

2008

# Young Living Essential Oils, LC, a Utah limited liability company v. Carlos Marin : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

\* \* \* \*

YOUNG LIVING ESSENTIAL OILS,  
INC.,

Plaintiff/Appellee,

vs.

CARLOS MARIN,

Defendant/Appellant.

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BRIEF OF APPELLANT

Case No. 20080624-CA

\* \* \* \*

DEFENDANT'S APPEAL FROM FINAL ORDERS OF THE FOURTH  
JUDICIAL DISTRICT COURT, THE HONORABLE SAMUEL MCVEY PRESIDING

\* \* \* \*

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PUBLISHED DECISION REQUESTED

FILED  
UTAH APPELLATE COURTS

MAR 04 2009

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### STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this appeal by virtue of Utah Code Ann. § 78B-4-102(2)(j).

### STATEMENT OF ISSUES AND STANDARDS OF REVIEW

a. **Issue:** Whether the trial court erred in granting plaintiff's motion for partial summary judgment based upon its conclusion that, as a matter of law, plaintiff did not breach the implied covenant of good faith and fair dealing inherent in the contractual relationship between the parties when it failed to cooperate in providing Mr. Marin with the marketing tools which were necessary in order for Mr. Marin to meet his performance guarantees. This issue was preserved for review in Mr. Marin's Response to Motion for Partial Summary Judgment and Counter-Motion for Partial Summary Judgment. (R. 0119)

**Standard of review:** Review of the district court's grant of summary judgment is for correctness, according no deference to that court's legal conclusions. *Brown v. Moore*, 973 P.2d 950, 953 (Utah 1998).

**Determinative law:** *Rawson v. Conover*, 2001 UT 24, 20 P.3d 876; *Brown v. Moore*, 973 P.2d 950 (Utah 1998); *St. Benedict's Dev. v. St. Benedict's Hosp.*, 811 P.2d 194 (Utah 1991); and *Andalex Resources, Inc. v. Myers*, 871 P.2d 1041 (Utah App. 1994).

b. **Issue:** Whether the trial court erred in the amount of attorney fees awarded to plaintiff. This issue was preserved in Defendant's Objection to Plaintiff's Proposed Final Judgment and Fee Affidavit. (R. 0499)

**Standard of review:** The standard of review on appeal of the amount of a trial court's award of attorney fees is patent error or clear abuse of discretion. *Jensen v. Sawyers*, 2005 UT 81, ¶127, 130 P.3d 325 (citing *Valcarce v. Fitzgerald*, 961 P.2d 305, 316 (Utah 1998)).

**Determinative law:** *Jensen v. Sawyers*, 2005 UT 81, 130 P.3d 325; *Foote v. Clark*, 962 P.2d 54 (Utah 1998); *Dixie State Bank v. Bracken*, 764 P.2d 985 (Utah 1988); and *Gardner v. Madsen*, 949 P.2d 785 (Utah App. 1997).

c. **Issue:** Whether the trial court erred in awarding to plaintiff as "costs" its expenditures for photocopies, overnight mail, courier, postage, online research, etc. This issue was preserved in Defendant's Objection to Plaintiff's Proposed Final Judgment and Fee Affidavit. (R. 0499)

**Standard of review:** A trial court's decision to award the prevailing party costs is reviewed under an abuse of discretion standard. *Jensen v. Sawyers*, 205 UT 81, ¶ 140, 130 P.3d 325 (citing *Young v. State*, 2000 UT 91, ¶ 4, 16 P.3d 549).



**Determinative law:** Rule 54(d), *Utah Rules of Civil*

*Procedure; Frampton v. Wilson*, 605 P.2d 771 (Utah 1980).

#### **DETERMINATIVE RULE**

Rule 56(c), *Utah Rules of Civil Procedure*

(c) *Motion and proceedings thereon.* The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions of 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 judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

#### **STATEMENT OF THE CASE**

##### **I. Nature of the Case**

This is an appeal from final orders of the Fourth Judicial District Court of Utah County.

##### **II. Statement of Facts**

1. Plaintiff is in the business of manufacturing and selling therapeutic grade essential oils and wellness supplements. Historically, plaintiff has sold its products through a network of individuals who are for the most part practitioners of alternative medicine, massage therapists, and quasi-naturopath non-licensed wellness enthusiasts. When plaintiff's representatives first contacted Mr. Marin, they represented to Mr. Marin that they desired to increase their company's sales volume using a mainstream network marketing model, i.e.,

marketing their products through traditional network marketing sales representatives directly to the individual consumer. Plaintiff's representatives were aware of the fact that Mr. Marin had previously built a global network of more than 500,000 distributors for Amway Corporation using a mainstream network marketing model. (R. 0126)

2. The parties entered into a Field Advisor to Executive Board Distributor Agreement on January 12, 2005 (hereinafter the "Agreement"). (R. 0090)

3. Paragraph 18 of the Agreement provides that "there are no representations, warranties, or other agreements between the Parties in connection with the subject matter hereof except as specifically set forth herein." (R. 0082)

4. Under paragraph 4 of the Agreement, plaintiff agreed to pay Mr. Marin advance payments of:

\$25,000 on execution of the Agreement (12 January 2005);

\$25,000 on 15 February 2005;

\$25,000 on 15 March 2005; and

\$25,000 on 15 April 2005.

(R. 0089)

5. Under paragraph 3.4 of the Agreement, Mr. Marin agreed that he would meet the following performance guarantees of cumulative "auto ship" sales volume by the specified dates:

\$5,000 by 15 February 2005;

\$30,000 by 15 March 2005;  
\$100,000 by 15 April 2005;  
\$300,000 by 15 May 2005;  
\$600,000 by 15 June 2005; and  
\$900,000 by 15 July 2005.

