

2002

Jerry Ford v. American Express Financial Advisors, Inc. : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

JERRY FORD, MARK RUSSELL, :
ROBERT P. WELCH, TRAVIS KELL, :
J. MATHEW ZUNDEL, DAVID K. :
EATON, JOHN D. FORD, ROBERT :
AAMODT, D. SCOTT BUNNELL, :
individuals, and others similarly :
situated, :

Plaintiffs and Appellees, :

vs. :

Supreme Court No. 20020550-SC

AMERICAN EXPRESS FINANCIAL :
ADVISORS, INC., a Minnesota :
corporation, :

Defendant and Appellant. :

BRIEF OF APPELLEES

Appeal from the Third Judicial District,
Salt Lake County, Judge Stephen L. Henriod

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JURISDICTION

The Supreme Court has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2-2-3(j) (Rep.Vol. 9 2002).

ISSUES PRESENTED FOR REVIEW

I. Did the Court below rule correctly in granting summary judgment for plaintiffs on the issue of liability? Decisions regarding summary judgment are reviewed for correctness. Harper v. Great Salt Lake Council, Inc., 1999 UT 34.

II. Did the Court below correctly conclude that the franchise agreement does not constitute a substituted contract. Contract interpretation presents an issue of law reviewed for correctness. Sackler v. Savin, 897 P.2d 1217 (Utah 1995).

III. Does the appellant's failure to preserve the issue of the franchise agreement's possible ambiguity preclude consideration of that issue on appeal? This is an issue of first impression in this Court presenting an issue of law. Badger v. Brooklyn Canal Co., 966 P.2d 844 (Utah 1998).

IV. Did the Court below properly exclude evidence relating to plaintiffs' alleged benefit from defendant's breach of contract? The decision to admit or exclude evidence is reviewed for abuse of discretion. Jensen v. Intermountain Power, 1999 UT 10.

STATEMENT OF THE CASE

This is a class action claim seeking damages for breach of contract. The plaintiff class is comprised of financial planners who worked as independent contractors for defendant American Express Financial Advisors (AEFA). Prior to trial, the court below granted the plaintiff's motion for partial summary judgment on the issue of liability. The issue of damages was tried to a jury, which returned a verdict of \$14,109,068.82 in favor of plaintiffs. This is an appeal from the judgment entered on that verdict.

STATEMENT OF FACTS

Plaintiffs and AEFA agree to many of the facts in this matter. Prior to March 22, 2000, a Financial Planners Agreement ("FPA") governed the relationship between AEFA and its Advisors. *See*, for example, R. 1450, Dep. Ex. 10 at AX002000-17. One aspect of the compensation provided under this contractual relationship was the "Star Quest" program. *See* R. 1449, Dep. Ex. 3 at AX000548049. Under Star Quest, an Advisor's performance was measured in a manner devised by AEFA, Total Weighted Production ("TWP"). R. 1449, Dep. Ex. 3 at AX000548049. If an Advisor met minimum production goals in one calendar year, he or she was entitled to Star Quest benefits the following year. R. 1450, Dep. Ex. 8 at AX001623. The Advisors would receive their insurance benefits contributions on a fiscal year basis. Thus,

benefits contributions earned in calendar year 1998 would be paid from May 1, 1999 to April 30, 2000. R. 1450, Dep. Ex. 6 at AX001233.

Each year AEFA would send its Advisors a "Star Chart" showing the minimum TWP an Advisor would need to meet in order to qualify for benefits the following year. R. 1450, Dep. Ex. 8 at AX001623.

The 1999 Star Chart contained the following information: If an Advisor had a minimum TWP of 2.0 million, he or she would qualify at Star Quest level 1. At Star Quest level 1, the Advisor did not qualify for commission bonuses, but did qualify for "Benefits". The 1999 Star Chart said that those benefits had a value of \$4,145. Advisors at all seven Star Quest levels had earned benefits. At levels 2 through 7, the Advisors would also qualify for bonuses. Id.

The Star Chart had two footnotes. The first explained the calculation of the \$4,145 figure, stating that it was the average company contribution for medical (\$3,767), dental (\$289) and life insurance (\$89) benefits for those who elected benefits. The second footnote read: "To remain eligible for a company contribution to group benefits, advisors must meet the minimum weighted production requirement in any given year. For details refer to Section 1 of your *Benefits Manual for Members of the Field Organization*, Form 513." Id.

The class is defined as those Advisors who met the TWP goals of Star Quest in

1998, 1999 or both, thereby earning a benefit contribution.

The Advisors and AEFA also agree that, in order to receive benefits contributions in the following year, an Advisor had to elect to participate in the benefit plan and pay his or her portion of the premium. R. 1450, Dep. Ex. 6, at AX001235-36. The Advisors disagree with one statement made by AEFA: The contract does not say that an Advisor had to continue to work under the FPA in order to receive a contribution. AEFA's record citation on that point, Id., simply contains no such language.

By March 21, 2000, when AEFA unilaterally terminated the FPA, the Advisors had already earned their benefits by meeting the Star Quest goals established by AEFA for 1998, 1999, or both. The FPA provided that upon its termination, the Advisors would not receive additional compensation except as provided by the Sales Compensation Plan. R. 1450, Dep. Ex. 17, at AX001977. The Advisors and AEFA agree that the Sales Compensation Plan includes the Star Quest program. R. 1450, Dep. Ex. 3, pp. AX000548-556.

