

2015

**Z-Corp, Dba onegreatfamily.com, a Utah Corporation; And
Onegreatfamily, LLC, a Utah Limited Liability Company, Plaintiffs
and Appellants, vs. Ancestry.com, Inc., a Utah Corporation; And
ancestry.com Operations, Inc., a Utah Corporation, Defendants
and Appellees**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

Z-CORP, dba OneGreatFamily.com, a
Utah Corporation; and
ONEGREATFAMILY, LLC, a Utah
limited liability company,

Plaintiffs and Appellants,

vs.

ANCESTRY.COM, INC., a Utah
Corporation; and ANCESTRY.COM
OPERATIONS, INC., a Utah
Corporation,

Defendants and Appellees

*Court of Appeals No. 20150405-CA
Trial Court No. 140401466*

BRIEF OF APPELLANT

**Appeal from Decision of the Fourth Judicial District Court, Utah County
The Honorable Fred Howard**

Robert L. Jeffs, #4349
Randall L. Jeffs, #12129
JEFFS & JEFFS, P.C.
90 North 100 East
Provo, Utah, 84603
Attorneys for Petitioner and Appellant

Mark O. Morris, #4636
Amber M. Mettler, #11460
SNELL & WILMER
15 West South Temple, Ste. 1200
Salt Lake City, Utah 84101
Attorneys for Respondents and Appellees

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Provo, Utah, 84603
Attorneys for Petitioner and Appellant

Mark O. Morris, #4636
Amber M. Mettler, #11460
SNELL & WILMER
15 West South Temple, Ste. 1200
Salt Lake City, Utah 84101
Attorneys for Respondents and Appellees

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JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to UTAH CODE ANN. § 78A-4-103(2)(j).

ISSUES PRESENTED AND STANDARD OF REVIEW

1. Did the trial court err in dismissing OneGreatFamily.com's ("OGF") cause of action for breach of contract for Ancestry.com's ("Ancestry") failure to pay funds due and owing under the contract when the contract provides for the payment of such funds and when OGF specifically alleged that Ancestry had failed to make such payment?

a. Standard of Review: In reviewing whether a district court properly granted a motion to dismiss, the appellate court accepts the factual allegations in the complaint as true and interprets those facts and all inferences drawn from them in the light most favorable to the non-moving party. Moreover, a trial court's decision granting a motion to dismiss a complaint is a question of law that the appellate court reviews for correctness, giving no deference to the trial court's ruling. *Lunceford v. Lunceford*, 2006 UT App 266, ¶¶ 2, 8; 139 P.3d 1073. *See also, Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 9, 104 P.3d 1226.

b. Preservation: This issue was raised and preserved in OGF's memorandum in opposition to Ancestry's motion to dismiss, and also in OGF's objection to the proposed order submitted to the trial court by Ancestry, which was ultimately entered by the trial court. R. 142-152, 229-231.

2. Did the trial court err in dismissing OGF's cause of action for breach of contract for Ancestry's failure to allow a meaningful contractual audit when the contract specifically provides for audit rights and when OGF alleged in its complaint that Ancestry had failed to provide OGF with a meaningful audit opportunity?

a. Standard of Review: In reviewing whether a district court properly granted a motion to dismiss, the appellate court accepts the factual allegations in the complaint as true and interprets those facts and all inferences drawn from them in the light most favorable to the non-moving party. Moreover, a trial court's decision granting a motion to dismiss a complaint is a question of law that the appellate court reviews for correctness, giving no deference to the trial court's ruling. *Lunceford v. Lunceford*, 2006 UT App 266, ¶¶ 2, 8; 139 P.3d 1073; *see also, Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 9, 104 P.3d 1226.

b. Preservation: This issue was raised and preserved in OGF's memorandum in opposition to Ancestry's motion to dismiss, and also in OGF's objection to the proposed order submitted to the trial court by Ancestry, which was ultimately entered by the trial court. R. 142-152, 229-231.

3. Did the trial court err in determining that the Marketing Agreement unambiguously does not require the parties to market each other's subscription service and therefore could not be breached, in spite of both the actual language of the contract and the parties' years-long prior course of dealing?

a. Standard of Review: “The question of whether a contract is ambiguous is decided by the court as a matter of law. When determining whether a contract is ambiguous, any relevant evidence must be considered. Otherwise, the determination of ambiguity is inherently one-sided, namely, it is based solely on the extrinsic evidence of the judge’s own linguistic education and experience.” *Lunceford*, 2006 UT App 266, ¶ 13. In reviewing whether a district court properly granted a motion to dismiss, the appellate court accepts the factual allegations in the complaint as true and interprets those facts and all inferences drawn from them in the light most favorable to the non-moving party. Moreover, a trial court’s decision granting a motion to dismiss a complaint is a question of law that the appellate court reviews for correctness, giving no deference to the trial court’s ruling. *Id.* at ¶¶ 2, 8; 139 P.3d 1073; *see also, Oakwood*, 2004 UT 101, ¶ 9.

b. Preservation: This issue was raised and preserved in OGF’s memorandum in opposition to Ancestry’s motion to dismiss. R. 142-152.

4. Did the trial court err in determining that Ancestry had not breached the covenant of good faith and fair dealing in refusing to market under the Marketing Agreement because the trial court determined that the Marketing Agreement could not be breached?

a. Standard of Review: “The question of whether a contract is ambiguous is decided by the court as a matter of law. When determining whether a contract is ambiguous, any relevant evidence must be considered. Otherwise,

the determination of ambiguity is inherently one-sided, namely, it is based solely on the extrinsic evidence of the judge's own linguistic education and experience." *Lunceford*, 2006 UT App 266, ¶ 13. In reviewing whether a district court properly granted a motion to dismiss, the appellate court accepts the factual allegations in the complaint as true and interprets those facts and all inferences drawn from them in the light most favorable to the non-moving party. Moreover, a trial court's decision granting a motion to dismiss a complaint is a question of law that the appellate court reviews for correctness, giving no deference to the trial court's ruling. *Id.* at ¶¶ 2, 8; *see also, Oakwood*, 2004 UT 101, ¶ 9.

b. Preservation: This issue was raised and preserved in OGF's memorandum in opposition to Ancestry's motion to dismiss. R. 142-152.

5. Did the trial court err in determining that no punitive damages were available in this breach of contract matter in spite of the contract's language that punitive damages are available in the event of willfulness or gross negligence and when such conduct was specifically alleged in the complaint?

a. Standard of Review: In reviewing whether a district court properly granted a motion to dismiss, the appellate court accepts the factual allegations in the complaint as true and interprets those facts and all inferences drawn from them in the light most favorable to the non-moving party. Moreover, a trial court's decision granting a motion to dismiss a complaint is a question of law that the appellate court reviews for correctness, giving no deference to the trial court's

ruling. *Lunceford*, 2006 UT App 266, ¶¶ 2, 8; *see also*, *Oakwood*, 2004 UT 101, ¶ 9.

b. Preservation: This issue was raised and preserved in OGF's memorandum in opposition to Ancestry's motion to dismiss. R. 135-36.

**STATUTES, RULES OR ORDINANCES WHOSE INTERPRETATION IS
DETERMINATIVE OF THE APPEAL**

None.

STATEMENT OF THE CASE

This is an appeal from the trial court's decision to grant a motion to dismiss the Plaintiff's complaint in its entirety.

In April 2009, Appellants Z-Corp, dba OneGreatFamily.com and OneGreatFamily, LLC (hereinafter OGF) entered into a Marketing Agreement with People Search Media, LLC (who operated Archives.com). R. 175. The Marketing Agreement provided for the joint marketing of each other's online businesses and for profit sharing between the two companies. R. 172, 175. Marketing was specifically contemplated within the "paid area" of the other's website. R. 172. During 2009 through 2012, both OGF and People Search Media, LLC promoted and marketed the other's website within the "paid area" of the other's website pursuant to the Marketing Agreement. R. 12. As alleged in the complaint, both OGF and People Search Media LLC understood "paid area" to mean the area immediately after a new customer enters their financial information to sign up for a new Archives.com or OneGreatFamily.com subscription. R. 12. Specifically, after subscribing to Archives.com a new subscriber

would be presented with a page giving the subscriber an opportunity to also subscribe to OneGreatFamily.com. R. 12. Additionally, OneGreatFamily.com was listed as an available subscription service in the Archives.com Products Page, which was only viewable by Archives.com subscription holders (i.e. current customers). R. 11.

Profit sharing under the Marketing Agreement was also spelled out. People Search Media, LLC would remit to OGF 40% of the subscription amount received through an OGF subscription obtained through the Archives.com website, and would retain the remaining 60% of the subscription amount (and vice versa). R. 11, 170. This division of proceeds applies to both new subscriptions and subsequent renewal subscriptions for returning customers who were originated pursuant to the Marketing Agreement. R. 11, 170. OGF and People Search Media, LLC coordinated their efforts so that Archives.com could grant immediate access to a new subscriber to OneGreatFamily.com and would later remit the appropriate portion of the subscription funds. R. 11-12. Both OGF and People Search Media, LLC were satisfied with the other's performance, expressed such satisfaction in writing, and both benefited due to the nature of the Marketing Agreement. R. 150.

Then, in August 2012, Ancestry.com (hereinafter "Ancestry") acquired Archives.com from People Search Media, LLC. R. 11. In connection with this acquisition, Ancestry assumed the Marketing Agreement, extended its performance period, and expressly undertook the obligations contained therein. R. 93. Initially, Ancestry continued to market OneGreatFamily.com within Archives.com in the same manner as People Search Media, LLC had done. R. 11. However, after some time,

subscriptions for OneGreatFamily.com declined significantly. R. 11. OGF discovered that Ancestry had begun to inconsistently promote OneGreatFamily.com within the “paid area” following a new subscription to Archives.com and instead was promoting other website subscription services available through Ancestry’s subsidiaries. R. 10-11. Also, OGF noticed large discrepancies between the number of subscribers who were granted new subscription access to the OneGreatFamily.com website through the Archives.com website, and the amount of funds being remitted to OGF under the profit sharing provision of the Marketing Agreement. R. 9. It appeared that there were up to 70,000 subscribers for which OGF had never received subscription funds from Ancestry. R. 9. Then, in May, 2014, Ancestry completely removed the subscription offer from the “paid area” following a new subscription to Archives.com. R. 10. OneGreatFamily.com subscriptions were also removed for a time from the Products Page of Archives.com. R. 10. OGF reached out to Ancestry to determine what precipitated this change and was told that Ancestry was “reinterpreting” the meaning of the Marketing Agreement. Not only did Ancestry.com cease its marketing activities, it also ceased remitting funds for renewal subscriptions under the Marketing Agreement. R.10-11. Ancestry’s actions deviate from the prior understanding, performance, intent, and actual language of the Marketing Agreement and clearly deviate from the prior course of dealing between OGF and Ancestry.

