

1992

William J. Searles v. Dayna Communications, INC : Petition for Rehearing

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Jon E. Waddoups; Attorney for Appellee.

D. Kendall Perkins; Attorney for Appellant.

Recommended Citation

Legal Brief, *Searles v. Dayna Communications*, No. 920285 (Utah Court of Appeals, 1992).
https://digitalcommons.law.byu.edu/byu_ca1/3226

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH STATE COURT OF APPEALS

WILLIAM J. SEARLES, :
Plaintiff-Appellant, :
vs. : **920285-CA**
DAYNA COMMUNICATIONS, INC. :
a Utah Corporation, : Case No. ~~900215-CA~~
Defendant-Appellee. : Priority No. (4)

PETITION FOR REHEARING

This is an appeal from a decision of the Third District Court at a bench trial, which granted a motion for a "directed verdict" in favor of Defendant-Appellee made at the end of Plaintiff-Appellant's case wherein the Court found the Plaintiff-Appellant to have not made a prima facie case of breach of contract or breach of the covenant of good faith and fair dealing by Defendant-Appellee. The petition for rehearing is from the Court of Appeals affirmance of the lower court for failure to plead impossibility of performance at trial.

The Honorable Michael R. Murphy, Presiding.

D. KENDALL PERKINS
124 South 600 East, Suite 300
Salt Lake City, Utah 84102
Attorney for Plaintiff/Appellant

JON E. WADDOUPS
P. O. Box 45340
50 South Main Street, Suite 1600
Salt Lake City, Utah 84145
Attorney for Defendant/Appellee

UTAH COURT OF APPEALS
BRIEF

FILED
Utah Court of Appeals

NOV 24 1993

L
KF
50
.A10

DOCKET NO. 920285

1

Mary T. Noonan
Mary T. Noonan
Clerk of the Court

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES.....	3
DETERMINATIVE PROVISIONS.....	4
STATEMENT OF ISSUE FOR REHEARING.....	4
SUMMARY OF ARGUMENT.....	5
ARGUMENT.....	5
POINT I	5
POINT II	8
POINR III	10
CONCLUSION.....	11
ADDENDUM.....	13

TABLE OF AUTHORITIES

CASES CITED	Page
<u>Beck v. Farmer's Insurance Exchange</u> 701 P.2d 795 (Utah 1985)	10
<u>Berube v. Fashion Center, Ltd.</u> 771 P.2d 1033 (Utah 1989)	10
<u>Board of Ed. of So Sanpete School District v. Barton</u> 617 P.2d 347 (Utah 1980)	8
<u>Canyon Country Store v. Bracey</u> 781 P.2d 414 (Utah 1989)	10
<u>City of Palmer v. Anderson</u> 603 P.2d 495 (Alaska 1979)	7
<u>Enlow v. Sears Roebuck & Co</u> 249 Kan 732, 822 P.2d 617 (Kan. 1991)	8
<u>Heslop v. Bank of Utah</u> 839 P.2d 828 (Utah 1992)	10
<u>Ray v. Davis</u> 254 Or. 155, 458 P.2d 679 (Or. 1969)	7
<u>Soliz v. Ammerman</u> 16 Utah 2d 11, 395 P.2d 25 (1964)	7
<u>Wheat v. Safeways Stores, Inc.</u> 146 Mont. 105, 404 P.2d 317 (Mont. 1965)	7
RULES CITED	
7(a) Utah Rules of Civil Procedure	4/6
8(d) Utah Rules of Civil Procedure	4/7

IN THE UTAH STATE COURT OF APPEALS

WILLIAM J. SEARLES :
Plaintiff-Appellant, :
vs. : Case No. 920285-CA
DAYNA COMMUNICATIONS, INC., :
a Utah Corporation, :
Defendant-Appellee, :

PETITION FOR REHEARING

DETERMINATIVE PROVISIONS, ETC.

Rule 7, Utah Rules of Civil Procedure provides as follows:

Rule 7. Pleadings Allows: Form of Motions.

(a) **Pleadings:** There shall be a complaint and an answer; a reply to counterclaim denominated as such; an answer to a crossclaim, if the answer contains a crossclaim; a third party complaint, if a person was not an original party is summoned under the provisions of Rule 14; and a third party answer, if a third party complaint is served. No other pleadings shall be allowed, except that the Court may order a reply to an answer or a third party answer.

Rule 8. General Rules of Pleadings.

