson was One Thousand Five Hundred Dollars (\$1,500.00). Exhibit A satisfies each of the elements of a contract, and therefore should be enforced by the Court.

## **II. SUNRIDER IS BOUND BY THE 1976 AGREEMENT SINCE SUNRIDER IS THE SAME COMPANY AS NATURALIFE INTERNATIONAL, INC.**

In 1982 the Defendant Tei Fu Chen acquired NaturaLife International, Inc. by entering into a Stock Sale Agreement with the sole stockholders of NaturaLife International, Inc., Kenneth A. Murdock and George T. Murdock, Jr. Shortly thereafter, NaturaLife International, Inc.'s name was changed to Sunrider Corporation.

For over 12 years after Tei Fu Chen's 1982 purchase of NaturaLife International, Inc.,

FILED IN  
4TH DISTRICT COURT  
STATE OF UTAH  
UTAH COUNTY

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IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

---

JANET PETERSON,	)	<b>PLAINTIFF'S REPLY TO</b>
	)	<b>DEFENDANTS' MEMORANDUM</b>
Plaintiff,	)	<b>IN OPPOSITION TO SUMMARY</b>
	)	<b>JUDGMENT</b>
vs.	)	
	)	
SUNRIDER CORP., dba SUNRIDER	)	
INTERNATIONAL, and TEI FU CHEN,	)	Civil No. 960400174
	)	
Defendants.	)	Judge Howard H. Maetani

---

COMES NOW the Plaintiff, JANET PETERSON, by and through her counsel of record Thomas W. Seiler of the firm of ROBINSON, SEILER & GLAZIER, LC, and replies to Defendants' Memorandum in Opposition to Summary Judgment as follows:

**MATERIAL FACTS AS TO WHICH DEFENDANTS ASSERT A GENUINE  
ISSUE OF FACT EXISTS**

8. It is undisputed that there has been no document signed by Mrs. Peterson, nor by her deceased husband, to modify Exhibit A. (See paragraph 3 of the Affidavit of Janet

## **ARGUMENT**

Defendant's Memorandum in Opposition to Summary Judgment misstates the basic points of Mrs. Peterson's Memorandum of Points and Authorities in support of her Motion for Summary Judgment. The Argument section of Mrs. Peterson's Memorandum contains three points, the third of which contains two sub-points.

### **Enforceable Contract**

Mrs. Peterson's first point is the 1976 agreement (hereafter referred to as Exhibit A) between Lloyd D. Peterson and NaturaLife is a valid, enforceable contract. Mrs. Peterson's Memorandum establishes that Exhibit A meets each of the elements of a contract, and should therefore be enforced by the Court. Defendant's Memorandum in Opposition to Summary Judgment does not contest, or even mention, Mrs. Peterson's first point.

### **NaturaLife is Sunrider**

Mrs. Peterson's second point is Sunrider is bound by Exhibit A since Sunrider is the same company as NaturaLife International, Inc. Mrs. Peterson's Memorandum explains that in 1982 the Defendant Tei Fu Chen acquired NaturaLife International, Inc. by entering into a Stock Sale Agreement with the sole shareholders of NaturaLife International, Inc., Kenneth A. Murdock and George T. Murdock, and then shortly thereafter changed the name of the

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*[Signature]*

JANET PETERSON, )  
)  
Plaintiff, )  
vs. )  
)  
SUNRIDER CORP., dba SUNRIDER )  
INTERNATIONAL, and TEI FU CHEN, )  
)  
Defendants. )

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN OPPOSITION  
TO DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT AND TO  
DISMISS**

Civil No. 960400174

Judge Howard H. Maetani

1

is derived primarily from the introduction of other persons into the sales device or plan rather than from the sale of goods, services, or property. The Defendants' argument grossly misstates the override commission called for by Exhibit A. The override bonus (currently known as the Leadership Development Bonus) pays a Director a monthly amount which is a percentage of sales made by all qualified directors that are one, two, or three levels "downline" from the Director. If the qualified directors that are one, two, or three levels downline from the Plaintiff did not sale any product, the Plaintiff's override bonus would be zero. No matter how the Defendants wish to characterize their own Leadership Development Bonus, the monthly amount due the Plaintiff pursuant to Exhibit A is clearly based on the sale of Sunrider products.

Defendants accuse Mrs. Peterson of not being able to establish to a degree of reasonable certainty what the amount of her damages are. It is clear that the percentages and other payment formulas of Exhibit A are defined by the NaturaLife Policy Guide in effect at the time Exhibit A was executed. Neither Mrs. Peterson nor the Defendants have a copy of this NaturaLife Policy Guide, however, the 1978 NaturaLife Policy Guide which is substantively the same as the NaturaLife Policy Guide that was in effect at the time Exhibit A was executed. The percentages and payment formulas in this Policy Guide easily establish to a degree of reasonable certainty what the amount of Mrs. Peterson's damages are. Mrs. Peterson is owed by the Defendants approximately Three Thousand Five Hundred Dollars (\$3,500.00) per month, commencing with the month of December, 1994, until judgment is

monthly payment which is the subject of Exhibit A, and to which she was already entitled. Any allegation to the contrary is not supported by the evidence.

Defendants attempt to use two employment cases to show that the Exhibit A was somehow modified. Both cases are easily distinguished from the present facts simply because both cases deal with an employment contract. Gilmore v. Community Action Program, 775 P.2d 940, 942 (Utah App. 1989), deals with an at-will employment contract. Because the employment contract was at-will it could be impliedly altered. Id. Employment manuals, oral agreements, the conduct of parties, practices of a particular trade or industry, etc, can all be evidence of the alteration of an at-will employment contract. Id. The two cases cited by Defendants do not lend any strength to their argument because Exhibit A was not an employment contract, Mrs. Peterson's relationship with the Defendants has never been as an employee, and there was never an "at-will" relationship between the parties.

The terms of Exhibit A have not been modified. There has never been a meeting of the minds concerning additional terms or requirements which would modify Exhibit A; there has never been additional or new consideration received by Mrs. Peterson that would support a modification of Exhibit A; and there is no writing signed by Mrs. Peterson modifying the agreement (Exhibit A).

Exhibit A is not void or illegal against public policy or any principles of state and federal law. The Defendants try to argue that Exhibit A is a plan under which one person gave consideration to another person in exchange for the right to receive compensation which