(R. 0089)

6. Paragraph 6.1 of the Agreement provides for Mr. Marin's payment of plaintiff's "legal fees" arising from "contravention ... of any of the terms and conditions imposed on [Mr. Marin] pursuant to this Agreement." (R. 0085)

7. On January 12, 2005, in connection with the execution of the Agreement, plaintiff paid a \$25,000 advance to Mr. Marin.  
(R. 0368)

8. By February 15, 2005, Mr. Marin met his \$5,000 cumulative "auto ship" sales volume performance guarantee under paragraph 3.4 of the Agreement. (R. 0368)

9. Accordingly, on February 15, 2005, plaintiff paid Mr. Marin another \$25,000 advance. (R. 0368)

10. Mr. Marin was unable to meet his \$30,000 cumulative auto ship sales volume performance guarantee by March 15, 2005 in accordance with paragraph 3.4 of the Agreement. (R. 0368)

11. On March 15, 2005, plaintiff paid Mr. Marin another \$15,000 advance. (R. 0368)

12. Mr. Marin was unable to meet his April 15, 2005 performance guarantee by April 15, 2005. (R. 0368)

13. As part of its pitch to induce Mr. Marin to enter into the Agreement, plaintiff represented to Mr. Marin that plaintiff was nearing completion of a new mainstream marketing website, recruiting DVD, audio CD, and other marketing materials (hereinafter referred to as the "marketing tools"). It was clearly understood by both plaintiff and Mr. Marin that these marketing tools would be absolutely necessary in order for Mr. Marin to be able to meet his performance guarantees under the Agreement and it was represented to Mr. Marin that they would be available for use by February 1, 2005. No experienced leader in the industry would agree to the performance guarantees without having these marketing tools. (R. 0126-0125)

14. Unfortunately, while plaintiff repeatedly promised to do so, plaintiff failed to provide Mr. Marin with any of the necessary marketing tools (except for one mediocre but expensive brochure which Mr. Marin's distributors were not interested in purchasing). After plaintiff's failure to provide the marketing tools by February 1, 2005, as promised, Mr. Marin spent more than a month working on his own and in conjunction with the third party vendor hired by plaintiff, Rainmaker Consulting Group, in order expedite the delivery of the marketing tools. Mr. Marin wrote more than 20 marketing and training scripts for video and

web based content. On two occasions, Mr. Marin traveled to St. Augustine, Florida to work with Rainmaker Consulting shooting marketing videos. To Mr. Marin's knowledge, the videos have never been completed. (R. 0125)

15. It was only based upon plaintiff's representations and the parties' mutual understanding that these marketing tools were almost ready and would be provided in a timely manner, that Mr. Marin agreed to the performance guarantees contained in paragraph 3.4 of the Agreement. Without the marketing tools there was virtually no possibility that Mr. Marin could have met his performance guarantees. (R. 0125)

16. On or about February 7, 2005, after plaintiff failed to provide the marketing tools as promised, Mr. Marin contacted Gary Young, plaintiff's Chief Executive Officer, and David Stirling, plaintiffs' Chief Operating Officer, with his growing concerns about his ability to meet his performance guarantees. Mr. Young and Mr. Stirling acknowledged that plaintiff had failed to perform as promised, assured Mr. Marin that his inability to satisfy his performance guarantees would not affect his receipt of the advance payment of \$25,000 due February 15, 2005, and expressed their confidence that the marketing tools would be ready for Mr. Marin's use by mid-February to early March 2005. (R. 0125-0124)

17. On or about March 16, 2005, Steve Bentley, plaintiff's Chief Financial Officer, informed Mr. Marin that due to Mr. Marin's failure to meet his March 15, 2005, performance guarantee, plaintiff was considering withholding further payment to Mr. Marin under the Agreement. In response, Mr. Marin made it very clear to Mr. Bentley that his failure to satisfy his performance guarantee was the unavoidable result of plaintiff's failure to provide the promised marketing tools, that he could and would meet his performance guarantees when the tools were provided, and that he expected plaintiff to continue making payment to him in accordance with the terms of the Agreement. Mr. Bentley acknowledged that plaintiff had failed to perform as promised, represented that plaintiff anticipated that its website would be completed within approximately two weeks, and stated that plaintiff would be making a partial \$15,000 payment to Mr. Marin. (R. 0124)

18. On April 12, 2005, Mr. Marin spoke again with Gary Young regarding plaintiff's failure to provide the marketing tools. Mr. Young responded by telling Mr. Marin that he would "get to the bottom" of the problem and see what he could do. (R. 0124-0123)

19. Despite its acknowledgment that it had failed to provide Mr. Marin with the marketing tools which he needed to do his job, and despite its requests for Mr. Marin to remain patient while it

continued in its efforts to provide the marketing tools, plaintiff failed to pay Mr. Marin \$10,000 of the advance payment due March 15, 2005 in accordance with paragraph 4 of the Agreement and failed to make any of the \$25,000 advance payment due to be paid to Mr. Marin on April 15, 2005. (R. 0123)

20. On April 26, 2005, Mr. Marin telephoned Mr. Stirling regarding plaintiff's failure to provide the promised marketing tools. Mr. Stirling again assured Mr. Marin that they would be provided soon and again requested that Mr. Marin be patient. (R. 0123)

21. On May 3, 2007, Mr. Stirling notified Mr. Marin that he had received an e-mail from Rainmaker Consulting (i.e., "John's folks") "which indicated they are making progress" on the website. Mr. Stirling asked Mr. Marin to "hold tight." Thus, 49 days after plaintiff stopped making payments to Mr. Marin in accordance with the Agreement, plaintiff acknowledged that it had still not provided Mr. Marin with the marketing tools which were absolutely essential for him to be able to do his job and requested his continued patience. (R. 0123)

22. On or about June 8, 2005, when plaintiff had still not provided any of the marketing tools which Mr. Marin needed in order to do his job, Mr. Marin spoke with Mr. Young and informed him that he believed he had been patient long enough in waiting for the repeatedly promised marketing tools and that he could no

longer afford to continue to his contractual relationship with plaintiff. (R. 0123-0122)

23. The Complaint commencing this action was filed on July 26, 2006. (R. 0023) Mr. Marin filed his Answer on December 15, 2006 (R. 0057) and an Amended Answer on December 18, 2006. (R. 0063)

24. Plaintiff filed its Motion for Partial Summary Judgment on March 21, 2007. (R. 0105) Mr. Marin filed his Response to Motion for Partial Summary Judgment and Counter-Motion for Partial Summary Judgment on April 4, 2007. (R. 0111)

25. Following a hearing held October 1, 2007, the trial court issued its Order granting plaintiff's Motion for Partial Summary Judgment and denying Mr. Marin's Counter-Motion for Partial Summary Judgment. (R. 0462)

26. On May 27, 2008, plaintiff filed a Motion for Order of Voluntary Dismissal of Plaintiff's Second, Third, Fourth, Fifth and Sixth Cause of Action. (R. 0495) On that same date, plaintiff submitted a Proposed Final Judgment and an Affidavit of Attorneys' Fees and Costs. (R. 0505)

27. Mr. Marin served his Objection to Plaintiff's Proposed Final Judgment and Fee Affidavit on June 7, 2008. (R. 0499)

28. On June 12, 2008, the trial court entered a Final Judgment in which it awarded plaintiff \$61,362.43 in compensatory damages and (despite the fact that this was a relatively simple



case in which neither party conducted any discovery and which was decided on summary judgment) awarded plaintiff \$45,502.43 in costs and attorney fees. (R. 0505)