(d) **Effect of failure to deny.** Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided. (Emphasis added)

STATEMENT OF ISSUE FOR REHEARING

The Court of Appeals in its memorandum decision dated

November 15, 1993 states that the Plaintiff failed to plead impossibility of performance at trial and since the Court will not review an issue not "pled" at trial, affirms the Trial Court's decision to dismiss Plaintiff's action. (A copy attached hereto as addendum exhibit A.) This statement is incorrect because there was no requirement for William J. Searles, (hereinafter Searles), to "pled" impossibility of performance in the pleadings on file and proceedings in the trial Court were terminated prior to the time the Plaintiff would have argued impossibility of performance, as is hereinafter more fully explained.

SUMMARY OF ARGUMENTS

- POINT I.** PROCEEDINGS BEFORE THE TRIAL COURT WERE NOT STRUCTURED IN SUCH A MANNER AS TO REQUIRE THE PLAINTIFF TO "PLEAD" IMPOSSIBILITY OF PERFORMANCE IN THE PLEADINGS BEFORE OR AT TRIAL.
- POINT II.** THE ISSUE OF IMPOSSIBILITY OF PERFORMANCE WAS A REBUTTAL ARGUMENT FOR SEARLES TO USE AGAINST DAYNA'S THIRD DEFENSE, BUT WHEN THE TRIAL COURT GRANTED DAYNA'S MOTION FOR INVOLUNTARY DISMISSAL, SEARLES WAS PREVENTED FROM ARGUING SAID ISSUE.
- POINT III** SEARLES IS ENTITLED TO RECOGNITION OF HIS RIGHT TO SEEK AND OBTAIN CONSEQUENTIAL DAMAGES, INCLUDING ATTORNEY'S FEES IN HIS ACTION AGAINST DAYNA.

ARGUMENT

- POINT I.** PROCEEDINGS BEFORE THE TRIAL COURT WERE NOT STRUCTURED IN SUCH A MANNER AS TO REQUIRE THE PLAINTIFF TO "PLEAD" IMPOSSIBILITY OF PERFORMANCE IN THE PLEADINGS BEFORE OR AT TRIAL.

The Court of Appeals in its memorandum decision of November 15, 1993 states, "On appeal, Plaintiff suggests that he

was prevented from meeting the quota. Plaintiff, however, failed to plead impossibility of performance at trial, and thus we will not review this issue for the first time on appeal." The Court was perceptive in identifying impossibility of performance as an issue in the cause of actions Searles brought against Dayna Communications, (hereinafter Dayna). However, the issues as framed by the pleadings were: a complaint by Searles against Dayna of breach of the employment agreement between the parties by Dayna's summary termination of Searles' employment as stated in the first cause of action and a claim of breach of the covenants of good faith and fair dealing by Dayna in its violation of the letter and spirit of the agreement between the parties as set forth in Searles' second cause of action. (A copy of said complaint is attached as addendum exhibit B.) The pertinent part of Dayna's defense is contained in its answer, where in its third defense, Dayna claims Searles was terminated for material breach of his obligations under the agreement and/or for his failure to perform his duties in an acceptable manner. (A copy attached hereto as addendum exhibit C.)

Rules 7(a) and 8(d) state as follows:

Rule 7. Pleadings Allows: Form of Motions.

(a) Pleadings: There shall be a complaint and an answer; a reply to counterclaim denominated as such; an answer to crossclaim, if the answer contains a crossclaim; a third party complaint, if a person was not an original party is summoned under the provisions of Rule 14; and a third party answer, if a third party complaint is served. No other pleadings shall be allowed, except that the Court may order a reply to an answer or a third party answer.

Rule 8. General Rules of Pleadings

(d) **Effect of failure to deny.** Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleadings. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided. (Emphasis Added).

The pleadings that framed the issues then were Searles' Complaint and Dayna's Answer. Under the rules, nothing more was required. A plaintiff has no duty to reply to a defendant's answer unless ordered to do so by the Court. Wheat v. Safeways Stores, Inc. 146 Mont 105, 404 P.2d 317 (Mont. 1965); Ray v. Davis 254 Or 155, 458 P.2d 679 (Or. 1969) More specifically in point is City of Palmer v. Anderson 603 P.2d 495 (Alaska 1979) in which the Court stated in a very similar case, that where the defendant has answered a complaint for breach of contract with an affirmative defense, i.e., that the plaintiff has failed to perform under the contract, the plaintiff had no duty to reply to said answer. Therefore, Searles did not have to "plead" impossibility of performance to be able to use the issue to rebut Dayna's third defense.