Due to concerns regarding these issues, OGF sought to conduct an audit of Ancestry pursuant to an audit provision contained within the Marketing Agreement. R. 9, 174. The Marketing Agreement provides that either party may conduct an audit to ensure

that the terms of the Marketing Agreement are being met. R. 174. OGF requested that Ancestry permit it to perform the audit required under the contract. R. 9. However, as the parties exchanged correspondence, Ancestry indicated that it would not allow electronic access to its records and further indicated that it would not provide OGF access to necessary information to conduct an actual and meaningful audit. R. 9.

OGF filed suit in the Fourth District Court, of Utah County, State of Utah for breach of contract, breach of the covenant of good faith and fair dealing, conversion, tortious interference with prospective economic relations, and punitive damages. R. 1-14. Ancestry filed a motion to dismiss the complaint under U.R.C.P., Rule 12(b)(6) arguing that the Marketing Agreement was unambiguous in its language that the parties were under no obligation to market each other. R. 102-125. In opposing the motion to dismiss, OGF argued the opposite. Specifically, OGF argued that the Marketing Agreement unambiguously required the parties to market each other. R. 135-152. And alternatively, even if the Marketing Agreement is ambiguous on the parties' duty to market each other, the parties' prior course of dealing and mutual understanding of the meaning of the Marketing Agreement was sufficient to create a question of latent ambiguity regarding the meaning and intent of the Marketing Agreement such that dismissal of the complaint at that early stage of the litigation would be legal error. R. 135-152. OGF also noted and argued that the complaint also alleged breach of contract for Ancestry's failure to remit funds payable under the contract, regardless of whether or not there existed a duty to market each other, and Ancestry's failure to permit a meaningful audit. R. 144-148. In other words, regardless of whether or not there was a

duty to market, OGF had properly articulated separate and actionable breach of contract claims for failure to remit payment and failure to permit an audit. R. 144-148. OGF further noted that if the contract had been breached under any of the theories set forth by OGF, and Ancestry had committed any of these breaches with the intent to deprive OGF from receiving the fruits of the contract, then Ancestry had also breached the implied covenant of good faith and fair dealing. R. 142-144. Finally, OGF noted that the contract contained a specific provision allowing for the imposition of punitive damages against the breaching party in the event that the breach was due to gross negligence or wilful misconduct. R. 135-136, 174. OGF had alleged wilful misconduct in its complaint, and therefore noted that dismissal of the complaint would be improper in the face of this affirmative allegation. R. 3, 135-136

After briefing and oral argument, the trial court rejected OGF's arguments and granted Ancestry's motion to dismiss. R. 218-224. In granting the motion to dismiss, the trial court never mentioned or addressed OGF's claims for breach of contract for failure to remit payment and failure to permit a meaningful audit. R. 218-224. The trial court seemed to focus completely on the question of whether there was a duty to market and whether the Marketing Agreement was ambiguous regarding a duty to market. R. 218-224. Ultimately the trial court found that there was no duty to market under the Marketing Agreement, and dismissed the whole complaint. R. 218-224. As the trial court was preparing to enter a final order on the matter, OGF submitted an objection to the trial court, noting that the trial court had failed to address the breach of contract claims for failure to remit payment and failure to permit a meaningful audit. R. 229-231.

The trial court overruled the objection and entered a final order dismissing the complaint in its entirety. R. 236-241. OGF filed a timely appeal¹. R. 242-243.

SUMMARY OF ARGUMENTS

On appeal from a district court's decision to grant a motion to dismiss, the appellate court accepts the factual allegations in the complaint as true and draws all inferences therefrom in favor of the Plaintiff and Appellant. In this case, the trial court erred in granting a motion to dismiss the entire complaint. The errors are myriad.

First, the trial court ignored the existence of two claims for breach of contract. These, claims (for failure to make payment and failure to allow a contractual audit) were clearly set forth in the complaint and clearly briefed in the opposition to the motion to dismiss. Moreover, the claims were well-pled and represent viable causes of action. The trial court ignored the existence of these claims and dismissed the whole complaint anyway.

Second, the trial court erroneously determined that the Marketing Agreement (the contract between the parties) did not contain within it a duty to market, and therefore Ancestry's refusal to market was not a breach of contract. In reaching this conclusion, the trial court negated multiple provisions in the contract, including a "best efforts" provision (the trial court expressly concluded that "best efforts" can be no efforts), a "shall perform" provision (the trial court expressly states that this provision is negated), and a "Promote the other company's Complimentary Products" provision (which the trial

¹ OGF does not appeal the trial court's dismissal of its conversion claim or its tortious interference with prospective economic relations claim.

court ignored and did not address even though it was briefed). The trial court should have attempted to harmonize these provisions and give them effect rather than negating them. In addition, the trial court failed to take into consideration the parties' intentions and expectations and prior course of dealing when interpreting and determining the meaning of the contract terms.

Third, the trial court erroneously concluded that Ancestry could exercise the discretion granted to it under the Marketing Agreement on how to market so as to engage in no marketing at all. However, the implied covenant of good faith and fair dealing prevents a party to a contract from exercising discretion in the performance of the contract in such a way as to deprive the other party from receiving the fruits and benefits of the contract. The trial court erred in endorsing Ancestry's actions depriving OGF from the benefits and fruits of the contract and dismissing OGF's cause of action for breach of the implied covenant of good faith and fair dealing.

Finally, the trial court erred in dismissing the claim for punitive damages even though the contract has an express provision allowing for punitive damages for breach of contract in the event of willful misconduct, and such willful misconduct was expressly alleged in the complaint. For these reasons, the decision of the trial court dismissing the complaint should be reversed and the matter should be remanded back to the trial court.

ARGUMENT

In reviewing whether a district court properly granted a motion to dismiss, the appellate court accepts the factual allegations in the complaint as true and interprets those facts and all inferences drawn from them in the light most favorable to the non-moving

party. Moreover, a trial court's decision granting a motion to dismiss a complaint is a question of law that the appellate court reviews for correctness, giving no deference to the trial court's ruling. *Lunceford v. Lunceford*, 2006 UT App 266, ¶¶ 2, 8; 139 P.3d 1073; *see also, Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 9, 104 P.3d 1226.

I. THE TRIAL COURT ERRED WHEN IT DISMISSED OGF'S CLAIMS FOR BREACH OF CONTRACT FOR ANCESTRY'S FAILURE TO REMIT PAYMENT UNDER THE MARKETING AGREEMENT AND FAILURE TO PERMIT A MEANINGFUL AUDIT UNDER THE CONTRACT.

The trial court erroneously dismissed OGF's well pled claims for breach of contract for failure to make appropriate payments under the Marketing Agreement and for breach of contract for failure to permit a meaningful audit. The trial court dismissed these claims without ever acknowledging them or addressing them.

Under the Marketing Agreement,

[Ancestry] will pay to OGF a Revenue Share consisting of 40% of the Gross Revenues (net of returns and chargebacks) collected from any customer who is referred to OGF from [Ancestry] and is subsequently billed by [Ancestry]. This Revenue Share will apply to all payments made by such customers for current membership subscriptions nor for any future new product offering or services.

R. 170.

Thus, regardless of whether or not there is an obligation on either party to market the other, if marketing occurs under the Marketing Agreement, then there is a clear obligation to share revenues consistent with the revenue sharing provisions of the Marketing Agreement. Ancestry is not permitted to sell subscriptions to OGF's products and just keep all the money. If Ancestry sells an OGF product, Ancestry must remit a

portion of the revenue, consistent with the terms of the Marketing Agreement, regardless of whether there is a duty to market or not.

In its complaint, OGF specifically alleged that “As the Parties have exchanged subscription and payment information for thousands of customers, OGF has uncovered information that between 20,000 and 70,000 payments from OneGreatFamily.com customer subscriptions are missing that are due from Ancestry.” R. 9. The complaint goes on to state that, “Ancestry breached the Marketing Agreement because, based on information and belief, it has withheld payments for subscriptions that are due to OGF. R. 8. This a clear and well pled allegation of breach of contract on the part of Ancestry that is not dependent upon whether the Marketing Agreement contains within it a duty to market.

The same is true of OGF’s cause of action for breach of contract for Ancestry’s failure to permit a meaningful audit as permitted under the contract. The Marketing Agreement has detailed language regarding each party’s right to conduct an audit of the other in relation to their marketing activities. R. 174. The Marketing Agreement has a separate “Audit Rights” section which provides,

OGF shall have the right to send an employee or other party, to [Ancestry’s] offices to inspect [Ancestry’s] records to the extent reasonably necessary and solely for the purpose of verifying [Ancestry’s] records regarding customer sign-ups, cancellations, and other information material to the terms of payment under the Marketing Program.
R. 174.

In its complaint, OGF alleges that “OGF demanded an audit of Ancestry’s records” and “Ancestry refused to honor OGF’s request and instead offered only to allow OGF to

inspect some limited financial records that would not have enabled OGF to conduct a meaningful and actual audit.” R. 9. The complaint goes on to say that, “Ancestry breached the Marketing Agreement when it refused to comply completely with the terms of the Audit Rights provision of the Marketing Agreement.” R. 8. Again, this is a clear and well pled allegation for breach of contract on the part of Ancestry that is not dependent upon whether the Marketing Agreement contains within it a duty to market.

When Ancestry filed its motion to dismiss the entirety of the complaint on theory that it had no duty to market under the Marketing Agreement, OGF pointed out in its opposing memorandum that, “Plaintiffs have information that between 20,000 and 70,000 subscription payments are missing. . . . The facts alleged are sufficient to support a claim for breach of the Marketing Agreement.” R. 145. As to the audit rights breach, the opposing memorandum states, “Defendants have failed to comply with the audit provision of the Marketing Agreement.” R. 145. And after some analysis, further asserts that, “The Defendants refused to provide access to necessary information that would allow the Plaintiffs to verify whether or not there were indeed missing subscription payments. By refusing to provide access to sufficient information to make the audit meaningful, Defendants breached the Marketing Agreement.” R. 144.

In other words, these two causes of action for breach of contract were squarely before the trial court on the motion to dismiss. They were clearly stated in the complaint—they were clearly articulated and briefed in opposition to the motion to dismiss. In spite of this, the trial court completely ignores the existence of these claims in ruling on the motion to dismiss. There is no mention of them at all. R. 224. The claims

were well pled and stand independent of any duty to market under the Marketing Agreement. Ancestry is not allowed to sell OGF's products and keep all the money. Ancestry is not permitted to refuse to supply information regarding all the OGF subscriptions it has sold when the Marketing Agreement requires such information to be disclosed through an audit right. These are clear causes of action that were squarely before the trial court. The trial court never addressed them, and that was legal error.