29. Mr. Marin filed his Notice of Appeal on July 14, 2008. (R. 0514)

#### SUMMARY OF ARGUMENT

The trial court erred in granting plaintiff's Motion for Partial Summary Judgment based the undisputed fact that Mr. Marin failed to meet his "performance guarantees." In opposing plaintiff's motion, Mr. Marin does not deny that he failed to meet his performance guarantees. However, it is Mr. Marin's position that plaintiff's prior material breach of its obligation of good faith and fair dealing excused Mr. Marin from further performance under the Agreement. See, e.g., *Holbrook v. Master Protection Corp.*, 883 P.2d 295, 301 (Utah App. 1994) (one party's material breach excuses the other party's further performance). Specifically, Mr. Marin contends that plaintiff's failure to provide him with the marketing tools which he needed in order to satisfy his performance guarantees constitutes a prior material breach of plaintiff's obligation to cooperate with Mr. Marin and to act consistently with Mr. Marin's justified expectations and with the parties' agreed common purpose, thereby excusing Mr. Marin from his performance guarantees. See *Rawson v. Conover*, 2001 UT 24, ¶ 44, 20 P.3d 876 (a party must act consistently with

the agreed common purpose and the justified expectations of the other party); and *PDQ Lube Center, Inc. V. Huber*, 949 P.2d 792, 798 (Utah App. 1997) ("one party may not render it difficult or impossible for the other to continue performance and then take advantage of the nonperformance he has caused").

The trial court abused its discretion in the amount of attorney fees awarded to plaintiff. This is a very simple breach of contract case in which neither party conducted any discovery and which was decided on summary judgment. Nevertheless, the trial court awarded plaintiff \$43,903 in attorney fees. In determining the amount of a reasonable fee, a trial court may consider, *inter alia*, "the difficulty of the litigation, [and] the efficiency of the attorneys in presenting the case..." *Dixie State Bank v. Bracken*, 764 P.2d 985, 988 (Utah 1988). Mr. Marin respectfully submits that if plaintiff spent the kind of time necessary to incur \$43,903 in attorney fees, it did so inefficiently and Mr. Marin should not be required to pay for that kind of inefficiency.

Additionally, a party requesting attorney fees is required to categorized the time and fees expended on successful claims for which fees may be awarded, unsuccessful claims for which fees might have been awarded if the claims had been successful, and claims for which there is no entitlement to attorney fees. *Jensen v. Sawyers*, 2005 UT 81, ¶132, 130 P.3 325 (quoting *Foot*

*v. Clark*, 962 P.2d 54, 54 (Utah 1998). In the case at bar, plaintiff failed to categorized its fee request.

Moreover, plaintiff was awarded thousands of dollars in attorney fees which it incurred in connection with: "Defendant's Objection to Plaintiff's Proposed Form of Order" and "Plaintiff's Motion to Reconsider." However, plaintiff did not prevail on either matter (R. 392 & 448) and should, therefore, not be entitled to recover any attorney fees incurred in litigating them. See *Gardner v. Madsen*, 949 P.2d 785, 792 (Utah Ct. App. 1997) (trial court should make adjustments to fee request so that the prevailing party "does not recover fees attributable to issues on which he did not prevail").

The trial court also abused its discretion in awarding plaintiff "costs" in the amount of \$1,599.43, all but \$235.00 of which were for photocopies, overnight mail, courier, postage, online research, etc. "Costs," as used in Rule 54(d)(1), URCP, means those fees which are required to be paid to the court and to witnesses, and which are authorized by statute to be included in a judgment. *Frampton v. Wilson*, 605 P.2d 771 (Utah 1980). There is no statute which would authorize plaintiff to recover as costs its expenditures for "photocopies, overnight mail, courier, postage, and online research."

## ARGUMENT

### **I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THERE IS AN ISSUE OF FACT AS TO WHETHER PLAINTIFF BREACHED ITS OBLIGATION OF GOOD FAITH AND FAIR DEALING.**

Whether there has been a breach of the covenant of good faith and fair dealing is a factual issue, generally inappropriate for decision as a matter of law. *Republic Group, Inc. v. Won-Door Corp.*, 883 P.2d 285, 291 (Utah App. 1994). Summary judgment is appropriate only where there are no disputed material facts and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c); *Brown v. Moore*, 973 P.2d 950, 953 (Utah 1998). "Because disposition of a case by summary judgment denies the benefit of a trial on the merits, any doubt concerning questions of fact, including evidence and reasonable inferences drawn from the evidence, should be resolved in favor of the party opposing the motion." *Beehive Brick Co. v. Robinson Brick Co.*, 780 P.2d 827 (Utah App. 1988).

Plaintiff's Motion for Partial Summary Judgment is premised on Mr. Marin's breach of contract as alleged in the First Cause of Action set forth in plaintiff's Complaint. Specifically, plaintiff alleges that Mr. Marin breached the Agreement by failing to meet his "performance guarantees."

In opposing plaintiff's motion, Mr. Marin does not deny that he failed to meet his performance guarantees. However, it is Mr. Marin's position that plaintiff's failure to provide him with the

marketing tools which were necessary for him to satisfy his performance guarantees was a prior material breach of its obligation of good faith and fair dealing which excused Mr. Marin from further performance under the Agreement, and specifically excused him from his performance guarantees. See, e.g., *Holbrook v. Master Protection Corp.*, 883 P.2d 295, 301 (Utah App. 1994) (one party's material breach excuses the other party's further performance).

Under Utah law, an implied covenant of good faith and fair dealing inheres to all contractual relationships. See, e.g., *Rawson v. Conover*, 2001 UT 24, ¶ 44, 20 P.3d 876. In order to comply with its obligation of good faith and fair dealing,

“... a party must act consistently ‘with the agreed common purpose and the justified expectations of the other party.’ In analyzing for compliance with the covenant, both the contract language and the course of dealings between the parties should be considered to determine the parties’ purpose, intentions, and expectations.”

*Id.* (citations omitted). Particularly applicable to the case at bar, this means that “one party may not render it difficult or impossible for the other to continue performance and then take advantage of the nonperformance he has caused.” *PDQ Lube Center, Inc. v. Huber*, 949 P.2d 792, 798 (Utah App. 1997) (quoting *Zion’s Properties, Inc. v. Holt*, 538 P.2d 1319, 1321 (Utah 1975); see also *Gregorson v. Jensen*, 617 P.2d 369, 373 n.9 (Utah 1980) (“... parties are obligated to cooperate with each other in good faith in the performance of a contract”); *Markham v. Bradley*, 2007 UT

App 379, ¶ 18, 173 P.3d 865 ("... one party may not render it difficult or impossible for the other to continue performance and then take advantage of the non-performance he has caused"); and 17A *Am Jur 2d Contracts* § 370 ("[W]henever the cooperation of the promisee is necessary for the performance of the promise, there is a condition implied that the cooperation will be given" ).