As far as the order of proof is concerned, usually, the party who has the affirmative burden of proof is required to produce the first evidence on an issue, and at that time should produce all his evidence in chief. Then after his adversary has produced all his evidence, the former should be confined to rebuttal evidence or evidence which tends to answer or explain his adversary's evidence. Soliz v. Ammerman 16 Utah 2d 11, 395 P.2d 25 (Utah 1964) "Rebuttal evidence" is that which tends to refute, or

to so modify or explain as to nullify or minimize the effect of the opponent's evidence. Board of Ed. of So. Sanpete School District v. Barton 617 P.2d 347 (Utah 1980). Rebuttal evidence can be introduced only after the parties have closed their case in chief and is limited to issues placed in conflict by the adverse party. Enlow v. Sears Roebuck & Co. 249 Kan 732, 822 P.2d 617 (Kan. 1991).

In recapitulation of the foregoing points; Searles was not required to "plead" the issue of impossibility of performance in his complaint because the issue was a rebuttal to the third defense stated in Dayna's answer. Presentation of Dayna's evidence in support of its third defense was curtailed when the Trial Court erroneously terminated the proceedings. It is therefore erroneous to say that Searles failed to "plead" impossibility of performance at trial.

POINT II. THE ISSUE OF IMPOSSIBILITY OF PERFORMANCE WAS A REBUTTAL ARGUMENT FOR SEARLES TO USE AGAINST DAYNA'S THIRD DEFENSE, BUT WHEN THE TRIAL COURT GRANTED DAYNA'S MOTION FOR INVOLUNTARY DISMISSAL, SEARLES WAS PREVENTED FROM ARGUING SAID ISSUE.

As has been stated in the Appellant's Brief, Searles had set forth at trial from both Searles testimony, and the testimony of Brad Romney, Dayna's Vice President, facts showing that Dayna had failed to timely supply the new products to be sold by Searles and his subordinates. It showed anticipated sales of new products were used to create projections, which projections were used to create the quotas that appeared in Dayna's employment agreements. This testimony showed that to reasonably increase Dayna's sales in the desired time frame, there would have to have been available the

three new products that Dayna anticipated being able to sell at the time the products were originally planned to have been available.

Searles had put on his case in chief in support of his complaint and then rested. Dayna, then moved for a "directed verdict", which motion was granted by the Court. This resulted in Dayna not presenting a case in chief supporting its defense. By reason of Dayna not having put on evidence in support of its third defense, which claimed the Plaintiff was terminated for material breach of his obligations under the employment agreement and/or for his failure to perform his duties in an acceptable manner, there was no opportunity for Searles to rebut said defense. Searles' rebuttal to Dayna's third defense would have been that he did not breach his obligations under the contract because such obligations were not in fact intended by the parties to be performance minimums. His rebuttal would also have included evidence and argument that if they were intended to be valid, binding obligations, it would have been impossible for him to meet any such quota requirements because Dayna failed to bring the products on line in a timely manner. With no product to sell or deliver there could have been no sales and no revenue therefrom. His evidence also would have shown that there was no complaint about his performance of his duties and therefore no sustainable allegation that he failed to perform his duties in an acceptable manner. The evidence before the Court at the end of the Plaintiff's evidence showed that there was no complaint about Searles' performance and that in fact, no person employed by Dayna at that time, who had any

quota requirement to be concerned about, was in fact meeting said quota requirement and that the terminations were a part and parcel of a general reduction in force made by Dayna in its attempt to reduce its overhead because of the revenue crunch caused by Dayna's failure to provide the new product on time.

The facts supporting the Plaintiff's claim of impossibility of performance were fully set forth in the evidence presented in support of his complaint. The structure of the written pleadings was never such that Searles was required to "plead" in writing impossibility of performance.

It is not necessary under the circumstances, for Searles to have plead in writing a defense of impossibility of performance because the issue was not in this case a defense, but would have been a rebuttal to the third defense of Dayna as stated in its answer.

POINT III. SEARLES IS ENTITLED TO RECOGNITION OF HIS RIGHT TO SEEK AND OBTAIN CONSEQUENTIAL DAMAGES, INCLUDING ATTORNEY'S FEES IN HIS ACTION AGAINST DAYNA.