After the trial court issued its ruling and as Ancestry had presented its proposed order reflecting the trial court's ruling, OGF filed an objection to the proposed order which specifically pointed out to the trial court its error in never addressing these separate claims. OGF stated,

Not only did Plaintiffs bring a cause of action for breach of contract on the theory that the Defendants had failed to appropriately market under the requirements of the Marketing Agreement, but Plaintiff's also alleged that Defendants had breached the contract by failing to render payment to Plaintiffs for funds already received by Defendants under the terms of the Marketing Agreement. . . .

The Proposed Order also does not address Plaintiffs' claim for breach of contract on the theory that Defendants failed to allow Plaintiffs access to information in order to allow Plaintiffs to conduct a meaningful audit under the Marketing Agreement. . . .

The Court's Ruling makes no findings as to why either of these causes of action should be dismissed and the Defendants' Proposed Order is likewise silent on these two causes of action. Nonetheless, both the Ruling and the Proposed Order dismiss all the causes of action in the Complaint without specifically addressing these two causes of action. This is error.

R. 230.

The trial court overruled this objection with a separate ruling. R. 237. Thus, in spite of having notice of this error before the entry of a final order, the trial court determined to proceed anyway and dismissed all the claims of the complaint, including the claims for failure to make payment under the contract and failure to allow an audit under the contract. R. 241. In doing so, the trial court committed reversible legal error and this court should reverse the decision of the trial court.

II. THE MARKETING AGREEMENT UNAMBIGUOUSLY REQUIRES THE PARTIES TO MARKET EACH OTHER'S SUBSCRIPTION SERVICE.

The trial court erroneously determined that the Marketing Agreement does not obligate the parties to market each other's subscription service and improperly dismissed the complaint. However, the contract is unambiguous in requiring the parties to market each other's subscription service, but grants the parties discretion in the manner in which they conduct their marketing activities. At most, if the contractual language is ambiguous and capable of more than one plausible meaning, the relevant extrinsic evidence as presented in the complaint together with all reasonable inferences drawn therefrom should have been considered by the trial court and the motion to dismiss should have been denied.

The Marketing Agreement outlines the responsibilities and rights as between the parties, and references the type of marketing contemplated by reference to an Exhibit 'A' entitled "Marketing Program." R. 175. The Marketing Agreement also provides that "[The parties] will use best efforts in the performance of this Agreement." R. 175. Within the Marketing Program Exhibit A of the contract, there is a table with different

sections numbered and titled. R. 172. The following relevant provisions are set forth under the first table section designated “Marketing” within the Marketing Program Exhibit A:

Each party shall perform the following activities as the “Marketing Partner” at their sole cost and expense, and under their own exclusive control. The Marketing Partner can only market the other company’s Complementary Products within the paid area of the Marketing Partner’s website or via email to previous paying customers.

...

Promote the other company’s Complementary Products as defined in Exhibit “B” through the web sites it owns and other applications.

R. 172.

The phrase “shall perform the following activities” followed by “Promote the other company’s Complementary Products . . . through the web sites it owns and other applications” presents an unambiguous contractual obligation on the part of each party to the contract to market the other’s products. R. 172. This, coupled with the overarching contractual obligation that each party “will use best efforts in the performance of this Agreement” makes it hard to conceive that using best efforts in promoting the other on the web sites each party owns can conceivably include not performing any marketing activity at all.

Surprisingly, the trial court reached the exact opposite conclusion. The trial court concluded that the phrase “under their exclusive control” gave such broad discretion to Ancestry in the activities which it “shall perform” that Ancestry could use that discretion to not perform any marketing activities at all. Thus, the trial court erroneously concluded that there was no duty to market. In reaching this conclusion, the trial court ignored and

did not address the provision that Ancestry was obligated to “Promote the other company’s Complementary Products . . . through the web sites it owns and other applications” and determined that the provision that each party was obligated to “use best efforts in the performance of this Agreement” could include doing nothing at all. R. 220. This was legal error.

A trial court must first attempt to harmonize all of the contract’s provisions and all of its terms when determining whether the plain language of the contract is ambiguous. It is axiomatic that a contract should be interpreted so as to harmonize all of its provisions and all of its terms, which terms should be given effect if it is possible to do so. Thus, to harmonize the provisions of a contract we examine the entire contract and all of its parts in relation to each other and give a reasonable construction of the contract as a whole to determine the parties’ intent.

Gilmor v. Macey, 2005 UT App 351, ¶ 19, 121 P.3d 57 (internal quotations and citations omitted).

This principle is black letter law in Utah. *See also, Wagner v. Clifton*, 2002 UT 109, ¶ 16, 62 P.3d 440; *LDS Hosp. v. Capitol Life Ins. Co.*, 765 P.2d 857, 858 (Utah 1988); *Brixen & Christopher Architects v. Elton*, 777 P.2d 1039, 1043 (Utah App. 1989).

In this case the trial court ignored the provision stating that Ancestry is obligated to “Promote the other company’s Complimentary Products . . . through the web sites it owns and other applications.” There was no discussion on the part of the trial court regarding how this provision might be harmonized with its conclusion that there was no duty to market. There was no effort to give this term any legal effect or to even discuss it. There was no examination of the entire contract and no determination of how this provision fits in relation to the other provisions of the contract. There was no effort to

give this provision reasonable construction in the context of the whole of the contract to determine the parties' intent. In ignoring and not addressing this provision, the trial court erred.

The trial court also failed to harmonize the "shall perform" provision and the "best efforts" provision of the contract. Specifically, rather than harmonizing the "shall perform" provision, the trial court reasoned that the discretion granted to the parties in fashioning their marketing activities eviscerated the "shall perform" provision. As the trial court stated, "This clause turns all exercise of any activities referred to in the independent clause over to the 'exclusive control' of the exercising party, essentially negating the phrase 'shall perform.'" R. 221. "[N]egating" a provision of a contract is not harmonizing it, is not giving that term legal effect, and is not giving reasonable construction to the whole of the contract. Rather, negating a provision of a contract in this manner is legal error.

The trial court committed similar error when it also declined to give the "best efforts" provision any effect. The trial court reasoned that since Ancestry had discretion in the fashioning of its marketing activities the "best efforts" clause carried no meaning. In the words of the trial court, "Thus, under the language of the contract, [Ancestry's] best efforts at marketing could include no efforts." R. 220. This is error. Best efforts cannot mean no efforts. The parties meant more than 'nothing' when they negotiated for and included a best efforts clause in the Marketing Agreement. Best efforts is defined as, "Diligent attempts to carry out an obligation. As a standard, a best-efforts obligation is stronger than a good-faith obligation." BLACK'S LAW DICTIONARY, p. 123 (Abridged 7th

Ed., 2000). It's hard to conceive how diligent attempts to carry out an obligation can amount to doing nothing at all. It's hard to conceive how the parties to the contract could have intended "best efforts" to mean no efforts. The trial court's decision does exactly what *Gilmor* and many other Utah cases prohibit. The trial court has eviscerated rather than harmonized provisions of the contract. And it had rendered provisions of the contract meaningless rather than giving effect to all of the contract terms. The trial court's decision is legal error.

The sole purpose of the Marketing Agreement was to provide for marketing of each other's products and sharing the revenue generated by those marketing efforts. Rather than harmonizing the provisions to accomplish the purpose of the agreement, the trial court focused on a small portion of the contract, ignoring the other provisions and thereby eviscerating the contract's purpose.

The trial court seems to have committed these legal errors due to its conclusion that under the "exclusive control" provision of the contract, Ancestry gained unfettered and unreviewable discretion in the way it might choose to fashion its marketing activities, to the point that it could choose to not market at all under the Marketing Agreement. However, as will be discussed at greater length in a separate section below, the granting of discretion to a party in the manner in which it might perform under a contract comes with important legal limitations. A party cannot exercise that discretion in a manner that deprives the other party to the contract from receiving the expected fruits of the contract. Rather, the party must exercise its discretion in good faith and deal fairly with its contractual partner. The greater the level of discretion afforded to a contract party, the

higher and more stringent its duty becomes to exercise that discretion reasonably. *See, Markham v. Bradley*, 2007 UT App 379, 173 P.3d 865; *Smith v. Grand Canyon Expedition Co.*, 2003 UT 57, ¶ 19, 84 P.3d 1154; *Cook Assocs. v. Utah Sch. & Inst. Trust Lands Admin.*, 2010 UT App 284, ¶ 27, 243 P.3d 888.

At the very most, the trial court's analysis regarding why it can disregard the "best efforts," "Promote the other company's Complementary Products" and "shall perform" provisions contained in the contract only present the possibility that there exists alternate plausible readings of the contractual language and that there exists ambiguity in the language of the contract. Thus, even under the trial court's own reasoning, it should have conducted an in depth analysis and exploration regarding both facial and latent ambiguity in the contract, considered the extrinsic evidence as presented in the complaint, and denied the motion to dismiss.

Ambiguity may present itself in two different ways in contracts, namely "(1) facial ambiguity with regard to the language of the contract and (2) ambiguity with regard to the intent of the contracting parties." *Hillcrest Inv. Co., LLC v. UDOT*, 2015 UT App 140, ¶ 7, 352 P.3d 128. (internal citations and quotations omitted). "A contractual term is ambiguous if, looking to the language of the contract alone, it is reasonably capable of being understood in more than one way such that there are tenable positions on both sides." *Deep Creek Ranch, LLC v. Utah State Armory Bd.*, 2008 UT 3, ¶ 13, 178 P.3d 886; *see also, Hillcrest*, 2015 UT App 140, ¶ 7; *Winegar v. Froerer Corp.*, 813 P.2d 104, 108 (Utah 1991). "When determining whether a contract is ambiguous, any relevant evidence must be considered. Otherwise, the determination of ambiguity is inherently

one-sided, namely, it is based solely on the extrinsic evidence of the judge's own linguistic education and experience." *Ward v. Intermountain Farmers Ass'n*, 907 P.2d 264, 268 (Utah 1995); *see also*, *Hillcrest*, 2015 UT App 140, ¶ 8. "Then, after the trial court has considered evidence of contrary interpretations, the trial court must ensure that the interpretations contended for are reasonably supported by the language of the contract." *Hillcrest*, 2015 UT App 140, ¶ 8; *see also*, *Hall v. Hall*, 2013 UT App 280, ¶ 12, 316 P.3d 970.