In his Affidavit submitted in opposition to plaintiff's Motion for Partial Summary Judgment, Mr. Marin offered the following testimony in support of his claim that plaintiff breached its covenant of good faith and fair dealing:

....

4. In order to induce me to enter into the Agreement, plaintiff represented to me that it was nearing completion of a new mainstream marketing website, recruiting DVD, audio CD, and other marketing materials (hereinafter referred to as the "marketing tools"). It was clearly understood by both plaintiff and myself that these marketing tools would be absolutely necessary in order for me to be able to meet my performance guarantees under the Agreement and it was represented to me that they would be available for use by February 1, 2005. No experienced leader in this industry would agree to these performance guarantees without having these marketing tools.

5. Unfortunately, while plaintiff repeatedly promised to do so, plaintiff failed to provide me with any of the necessary marketing tools (except for one mediocre but expensive brochure which my distributors were not interested in purchasing). After plaintiff's failure to provide the marketing tools by February 1, 2005, as promised, I spent more than a month working on my own and in conjunction with the third party vendor hired by plaintiff, Rainmaker Consulting Group, in order expedite the delivery of the marketing tools. I wrote more than 20 marketing and training scripts for video and web based content. On two occasions, I traveled to St. Augustine, Florida to work with Rainmaker Consulting shooting marketing videos. To my

knowledge, the videos have never been completed.

6. It was only based upon plaintiff's representations and our mutual understanding that these marketing tools were almost ready and would be provided in a timely manner, that I agreed to the performance guarantees contained in paragraph 3.4 of the Agreement. Without the marketing tools there was virtually no possibility that I could have met the performance guarantees.

7. On or about February 7, 2005, after plaintiff failed to provide the marketing tools as promised, I contacted Gary Young, plaintiff's Chief Executive Officer, and David Stirling, plaintiffs' Chief Operating Officer, with my growing concerns about my ability to meet the performance guarantees. Mr. Young and Mr. Stirling acknowledged that plaintiff had failed to perform as promised, assured me that my inability to satisfy the performance guarantees would not affect my receipt of the advance payment of \$25,000 due February 15, 2005, and expressed their confidence that the marketing tools would be ready for my use by mid-February to early March 2005.

8. On or about March 16, 2005, Steve Bentley, plaintiff's Chief Financial Officer, informed me that due to my failure to meet the March 15, 2005 performance guarantee, plaintiff was considering withholding further payment to me under the Agreement. In response, I made it very clear to Mr. Bentley that my failure to satisfy the performance guarantee was the unavoidable result of plaintiff's failure to provide the promised marketing tools, that I could and would meet my performance guarantees when the tools were provided, and that I expected plaintiff to continue making payment to me in accordance with the terms of the Agreement. Mr. Bentley acknowledged that plaintiff had failed to perform as promised, represented that plaintiff anticipated that its website would be completed within approximately two weeks, and stated that plaintiff would be making a partial \$15,000 payment to me.

9. On April 12, 2005, I spoke again with Gary Young regarding plaintiff's failure to provide the marketing tools. Mr. Young responded by telling me that he would "get to the bottom" of the problem and see what he could do.

10. Despite its acknowledgment that it had failed to provide me with the marketing tools which I needed to do my job, and despite its requests that I remain patient while it

continued in its efforts to provide the marketing tools, plaintiff failed to pay me \$10,000 of the advance payment due March 15, 2005 in accordance with paragraph 4 of the Agreement and failed to make any of the \$25,000 advance payment due to be paid to me on April 15, 2005.

11. On April 26, 2005, I telephoned Mr. Stirling regarding plaintiff's failure to provide the promised marketing tools. Mr. Stirling again assured me that they would be provided soon and again requested my patience.

12. On May 3, 2007, Mr. Stirling notified me that he had received an e-mail from Rainmaker Consulting (i.e., "John's folks") "which indicated they are making progress" on the website. Mr. Stirling asked me to "hold tight". A copy of the e-mail is attached hereto. Thus, 49 days after plaintiff stopped making payments to me in accordance with the Agreement, plaintiff acknowledged that it had still not provided me with the marketing tools which were absolutely essential for me to be able to do my job and again requested my continued patience.

13. On or about June 8, 2005, when plaintiff had still not provided any of the marketing tools which I needed in order to do my job, I spoke with Mr. Young and informed him that I believed I had been patient long enough in waiting for the repeatedly promised marketing tools and that I could no longer afford to continue to my contractual relationship with plaintiff.

(R. 0126-0122)

Mr. Marin's respectfully submits that his testimony is sufficient to establish issues of fact as to whether plaintiff failed to act consistently with the parties' agreed upon common purpose of marketing and distributing plaintiff's product through a mainstream network marketing model, whether plaintiff failed to act consistently with Mr. Marin's justified expectation that plaintiff would provide Mr. Marin with the marketing tools necessary in order for him to be able to satisfy his performance



guarantees, and whether plaintiff made it difficult or impossible for Mr. Marin to meet his performance guarantees and is now attempting to take advantage of the non-performance which it caused.

The trial court, however, rejected Mr. Marin's defense on the basis that "[i]t is well settled that the implied covenant of good faith and fair dealing cannot be used to impose new, independent duties in a written agreement."<sup>1</sup> The trial court also reasoned that the parol evidence rule barred the testimony which Mr. Marin offered to prove his claim. Mr. Marin respectfully submits that the trial court's conclusions are erroneous.

**(A) Mr. Marin is not attempting to impose new, independent duties into the parties' Agreement.**

The trial court was correct in recognizing that "[i]t is well settled that the implied covenant of good faith and fair dealing cannot be used to impose new, independent duties in a written agreement."<sup>2</sup> See *Brown v. Moore*, 973 P.2d 950, 955 (Utah 1998). However, it is equally well settled that a breach of the covenant of good faith and fair dealing may result from an obligation, express or implied, which arises not from the language of the contract, but from the course of dealings and

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<sup>1</sup>(R. 456)

<sup>2</sup>(R. 456)

conduct of the parties. *Brown, supra*, 973 P.2d at 954; *St. Benedicts Dev. v. St. Benedicts Hosp.*, 811 P.2d 194, 200 (Utah 2001); and *Myers, supra*, 871 P.2d at 1048.