In a case reported after the filing of the Searles' Appellant's Brief, specifically Heslop v. Bank of Utah 839 P.2d 828 (Utah 1992). The Supreme Court of Utah refers to holdings in the cases of Berube v. Fashion Center, Ltd. 771 P.2d 1033 (Utah 1989); Beck v. Farmer's Insurance Exchange 701 P.2d 795 (Utah 1985) and Canyon Country Store v. Bracey 781 P.2d 414 (Utah 1989) and states that terminated employees who find themselves in a particularly vulnerable position once the employee has breached an employment agreement, are in a situation where the employer could reasonably

foresee that wrongful termination would force said employee to file a suit to enforce his or her employment contract and in doing so, would foreseeably incur attorney's fees. The Court thereby goes on to recognize such an employee's right to avail himself of consequential damages including attorney's fees in such a suit. Therefore, Searles asks this Court to recognize the law as stated in those cases and to affirm Searles' right to the availability of consequential damages including attorney's fees involved in bringing this suit. Searles raised the question of his entitlement of attorney's fees in the second paragraph of Point VII of his Appellant's Brief.

CONCLUSION

Searles filed his complaint against Dayna claiming breach of the employment agreement and breach of the duties of the covenant of good faith and fair dealing impliedly contained therein. Dayna filed its answer, claiming in pertinent part, as its third defense, the claim of breach of contract by the Plaintiff and/or that the Plaintiff failed to perform his duties in an acceptable manner. With the issues framed in this manner, it then became appropriate for Searles to claim impossibility of performance in his rebuttal to Dayna's third defense. However, as above stated, the proceedings before the Trial Court did not get to the stage where Dayna put on any defense that would have then allowed Searles to present his rebuttal. Therefore, the finding by this Court that Searles "failed to plead impossibility of performance at trial" is not accurate. The Trial Court's action

was not appropriate and therefore should not be affirmed. For the reasons above stated and for the reasons stated in Searles' Appellant's Brief, this Court should grant Searles the relief sought on this appeal including the right to pursue consequential damages, including attorney's fees.

RESPECTFULLY SUBMITTED this ____ day of _____,
1993.

D. Kendall Perkins
Attorney for Plaintiff/Appellant

CERTIFICATE OF HAND DELIVERY

I hereby certify that I hand delivered a copy of the foregoing to Jon E. Waddoups, Attorney for Defendant/Appellee, 50 South Main Street, Suite 1600, Salt Lake City, Utah 84145 this ____ day of November, 1993.

ADDENDUM

	Page
Exhibit A	1
Exhibit B	3
Exhibit C	13

NOV 15 1993

IN THE UTAH COURT OF APPEALS

-----ooOoo-----


Mary T. Noonan
Clerk of the Court

William J. Searles,)
)
Plaintiff and Appellant,)
)
v.)
)
Dayna Communications, Inc., a)
Utah corporation,)
)
Defendant and Appellee.)

MEMORANDUM DECISION
(Not For Publication)

Case No. 920285-CA

F I L E D
(November 15, 1993)

Third District, Salt Lake County
The Honorable Michael R. Murphy

Attorneys: D. Kendall Perkins, Salt Lake City, for Appellant
Jon E. Waddoups, Salt Lake City, for Appellee

Before Judges Bench, Jackson, and Orme.

BENCH, Judge:

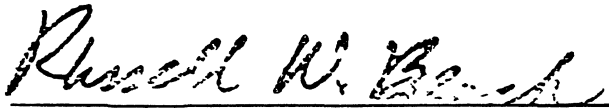
Plaintiff appeals the trial court's grant of defendant's motion for involuntary dismissal of plaintiff's cause of action. Plaintiff's action was based upon wrongful discharge from defendant's employ.

Plaintiff's employment agreement provides that defendant may terminate plaintiff for cause, which includes "a failure by [plaintiff] to perform the duties assigned to [him] in an acceptable manner." One of plaintiff's duties included fulfilling a quota, which plaintiff indisputably failed to meet. Therefore, defendant was entitled to discharge plaintiff under the employment agreement.

On appeal, plaintiff suggests that he was prevented from meeting the quota. Plaintiff, however, failed to plead impossibility of performance at trial, and thus, we will not review this issue for the first time on appeal. See State v. Webb, 790 P.2d 65, 77 (Utah App. 1990).

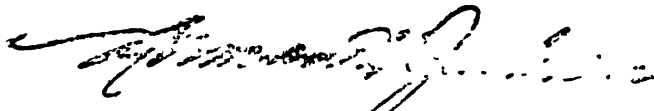
FILED

We therefore affirm the trial court's decision to dismiss plaintiff's action.