Thus, the first step is to consider relevant extrinsic evidence to determine whether the contract is ambiguous. *Hillcrest*, 2015 UT App 140, ¶ 9. Indeed "Utah no longer strictly applies the . . . plain meaning rule; rather, that rule is just part of the initial inquiry to determine whether an ambiguity exists in contract language." *State v. Davis*, 2011 UT App 74, ¶ 4 fn. 3, 272 P.3d 745 (internal citations and quotations omitted). As a trial court conducts this initial analysis, "[a]lthough the terms of an instrument may seem clear to a particular reader--including a judge--this does not rule out the possibility that the parties chose the language of the agreement to express a different meaning. A judge should therefore consider any credible evidence offered to show the parties' intention." *Ward*, 907 P.2d at 268. A trial court should, "consider the writing in light of the surrounding circumstances" rather than embracing a strict rule which would "restrict a determination of whether ambiguity exists to a judge's determination of the meaning of the terms of the writing itself." *Id.* (internal citations omitted). The trial court should conduct "a preliminary consideration of all credible evidence offered to prove the intention of the parties so that the court can place itself in the same situation in which the

parties found themselves at the time of contracting.” *Id.* Evidence of a prior course of dealing between contracting parties is directly relevant and should be considered by a trial court which is attempting to make a determination regarding whether the contract is facially ambiguous. *Peterson v. Sunrider Corp.*, 2002 UT 43, ¶ 23, 48 P.3d 918.

It is important to note that this consideration of extrinsic evidence to ascertain the intent of the parties and determine whether the contract is facially ambiguous is distinct and separate from the admission of extrinsic evidence after a determination of ambiguity has been reached in order to resolve the ambiguity and ultimately interpret the meaning of the contract. The two analyses are discrete, and although there may be overlap in evidence, the purpose of the consideration of the extrinsic evidence is wholly distinct. In other words, relevant, extrinsic evidence of “the facts known to the parties at the time they entered the [contract] is admissible to assist the court in determining whether the contract is ambiguous.” *Nielsen v. Gold's Gym*, 2003 UT 37, ¶ 7, 78 P.3d 600. Thereafter, if ambiguity is found, extrinsic evidence is also admissible to help ultimately determine the actual meaning of the contract and resolve the ambiguity. *Gilmor*, 2005 UT App 351, ¶ 37.

In the present matter, the trial court did not conduct any such analysis and failed to consider the allegations contained in the complaint, which it was required to treat as true in the motion to dismiss. Further, the trial court did not conduct any analysis into extrinsic evidence of the parties’ prior course of dealing together with their intentions and expectations at the time of contracting, which might provide insight into whether the Marketing Agreement is facially ambiguous on the question of whether there is a duty to

market. Instead, the trial court misread the law and seems to have conflated the admissibility of extrinsic evidence to ascertain an ambiguity with the admissibility of extrinsic evidence to resolve an ambiguity. The trial court states, “The Court may only consider extrinsic evidence of the parties’ intentions when a contract is ambiguous.” R. 222. As shown above, this statement is legally incorrect. The trial court should consider extrinsic evidence to determine whether the Marketing Agreement is ambiguous. Thus, even if the trial court’s reading of the meaning of the Marketing Agreement is plausible, the trial court should then have considered the extrinsic evidence concerning the parties’ intentions and prior course of dealing, to determine if that reading might also conform with the parties’ intentions and behavior. To do so would require a determination that there remain questions of fact regarding intent, and a determination that the complaint states a valid cause of action for breach of contract under that potential meaning of the contract. The trial court did not do this, and instead committed reversible error.

Indeed, the trial court has done what the case law specifically warns against—it has substituted its own linguistic education and experience for that of the actual intentions of the parties. *See Ward*, 907 P.2d at 268; *Hillcrest*, 2015 UT App 140, ¶ 7. The trial court engages in a grammatical and linguistic analysis of what the “exclusive control” provision means in the context of the sentence in which it appears. R. 221-22. The trial court discusses the relationship of this provision to the “shall perform” provision and the “best efforts” provision and concludes that the “exclusive control” provision “negates” the other two and rules the day. R. 221-22. The error in this analysis, in addition to what has already been discussed above, is that it consists of the trial court

engaging in a “one-sided” analysis based solely on “the judge’s own linguistic education and experience” and without considering the parties own intentions. *Id.* This is reversible legal error. This Court should therefore reverse the trial court’s decision to dismiss OGF’s complaint and remand this case back to the district court.

III. THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING REQUIRES THAT ANCESTRY CANNOT EXERCISE ANY DISCRETION IT HAS UNDER THE MARKETING AGREEMENT TO COMPLETELY DEPRIVE OGF OF THE BENEFITS OF THE MARKETING AGREEMENT.

OGF properly alleged in its complaint that Ancestry’s behavior in relation to the contract violated the implied covenant of good faith and fair dealing, and the trial court’s decision to dismiss that claim was legal error.

Under the covenant of good faith and fair dealing, parties to a contract agree “not to intentionally do anything to injure the other party’s right to receive the benefits of the contract.” *Markham*, 2007 UT App 379, ¶ 18. A grant of discretion in the performance of a contract does not remove the covenant of good faith and fair dealing from the contract, but instead amplifies the duty. *See Smith*, 2003 UT 57, ¶ 19 (“[W]here one party has discretion over another according to the terms of the contract, that party must act with good faith and fair dealing.”); *Cook Assocs.*, 2010 UT App 284, ¶ 27. Indeed, “[t]he degree to which a party to a contract may invoke the protections of the covenant turns on the extent to which the contracting parties have defined their expectations and imposed limitations on the exercise of discretion through express contract terms.” *Markham*, 2007 UT App 379, ¶ 21 (quoting *Smith*, 2003 UT 57, ¶ 20). When “express

contract terms” do not limit a party’s exercise of discretion, the covenant of good faith and fair dealing is paramount. *Id.*

Courts imply a “reasonableness” limitation to the exercise of contractually permitted discretion. In *Markham*, the court supplied an “objective standard of reasonableness” to a seller’s discretion to cancel a real estate purchase contract if it disapproved of the buyer’s financial information. *Markham*, 2007 UT App 379, ¶ 22. The court noted that without an objective reasonableness standard governing the seller’s discretion, the seller’s promise to sell the property would be “illusory.” *Id.* at ¶ 23. Similarly, in *Cook Assoc.*, a clause in a lease agreement gave the landlord “sole discretion” to raise rents every five years as the landlord deemed “reasonably necessary.” *Cook Assoc.*, 2010 UT App 284, ¶¶ 18, 27. The court held that because of the explicit grant of discretion to the landlord, the covenant of good faith and fair dealing served “to protect the other party from an inappropriate exercise of that discretion.” *Id.* at ¶ 27. Because the contract imposed no “agreed formula” or “express standard,” the landlord was required to exercise its discretion “reasonably within the contemplation of the parties” in accordance with their “purpose, intentions, and expectations” when it raised rent. *Id.* at ¶¶ 28-29. Finally, Utah law is clear that,

An examination of express contract terms alone is insufficient to determine whether there has been a breach of the implied covenant of good faith and fair dealing. To comply with his obligation to perform a contract in good faith, a party’s actions must be consistent with the agreed common purpose and the justified expectations of the other party. The purpose, intentions, and expectations of the parties should be determined by considering the contract language *and* the course of dealings between and conduct of the parties.

St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 200 (Utah 1991)(internal citations omitted, emphasis in original).

In the instant case, OGF presented a complaint that alleged that Ancestry had improperly reinterpreted the Marketing Agreement in an unreasonable way. R. 6-7. The trial court was required to accept those allegations as true for the purposes of the motion to dismiss. *Id.* at 196. Specifically, that Ancestry unreasonably decided that the Marketing Agreement did not contain an obligation to market and had therefore ceased its marketing activities. Ancestry argued to the trial court that the discretion granted to it under the marketing agreement was so broad that it was not required to market at all. R. 102-125. In support of this theory, Ancestry relied on a portion of the Marketing agreement which provides as follows:

Each party shall perform the following activities as the "Marketing Partner" at their sole cost and expense, and under their own exclusive control.

R. 172.

The trial court accepted this argument, reasoning that,

Generally, "shall perform" is indeed obligatory language that imposes a duty upon a party, and would do so in this case were the sentence to end there. However, in this case, this sentence includes the dependent clause "at their sole cost and expense, and under their own exclusive control." This dependent clause is a restrictive modifying clause, changing the entire meaning of the independent clause. This clause turns all exercise of any activities referred to in the independent clause over to the "exclusive control" of the exercising party, essentially negating the phrase "shall perform." Because each party maintains exclusive control over any activities performed under the Marketing Agreement, each party retains the right to perform any amount of marketing that the party chooses, including no

marketing at all. Because Defendants have no affirmative duty to perform any marketing activity under the Marketing Agreement at all, they cannot be in breach of contract for performing no marketing activity.
R. 221.

As already discussed above, this ruling and rationale by the trial court is erroneous for a number of reasons.² As it relates to the claim for breach of the covenant of good faith and fair dealing, the trial court expressly states that Ancestry is permitted to interpret the contract in a manner which allows Ancestry to strip from OGF the anticipated fruits of the contract. This result is exactly what the implied covenant of good faith and fair dealing is designed to prevent.

As set forth above, if Ancestry had discretion in the manner in which it could market under the Marketing Agreement, as the trial court found, then Ancestry has a duty to exercise that discretion reasonably. Moreover, without express definitions or limitations on how the discretion should be exercised, Ancestry's duty to exercise that discretion reasonably is even more amplified. *Smith*, 2003 UT 57, ¶ 20; *Markham*, 2007 UT App 379, ¶ 21. The trial court's decision that the Marketing Agreement contains no duty to market accomplishes the very result that this Court specifically warned against in *Markham*. The promised fruits of the contract become "illusory." 2007 UT App 379, ¶ 22. Similar to *Cook Assoc.*, the implied covenant of good faith and fair dealing should

² Those reasons include the failure to consider extrinsic evidence like the parties' prior course of dealing and the intent of the individuals who originally drafted and entered into the Marketing Agreement to determine if there is latent ambiguity, as well as an express willingness on the part of the trial court to disregard or eviscerate clear contract terms, rather than harmonize and give effect to all terms, like finding that the phrase "shall perform" has been "negated."

serve “to protect the other party from an inappropriate exercise of that discretion.” 2010 UT App 284, ¶ 27. The trial court’s failure to acknowledge that the covenant of good faith and fair dealing protects OGF, and the trial court’s outright endorsement of Ancestry’s abuse of the discretion granted to it in the contract, was legal error.