AEFA claims that it could not economically pay its Advisors the benefits contributions they had earned. However, AEFA's net after tax income is approximately one billion dollars per year. R. 1451 at Lennick Dep. p. 18.

The Advisors admit that AEFA changed from the FPA to a Business Franchise

Arrangement ("BFA") in March, 2000, and that each of the Advisors chose to continue their relationship with AEFA as Platform 2 Advisors. The Advisors were not given any meaningful input into the contractual terms of the BFA. The BFA was offered on a "take it or leave it" basis and was "not amendable on an individual basis." R. 1452, Ex. C, Affidavit of William Mark Russell. Introduction to BFA at AX006857, Russell ¶ 12. The BFA included Instructions, the first paragraph of which stated that the BFA "must be signed and dated as specified in these instructions, and NO other notes or comments can be written on the documents." R. 1450, Ex. 28.

The Advanced Advisor Board, who AEFA consulted concerning the terms of the BFA, was not elected by the Advisors and did not represent the Advisors. R. 1452, Ex. C, (Russell Affidavit ¶ 10).

AEFA did not notify the Advisors of its intention to discontinue making benefits contributions until after the Advisors had already earned or begun earning their Star Quest benefits. On March 10, 1999, Craig Wallenta, AEFA's Director of Field Compensation, sent an e-mail to various other AEFA employees concerning benefits contributions under Star Quest. He questioned the propriety and legality of eliminating Star Quest benefits. His memorandum reads, in part:

The question that we are seeking an answer to is as follows.

When will benefits that were qualified for via the 1999 Star Quest program be turned off for Platform 2 advisors?

What I thought I heard Jean say in her first voicemail response, and what I thought I have heard previously from others, is benefits would be turned off for individual advisors as that advisor's market group began implementing Platforms. Thus, if an advisor moves to the Platform/GDC world in March, 2000, that is when they would no longer be eligible to participate in company supported benefits (I am only talking about medical, dental and life insurance--those in the S[tar] Q[uest] program).

I have concerns with this position from a legal and a values perspective. The company contribution to benefits that is earned via the Star Quest program runs from May - April of the following two years. We have already communicated the 1999 Star Quest program via bulletin #3810 which says "Advisors in third year and beyond will qualify to receive a company contribution toward benefits the following May." In addition, it is communicated via memo to individual advisors from the Field Administration department each year (there is a communication scheduled for next week that should be delayed if there is any uncertainty on this issue).

I do not believe that we should, and may not be able to legally, discontinue the benefits contribution for those who qualified via the 1999 Star Quest program until April, 2001. In short, we have already communicated to them that they would receive this for a given level of performance. Similarly, those who qualified in 1998, and consequently receive a benefit contribution between May of 1999 and April of 2000, should not have that contribution end if they roll out in March or April of 2000.

I recommend we do not have a benefit contribution award to be a part of the 2000 Star Quest program for obvious reason. The year 2000 will be last year of Star Quest, but will be measured on a prorated basis.

R. 1452, Ex. I. (emphasis added).

Although the BFA contract followed the FPA, it did not, in the view of the Advisors, deprive them of benefits earned under the FPA. R. 1451, John Ford Dep. pp. 199-201.

Despite these stated concerns, AEFA unilaterally decided to forego payments of the benefits the Advisors had already earned.

Many of the facts alleged by AEFA are simply not relevant to this appeal. For example, the manner in which AEFA chose to account for Star Quest benefits is of no legal significance. Compensation of Platinum Team members is irrelevant, because the members of the Platinum Team are not members of the class in this class action suit. The mechanisms used by AEFA to announce its unilateral program changes do not bear on the question of whether earned benefits can be taken away.

SUMMARY OF ARGUMENTS

American Express Financial Advisors ("AEFA") promised its independent financial advisors ("Advisors") that they would receive an enumerated benefit contribution if they met specified production goals. The plaintiff class consists of the group of Advisors who met the performance criteria set forth by AEFA and who, therefore, are entitled to recover the value of the benefits which were promised but not delivered. After the Advisors began working in an effort to achieve those goals, AEFA

was no longer free to modify or revoke its promise.

AEFA's assertion that it retained the right to unilaterally revoke its promise of benefits is without merit. The documents establishing the Advisors' entitlement do not condition their right to receive such benefits upon their continued performance under their agreements as they existed prior to March 2000. The documents provide that the Advisors are entitled to those contributions as long as they remain active financial advisors appointed by AEFA. It is undisputed that they did so for the entire period for which benefits have been claimed.

While AEFA did purport to reserve the right to terminate certain benefits at its sole discretion, that reservation did not apply to the class plaintiffs nor to the benefits which are the subject of this lawsuit.

The agreements entered into by AEFA and the Advisors in March of 2000 do not constitute a substituted contract for the prior agreement breached by AEFA because the agreements have different subject matters and because the later agreement expressly acknowledges that it doesn't constitute an agreement by plaintiffs to forego all obligations owed them by AEFA as of March 2000 in return for the consideration set forth in the new agreement. The existence of continuing obligations under the old agreement precludes the new agreement from being a substituted contract.

The argument advanced by AEFA on appeal that the franchise agreement is

ambiguous and created a question of fact requiring jury resolution was never advanced in the trial court and was, therefore, not preserved for appeal.