Russell W. Bench, Judge

WE CONCUR:



Norman H. Jackson, Judge



Gregory K. Orme, Judge

D. KENDALL PERKINS (2566)
Attorney for Plaintiff
124 South 600 East
Salt Lake City, Utah 84102
Telephone: (801) 533-8505

IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY

STATE OF UTAH

WILLIAM J. SEARLES,

:

Plaintiff,

: COMPLAINT

vs.

:

DAYNA COMMUNICATIONS, INC., a
Utah corporation,

:

: Civil No.

:

Defendant.

Plaintiff for cause of action alleges:

1. This cause of action arises from an agreement entered into between plaintiff and defendant to be performed in the County of Salt Lake, State of Utah and the defendant is a corporation organized and existing under the laws of the State of Utah with its principal place of business in the County of Salt Lake, State of Utah.

STATEMENT OF FACT

2. Plaintiff and defendant entered into a written employment agreement on the 1st day of October, 1988, a copy of which is attached hereto and incorporated by reference herein as exhibit "A".

3. The agreement provided for a term of employment from October 1, 1988 until September 30, 1989. Said agreement contained a paragraph 10 dealing with termination which set forth therein conditions under which the agreement would terminate and

which paragraph provided as follows: "This Agreement shall terminate automatically at the end of its Term. This Agreement shall terminate prior to the end of its Term (i) at the death of DS, or (ii) at Dayna's option and upon the giving of ninety (90) days written notice of termination to DS, or (iii) "for cause" which shall include, but not limited to, conviction of a felony, dishonesty, breach of confidentiality, and material breach of DS's obligations, covenants, agreements or warranties hereunder, or a failure by DS to perform the duties assigned to DS in an acceptable manner. If employment is terminated pursuant to this paragraph, all compensation shall cease and no additional amounts will be payable to DS by Dayna, or to DS's heirs, executors, administrator or legal representatives, other than that portion of any Override which was earned by DS, pursuant to the terms hereof, prior to such termination, net of any chargeback."

4. On or about January 31, 1989, plaintiff was given notice by defendant of his termination which was to be as of the end of business on Friday, February 10, 1989. A copy of said letter of January 31, 1989 is attached hereto as Exhibit "B"

5. The letter of January 31, 1989 stated that if the employer was called for a reference on his past performance that a good reference would be given.

6. That the proposed attempt at termination by defendant was contrary to the provisions of paragraph 10 of the employment agreement entered into between the parties.

7. After having received a letter from plaintiff's counsel, in which it was pointed out that the termination was not appropriately done pursuant to the provisions of paragraph 10 of the agreement between the parties.

FIRST CAUSE OF ACTION

8. Plaintiff incorporates the allegations contained in paragraphs 1 through 7 as if herein fully set forth and incorporates them by reference.

9. The defendant's earlier attempts at termination of the employment of the plaintiff were improper and not done pursuant to the appropriate paragraph of the employment agreement between the parties and therefore is not supported by the facts and is in fact not provided for in the agreement between the parties in that in any mention of any quotas, there is no provision in the agreement in which the employee may be summarily terminated for failure to reach quotas and in fact the quota requirements do not end until the end of the fourth quarter fiscal 1989 which has yet to expire.

10. At best, this attempt to terminate the employee dated January 31, 1989 should start the ninety days notice period running and plaintiff should be entitled to all pay due him in both salary and commissions or override due during the period ending three months after January 31, 1989 which is the approximate amount of \$11,000.00 for salary and whatever amount is appropriately due for commissions and override, which will have to be calculated from information and records in possession

of defendant.

11. In the alternative, the Court should find that the employment agreement between the parties has not been properly terminated at all and the plaintiff is entitled to the pay he would receive from February 10, 1989 until the expiration of the employment agreement which is September 30, 1989 to include salary and all commissions and overrides due within that period.

WHEREFORE, plaintiff prays judgement on his first cause of action in the principal amount of \$11,000.00 as salary, for such other amount as is appropriately due for commissions and override, or in the alternative, for his salary due from February 10, 1989 until the end of the employment agreement, September 30, 1989, plus such amounts as are appropriately due for a commission and override during that period of time and in either case plaintiff should be awarded his costs incurred, and in the event the Court finds the defendant to resist suit in a manner not in good faith, then he should be awarded his attorney's fees as are reasonable and provided for by appropriate Utah law, such amounts should include appropriate pre-judgement interest, and for such other and further relief as the Court deems just when fully advised in the premises.