OGF properly articulated a cause of action for breach of the covenant of good faith and fair dealing by asserting that Ancestry had improperly reinterpreted the contract in an unreasonable manner which directly deprived OGF of the fruits of the contract and which deviated from the purpose, intentions, and expectations and was directly contrary to the parties’ prior course of dealing. R. 6-7; *see St. Benedict’s*, 811 P.2d at 200. The cause of action was well pled and, for the purposes of the motion to dismiss, the trial court was required to accept those facts as true. *Id.* at 196. The trial court committed error, when, in the face of these well pled allegations, it found that the benefits OGF expected to receive under the contract were illusory and that Ancestry had no duty to perform any marketing at all. The trial court should have permitted OGF to proceed with its claim of breach of the covenant of good faith and fair dealing when it properly alleged that Ancestry had breached its duty to exercise its discretion in a manner that was “reasonably within the contemplation of the parties” and in accordance with their “purpose, intentions, and expectations.” *Cook Assoc.* 2010 UT App 284 at ¶¶ 28-29. Indeed, the trial court declined to even allow OGF the opportunity to develop evidence on what the “purpose, intentions, and expectations” of the parties even were. This was legal error and requires reversal. OGF presented a properly pled claim and should be provided an

opportunity to prove that claim through appropriate legal process. This Court should reverse the decision of the trial court.

IV. THE CONTRACT HAS AN EXPRESS PUNITIVE DAMAGES PROVISION AND OGF PRESENTED A PROPER CAUSE OF ACTION FOR PUNITIVE DAMAGES.

The trial court dismissed OGF's cause of action for punitive damages because it found that "because there is no breach of contract."³ However, if OGF did properly plead valid causes of action in its complaint, then its claim for punitive damages also survives. The Marketing Agreement contains the following punitive damages provision,

In no event will a Party be liable to the other for indirect, incidental, consequential, punitive, special or exemplary damages . . . unless such breach is as a result of gross negligence or willful misconduct.
R. 99.

The complaint states,

The combined actions of Ancestry to breach and thwart performance under the Marketing Agreement and prevent OGF from receiving the fruits of the contract constitute willful and malicious conduct because the intentionally breached the clear and understood language of the contract.

...

Such actions were taken intentionally, knowingly, and with conscious disregard for OGF's rights.

R. 3.

These allegations properly state a cause of action for punitive damages under the terms of the Marketing Agreement and the trial court recognized such, but dismissed

³ It is also worth noting that on a motion to dismiss, the trial court should not decide whether a breach of contract occurred, but rather whether or not the complaint states a valid cause of action for breach of contract under the facts alleged.

them on the basis of its conclusion to dismiss all other causes of action in the complaint.

R. 219. If this Court reverses the decision of the trial court to dismiss OGF's breach of contract claims and breach of the implied covenant of good faith and fair dealing, it must also reverse the decision of the trial court to dismiss its properly pled cause of action for contractually allowed punitive damages.

CONCLUSION

For the aforementioned reasons, this Court should hold that the trial court committed reversible legal error when it failed to address or consider OGF's causes of action for breach of contract for failure to make payment and for failure to allow an audit under the contract. This Court should further hold that the Marketing Agreement unambiguously contains a duty to market and the trial court's decision to the contrary was likewise in error. Also, this Court should determine that OGF presented a properly pled claim for breach of the implied covenant of good faith and fair dealing in alleging that Ancestry acted unreasonably when it decided to engage in no marketing efforts at all under the Marketing Agreement and reverse the decision of the trial court. Finally, this Court should reverse the trial court's decision dismissing OGF's claim for contractually permitted punitive damages.

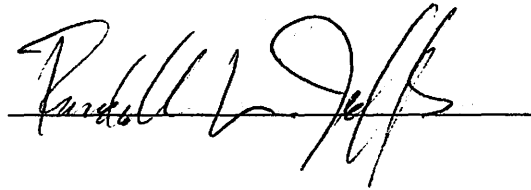
DATED and SIGNED this 2nd day of September, 2015.

JEFFS & JEFFS, P.C.


Robert L. Jeffs

CERTIFICATE OF COMPLIANCE

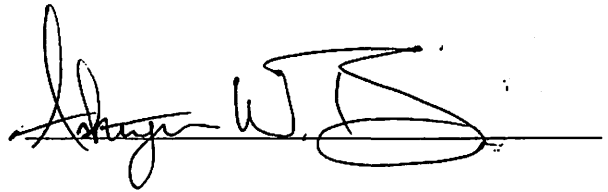
I certify that this Brief complies with the type and volume limitations of the Utah Rules of Appellate Procedure, Rule 24(f)(1)(A), because this Brief contains 8,720 words (including headings, footnotes and quotations) in 13 point Times New Roman font, excluding the parts of the Brief exempted by Rule 24(f)(1)(B), as calculated by Microsoft Word 2013, the word processing system used to prepare this Brief.

A handwritten signature in black ink, appearing to read "Randall L. Jeff", is written over a horizontal line.

CERTIFICATE OF SERVICE

I hereby certify that the original Brief of Appellants Z-Corp and OneGreatFamily, LLC, together with required copies, was hand delivered to the Clerk of the Court, in the Utah Court of Appeals and two copies mailed to the below named parties by placing the same in the United States mail, postage prepaid, this 4th day of September, 2015, addressed as follows:

Mark O. Morris
Amber M. Mettler
SNELL & WILMER LLP
15 West South Temple
Suite 1200
Gateway Tower West
Salt Lake City, Utah 84101

A handwritten signature in black ink, appearing to read "Amber M. Mettler", is written over a horizontal line.

ADDENDUM

INDEX TO ADDENDUM

1. Marketing Agreement
2. Consent to Assignment
3. Complaint
4. Ruling Re: Defendants' Motion to Dismiss
5. Objection to Defendants' Proposed Order Granting Defendants' Motion to Dismiss and Dismissing Plaintiff's Complaint

Addendum A

MARKETING AGREEMENT

THIS AGREEMENT is made as of April 20, 2009 by and between Z-Corp, a Utah corporation, dba OneGreatFamily.com (hereafter referred to as "OGF") with its principal place of business located at 743 West 1200 North #100, Springville, Utah 84663 and People Search Media, LLC., a Nevada Limited Liability Corporation with its principal place of business located at 101 University Ave. Suite #320, Palo Alto, CA 94301 (hereinafter referred to as "PSM").

WITNESSETH:

WHEREAS, PSM and OGF are in the business of online marketing and selling various products and services to consumers.

WHEREAS, the parties desire for PSM to use the OGF name and trademarks to allow PSM customers to purchase access to OGF's products and services and also for OGF to use the PSM name and trademarks to allow OGF customers to purchase PSM products and services as provided herein and further described in Exhibit A attached hereto and made part of this Agreement (the "Marketing Program");

NOW, THEREFORE, for and in consideration of the promises and covenants contained herein and other good and valuable consideration, the receipt, sufficiency and adequacy of which are hereby acknowledged, the parties hereto agree as follows:

1. Marketing Program: OGF and PSM agree to implement all of the elements of the Marketing Program as described in Exhibit A attached hereto and made part of this Agreement. Parties will mutually agree on what subscription offerings will be promoted and the price that will be charged to the end-user. Such agreement, once made in writing, will be valid until the party who's offering is being promoted gives notice to the promoting party of their desire to no longer support that offering or price. Upon receipt of such notice, the promoting party will have 30 days to stop promoting that offer.
2. Good and Workmanlike Manner: OGF and PSM will use best efforts in the performance of this Agreement, and both will be responsible for providing services by qualified personnel in accordance with the specifications and requirements of each Party, on a timely basis in a professional, good and workmanlike manner, and will conform to the standards of care, skill, diligence, performance and safety customarily exercised by competent professionals performing services similar to those contemplated by this Agreement.
3. Indemnification: Each Party (the "Indemnifying Party") agrees to indemnify and hold harmless the other Party, its officers, directors, shareholders, employees or agents (the "Indemnified Parties") from any and all liabilities, losses, damages, claims, suits, judgments, costs and expenses (including reasonable attorneys' fees and costs of any investigation or action related thereto) suffered or incurred by the Indemnified Parties arising from a third party claim (i) as a result of the Indemnifying Party's performance under or breach of this Agreement; or (ii) from the breach or incorrectness of any representation or warranty made herein by the Indemnifying Party. The indemnified Party shall give notice to the Indemnifying Party promptly after the Indemnified Party has actual knowledge of any claim as to which indemnity may be sought, and shall permit the Indemnifying Party to assume the defense of any such claim or any litigation resulting therefrom. The Indemnifying Party shall not have the right to settle compromise or otherwise enter into any agreement regarding the disposition of any claim against the Indemnified Party without prior written consent and approval of the Indemnified party, which shall not be unreasonably withheld.

4. Limitation of Liability: In no event will a Party be liable to the other for indirect, incidental, consequential, punitive, special or exemplary damages (even if that Party has been advised of the possibility of such damages), arising from performance under or failure of performance of any provision of this Agreement (including such damages incurred by third parties), such as, but not limited to, loss of revenue or anticipated profits or lost business, unless such breach is as a result of gross negligence or willful misconduct.
5. Confidentiality: From time to time a Party will disclose (the "Discloser") confidential and proprietary information that is marked as confidential or proprietary or by the nature of the circumstances of the disclosure or content of the information should reasonably be known to be confidential ("Confidential Information") to the other Party (the "Recipient"). In each such case, the Recipient shall hold such Confidential Information in strictest confidence and shall protect such information by all reasonable and necessary security measures. The Confidential Information shall not be disclosed except to a Party's employees, who are subject to similar confidential obligations and who have a need to know such Confidential Information in order to perform such Party's obligations under this Agreement. Neither Party shall have any rights in the other Party's Confidential Information and shall return or destroy all such Confidential Information upon the termination of this Agreement or request of the Disclosing Party. "Confidential Information" shall not include information that: (a) was already in the lawful possession of the Recipient prior to receipt thereof, directly or indirectly, from the Discloser; (b) lawfully becomes available to Recipient on a non-confidential basis from a source other than Discloser that is not under an obligation to keep such information confidential; (c) is generally available to the public other than as a result of a breach of this Agreement by Recipient or its representative(s); or (d) is subsequently and independently developed by employees, consultants or agents of the Recipient without reference to the Confidential Information disclosed under this Agreement. Notwithstanding anything to the contrary in this Agreement, nothing shall prevent or prohibit Recipient from providing access to Confidential Information as may be required by law provided that Recipient gives as much notice as is reasonably practical and provides reasonable assistance to the Discloser in challenging or modifying the disclosure so required by law. The Parties acknowledge that Confidential Information is unique and valuable, and that disclosure in breach of this Agreement will result in irreparable injury to Discloser for which monetary damages alone would not be an adequate remedy. Therefore, the Parties agree that in the event of a breach or threatened breach of confidentiality, the Discloser shall be entitled to seek injunctive or other equitable relief as a remedy for any such breach or anticipated breach without the necessity of posting a bond.
6. Audit Rights: During the Program Term, upon twenty (20) business days' prior written notice, PSM shall have the right to send an employee or other party, to OGF's offices to inspect OGF's records to the extent reasonably necessary and solely for the purpose of verifying OGF's records regarding customer sign-ups, cancellations, and other information material to the terms of payment under the Marketing Program. Such inspection shall not occur more than once per calendar year during the Program Term. All such records shall be treated as Confidential Information and such inspections shall be conducted by PSM during OGF's normal business hours and in a reasonable manner without undue burden on the conduct of OGF's business. Such audit will be at the expense of PSM, unless any audit shows an underpayment to PSM for the audit period of five percent (5%) or more, in which case OGF shall pay the reasonable expenses of such audit. Likewise, during the Program Term, upon twenty (20) business days' prior written notice, OGF shall have the right to send an employee or other party, to PSM's offices to inspect PSM's records to the extent reasonably necessary and solely for the purpose of verifying PSM's records regarding customer sign-ups, cancellations, and other information material to the terms of payment under the Marketing Program. Such inspection shall not occur more than once per calendar year during the Program Term. All such records shall be treated as Confidential Information and such inspections shall be conducted by OGF during PSM's normal business hours and in a reasonable manner without undue burden on the conduct of PSM's business. Such audit will be at the expense of OGF, unless any audit shows an