In *Brown*, the Supreme Court of Utah explained that “[i]n determining whether a party has breached the covenant of good faith and fair dealing, **we are not limited to an examination of the express contractual provisions; we will also consider the course of dealing between the parties.**” 973 P.2d at 954

(citations omitted) (emphasis added). The *Brown* plaintiffs had purchased all of the stock of Western Heritage Thrift and Loan pursuant to an agreement which they entered into with the Utah Department of Financial Institutions (DFI). Because the plaintiffs were not infusing new capital sufficient to meet the minimum requirements under Utah law, “DFI told plaintiffs that the necessary additional capital could be supplied by the Utah Industrial Loan Guaranty Corporation’s (ILGC) purchase of \$2,000,000 of ‘net worth certificates’ from Western Heritage, which DFI would recognize as cash equivalents for accounting purposes in meeting capitalization requirements.” 973 P.2d at 952. Approximately two years later, the ILGC became insolvent and, as a consequence, Western Heritage became a failing depository institution because it was no longer able to use the net worth certificates in calculating its operating capital. Following DFI’s seizure of Western Heritage due to its failure to

maintain adequate capital, the plaintiffs filed suit claiming, inter alia, that "DFI breached the implied covenant of good faith and fair dealing by taking possession of Western Heritage before the lapse of a period sufficient to permit them to recover their investment. Plaintiffs assert[ed] that ... DFI was obligated to continue crediting the ILGC net worth certificates toward capital requirements imposed by State law." 973 P.2d at 954.

The trial court granted summary judgment in DFI's favor and the Supreme Court affirmed, explaining the analytical framework for its decision as follows:

In this case, **an examination of the contract language reveals no express obligation** on the part of DFI to allow plaintiffs to operate Western Heritage for a sufficient period to recoup their investment. Nor is there any language which guarantees that DFI will continue to count the net worth certificates toward capital requirements for any specific amount of time... **Thus, if plaintiffs are to defeat summary judgment, the course of dealings between the parties must disclose some other obligation, express or implied,** on the part of DFI which could give rise to a breach of the covenant of good faith and fair dealing.

*Id.* Because the plaintiffs were unable to do so, the Supreme Court affirmed the summary judgment order:

"Because no express or implied obligations of or representations by DFI indicated that DFI would recognize the net worth certificates regardless of the ILGC's financial condition, DFI's eventual decision to discontinue doing so cannot form the basis of a breach of the covenant of good faith and fair dealing. **A contrary holding would 'establish new, independent rights or duties not agreed upon by the parties.'**"

973 P.2d at 955 (citation omitted) (emphasis added).

In short, the *Brown* court clearly recognized that a cause of action for breach of the implied covenant of good faith and fair dealing may arise from obligations or representations, express or implied, which are not found in the language of the contract itself. See also, *St. Benedicts Dev.*, *supra*, 811 P.2d at 200 (the Court examined the "parties' conduct" in finding that the plaintiff had stated a claim for breach of the implied covenant of good faith and fair dealing); and *Myers*, *supra*, 871 P.2d at 1048 (parties' "course of dealings" failed to establish a breach of the implied covenant of good faith and fair dealing).

In the case at bar, Mr. Marin respectfully submits that his testimony regarding the parties' course of dealing and conduct is sufficient to establish issues of fact as to: (a) whether plaintiff failed to act consistently with the parties' agreed upon common purpose of marketing and distributing plaintiff's product through a mainstream network marketing model; (b) whether plaintiff failed to act consistently with Mr. Marin's justified expectation that plaintiff would provide Mr. Marin with the marketing tools necessary in order for him to be able to satisfy his performance guarantees; and (c) whether plaintiff failed to cooperate in providing the necessary marketing tools thereby making it difficult or impossible for Mr. Marin to meet his performance guarantees and is now attempting to take advantage of the non-performance which it caused.

Because there is a dispute as to these material issues of fact, the trial court's Order granting Plaintiff's Motion for Partial Summary Judgment was improper and should be reversed.

**(B) The parol evidence rule is not implicated because the implied covenant of good faith and fair dealing inheres to all contractual relationships.**

The trial court also concluded that Mr. Marin's claim for breach of the implied covenant of good faith and fair dealing

"necessarily implicates the parol evidence rule. It is well settled that 'the [parol evidence] rule operates, in the absence of fraud or other invalidating causes, to exclude evidence of contemporaneous conversations, representations, or statements offered for the purpose of varying or adding to the terms of an *integrated* contract.'"<sup>3</sup>

Mr. Marin respectfully submits that trial court's conclusion is erroneous.

The covenant of good faith and fair dealing inheres in every contract. See, e.g., *Markham v. Bradley, supra*, 173 P.3d at 871. Because the covenant was already part of the contract at issue in this case, it follows that Mr. Marin's testimony in support of his claim for breach of the covenant was not "offered for the purpose of varying or adding to the terms of" the contract. Therefore, the trial court erred in concluding that the parol evidence rule barred Mr. Marin's testimony.

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<sup>3</sup>(R. 456) (trial court's emphasis).

**II. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING ATTORNEY FEES OF \$43,903 IN THIS RELATIVELY SIMPLE BREACH OF CONTRACT CASE IN WHICH NEITHER PARTY CONDUCTED ANY DISCOVERY AND WHICH WAS DECIDED ON SUMMARY JUDGMENT.**

The trial court awarded plaintiff attorney fees in the amount of \$43,903. Mr. Marin respectfully submits that the trial court abused its discretion in awarding such an excessive amount of fees. This is a very simple breach of contract case which was decided on summary judgment. Neither party conducted any discovery of any kind.

Calculation of the amount of a reasonable attorney fee is within the sound discretion of the trial court. *Dixie State Bank v. Bracken*, 764 P.2d 985, 988 (Utah 1988). In determining the amount of a reasonable fee, the trial court may consider, inter alia, "the difficulty of the litigation, [and] the efficiency of the attorneys in presenting the case..." *Id.* (quoting *Cabrera v. Cottrell*, 694 P.2d 622, 625 (Utah 1983)). This was not a difficult case. The only issue which the trial court was required to determine in order to grant summary judgment was whether there is a genuine issue of fact as to whether plaintiff's prior material breach of the implied covenant of good faith and fair dealing excused Mr. Marin's performance under the Agreement. This was a relatively simple issue which should have required very little attorney time to address. It certainly should not have required tens of thousands of dollars. Accordingly, if plaintiff did spend that kind of time, it did so

inefficiently and Mr. Marin should not be required to pay for that kind of inefficiency.

Additionally, a party requesting attorney fees must

"categorize the time and fees expended for 'successful claims for which there may be an entitlement to attorney fees, (2) unsuccessful claims for which there may be an entitlement to attorney fees had the claims been successful, and (3) claims for which there is no entitlement to attorney fees.'"