SECOND CAUSE OF ACTION

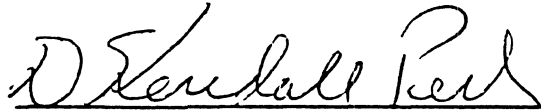
12. Plaintiff repeats the allegations contained in paragraphs 1 through 7 as if hereinafter fully set forth and incorporates them by reference.

13. Defendant has attempted to terminate plaintiff's

employment contrary to the provisions of the agreement between the parties. The defendant's later attempt to terminate Plaintiff's employment for claimed "cause" constitutes a breach of the implied covenants of good faith and fair dealing implicit in any agreement and are in fact a bad faith attempt to avoid paying the plaintiff amounts he is entitled to under the agreement between the parties and by reason thereof, plaintiff should receive an award of exemplary damages as are sufficient to appropriately punish the defendant for its bad faith conduct after the Court hears evidence on the financial condition and other relevant facts pertaining thereto, but in no event less than an amount of \$75,000.00.

WHEREFORE, plaintiff, on his second cause of action, prays for an award of exemplary damages as are sufficient to punish defendant for its breach of the covenants of good faith and fair dealing and in fact its bad faith and deliberate attempt to deprive plaintiff from the benefits due him under the employment agreement with defendant after hearing evidence thereon, but in no event less than \$75,000.00, for attorney's fees as are appropriate and as are allowed at law or in equity, for his costs incurred herein and for such other and further relief as the Court deems just when fully advised in the premises.

DATED this 2nd day of May, 1990.


D. Kendall Perkins
Attorney for Plaintiff

Plaintiff's Address:

1441 State Street
San Diego, CA 92101

AREA DIRECTOR AGREEMENT

THIS AREA DIRECTOR AGREEMENT (the "Agreement") made and entered into on the date set out below, by and between WILLIAM SEARLES ("AD") and DAYNA COMMUNICATIONS, INC. ("Dayna"), each of whom acknowledges and agrees to abide by these covenants.

RECITALS

- 1- Dayna desires to secure the services of AD to promote sales of Dayna Products, pursuant to the terms and conditions herein contained.
- 2- AD desires to enter into this Agreement in order to receive compensation for efforts to be expended by AD pursuant to the terms and conditions of this Agreement.

NOW THEREFORE, in consideration of the mutual covenants and conditions herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound, do hereby agree as follows:

1- Term.

The term of this Agreement shall begin on October 1, 1988 and shall continue to September 30, 1989, subject to prior termination as hereinafter provided. It is the intention of the parties that this Agreement shall be reviewed, and a new and similar Agreement shall be entered into to cover Dayna's fiscal year 1990, based on performance under this Agreement.

2- Salary.

The salary to be paid to AD by Dayna shall be Forty-four Thousand and no/100 Dollars (\$44,000) computed on an annual basis, payable on a biweekly basis, pursuant to Dayna's usual and customary payroll practices, and subject to termination as hereinafter provided.

3- Commission and Incentive Bonus.

The Override to be paid to AD for net dollars revenue to Dayna from the assigned Territory (see Paragraph 5, Territory) in the first six months of the Term of the Agreement shall be one percent (1%) of all net dollars to Dayna as a result of sales to all Buyers other than Distributors. Revenue dollars from sales to Distributors in the first six months of the Term of the Agreement shall earn Override of six-tenths of one percent (0.6%). The Override to be paid to AD in the second six months of the Term of the Agreement for all Buyers other than Distributors shall be eight-tenths of one percent (0.8%). Revenue dollars from sales to Distributors shall continue to earn Override of six-tenths of one percent (0.6%). Commission and Override on all Major National Store Chains shall be paid at the rate of seventy-five percent (75%) to the Area into which the goods are shipped, twenty-five percent (25%) to the Area handling the Corporate offices.

- A- Neither Commission nor Override shall be paid on service revenues, spare parts or accessories ordered from Customer Support, or on component parts of any Dayna product that may be ordered as a

result of negotiations conducted by persons employed by Dayna other than the AD or Agents under his control.