The court below was correct in precluding AEFA from presenting evidence of the purported benefit received by plaintiffs by virtue of AEFA's breach of its contractual obligations. Having fully provided the services requested by AEFA, the Advisors were in no way benefitted by AEFA's breach of contract because that breach did not relieve the Advisors of any portion of their performance obligation.

INTRODUCTION

"We lost because we made too many wrong mistakes." - Yogi Berra¹

In 1999, AEFA began to develop a new compensation plan for its financial advisors. As a part of that plan AEFA sought to revoke a prior offer it had made to the Advisors. It assumed it could do so at its whim regardless of whether the Advisors agreed to such a change. This assumption was simply inconsistent with the law.

In seeking to justify its decision, AEFA has claimed that it retained the right to revoke its offer when it did not and that the Advisors agreed with its decision when they did not. The court below rejected AEFA's position because it was unsupported by the evidence and was based upon an incorrect view of the applicable law.

¹Y. Berra, The Yogi Book, p. 34 (1998).

POINT I AEFA WAS NOT FREE TO REVOKE ITS PROMISE OF A BENEFITS CONTRIBUTION AFTER THE ADVISORS PERFORMED AS REQUESTED

Both in this Court and in the court below, AEFA fails to acknowledge the reality of what it did with respect to the Advisors which constitutes its breach of contract. It promised the Advisors that if they performed at a specified level of production they would earn an enumerated benefit contribution. After the Advisors earned those benefits by meeting the goals AEFA had established, AEFA simply refused to honor its promise. It suggests that it was justified in doing so because the contract under which the benefits were earned ceased to exist as of March 2000, thereby ending the Advisors' entitlement to any further benefit payments thereafter, and because AEFA had reserved the right to revoke prior offers. Neither of these contentions provides legal justification for AEFA's conduct.

It is clear under Minnesota law, which the parties agree applies in this case, that if one party makes a promise to another which can be accepted by performance, that offer cannot be withdrawn after the offeree has begun the performance requested. As stated by the Minnesota Supreme Court,

An offeror of a unilateral contract always retains the power to modify or revoke the offer so long as the offeree has not begun performance, but retention of that power does not preclude the offer from becoming a contract once accepted by the offeree by tender of performance.

Feges v. Perkins Restaurants, Inc., 483 N.W.2d 701, 708 (Minn. 1992) (citation omitted).

Once the promisee undertakes performance, the offeror is no longer free to change the terms of his offer. "[A]n offer for a unilateral contract may neither be changed nor revoked once the offeree begins the performance requested by the offer." Peters v. The Mutual Benefit Life Ins. Co., 420 N.W.2d 908, 914 (Minn. App. 1988).

An illustration offered in the Restatement 2d, Contracts, makes the point at issue in the present action.

In January A, an employer, publishes a notice to his employees, promising a stated Christmas bonus to any employee who is continuously in A's employ from January to Christmas. B, an employee hired by the week, reads the notice and continues at work beyond the expiration of the current week. A is bound by an option contract, and if B is continuously in A's employ until Christmas a notice of revocation of the bonus is ineffective.

Restatement 2d, Contracts § 45, illus. 8.

AEFA's attempt to revoke its offer after the plaintiffs had undertaken to perform is of no effect. Once full performance was tendered as originally requested, AEFA was obligated to honor its original promise.

If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered

within the time stated in the offer.

Sylvestre v. State, 214 N.W.2d 658,667 (Minn. 1973).

In short, as noted by the Eight Circuit Court of Appeals, under Minnesota law

[w]here an employer represents in a written document distributed to employees that an employee will receive benefit payments in certain specified circumstances as an incentive for continued service, those benefits are a part of the employees compensation which the employer is contractually obligated to pay.

Landro v. Glendenning Motorways Inc. Retirement Plan and Trust, 625 F.2d 1344, 1352 (8th Cir. 1980).

It is undisputed that plaintiffs performed as originally requested. AEFA is, therefore, required to perform as originally promised.

AEFA's claim that its original promise required more of the plaintiffs than it has received is simply wrong. It contends that one of the requirements of the Star Quest program that had to be met by the plaintiffs to receive the promised benefits was that they "continue to work under the FPA." Appellant's brief at p. 24. While AEFA provides a record citation for this supposed obligation, R. 1450, Dep. Ex. 6 at AX001235-36, the purported requirement to which they refer is nowhere to be found in that document. The stated events of termination are as follows:

- The date of receipt of lifetime maximum benefits under the applicable plan
- For medical, dental, and vision, the last day of the month in which active work ceases, unless retired as defined under "Medical and Life

Insurance coverage as a retiree"

- The last day of the month in which you or your dependents cease to be a member in an eligible class
- The date of the termination of the plan
- A portion of your coverage will end on the date of termination of the portion of the plan providing any particular personal coverage benefit
- the end of the period for which you last made a contribution for personal coverage, if you fail to make any required cost contribution when due
- The last day of the month in which HRICS receives your request for voluntary cancellation of personal coverage within 60 days after a qualified family status change event
- Your total weighted production (TWP) falls below the minimum requirement and you do not pay the full cost to extend coverage, as described above (applicable to the medical, dental and life insurance plans)
- The last day of the calendar year during which you did not elect coverage for the following calendar year during the annual enrollment period.