*Jensen v. Sawyers*, 2005 UT 81, ¶132, 130 P.3d 325 (quoting *Foote v. Clark*, 962 P.2d 54, 54 (Utah 1998)). In the case at bar, plaintiff failed to categorize its fee request. (R. 0492)

Moreover, plaintiff was awarded thousands of dollars for the attorney fees which it incurred in connection with:

a. Defendant's Objection to Plaintiff's Proposed Form of Order; and

b. Plaintiff's Motion to Reconsider.

However, plaintiff did not prevail on either matter (R. 392 & 448) and should, therefore, not be entitled to recover any attorney fees incurred in litigating them. See *Foote v. Clark*, 962 P.2d 52, 57 (Utah 1998) ("the court should not reimburse counsel for time spent pursuing ungrounded and infeasible theories of recovery"); and *Gardner v. Madsen*, 949 P.2d 785, 792 (Utah Ct. App. 1997) (trial court should make adjustments to fee request so that the prevailing party "does not recover fees attributable to issues on which he did not prevail").

**III. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING AS COSTS PLAINTIFF'S EXPENDITURES FOR PHOTOCOPIES, OVERNIGHT MAIL, COURIER, POSTAGE, ONLINE RESEARCH, ETC.**

The trial court also awarded plaintiff "costs" in the amount of \$1,599.43. However, with the exceptions of its \$155 filing fee and \$80 service of process fee, the "costs" which plaintiff was awarded are not taxable "costs" within the meaning of Rule 54(d)(1) of the Utah Rules of Civil Procedure. "Costs," as used in subdivision (d)(1), means those fees which are required to be paid to the court and to witnesses, and which are authorized by statute to be included in a judgment. *Frampton v. Wilson*, 605 P.2d 771 (Utah 1980). There is no statute which would authorize plaintiff to recover as costs its expenditures for photocopies, overnight mail, courier, postage, and online research.

Additionally, plaintiff's "Exhibit B Costs" lists two expenditures of \$80 each and one expenditure for \$130 which all represent that they are for "Marin service of process - Service of Process, Miami, Florida." Mr. Marin is unaware of any legitimate reason why three service of process charges would have been required.

**CONCLUSION**

Based on the foregoing, Mr. Marin respectfully requests that the trial court's March 26, 2008 Order granting plaintiff's Motion for Partial Summary Judgment be reversed, that the Final Judgment be vacated, and that this case be remanded to the trial



court for further proceedings consistent with this Court's decision.

DATED this 3<sup>rd</sup> day of March 2009.

  
\_\_\_\_\_  
Scott B. Mitchell  
Attorney for Appellant

**MAILING CERTIFICATE**

Undersigned certifies that two copies of the foregoing were mailed this 3<sup>rd</sup> day of March 2009 via first class U.S. Mail, postage prepaid, to the following:

Barnard N. Madsen  
Scott D. Preston  
FILLMORE SPENCER, LC  
3301 North University Avenue  
Provo, Utah 84604

  
\_\_\_\_\_

## Addendum 1

**FILED**  
✓

MAR 23 2008

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

Barnard N. Madsen (4626)  
Scott D. Preston (11019)  
FILLMORE SPENCER LLC  
3301 North University Avenue  
Provo, Utah 84604  
Telephone: 426-8200  
Fax: 426-8208

Attorneys for Plaintiff

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

**UTAH COUNTY, PROVO DEPARTMENT**

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YOUNG LIVING ESSENTIAL OILS, INC.,  
a Utah corporation,

Plaintiff,

vs.

CARLOS MARIN, an individual,

Defendant.

**ORDER**

Case No. 060402237

Judge Samuel McVey  
Division 1

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Plaintiff Young Living Essential Oils, LC ("Plaintiff") is a Utah limited liability company. Defendant Carlos Marin ("Defendant") is an individual who resides in Miami, Florida. The matter is before the Court on the parties' cross-motions for partial summary judgment.

**I. Undisputed Material Facts**

The following undisputed facts are taken from the parties' pleadings with citations to the record omitted.

### **A. Valid Contract**

After negotiations, Plaintiff, a Utah corporation, executed a written agreement (“Agreement”) with Defendant on 12 January 2005.

In their Agreement, Defendant expressly represented and warranted that he had “significant experience as a Distributor/Leader”, had “numerous contacts with potential Distributor/Leaders” whom he could “bring to the Company and sign as new distributors with the Company”, and had “successful, favorable experience in providing Services such as the duties as contemplated herein.”

Paragraph 18, the last paragraph of their Agreement directly above the signature blocks, is labeled “Entire Agreement” (underline in original) and states in part: “there are no representations, warranties, or other agreements between the Parties in connection with the subject matter hereof except as specifically set forth herein.”

### **B. Plaintiff’s Obligations**

Under paragraph 4 of their Agreement, Plaintiff agreed to pay Defendant advance payments of

\$25,000 on execution of the Agreement (12 January 2005);

\$25,000 on 15 February 2005;

\$25,000 on 15 March 2005, and

\$25,000 on 15 April 2005.

According to their Agreement, these advances and other specified performance bonuses were to help Defendant devote “all his time and attention into [sic] recruiting additional

distributors underneath him and training them” and were expressly intended “to entice [Defendant] to quickly build an organization by devoting the necessary time to it. Also, [they] will provide him with a quick resource of cash to build the business.”

Under paragraphs 4 and 4.1, these advanced amounts were to be offset by any payments due Defendant for commissions and “Fast Cash” bonuses.

Under paragraph 4.3, Plaintiff gave Defendant a product credit of \$5,000 for January 2005, and \$5,000 for February 2005 “to be used for samples in attracting new Distributor/Leaders.”

### **C. Defendant’s Obligations**

Under paragraph 3.3 of their Agreement, Defendant agreed to “devote his full time and attention to recruiting new Distributor/Leaders” to sell Plaintiff’s products.

Under paragraph 3.4 of their Agreement, Defendant agreed that he would meet the following performance guarantees of cumulative “auto ship” sales volume by the specified dates:

\$5,000 by 15 February 2005;

\$30,000 by 15 March 2005;

\$100,000 by 15 April 2005;

\$300,000 by 15 May 2005;

\$600,000 by 15 June 2005, and

\$900,000 by 15 July 2005.

Paragraph 6.1 of their Agreement provides for Defendant's payment of Plaintiff's "loss and damage" and "legal fees" arising from "contravention . . . of any of the terms and conditions imposed on [Defendant] pursuant to this Agreement."

**D. Plaintiff's Performance and Defendant's Breach**

On 12 January 2005, in connection with the execution of their Agreement, Plaintiff paid Defendant a \$25,000 advance.

On 15 February 2005, Defendant met his \$5,000 cumulative "auto ship" sales volume performance guarantee under paragraph 3.4 of his Agreement.

Accordingly, on 15 February 2005, Plaintiff paid Defendant another \$25,000 advance.