- B- The Commission and Override shall be paid on net dollars received by Dayna. In the event substantial or extraordinary discounts are offered in order to obtain a specific contract, the Commission or Override rate, if any, may be negotiated by Dayna's Vice President of Sales, or other authorized Dayna officer.
- D- Incentive Commission shall be paid for performance in excess of Quota (see Paragraph 6, Quota). In the first six months of the Term of the Agreement, Quota shall have been met when the Quota for First Six Months has been shipped and invoiced by the Company. Incentive Commissions shall be paid on all dollars in excess of Quota that have been shipped and invoiced during that six month period. In the second six months of the Term of the Agreement, Quota shall have been met when the Annual Quota has been shipped and invoiced by the Company, and Incentive Commission shall be paid on all dollars in excess of that Quota that have been shipped and invoiced during the Fiscal Year. Incentive Commission shall consist of two times the Commission Rate.
- F- In order to earn the Override the AD or agents under his control must obtain a purchase order against which product may be properly shipped and invoiced, and the customer must honor the invoice with payment. **UNTIL THE PAYMENT IS COMPLETE, THE COMMISSION HAS NOT BEEN EARNED.** Notwithstanding this fact, Dayna may elect to pay the Commission in anticipation of payment being completed. In that event, should payment not be completed, the AD may be charged back an amount equal to the Commission paid.
- G- The Commission shall be paid on the last paycheck of each month, for the previous monthly period. (i.e., April's Commission paid on last paycheck of May).

4- Expenses.

Dayna shall reimburse AD for the reasonable amount of hotel, traveling, entertainment and other expenses wholly, exclusively, and necessarily incurred by AD in the discharge of AD's duties hereunder, in accordance with the normal practice for such reimbursements by Dayna to its other employees. AD shall submit to Dayna substantiation of the expenses incurred, as reflected in a credit card statement or other documentation, together with a record of (1) the amount of the expenditure, (2) the time, place and nature of the expenditure, (3) the business reason for the expenditure and expected benefit, (4) the names, positions and other information concerning individuals entertained sufficient to establish their business relationship to Dayna, and (5) any and all other information specifically required by Dayna, from time to time. The foregoing information shall be submitted in such form as Dayna may, from time to time, determine. Reimbursement of expenses shall be contingent upon the approval of Dayna's Vice President of Sales, or other authorized Dayna officer.

5- Territory.

The AD shall have as his Area of Management the States West of the Mississippi River, and the States of Alaska and Hawaii, except for the States of Minnesota, Iowa, and Missouri.

The foregoing Territory assignment shall be subject to change at Dayna's sole discretion.

6- Quota.

The Quota assigned to AD shall be as set forth below for the Term of this Agreement:

Quarter 1, Fiscal 1989	\$1,000,000	
Quarter 2, Fiscal 1989	<u>\$1,400,000</u>	
First Six Months Quota		\$2,400,000
Quarter 3, Fiscal 1989	\$2,600,000	
Quarter 4, Fiscal 1989	<u>\$3,800,000</u>	
Annual Quota Fiscal 1989		\$8,800,000

The Quota is to be derived from the assigned Area.

7- Responsibilities of Area Director.

The AD shall have the following responsibilities:

A- To obtain, or direct agents under his control to obtain, orders for Dayna Products which can be shipped and invoiced with complete expectation that the customer will honor the invoice with payment at prices specified in Dayna's published pricing schedules, or pursuant to specific contracts with such customer.

B- To represent Dayna, its products, personnel and business in a manner which Dayna shall prescribe as appropriate for its sales personnel.

C- To refrain from making any misleading, inaccurate or other improper statement, or from giving such indication to any third party relative to Dayna's business, products or relationships.

D- To fulfill the Quota requirements established pursuant to this Agreement.

8- Time Devoted by Area Director.

AD agrees to devote his or her full business time, attention, efforts and abilities exclusively to the business of Dayna and to use his or her utmost endeavors to promote the interests of Dayna.

9- Chargebacks.

In the event of payment of the Commission in advance of receipt by Dayna of all monies from the customers on orders covered by such payment, or in the event a

draw against Commission is outstanding, a "chargeback" in the amount of the Commission shall be paid to Dayna by AD should the employment of AD be terminated.

10- Termination.

This Agreement shall terminate automatically at the end of its Term. This Agreement shall terminate prior to the end of its Term (i) at the death of AD, or (ii) at Dayna's option and upon the giving of ninety (90) days' written notice of termination to AD, or (iii) "for cause" which shall include, but not be limited to, conviction of a felony, dishonesty, breach of confidentiality, any material breach of AD's obligations, covenants, agreements or warranties hereunder, or a failure by AD to perform the duties assigned to AD in an acceptable manner. If employment is terminated pursuant to this paragraph, all compensation shall cease and no additional amounts will be payable to AD by Dayna, or to AD's heirs, executors, administrators or legal representatives, other than that portion of any Commission which was earned by AD, pursuant to the terms hereof, prior to such termination, net of any chargeback.