underpayment to OGF for the audit period of five percent (5%) or more, in which case PSM shall pay the reasonable expenses of such audit.

7. Notices: Notices provided for in this Agreement will be in writing and will be delivered by hand, facsimile, overnight mail or certified mail, email, or recognized overnight delivery service to the Parties at the addresses mentioned above, or such other addresses either Party may provide to the other Party in writing.
8. Relationship: Neither this Agreement, nor either Party's participation in the subject matter of the Agreement is intended to create any agency, franchise, sales representative, joint venture, partnership, or employment relationship between the Parties and neither Party has any authority to bind the other without prior written consent.
9. Term: This Agreement commences on the Effective Date and shall continue in effect for one year "Initial Term" and shall automatically renew thereafter for additional one year terms any of which constitutes a "Term" unless either party provides the other party with written notice of non-renewal at least (60) days prior to the end of a Term. If either party should be in material breach of this Agreement, and such breach is not rectified within 7 days of notification by the non-breaching party, then the non-breaching party shall have the right to terminate this Agreement on 60 days notice to the party in breach. To the fullest extent applicable, Sections 2, 3, 4, 5, 6, , and all revenue share & commission, and billing & invoice obligations of any Exhibit attached hereto in their entirety shall survive termination of this Agreement.
10. Severability: If any provision of this Agreement is invalid or unenforceable, the Agreement will be construed as if such invalid or unenforceable provision was not included and the remainder of the Agreement shall be enforced as written.
11. Waiver: A Party's failure to enforce any provision of the Agreement will not be a waiver of its right to subsequent enforcement of the provision or any other provision of the Agreement.
12. Assignment: Neither Party may assign this Agreement without the other Party's prior written consent, except as follows: (i) to an affiliate, provided the assigning Party remains responsible for all of its obligations under this Agreement, and (ii) to an acquirer of all or substantially all of the assets or equity of the Party, provided the acquiring party assumes responsibility for all of the obligations of that Party under this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be effective upon the execution hereof.

PEOPLE SEARCH MEDIA, LLC

By: [Signature]
Title: VP of Sales
Date: 5.12.00

ONE GREAT FAMILY, INC.

By: [Signature]
Title: SVP Marketing and Sales
Date: May 5, 2000

EXHIBIT "A"

MARKETING PROGRAM

1	Marketing	<p>Each party shall perform the following activities as the "Marketing Partner" at their sole cost and expense, and under their own exclusive control. The Marketing Partner can only market the other company's Complementary Products within the paid area of the Marketing Partner's website or via email to previous paying customers. Offering bundles that include Marketing Partner's and Complementary Products to non-customers is strictly prohibited unless approved of in writing by Receiving Partner.</p> <p>Promote the other company's Complementary Products as defined in Exhibit "B" through the web sites it owns and other applications.</p> <ul style="list-style-type: none">• Capture customer contact, enrollment and payment information for customers who wish to purchase the Complementary Products, and transfer sufficient information to create an account. (Minimum requirements: First/Last Name and email address; providing Postal Code and a daytime phone number will be tested for retention purposes) in a secure manner to the other company via a mutually agreed upon interface no later than 24 hours after a customer places the order.• Bill the customer upon purchase. This will happen immediately upon an upfront sale or after the appropriate elapsed period if sold on a free-trial basis.• Provide other company with an online method for their support representatives to cancel future billings, extend a future billing date, or refund a past billing.• Inform other company if the customer's account is deactivated for any reason other than the account being cancelled by a support representative of the other company.
2	Order Fulfillment	<p>Each party receiving an order for a Complementary Product "Receiving Partner" from the other company "Marketing Partner" shall perform the following activities at the Receiving Partner's sole cost and expense, and under the Receiving Partner's exclusive control:</p> <ul style="list-style-type: none">• Fulfill orders for customers passed to Receiving Partner by Marketing Partner at service levels consistent with those provided by Receiving Partner generally.• Provide timely customer support service whose representatives actively cancel future billings, extend a future billing date, or refund past billings as required to satisfy customers using the interface provided by Marketing Partner for such purposes. Incoming calls will be picked up at least 70% of the time during business hours and all phone calls and emails will be personally responded to within 48 hours, with the average monthly response time being less than 24 hours.
3	Early Termination	<ul style="list-style-type: none">• In addition to the termination rights covered in Section 9 of this agreement, any time prior to 90 days after the first transfer of enrollment and payment information described in Exhibit "A", section 1, either party can provide written notice to the other of their desire to terminate the program. If such event, the program will terminate 60 days after receipt of said written notice.
4	Product Configuration	<ul style="list-style-type: none">• The product configuration and pricing will be determined mutually and may only be changed by a mutual agreement of both parties, and must be documented in writing.

5	Customer Data	<ul style="list-style-type: none"> Each company shall own any data that it collects with regards to customers as well as any data that is sent to it by the other company as a part of this Marketing Program.
6	Revenue Share and Commissions	<ul style="list-style-type: none"> Revenue share and commissions shall be as defined in Exhibit B and can only be changed through mutual agreement of both parties, and must be documented with an addendum to this agreement. Revenue share payments shall apply only to billings for memberships sold via the Marketing Partner and not for any future products or services that may be offered to the Customer by the Receiving Partner.
7	Billing/invoicing	<ul style="list-style-type: none"> See Exhibit B.
8	Termination	<ul style="list-style-type: none"> In the event of termination of the Marketing Program by either party, Marketing Partner shall pay Receiving Partner for all commissions earned from the program prior to the Termination date, and will also pay Receiving Partner for all commissions on sales due to referrals which occurred prior to Termination but for which sales were recorded after Termination.

EXHIBIT "B"

Commissions

Commission Percentage: PSM will pay OGF a Revenue Share consisting of 40% of the Gross Revenues (net of returns and chargebacks) collected from any customer who is referred to OGF from PSM and is subsequently billed by PSM. This Revenue Share will apply to all payments made by such customers for current membership subscriptions not for any future new product offering or services.

Payment Terms: By the 5th of each month, PSM will provide OGF with a list of all PSM referred customers who were successfully billed during the prior month as well as any refunds or chargebacks associated with any PSM customers during the same month, along with the Gross Revenue associated with each transaction. By the 30th of each month, PSM will provide OGF payment via direct bank deposit of the Revenue Share.

Termination: In the event that this contract is terminated, PSM will continue to pay the appropriate Revenue Share to OGF for customers referred to OGF during the time period that the contract was in force. However, following 12 months after termination of this agreement, if for any 3 month period the average total Revenue Share owed to OGF per month is less than \$250, then following the end of that 3 month period PSM may cease any future Revenue Share payments to OGF.

Commission Percentage: OGF will pay PSM a Revenue Share consisting of 40% of the Gross Revenues (net of returns and chargebacks) collected from any customer who is referred to PSM from OGF and is subsequently billed by OGF. This Revenue Share will apply to all payments made by such customers for current membership subscriptions not for any future new product offering or services.

Payment Terms: By the 5th of each month, OGF will provide PSM with a list of all OGF referred customers who were successfully billed during the prior month as well as any refunds or chargebacks associated with any OGF customers during the same month, along with the Gross Revenue associated with each transaction. By the 30th of each month, OGF will provide PSM payment via direct bank deposit of the Revenue Share.

Termination: In the event that this contract is terminated, OGF will continue to pay the appropriate Revenue Share to PSM for customers referred to PSM during the time period that the contract was in force. However, following 12 months after termination of this agreement, if for any 3 month period the average total Revenue Share owed to PSM per month is less than \$250, then following the end of that 3 month period OGF may cease any future Revenue Share payments to PSM.

Addendum B

CONSENT TO ASSIGNMENT

This Consent to Assignment ("Agreement") is entered into as of August 16, 2012, to become effective as of the Closing Date (defined below), by and between Z-CORP, INC. (dba OneGreatFamily.com) with a principal place of business at 2162 West Grove Parkway, Suite 150, Pleasant Grove, Utah 84062 ("OGF"), INFLECTION LLC (formerly known as People Search Media, LLC) with a principal place of business at 355 Twin Dolphin Drive, Redwood Shores, CA ("Assignor"); and ANCESTRY.COM OPERATIONS, INC. with a principal place of business at 360 West 5800 North, Provo, UT ("Assignee").

RECITALS

WHEREAS, OGF and Assignor are parties to that certain Marketing Agreement dated April 20, 2009 (the "Marketing Agreement"); and

WHEREAS, Section 12 of the Marketing Agreement requires that neither party may assign its rights and obligations under the Marketing Agreement without the prior written consent of the other party; and

WHEREAS, Assignor and Assignee have entered into that certain Asset Purchase Agreement (the "Asset Purchase Agreement"), pursuant to which Assignee will purchase certain assets of the Assignor relating to family history research websites (the "Asset Purchase"); and

WHEREAS, subject to the requirements of the Marketing Agreement, Assignor desires to assign to Assignee, and Assignee desires to assume, all of Assignor's rights and obligations under the Marketing Agreement effective as of the closing of the Asset Purchase under the Purchase Agreement ("Closing Date"); and

WHEREAS, OGF is willing to provide written consent to such assignment subject to the terms and conditions of this Agreement.