On 15 March 2005, Defendant had failed to meet his \$30,000 cumulative "auto ship" sales volume performance guarantee under paragraph 3.4 of his Agreement.

On 15 March 2005, Plaintiff paid Defendant another \$15,000 advance based on Defendant's representation that he would meet his 15 March 2005 performance guarantee of \$30,000 in cumulative sales volume by 15 April 2005.

On 15 April 2005, Defendant had failed to meet his 15 March 2005 \$30,000 (let alone his 15 April 2005 \$100,000) cumulative "auto ship" sales volume performance guarantee under paragraph 3.4 of his Agreement.

Through June 2006, Defendant had generated a grand total of less than \$36,000 in cumulative "auto ship" sales volume.

**E. Damages**

Plaintiff paid Defendant \$65,000.00 in advances.

In 2005 and 2006, Defendant earned a total of \$3,637.57 in commissions from Plaintiff.

Defendant never earned “Fast Cash” bonus payments.

Paragraph 4 of the Agreement states that the “monies advanced to [Defendant] will be offset by any payments due [Defendant] under the Fast Cash Program as calculated below. Also, these payments will be offset by any commission payments due [Defendant] each month as calculated by the standard commission payout plan. . . . If any of the advanced amounts are not repaid by the commission payouts or Fast Cash at the end of the guaranteed payments, these amounts will be deducted from any future commission payout . . . .”

## **II. Discussion**

### **A. Legal Standards**

**1. Summary Judgment.** Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. Rule 56; see also Billings ex. rel. Billings v. Union Bankers Ins. Co., 819 P.2d 803 (Utah 1991).

**2. Contract Interpretation.** “[I]nterpretation of a contract is a question of law.” Dennis Dillon Oldsmobile, GMC v. Zdunich, 668 P.2d 557, 561 (Utah 1983), citing Morris v. Mountain States Tel. & Tel. Co., 658 P.2d 1199 (Utah 1983). “A completely integrated agreement must be interpreted on its face.” Ford v. Am. Express Fin. Advisors, Inc., 98 P.3d 15 ¶ 28 (Utah 2004).

**3. Material Breach Excuses Nonbreaching Party’s Further Performance.** “The law is well settled that a material breach by one party to a contract excuses further performance by the nonbreaching party.” Holbrook v. Master Protection Corp., 883 P.2d 295, 301 (Utah App.

1994), citing, Saunders v. Sharp, 840 P.2d 796, 806 (Utah App. 1992); Wright v. Westside Nursery, 787 P.2d 508, 516 (Utah App. 1990).

**4. Prejudgment Interest.** Prejudgment interest may be recovered where the damage is complete, the amount of the loss is fixed as of a particular time, and the loss is measurable by facts and figures. Cornia v. Wilcox, 898 P.2d 1379, 1387 (Utah 1995). “Unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 10% per annum.” Utah Code Ann. § 15-1-1 (2006).

**B. Elements of Proof for a Breach of Contract Claim**

To prevail on its breach of contract claim, Plaintiff must prove (1) a valid contract, (2) performance by Plaintiff, (3) breach by Defendant, and (4) damages. Bair v. Axiom Design, L.L.C., 20 P.3d 388, 392 ¶ 14 (Utah 2001).

Each of these elements is undisputed based on the parties’ submissions.

**C. Defendant’s Claims**

However, Defendant claims that his performance was excused because of Plaintiff’s prior material breach of an oral term by failing to provide “marketing tools” by a purported deadline. Defendant also claims that his assertions concern a breach of the covenant of good faith and fair dealing. At oral argument, Defendant’s counsel argued and directed the Court’s attention to the Restatement of Contracts, Second § 216, and to FMA Financial Corp. v. Hansen Dairy, Inc., 617 P.2d 327, 329 (Utah 1980) in support of Defendant’s position that the contract was not completely integrated.



Defendant's claims are without merit.

## **1. Breach of the Covenant of Good Faith and Fair Dealing**

Defendant's claim of Plaintiff's breach of the implied covenant of good faith and fair dealing is misplaced. It is well settled that the implied covenant of good faith and fair dealing cannot be used to impose new, independent duties in a written agreement. Slicex, Inc. v. Aeroflex Colorado Springs, Inc., 2006 U.S. Dist. LEXIS 74234 n.1 ("The implied covenant of good faith and fair dealing is 'implied in contracts "to protect the express covenants or promises of the contract."' ... '[T]he doctrine of good faith and fair dealing does not serve to import new obligations into a contract. It merely controls how the obligations stated within the contract are to be performed.'").

## **2. The Parol Evidence Rule**

Defendant's claim that Plaintiff breached a purported oral term necessarily implicates the parol evidence rule. It is well settled that "the [parol evidence] rule operates, in the absence of fraud or other invalidating causes, to exclude evidence of contemporaneous conversations, representations, or statements offered for the purpose of varying or adding to the terms of an *integrated* contract." Hall v. Process Instruments & Control, 890 P.2d 1024, 1026-27 (Utah 1995) (italics in original) citing inter alia Eie v. St. Benedict's Hosp., 638 P.2d 1190, 1192 (Utah 1981); Restatement (Second) of Contracts §§ 213-14 (1981).

Under the parol evidence rule, the Court must undertake a two-step analysis. First, is the parties' Agreement integrated? Second, did Defendant claim ambiguity or fraud?

**a. Is the Agreement integrated?** "[B]efore considering the applicability of the parol

evidence rule in a contract dispute, the Court must first determine that the parties intended the writing to be an integration. To resolve this question of fact, any relevant evidence is admissible.” Hall, 890 P.2d at 1026.

Based on all the relevant evidence submitted by the parties, the Court concludes as a preliminary matter that the parties intended their Agreement to be a complete integration and the final expression of their agreement.

The Court’s determination is based in part on the express integration provision directly over Defendant’s signature in the Agreement itself which Defendant has neither disputed nor explained. Although not conclusive, the Court finds this express provision particularly persuasive.

Further, the Agreement itself sets out in detail the rights and obligations of the parties, including various deadlines for their performance. It therefore begs the question: if, as Defendant contends, the purported term that Plaintiff breached was so critical to Defendant’s performance, why was it not included in the parties’ Agreement?

Finally, the email communications between Defendant and Plaintiff submitted to the Court are devoid of any reference by Defendant to Plaintiff’s breach of this purported critical term. The Court finds particularly persuasive an email exchange between Defendant and Plaintiff’s general counsel on February 3, 2005, two days after the deadline Defendant contends that Plaintiff was to provide promised “marketing tools”. Instead of complaining about how Plaintiff’s recent breach would prevent his further performance, Defendant represented that he could expand Plaintiff’s business into several foreign markets. Indeed, In the submissions before

the Court, there is no written notice of the purported breach to give Plaintiff the contractually-required 10-day opportunity to cure.