R. 1450, Dep. Ex. 6 at AX001235 - 6.

Presumably, AEFA means to suggest that when the FPA was terminated this event meant the plaintiffs were no longer engaged in "active work" within the meaning of the provision in the benefits handbook stating that benefits terminate "the last day of the month in which active work ceases. . . ." Id. Actually, the glossary to the compensation handbook makes it clear that plaintiffs remained "active financial advisors" when they continued working for AEFA under the BFA. An "active financial advisor" is defined simply as "A person who is appointed with American Express Financial Advisors Inc. as a financial advisor and is not terminated, on leave of absence or suspended." R. 1450, Dep. Ex. 3 at AX000598. It is undisputed that all

plaintiffs met this definition both before and after the termination of the FPA.

AEFA's entire premise, that termination of the FPA terminated all Star Quest benefits which were not expressly incorporated into the BFA, is simply false and finds no support in the record.

The fact that benefits contributions were not, pursuant to the terms of the AEFA benefits handbook, only available to advisors working pursuant to the FPA is further demonstrated by reference in the handbook to the advisor's "association" with AEFA as being the trigger which made them eligible for benefits contributions. "If your association with the Company ends but you return later that same calendar year, your benefit elections will be reinstated." R. 1450, Dep. Ex. 6 at AX001236. Nowhere in the contract documents does it say that Star Quest benefits earned will only be paid while an advisor is working pursuant to the terms of the FPA.

AEFA also builds, and attacks, a strawman by arguing that plaintiffs are seeking "vested rights" to a future benefits despite AEFA's express reservation of the right to terminate benefits in the future. Again, this is a false representation. AEFA quotes this language in making its argument.

[AEFA] makes no promise to continue these benefits in the future and has the right to amend or terminate any coverage for active plan participants or retired covered individuals at any time. Rights to future benefits will never vest.

This language comes from section 9 of the benefits handbook and applies, by its

own terms, only to AEFA employees' ERISA benefits. "[T]his section [9] applies only to first year financial advisors, district managers within the State of New York, field vice presidents and group vice presidents." R. 1450, Dep. Ex. 6 at AX00139. These individuals are not plaintiffs in this action and the ERISA benefits over which AEFA reserved the right of termination are not the benefits which the Advisors sought, and obtained, below. The suggestion to this Court that this language has any bearing on the Advisors' claims is a misrepresentation AEFA has made knowingly, as the Advisors previously pointed AEFA to the language which expressly demonstrates that the quoted provision is not applicable to the plaintiffs in this case or the benefits they are claiming.

The Advisors performed, AEFA received the benefit of its bargain and the promise it made must now be enforced.

While AEFA cites Minnesota cases dealing with "post termination entitlements" (Brief of Appellant at p. 21), these cases have no bearing on the issues before the Court. None of the plaintiffs were terminated. They remained associated with AEFA and met all the conditions necessary for payment in 2000 of the promised benefits earned by their performance in prior years.

AEFA contends that the FPA "repeatedly explained that the agreement's termination ended all claims a planner had to benefits contributions." Brief of Appellant at p. 24. This is simply not true. The FPA provided that, upon termination,

the Advisor "will not, except as provided by the Sales Compensation Plan, be entitled to any further commissions, fees, overwriting or compensation" R. 1450, Dep. Ex. 17 at AX001977. The benefits the plaintiffs earned in Star Quest are benefits provided for under the Sales Compensation Plan. See R. 1450, Dep. Ex. 3 at AX000548-AX000576. Accordingly, these benefits do not end with termination of the FPA. AEFA's repeated suggestion that the plaintiffs had no right to continued payment of benefits after the FPA was terminated is without support in the contract documents no matter how many times it makes that assertion.

POINT II THE FRANCHISE AGREEMENT IS NOT A SUBSTITUTED CONTRACT.

As an alternative to its argument that it was free to disavow its prior promise to the plaintiffs, AEFA argues on appeal that the franchise agreement signed by the plaintiffs constitutes a substituted contract which relieves AEFA of all obligations it undertook in its prior agreements with plaintiffs. In evaluating this argument it should be borne in mind that the allegation of a substituted contract is an affirmative defense which AEFA had the burden of establishing by clear evidence. As stated by the Court in Klipp v. Iowa Grain Indem. Fund Bd., 502 N.W.2d 9 (Iowa 1993):

Substitution (or novation) of the contract is not easily established. As we said in In re Estate of Eitzen, 231 Iowa 1169, 3 N.W. 2d 546 (1942): "It is well settled that novation is never presumed, but must be proved, and all the essentials must be established by legal and sufficient

evidence. The burden of proving a novation rests upon him who asserts it, and where a novation is pleaded in defense, the burden of establishing it is on the defendant.

502 N.W.2d at 11.

The elements on which the defendant bears this burden are not disputed. They are: "(1) the existence of a previous valid contract; (2) the parties agreed to a new contract; (3) the parties formed a valid new contract; and (4) the parties intended to extinguish the old contract and substitute the new." National Am. Ins. Co. v. Hogan, 173 F.3d 1097, 1105 (8th Cir. 1999). See also, Horman v. Gordon, 740 P.2d 1346 (Utah App. 1987). The defendant needs to establish evidence of a "clear and definite intention" on the part of the plaintiff to release the defendant from all obligations arising from prior agreements. National Am., *supra*, at 1107.