11- Entire Agreement.

This Agreement contains the entire agreement between the parties pertaining to the subject matter hereof. This Agreement shall be subject to, and construed in accordance with, the laws of the State of Utah. This Agreement shall supercede any and all prior agreements between the parties.

IN WITNESS WHEREOF, the parties hereto have set their hands this ____ day of _____, 1988.

AREA DIRECTOR



William Searles

DAYNA COMMUNICATIONS, INC.

By: _____

James F. Waltz

Its: VICE PRESIDENT, SALES

VAN COTT, BAGLEY, CORNWALL & McCARTHY
Patricia M. Leith, Bar No. 1932
Attorneys for Defendant
50 South Main Street, Suite 1600
P. O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

WILLIAM J. SEARLES,)	
)	
Plaintiff,)	
)	ANSWER
vs.)	
)	
DAYNA COMMUNICATIONS, INC.,)	Civil No. 900902787CN
a Utah corporation,)	Honorable Michael Murphy
)	
Defendant.)	
)	

The defendant Dayna Communications, Inc. answers the complaint as follows.

FIRST DEFENSE

The plaintiff's complaint fails to state a claim against the defendant upon which relief can be granted.

SECOND DEFENSE

The defendant admits, denies, and otherwise responds to the allegations contained in the plaintiff's complaint as follows.

1. In response to paragraph 1 of the plaintiff's complaint, the defendant admits that it is a corporation organized and existing under the laws of the State of Utah; that it has its principal place of business in Salt Lake County, Utah;

and that it entered into an agreement with plaintiff that was to be performed in Salt Lake County, Utah, and elsewhere; but denies the remaining allegations in paragraph 1 of the complaint.

2. In response to paragraph 2 of the plaintiff's complaint, the defendant admits that it entered into a written employment agreement, a copy of which is attached to the complaint as Exhibit A, but denies the remaining allegations in paragraph 2 of the complaint.

3. The defendant admits the terms that are contained in the agreement attached to the complaint as Exhibit A, but denies the remaining allegations contained in paragraph 3 of the complaint.

4. The defendant admits that on or about January 31, 1989, it gave the plaintiff the memorandum dated January 31, 1989 that is attached to the complaint as Exhibit B, but denies the remaining allegations contained in paragraph 4 of the complaint.

5. The defendant denies the allegations contained in paragraph 5 of plaintiff's complaint.

6. The defendant denies the allegations contained in paragraph 6 of plaintiff's complaint.

7. The defendant denies the allegations contained in paragraph 7 of plaintiff's complaint.

8. In response to paragraph 8 of the complaint, the defendant repeats and incorporates by reference each and every response set forth in paragraphs 1 through 7 above.

9. The defendant denies each and every allegation contained in paragraph 9 of the complaint.

10. The defendant denies each and every allegation contained in paragraph 10 of the complaint.

11. The defendant denies each and every allegation contained in paragraph 11 of the complaint.

12. In response to paragraph 12 of the complaint, the defendant repeats and incorporates by reference each and every response set forth in paragraphs 1 through 7 above.

13. The defendant denies each and every allegation contained in paragraph 13 of the complaint.

14. The defendant denies each and every allegation not specifically admitted in this answer.

THIRD DEFENSE

The plaintiff was terminated for a material breach of his obligations under the agreement and/or for his failure to perform his duties in an acceptable manner.

FOURTH DEFENSE

The defendant has paid all sums due and owing to the plaintiff.

FIFTH DEFENSE

The plaintiff has failed to mitigate his damages.

WHEREFORE, the defendant demands that plaintiff's complaint be dismissed with prejudice, that plaintiff take nothing thereby, and that defendant be awarded its costs of action together with such other relief as the Court deems proper.

DATED this 7th day of June, 1990.

VAN COTT, BAGLEY, CORNWALL & MCCARTHY
Patricia M. Leith

By Patricia M. Leith
Attorneys for Defendant
50 South Main Street, Suite 1600
P. O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the within and foregoing Answer to be mailed, postage prepaid, this 7th day of June, 1990, to the following:

D. Kendall Perkins, Esq.
124 South Sixth East
Salt Lake City, Utah 84102

Patricia M. Leith