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants and agreements herein contained and for other good and valuable consideration, the receipt of which are hereby acknowledged, the parties agree as follows:

AGREEMENT

1. **Revised Term.** The parties hereby agree that as of the Closing Date the Marketing Agreement shall be amended to replace the first sentence of Section 9 of the Marketing Agreement with the following language:

"This Agreement commences on the Effective Date and shall continue in effect until December 31, 2015 ("Initial Term") and shall automatically renew thereafter for additional one-year terms, any of which constitute a "Term,"

unless either party provides the other party with written notice of non-renewal at least sixty (60) days prior to the end of a Term."

2. **No Other Changes.** The parties hereby agree that, except for the amendment expressly set forth in paragraph 1 above, all other provisions of the Marketing Agreement, including all Exhibits, shall remain in full force and effect.

3. **Written Consent.** Upon Closing and subject to the agreement of Assignor and Assignee to all terms and conditions of this Agreement, and further subject to Assignee's acceptance of all terms and conditions of the Marketing Agreement, as hereby amended, which agreement and acceptance is indicated by the parties' signatures below, OGP hereby consents to the assignment of all rights and obligations of Assignor under the Marketing Agreement to Assignee.

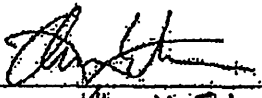
5. **Effect of Assignment.** Assignor and Assignee hereby acknowledge and agree that, notwithstanding anything herein to the contrary, (i) Assignor shall remain obligated and liable to OGP for compliance with all terms and conditions of the Marketing Agreement prior to the Closing Date, and (ii) Assignee shall become obligated and liable to OGP for compliance with all terms and conditions of the Marketing Agreement, as hereby amended, as of and following the Closing Date. The parties understand and agree that Assignor shall have no responsibility for the obligations assumed by Assignee as of and following the Closing Date.

6. **Execution.** This Consent for Assignment may be executed in one or more counterparts, each of which shall be deemed to be an original but all of which together shall constitute one and the same instrument, and shall become effective when one or more counterparts have been signed by each of the parties and delivered to the other party. A facsimile, pdf format or other electronic signature of this Assignment shall be valid and have the same force and effect as a manually signed original.

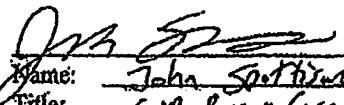
[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the parties hereto have executed this Consent to Assignment as of the day and year first hereinabove written.


OGF

By: 
Name: Alan V. Balon
Title: CEO

ASSIGNOR

By: 
Name: John Spethwood
Title: Corp. Sec. & Corp. Dev.

ASSIGNEE

By: 
Name: William R. Stead
Title: General Counsel

Addendum C

Robert L. Jeffs, #4349
Randall L. Jeffs, #12129
JEFFS & JEFFS, P.C.
90 North 100 East
P.O. Box 888
Provo, UT, 84603
Telephone: (801) 373-8848
Email: rljeffs@jeffslawoffice.com
rzjeffs@jeffslawoffice.com

Attorneys for Plaintiffs

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

Z-CORP, dba OneGreatFamily.com, a Utah
Corporation; and ONEGREATFAMILY,
LLC, a Utah limited liability company,

Plaintiffs,

v.

ANCESTRY.COM, INC., a Utah
Corporation; and ANCESTRY.COM
OPERATIONS, INC., a Utah Corporation,

Defendants.

COMPLAINT

Civil No.: _____

Judge: _____

COME NOW Plaintiffs Z-Corp and OneGreatFamily, LLC by and through their counsel,
Robert L. Jeffs and Randall L. Jeffs of the law firm Jeffs & Jeffs, P.C., and for cause of action
against Defendants allege and aver as follows:

000014

PARTIES

1. Plaintiff Z-Corp is a Utah corporation located in Utah County, State of Utah doing business as OneGreatFamily.com.

2. Plaintiff OneGreatFamily, LLC is a Utah limited liability company located in Utah County, State of Utah.

3. Defendant Ancestry.com, Inc. is a Utah corporation located in Utah County, State of Utah.

4. Defendant Ancestry.com Operations, Inc. is a Utah corporation located in Utah County, State of Utah.

JURISDICTION

5. The facts and circumstances of this Complaint involve a Marketing Agreement and subsequent Consent to Assignment, which was created in Utah County, State of Utah.

6. The principle place of business for Z-Corp and OneGreatFamily, LLC is 1371 West 1250 South, Orem, Utah 84058. The principle place of business for Ancestry.com, Inc. and Ancestry.com Operations Inc. is 360 West 5800 North, Provo, Utah 84604.

7. This Court properly maintains jurisdiction over this matter pursuant to UTAH CODE ANN. §78A-5-102.

8. Venue is proper in this Court pursuant to UTAH CODE ANN. § 78B-3-304.

GENERAL ALLEGATIONS

9. Z-Corp, its dba OneGreatFamily.com and subsidiary OneGreatFamily, LLC (hereinafter "OGF") have an ongoing contractual relationship with Ancestry.com, Inc. and Ancestry.com

Operations, Inc. (hereinafter "Ancestry") through a Marketing Agreement and subsequent Consent to Assignment with Ancestry. A copy of the Marketing Agreement is attached herewith as Exhibit A. A copy of the Consent to Assignment is attached herewith as Exhibit B.

10. Initially, OGF entered into the Marketing Agreement with People Search Media, LLC (who operated Archives.com) on April 20, 2009.

11. Later, in August 2012 Ancestry was in the process of acquiring Archives.com and during this process, OGF and Ancestry agreed to the assignment of the Marketing Agreement to Ancestry. This agreement is reflected in the Consent to Assignment, Ex. B.

12. Ancestry continues to operate Archives.com.

13. The Marketing Agreement provided that there would be a cooperation of marketing between OGF and Archives.com.

14. Specifically, the Marketing Agreement provides that, "OGF and [Ancestry] will use best efforts in the performance of this Agreement." Ex. A.

15. The Marketing Agreement contemplates that once a customer has subscribed to Archives.com, they will be presented immediately with an offer for a subscription to OneGreatFamily.com.

16. This presentation requirement is to be made in the "paid area" following the signup for an Archives.com subscription.

17. Throughout the several year history of the Marketing Agreement the "paid area" has been mutually understood and treated by the parties as the area that immediately follows the entering of a customer's financial information.

18. Additionally, Archives.com presented and marketed OneGreatFamily.com subscriptions on its Products Page.

19. The Marketing Agreement also provided for revenue sharing between OGF and Archives.com; specifically for every OneGreatFamily.com subscription Archives.com would receive 60% of the revenue and OneGreatFamily.com would receive 40% of the revenue.

20. After the August 2012 acquisition of Archives.com by Ancestry, there was a gradual but significant reduction in the number of subscriptions to OneGreatFamily.com through Archives.com.

21. Subscriptions to OneGreatFamily.com continued to lower until they reached a level that was approximately half of the historical subscription levels, despite the fact that Archives.com subscriptions were increasing.

22. After researching and investigating the matter, OGF discovered that subscription offers to OneGreatFamily.com were frequently not being presented in the "paid area" of Archives.com.

23. Upon information and belief, Ancestry had gradually begun substituting advertisements for their wholly owned subsidiary companies within the "paid area" rather than presenting a subscription offer for OneGreatFamily.com.

24. In January 2014, OGF discovered that the subscription offer of OneGreatFamily.com on the Archives.com Product Page had been entirely removed.

25. On April 27, 2014, OneGreatFamily.com subscriptions were suddenly additionally reduced and OGF noticed that all offers for OneGreatFamily.com had been removed from the "paid area" of Archives.com.

26. Ancestry then began only offering subscription offers for their wholly owned subsidiaries and associated entities in the "paid area."

27. The subscription offer for OneGreatFamily.com was restored to the "paid area" on April 29, 2014.

28. In subsequent discussions between the Parties, Ancestry informed the Plaintiff that Ancestry.com had "reinterpreted" the Marketing Agreement and that they no longer were required to offer OneGreatFamily.com subscriptions in the "paid area," contrary to the Parties historical practices and course of dealing.

29. On May 10, 2014 the OneGreatFamily.com subscription offer was again removed from the "paid area" of Archives.com.

30. Once again, Ancestry then began only offering subscription offers for their wholly owned subsidiaries and associated entities in the "paid area."

31. The termination of the OneGreatFamily.com subscription offer from the Archives.com "paid area" resulted in a very substantial reduction in OneGreatFamily.com subscriptions derived from Archives.com.

32. To date there appears to be no marketing of OneGreatFamily.com anywhere in the Archives.com "paid area."

33. During the same time, in May, 2014, Archives.com restored the OneGreatFamily.com link to its Products Page, however it is only viewable after one logs into Archives.com under a current Archives.com subscription.

34. As the Parties have exchanged subscription and payment information for thousands of customers, OGF has uncovered information that between 20,000 and 70,000 payments from OneGreatFamily.com customer subscriptions are missing that are due from Ancestry.

35. The Marketing Agreement contains within it an Audit Rights provision that permits OGF to audit Ancestry's "records to the extent reasonably necessary and solely for the purpose of verifying [Ancestry's] records regarding customer sign-ups, cancellations, and other information material to the terms of payment under the Marketing Program." Ex. A.

36. On the basis of the Audit Rights provision, OGF demanded an audit of Ancestry's records regarding its Archives.com subscriptions, its OneGreatFamily.com subscription records, and its terms of payment records, including the ability to validate "paid area" subscription offers.

37. Ancestry refused to honor OGF's request and instead offered only to allow OGF to inspect some limited financial records that would not have enabled OGF to conduct a meaningful and actual audit.

**FIRST CAUSE OF ACTION
(Breach of Contract)**

38. Plaintiffs incorporate and re-allege the preceding paragraphs as if fully set forth herein.

39. OGF and Ancestry entered into a contract when they signed the Consent to Assignment and agreed to the terms of the Marketing Agreement to share marketing of their respective websites.

40. OGF has performed its duties, requirements, and obligations under the Marketing Agreement.

41. Ancestry has breached its duties under the Marketing Agreement and Consent to Assignment in multiple ways.

42. Ancestry breached the "best efforts" provision of the Marketing Agreement when it departed from the historic practice and course of dealing between the Parties and failed to consistently offer OneGreatFamily.com subscriptions in the "paid area" after Ancestry first took over the Marketing Agreement through the Consent to Assignment.

43. Ancestry breached the Marketing Agreement when, on May 10, 2014 and continuing through the filing of this Complaint, it completely removed OneGreatFamily.com offers from the "paid area" of Archives.com.