Despite this burden, AEFA has never offered any evidence that the plaintiffs actually intended to release it from the obligation it incurred under the Star Quest program. It contends, rather, that such intent can be found from "the express words of the parties or . . . the facts and circumstances attending the transaction." Brief of Appellant at p. 28.

With regard to the express words of the parties, it is undisputed that the BFA does not expressly say that the plaintiffs are releasing AEFA from its Star Quest obligations. Instead, AEFA contends that such an intention on the part of the plaintiffs

can be determined, as a matter of law, from language used by the parties in the "Disclaimer of Benefits" section of the franchise agreement. That language is as follows:

Disclaimer of Benefits. Independent Advisor acknowledges that the Manuals, including the Compensation Schedule contained therein, constitute the complete list of the compensation and benefits owed Independent Advisor resulting from this Agreement or Independent Advisor's relationship with AEFA. Independent Advisor acknowledges that Independent Advisor has no claim to any other compensation or benefit plan, program or policy of or sponsored by AEFA unless such plan, policy or benefit plan specifically references Independent Advisors in their role as Independent Advisors as an eligible group under such plan, program or policy and Independent Advisor meets all conditions for eligibility set forth in such program.

This provision, when given its common sense meaning, acknowledges that a financial advisor may currently have claims against AEFA which he is not disclaiming. By so providing, AEFA has refuted its own contention that the franchise agreement was intended as a substitute for all of its prior obligations to the Advisors. The Advisor is acknowledging that the "has no claim" (present tense) "unless" certain conditions have been met. If such conditions have been met, then some of AEFA's obligations aren't being extinguished by the franchise agreement but survive. This is fatal to the claim of substituted contract.

[O]ne universally required element of the doctrine [of substituted contract or novation] . . . is that the parties agree

that the formation of a new contract will extinguish all obligations under a previous contract.

Lampley v. U.S., 17 F. Supp. 2d 609, 617 (N.D. Miss. 1998).

If an obligation from the old agreement is acknowledged to still exist, there is no substituted contract.

A novation requires that the pre-existing obligation be extinguished and anything remaining of the original obligation prevents a novation.

Resolution Trust Corp. v. Teem Partnership, 835 F. Supp. 563, 569 (D. Colo 1993).

AEFA attempts to avoid this result by arguing that the term "Independent Advisors" was meant to refer to a group which didn't exist prior to the execution of the franchise agreement and which, therefore, could not have had any claims subject to the "unless" clause of the provision. This interpretation is nonsensical. If this interpretation were adopted, then the language acknowledging that an "independent advisor has no claim to any other compensation or benefit plan, program or policy of or sponsored by AEFA unless such plan, policy or benefit plan specifically references to Independent Advisors in their role as Independent Advisors as an eligible group under such plan, program or policy" would be meaningless. A group which doesn't exist can't presently have any claims. Use of the word "unless" clearly acknowledges that AEFA believed that the independent advisors did, or might, have such claims as of the date the agreement was signed. Therefore, the words "independent advisors" have to

refer to a group that existed prior to execution of the franchise agreement. If they did not, the reservation of claims language would be referring to claims which, by definition, could not exist. A Court must not interpret a contract so as to render its provisions meaningless. As stated by the Minnesota Supreme Court, it is

the cardinal rule of construction that any interpretation which would render a provision meaningless should be avoided on the assumption that parties intended the language used by them to have some effect.

Independent School District No. 877 v. Loberg Plumbing & Heating Co., 123 N.W.2d 793, 799-800 (Minn 1963). Or, as the Court stated in Chergosky v. Crosstown Bell, Inc., 463 N.W.2d 522, 526 (Minn. 1990):

Because of the presumption that the parties intended the language used to have effect, we will attempt to avoid an interpretation of the contract that would render a provision meaningless.

In point of fact, AEFA itself believed that the independent advisors referred to in the disclaimer of benefits provision were the independent contractor advisors who had participated in the Star Quest program. James Punch, the architect of the franchise agreement, was asked specifically about the disclaimer of benefits provisions and whether the Star Quest program was offered to the plaintiffs in their role as independent advisors.

Q. Let me make sure that I understand. Prerollout independent advisors would have referred to all

independent contractor advisors?

- A. Second year and beyond advisors were all independent contractors prior to rollout.
- Q. With a few exceptions, that group of people became Platform II advisors, correct?
- A. Correct.
- Q. Now, the Star Quest program or plan or policy, whichever you want to call it, was offered to those people in their role as independent advisors, wasn't it?
- A. Yes, it was.
- Q. All of the prerollout independent contractors constituted an eligible group under the Star Quest Program, didn't they?
-
- A. I'm not certain what the legal interpretation is of eligible group. Prior to rollout not all advisors were eligible for Star Quest because they were below Star Quest zero in terms of production.
- Q. Okay. But anyone who met the Star level one was a member of an eligible group under Star Quest, correct?
- A. Yes.
- Q. As a matter of fact, that is addressed in the very last clause, isn't it, where it says, "an independent advisor meets all conditions for eligibility set forth in such programs," which would mean they would have to meet level one of Star Quest, right?

A. Right.

Q. So as far as you can tell is it fair to say that "unless" clause would cover the Star Quest program?

. . .

A. I would say it would include that but not be limited to that.

Dep. of James Punch at pp. 58-60.