The Court notes that oral representations of additional terms have been accepted by other courts notwithstanding an integration clause in a written agreement. But those cases are most often in the context of a construction contract where the performance of the parties manifests their agreement or consent to “extras” beyond a written agreement. Therefore, those cases are distinguishable.

Further, Defendant’s assertions of Plaintiff’s representations lack foundation as to the circumstances including who made the purported representation or representations and when such representations were made.

In sum, based on all the relevant evidence submitted by the parties, the Court rejects Defendant’s assertions that the parties intended to be bound by terms not found in their written Agreement and concludes as a threshold matter that the parties’ Agreement was integrated.

**b. Did Defendant claim ambiguity or fraud?**

Nowhere in his pleadings or submissions to this Court did Defendant claim that the parties’ Agreement was ambiguous or that it was induced by fraud. On the contrary, he contended that the Agreement was a “valid contract” but that Plaintiff was the one who breached it.

Thus, in the absence of any claim of fraud or ambiguity, Defendant’s assertions offered for the purpose of adding to the terms of the parties’ integrated Agreement must be excluded. Hall, 890 P.2d at 1026-27.

As to Plaintiff’s breach of contract claim involving a product credit Plaintiff provided to

Defendant, Defendant's order of product in excess of that credit, and the amount due to Plaintiff, the Court finds that there is a dispute as to the material facts. Therefore, the Court denies any relief to Plaintiff on that portion of its breach of contract claim at this point in the proceedings.

### **Plaintiff's Remedy**

Based on the undisputed facts and as a matter of law (and pursuant to the parties' Agreement), Plaintiff is entitled to the difference between the advances it paid to Defendant (\$65,000.00) and the commissions Defendant earned (\$3,637.57). Plaintiff is thus entitled to damages in the amount of \$61,362.43.

Because that damage amount was complete and fixed as of April 15, 2005 and is measurable by facts and figures, Plaintiff is also entitled to 10% prejudgment interest (simple not compounded) from April 15, 2005 through October 1, 2007, the date upon which the Court ruled that the Plaintiff is entitled to summary judgment.

Plaintiff is also entitled to post-judgment interest at the statutory rate commencing on the date this order is entered.

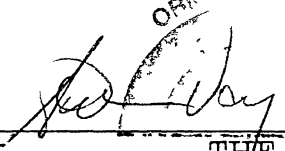
Because Plaintiff is the prevailing party herein, it is entitled under the Parties' Agreement to its attorney fees and costs. Since Plaintiff has outstanding claims that remain to be tried, the Court defers a ruling on the amount of Plaintiff's attorney fees and costs until the conclusion of the case and entry of a final judgment.

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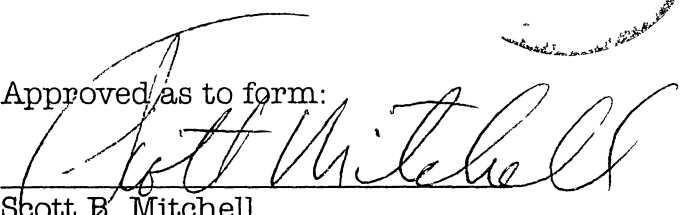
### **E. Conclusion**

Accordingly, Plaintiff's Motion for Partial Summary Judgment is GRANTED in part and DENIED in part, and Defendant's Motion for Partial Summary Judgment is DENIED.

DATED this 26 day of March, 2007.

  
\_\_\_\_\_  
THE HONORABLE SAMUEL MCVEY  
DISTRICT COURT JUDGE

Approved as to form:

  
\_\_\_\_\_  
Scott B. Mitchell  
Attorney for Defendant

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the ORDER to be faxed and mailed, first-class, postage prepaid, this 20 day of March, 2008, to the following:

Scott B. Mitchell  
SCOTT B. MITCHELL, PC  
2469 East 7000 South, Suite 204  
Salt Lake City, UT 84121  
Attorney for defendant

A handwritten signature in black ink, appearing to read "Ken B. Mitchell", is written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.

## Addendum 2

FILED  
JUN 11 2008  
4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

Barnard N. Madsen (4626)  
Scott D. Preston (11019)  
FILLMORE SPENCER LLC  
3301 North University Avenue  
Provo, Utah 84604  
Telephone: 426-8200  
Fax: 426-8208

Attorneys for Plaintiff

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

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YOUNG LIVING ESSENTIAL OILS, INC.,  
a Utah corporation,

Plaintiff,

**vs.**

CARLOS MARIN, an individual,

Defendant.

~~PROPOSED~~ FINAL JUDGMENT

Case No. 060402237

Judge Samuel McVey  
Division 1

WHEREFORE, having heard oral arguments on this matter, having considered pleadings, prior orders and argument of counsel and pursuant to the Court's Order granting Plaintiff's motion for partial summary judgment consistent with the Court's ruling on October 1, 2007, the Court hereby enters judgment as follows:

1. In favor of Plaintiff and against Defendant in the principle amount of **\$61,362.43**.
2. Prejudgment interest at 10% per year (simple not compounded) from April 15, 2005 through October 1, 2007 in the amount of **\$15,128.48**. (\$6,136.24 per year; \$16.80 per day for



two (2) years and 170 days.)

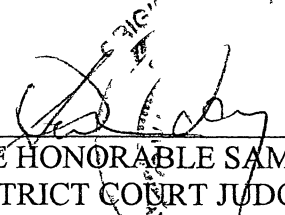
3. Post-judgment interest at the statutory rate of 5.42% from commencing March 26, 2008, the date Judgment is entered.

4. As the prevailing party and pursuant to the Parties' Agreement, Plaintiff is entitled to its attorney fees and costs in the amount of **\$45,502.43**. (See Affidavit of Attorney Fees and Costs filed concurrently with this Proposed Final Judgment.)

5. Total Judgment in the amount of **\$121,993.34**.

6. This Judgment shall be augmented in the amount of reasonable costs and attorney's fees expended in collecting said judgment by execution or otherwise as shall be established by affidavit, including the costs of appeal, pursuant to the contract at issue.

DATED this 12 day of June, 2008.

  
\_\_\_\_\_  
THE HONORABLE SAMUEL MCVEY  
DISTRICT COURT JUDGE

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the PROPOSED FINAL JUDGMENT to be mailed, first-class, postage prepaid, this 27 day of May, 2008, to the following:

Scott B. Mitchell  
SCOTT B. MITCHELL, PC  
2469 East 7000 South, Suite 204  
Salt Lake City, UT 84121  
Attorney for defendant