It is true that after his deposition, and apparently after learning that his testimony was inconsistent with the legal position AEFA was advocating, Mr. Punch got religion and "corrected" several of his answers. He changed "Yes it was" to "No;" he changed "Right" to "Wrong;", and he changed his last quoted response to a simple "No." However, Mr. Punch's eleventh hour conversion is of no moment.² His initial reading of the disclaimer of benefits provision is the only one which permits the terms of the provision to have any meaning. The court below, in determining that the words "independent advisors" included the "independent contractor advisors," as AEFA had previously referred to plaintiffs, applied the common sense rules of contract

²Mr. Punch's changes in his testimony should simply be ignored as impermissible under Rule 30(e). In Albrecht v. Bennett, 2001 UT App. 399, the Court of Appeals recognized that the rule does not permit deposition answers to be changed from "yes" to "no" if "yes" was the answer actually given under oath. It is not proper for a witness to rethink his sworn testimony and purport to contradict his earlier answers as though they hadn't been given. "The Rule cannot be interpreted to allow one to alter what was said under oath. . . . A deposition is not a take home examination." 2001 UT App. at ¶ 29, quoting Greenway v. International Paper, 144 F.R.D. 322 (W.D. La. 1992).

construction employed by all courts.

In interpreting a contract, the language is to be given its plain and ordinary meaning. We read contract terms in the context of the entire contract and will not construe the terms so as to lead to a harsh and absurd result. Additionally, we are to interpret a contract in such a way as to give meaning to all of its provisions.

Brookfield Trade Center, Inc. v. County of Ramsey, 584 N.W.2d 390, 394 (Minn. 1998).

When Mr. Punch was asked what was meant by the words "independent advisor," he testified that "independent advisor" meant "[a]ny independent contractor advisor that is signing this document." Dep. of Punch at p. 58. He did not recant that testimony. It is obvious under the circumstances in which the agreement was signed, the terms "independent advisors" used in the franchise agreement meant those people who signed the agreement who had previously been called "independent contractor advisors." Therefore, any reference to claims possessed by the independent advisors before they signed the franchise agreement could only be a reference to claims they acquired as "independent contractor advisors."

The term "financial advisor" is nowhere defined in the franchise agreement except as the title for "you," the non-AEFA party to the agreement. The collective term "financial advisors" would, therefore, simply mean "all of you" who sign the agreement. As the "all of you" who signed the agreement were independent contractor

advisors, under the BFA "independent advisors" and "independent contractor advisors" are synonymous.

The integration clause of the franchise agreement does not alter this result. That clause reads as follows:

This Agreement, the attachments hereto, and the documents referred to herein constitute the entire Agreement between AEFA and Independent Advisor concerning the subject matter hereof, and supersede all prior and contemporaneous agreements, negotiations and representations (written and oral), no other representations having induced Independent Advisor to execute this Agreement. No party is relying on any agreement or representation, or bound by any other agreement or obligation concerning the subject matter of this Agreement that is not expressly set forth herein. Except for those permitted to be made unilaterally by AEFA hereunder, no amendment, change or variance from this Agreement shall be binding on either party unless mutually agreed to by the parties and executed by their authorized officers or agents in writing.

While AEFA argues that the language of the BFA contract documents "supercede all prior and contemporaneous agreements," it ignores the fact that this language modifies the phrase "constitute the entire Agreement between AEFA and Independent Advisor concerning the subject matter hereof . . ." Such language in an integration clause does not relieve a party of obligations it has incurred under prior contracts. It merely restricts the parties from seeking to use other matters as evidence of what the parties intended in the new contract. For example, in Security Watch, Inc.

v. Sentinel Systems, Inc., 176 F.3d 369 (6th Cir. 1999), the Court rejected the suggestion that an integration clause containing the phrase, "[t]he terms and conditions contained in this Agreement supersede all prior oral or written understandings between the parties and constitute the entire agreement between them concerning the subject matter of this agreement," had the effect voiding a party's rights under a prior agreement. As the Court noted:

it is inappropriate to read the . . . merger clause as superseding prior annual contracts. Merger clauses are routinely incorporated in agreements in order to signal to the courts that the parties agree that the contract is to be considered completely integrated. A completely integrated agreement must be interpreted on its face, and thus the purpose and effect of including a merger clause is to preclude the subsequent introduction of evidence of preliminary negotiations or of side agreements in a proceeding in which a court interprets the document. See 2 Farnsworth on Contracts § 7.3 at 215-25.

176 F.3d at 372.

The Court also acknowledged that this is "the universally understood purpose of this boilerplate clause. . . ." Id.

In the instant case, the BFA was an agreement to govern the parties' relations after termination of the FPA and the FPA's subject matter was the relationship between the parties prior to the BFA. Because the FPA had a different subject matter than the BFA, rights acquired under the FPA were not extinguished by the BFA. See Kentucky

Fried Chicken Corp. v. Collectamatic, Inc., 547 A.2d 245, 248 (N.H. 1988).

In the only case cited by AEFA for the proposition that an integration clause can produce a substituted contract, the two agreements in question had an identical subject matter, the amount owed to an employee for his services. Contrary to the suggestion of AEFA, the Court, in In re Worldwide Direct, Inc., 268 B.R. 69 (D. Del.2001), did not characterize the language of the merger clause as that which "clearly evidences the intent to create a substitute contract" (Brief of Appellant at p. 31). The Court applied that characterization to the following language of the parties' agreement:

Employee does hereby . . . release, acquit and forever discharge the Company . . . from any and all charges, complaints, liabilities. . . including, but by no means limited to, rights arising out of alleged violations of any contracts, express or implied . . . from the beginning of time to the date of execution hereof. (See Severance Agreement at § 3.)

This language clearly evidences the intent to create a substituted contract.

268 B.R. at 72 (emphasis added).

In the present case, the two contracts deal with entirely different subject matters, one defining the parties' rights prior to March 2000 and the other establishing their respective rights and duties thereafter. Accordingly, the integration clause in the BFA only has prospective application to the obligations arising after its execution and does not alter rights previously acquired. Merger clauses in contracts which govern the

prospective rights and duties of the parties "concern future dealings between contracting parties, not the alteration of rights acquired and duties undertaken in completed transactions." Kentucky Fried Chicken Corp., *supra*, 547 A.2d at 248.

POINT III THE ARGUMENT THAT THE FRANCHISE AGREEMENT IS AMBIGUOUS CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL.

In apparent recognition of the fact that the franchise agreement cannot be read as an express agreement by plaintiffs to forego the benefits they earned under the Star Quest program, AEFA now argues that it is entitled to jury resolution of the parties' intent in signing the franchise agreement. This argument is being made for the first time on appeal and was not preserved in the Court below. The cited portion of the record where AEFA claims to have raised and preserved this issue, in Defendant's Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment and in Support of Defendant's Motion for Summary Judgment, R. 337-44, nowhere discusses the issue of possible ambiguity of the agreement or of reasonable alternative meanings of the franchise agreement. In fact, in its Reply Memorandum in Support of defendant's Motion for Summary Judgment, R. 1353, at 36-48, AEFA repeatedly asserted that the franchise agreement's unambiguous language foreclosed the Advisors' claims and never suggested or implied that such language was susceptible to more than one reasonable interpretation, thereby presenting a jury question regarding the parties'

intent in signing the agreement. This argument echoed AEFA's initial assertion that the language of the franchise agreement was unambiguous and "it is subject to interpretation by the court as a matter of law." R. 337-38. AEFA never deviated from this position and never raised the issue that the franchise agreement's language created factual disputes requiring jury resolution.

To preserve an issue for appeal, a party must give the court below the opportunity to consider and rule upon that issue. As this Court stated in Brookside Mobile Home Park, Ltd. v. Peeples, 2002 UT 48, "in order to preserve an issue for appeal the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." 2002 UT at ¶ 14. The test for determining if a party has done so was articulated by this Court in Badger v. Brooklyn Canal Co., 966 P.2d 844, 847 (Utah 1998).

A trial court has the opportunity to rule if the following three requirements are met: (1) "the issue must be raised in a timely fashion;" (2) "the issue must be specifically raised;" and (3) a party must introduce "supporting evidence or relevant legal authority."

In the instant case, AEFA's claim of an entitlement "to present issues of disputed fact regarding substituted contract to the jury" (Brief of Appellant at p. 2), was not raised below, either generally or specifically, and AEFA never presented any legal argument regarding that issue or suggested that the facts warranted such an entitlement.

After arguing vigorously and exclusively that the franchise agreement should be interpreted as a matter of law, AEFA cannot now be heard to argue that the court below erred in doing so. It is axiomatic that

[t]his Court will not consider on appeal issues which were not submitted to the trial court and concerning which the trial court did not have the opportunity to make any findings of facts or law.

Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667, 672 (Utah 1982).

Even if the argument had been preserved, it is without merit. A contract provision is ambiguous if it is susceptible to more than one reasonable interpretation. The interpretation urged by AEFA requires that an entire clause of the disclaimer of benefits provision be deemed to have no meaning whatsoever. This is not a reasonable interpretation and cannot give rise to an ambiguity. In Jones v. Hinkle, 611 P.2d 733 (Utah 1980), this Court held that an interpretation which renders a portion of a contract meaningless cannot create an ambiguity. "It is axiomatic that a contract should be interpreted so as to harmonize all of its provisions." 611 P.2d at 735.

The fact that a party can suggest an alternative interpretation of a contract does not create an ambiguity. "Of course, the fact that the parties differ as to the interpretation of an agreement does not alone establish that ambiguity exists." Winegar v. Froerer Corp., 813 P.2d 104, 109 (Utah 1991). An asserted interpretation of an

agreement only creates an ambiguity requiring jury resolution if

there is some genuine ambiguity or uncertainty in the language upon which reasonable minds may differ as to the meaning. That requirement is not satisfied because a party may get a different meaning by placing a forced or strained construction on it in accordance with his interest. The test to be applied is: would the meaning be plain to a person of ordinary intelligence and understanding, viewing the matter fairly and reasonably, in accordance with the usual and natural meaning of the words, and in light of existing circumstances, including the purpose of the [contract]. If so, the special rule of construction is obviously unnecessary.

Auto Leasing Co. v. Central Mutual Ins., 325 P.2d 264, 266 (Utah 1958).

AEFA's strained construction of the meaning of the words "independent advisor," rendering a portion of the contract meaningless, does not create an ambiguity. The trial court's interpretation, deeming the words "independent advisors" to simply mean "independent contractor advisors" who ultimately signed the BFA, and that the terms were synonymous, is the only reasonable interpretation of the contract in light of the circumstances surrounding the execution of the new agreement. In fact, as noted previously, it was the interpretation AEFA management initially gave to the agreement. The strained construction it now urges is insufficient to create any ambiguity.

POINT IV. AEFA'S BREACH OF CONTRACT DID NOT CONFER ANY BENEFIT UPON THE ADVISORS.

The offsetting benefits doctrine has no application to the present case. That doctrine, which is a species of mitigation, only applies in circumstances where the

breach "obviates the necessity for the plaintiff's own performance or some part of it. . . ." D. Dobbs, 3 Handbook of the Law of Remedies - Damages, Equity and Restitution, at 124 (2d ed. 1993). Because the breach by AEFA occurred after the Advisors had fully performed, they were spared no part of their performance and obtained no benefit by virtue of the breach. As has been noted by the Utah Court of Appeals,

[i]n limited circumstances . . . general damages may be reduced by the amount of gains received by performing another contract which could not have been entered into but for defendants' breach of the prior contract and the plaintiffs being thereby left free to perform the second contract.

John Call Engineering v. Manti City, 795 P.2d 678, 681 (UT App. 1990).

When the non-breaching party has fully performed prior to the breach, he lacks any ability to mitigate the consequences of the breach. The cost of his performance has already been fully paid and there are no avoidable consequences of the breach. The doctrine of offsetting benefits only applies when the non-breaching party is thereby freed to use his time or money to pursue a new venture he would not have been free to pursue had no breach occurred.

The first rule of avoidable consequences is really a rule of avoided consequences; it allows the defendant to claim a credit for an actual gains the plaintiff receives in transactions that are substituted for the contract breached by the defendant. That is, if the plaintiff makes gains in transactions that he could only have entered into because of

the defendant's breach, those gains are credited to the defendant. For instance, if the defendant eliminates plaintiff's employment in breach of a contract for a specific term, and in consequences the plaintiff actually earns money in other jobs, the money earned is credited against the defendant's liability on the contract.

D. Dobbs, supra, at 128-29 (emphasis in original) (citation omitted).

The cases cited by AEFA are not to the contrary. For example, in Buono Sales, Inc. v. Chrysler Motors Corporation, 449 F.2d 715 (3rd 1971), the court applied offsetting benefits because the

law is clear that if a defendant's breach of contract frees the plaintiff to profitably utilize its facilities in some other way, the amount of compensating advantage thus derived must be subtracted from profit which the plaintiff lost because of the breach.

449 F.2d at 720.

Buono Sales doesn't address the situation where the non-breaching party has fully performed, nor do any of the other cases cited by AEFA. This is because the whole theory is predicated upon analyzing the benefit obtained by the non-breaching party in being excused from performing.

To the extent that defendant's breach obviates the necessity for the plaintiff's own performance or some part of it, the breach gives the plaintiff an element of savings, since he will not have the expense of completing performance. Much the same is true if the breach leaves the plaintiff holding salvageable materials. The savings thus effected to the plaintiff by reason of the breach are deducted from the

damage otherwise due the plaintiff. The rule is mainly applicable to contracts involving a substantial element of personal services. For example, if landowner repudiates a building contract when the contractor has completed half the work, the contractor may be entitled to recovery the contract price with a deduction for savings he makes because he need not perform the remainder of the contract.

D. Dobbs, supra, at 124 (citation omitted).

Because the Star Quest benefits at issue here, though to be paid in 2000, were actually earned in 1998 and 1999, AEFA's breach in 2000 could not, and did not, confer any benefit upon the plaintiffs.

The obligations AEFA incurred to plaintiffs by virtue of entering into a new agreement with them in 2000 are wholly attributable to the promises it made in that agreement. The suggestion that AEFA wouldn't have entered into that agreement had it known that it wouldn't be allowed to repudiate its prior promise is of no moment to the Advisors' present claim. Asserting that you wouldn't have made a second deal if you had known how much you owed under the terms of the first deal is no defense to payment under either contract.

The suggestion by AEFA that plaintiffs should bear the financial consequences of AEFA's error, is, however, typical of its approach to this entire situation. It made a unilateral decision to restructure Advisor compensation, and to eliminate earned benefits, on assumptions it didn't ask the Advisors if they shared. It could have made

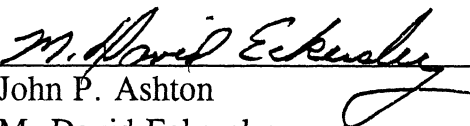
this restructure contingent upon the agreement of the Advisors to expressly waive their Star Quest benefits. It didn't, but it is still seeking the benefit of a bargain it didn't make. Neither the offsetting benefits doctrine nor any other legal theory gives it that entitlement.

CONCLUSION

AEFA promised the plaintiffs benefit contributions if they met certain performance requirements. The class plaintiffs all met these requirements. AEFA was not free to revoke its promise once the Advisors began their performance. While AEFA and the Advisors could have agreed to make and accept other payment for the services provided, they did not do so. AEFA did not make participation by the Advisors in its new compensation structure contingent upon the waiver of their rights under the prior compensation plan and the Advisors did not agree to forego their earned benefits. Accordingly, the Advisors are entitled to the value of the benefits earned and the judgment of the court below should be affirmed.

DATED this 30th day of December, 2002.

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MAILING CERTIFICATE

I hereby certify that on the 30th day of December, 2002, I caused two true and correct copies of the foregoing **Brief of Appellees** to be mailed, first-class postage prepaid thereon, to the following:

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