44. Ancestry breached the Marketing Agreement when it removed OneGreatFamily.com subscription offers from the Archives.com Products Page for approximately 5 months.

45. Ancestry breached the Marketing Agreement because, upon information and belief, it has withheld payments for subscriptions that are due to OGF.

46. Ancestry breached the Marketing Agreement when it refused to comply completely with the terms of the Audit Rights provision of the Marketing Agreement and indicated its intention to only supply information to OGF in such a way that OGF would be prevented from conducting a meaningful and actual audit.

47. As a result of Ancestry's multiple breaches, OGF has suffered damages in an amount to be determined by the Court but believed to be in excess of \$8,900,000.

SECOND CAUSE OF ACTION
(Breach of Implied Covenant of Good Faith and Fair Dealing)

48. Plaintiffs incorporate and re-allege the preceding paragraphs as if fully set forth herein.

49. Upon signing the Consent to Assignment of the Marketing Agreement, Ancestry inherently undertook the obligation of the covenant of good faith and fair dealing to not intentionally harm OGF's rights under the contract.

50. Notwithstanding this obligation, Ancestry intentionally sought to undermine and thwart the full performance of the contract and failed to use their "best efforts" to market OneGreatFamily.com.

51. This breach of the covenant occurred in multiple ways, including not consistently offering OneGreatFamily.com in the "paid area," and the eventual removal of OneGreatFamily.com subscription offers within the "paid area" of Archives.com, and by only making OneGreatFamily.com subscription offers viewable on the Archives.com Products Page after one signs in as a current account member of Archives.com.

52. The intentional acts of limiting OneGreatFamily.com subscription offers within Archives.com by Ancestry prevented OGF from being able to receive the fruits of the contract.

53. This change of conduct by Ancestry towards OGF is inconsistent with the prior course of dealing between the parties because Ancestry has opportunistically sought to reinterpret the meaning of "paid area" for their own benefit and to the detriment of OGF.

54. Additionally, due to the nature of the Marketing Agreement, Ancestry is under an obligation to promote and market OneGreatFamily.com, which purpose was undermined by

Ancestry's overt and intentional efforts to put OneGreatFamily.com out of business and take their market share by failing to market OneGreatFamily.com in the "paid area" and instead opting to promote Ancestry's own affiliates and subsidiaries.

55. Ancestry's conduct of restricting OneGreatFamily.com advertising and subscription offers from Archives.com is a deliberate attempt to deprive market share from OneGreatFamily.com, and an attempt to hurt or potentially drive out of business OneGreatFamily.com in violation of the implied covenant of good faith and fair dealing.

56. Consequently as a result of these actions, Ancestry has breached the implied covenant of good faith and fair dealing because they have not allowed OGF to receive their fruits from the contract, have varied from the understood meaning of the contract, departed from the previous course of dealing that had been established by the parties, and by attempting to put OneGreatFamily.com out of business.

57. OGF has suffered damages in an amount to be determined by the Court but believed to be in excess of \$8,900,000.

THIRD CAUSE OF ACTION (Conversion)

58. Plaintiffs incorporate and re-allege the preceding paragraphs as if fully set forth herein.

59. Ancestry exercised and continues to exercise dominion and control over subscription funds to which OGF is immediately entitled.

60. Ancestry's possession, use and conversion of these funds is inconsistent with OGF's present rights to receive the subscription funds for the missing 20,000 to 70,000 subscriptions of OneGreatFamily.com that are owed to OGF.

61. Under the terms of the Marketing Agreement, OGF has an immediate right to receive payments from OneGreatFamily.com subscriptions and the refusal of Ancestry to make these payments has resulted in OGF being deprived of the use and possession of these payments.

62. Ancestry's continued possession and use of these funds is intentional, willful, and without legal justification.

63. As a result of Ancestry's unlawful possession, control and conversion of these missing subscription payments, OGF has suffered damages in an amount to be determined by the Court but believed to be in excess of \$3,000,000.

FOURTH CAUSE OF ACTION
(Intentional Interference with Prospective Economic Relations)

64. Plaintiffs incorporate and re-allege the preceding paragraphs as if fully set forth herein.

65. Ancestry has intentionally interfered with potential subscribers of OneGreatFamily.com.

66. Specifically, rather than marketing OneGreatFamily.com to potential subscribers within the "paid area" of the Archives.com website as required under the Marketing Agreement, Ancestry has marketed its own subsidiaries and related entities, from which it derived substantial subscriptions and corresponding profits.

67. Therefore, Ancestry diverted prospective OneGreatFamily.com subscribers to its own web services instead.

68. This intentional interference with OGF's prospective economic relations was done for an improper purpose. Namely, Ancestry had a contractual obligation to market OGF products, and its failure and refusal to do so, together with its marketing of Ancestry products in the place of OGF products qualifies as an improper purpose.

69. Moreover, upon information and belief, Ancestry undertook these actions with the express purpose of harming OGF's business, reducing OGF's market share, and potentially driving OGF out of business. Such intentions also qualify as an improper purpose.

70. Upon information and belief, the failure of Ancestry to perform its duties under the Marketing Agreement constitute more than a feeling of ill-will towards OGF, rather the predominant purpose behind the breach was to cause injury to OGF by stealing potential subscribers from OneGreatFamily.com and this purpose predominated over any other legitimate purpose for Ancestry's actions.

71. Ancestry had an inherent duty in the Marketing Agreement to not interfere with potential subscribers that OneGreatFamily.com would receive through Archives.com. Rather Ancestry had a duty to promote and market OneGreatFamily.com.

72. These actions of intentionally interfering with potential OneGreatFamily.com subscribers have significantly reduced the revenues, total number of subscribers, and the value of OGF's business.

73. As a result of Ancestry's intentional interference, OGF has suffered damages in an amount to be determined by the Court but believed to be in excess of \$21,000,000.

**FIFTH CAUSE OF ACTION
(Punitive Damages)**

74. Plaintiffs incorporate and re-allege the preceding paragraphs as if fully set forth herein.

75. The combined actions of Ancestry to breach and thwart performance under the Marketing Agreement and prevent OGF from receiving the fruits of the contract constitute willful and malicious conduct because they intentionally breached the clear and understood language of the contract.

76. Additionally, by refusing to comply completely with the terms of the Audit Provision of the Marketing Agreement Ancestry has not allowed OGF an opportunity to complete a meaningful audit.

77. Such actions were taken intentionally, knowingly, and with conscious disregard for OGF's rights.

78. As a result of this deliberate, willful, and malicious conduct, OGF is entitled to punitive damages, pursuant to UTAH CODE ANN. § 78B-8-201, in an amount to be determined by the Court.

PRAYER FOR RELIEF

WHEREFORE PLAINTIFF prays for relief as follows:

1. For a determination by the Court that Ancestry breached the Marketing Agreement by; departing from the historic practice and course of dealing between the parties in not consistently offering OneGreatFamily.com subscriptions within the "paid area;" completely removing OneGreatFamily.com offers from the "paid area;" removing OneGreatFamily.com from the

Archives.com Products Page for approximately 5 months; withholding customer payments for OneGreatFamily.com subscriptions and; refusing to comply completely with the terms of the Audit Rights provision of the Marketing Agreement; and that such breaches caused damage to the Plaintiff in an amount of approximately \$8,900,000.

2. For a determination by the Court that Ancestry breached the implied covenant of good faith and fair dealing through their deliberate attempt to reinterpret the meaning of "paid area," departing from the prior course of dealing, attempting to put OneGreatFamily.com out of business, and preventing OGF to receive the fruits of the contract; and that such violation caused damage to the Plaintiff in an amount of approximately \$8,900,000.

3. For a determination by the Court that Ancestry has converted Plaintiff's property; and that such actions caused damage to the Plaintiff in an amount of approximately \$3,000,000.

4. For a determination by the Court that Ancestry has intentionally interfered with prospective economic relations of OGF; and that such actions have caused damage in an amount of approximately \$21,000,000.

5. For punitive damages, pursuant to UTAH CODE ANN. § 78B-8-201, in an amount to be determined by the Court.

6. For costs and attorney's fees.

7. For any other or further relief deemed by the Court to be appropriate under the circumstances.

DATED and SIGNED this 10th day of October, 2014.

JEFFS & JEFFS, P.C.

/s/ Robert L. Jeffs
Attorney for the Plaintiffs

Addendum D

FILED
Fourth Judicial District Court
of Utah County, State of Utah
24/1/15 MJ Deputy

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

Z-CORP., dba OneGreatFamily.com, a Utah
Corporation, and ONEGREATFAMILY,
LLC, a Utah limited liability company,

Plaintiffs,

vs.

ANCESTRY.COM INC., a Utah
Corporation; and ANCESTRY.COM
OPERATIONS INC., a Utah Corporation,

Defendants.

DEFENDANTS'
RULING RE: PLAINTIFFS' MOTION
TO DISMISS

Case No. 140401466

Judge Fred D. Howard

This matter comes before the Court on Defendants' November 13, 2014 *Motion to Dismiss the Complaint* with accompanying memorandum. On December 24, 2014, Plaintiffs filed their *Memorandum in Opposition of Defendants' Motion to Dismiss the Complaint*. Defendants then filed their *Reply and Request to Submit for Hearing and Decision* on January 12, 2015. The Court heard oral argument on March 9, 2015. Having heard oral argument and having reviewed the parties' motion and memoranda, the Court now makes the following Ruling.

RULING

Rule 12(b)(6) of the Utah Rules of Civil Procedure governs motions to dismiss for failure to state a claim upon which relief can be granted. When considering a Rule 12(b)(6) motion to dismiss, the Court views the facts in the complaint as true, and determines "the plaintiff's right to

relief based on those facts.”¹ In addition, under a Rule 12(b)(6) motion this Court is not deciding the merits of the case.² As a result, this Court is “concerned solely with the sufficiency of the pleadings, and not the underlying merits of the case.”³ Further, this Court recognizes that “[a] dismissal is a severe measure and should be granted . . . only if it is clear that a party is not entitled to relief under any state of facts which could be proved in support of its claim.”⁴

On April 20, 2009, Plaintiffs and People Search Media, LLC, both of which operate online family research websites, entered into a marketing agreement. Subsequently, in August 2012, Defendants, who also operate online family research resources, acquired People Search Media, LLC, and consented to the assignment of the Marketing Agreement. Plaintiffs allege that since Defendants took over People Search Media that Defendants have changed how they perform under the Marketing Agreement. Specifically, Plaintiffs claim that Defendants have breached their marketing obligations under the Marketing Agreement by failing to market Plaintiffs at all. Plaintiffs argue that the obligatory language of the Marketing Agreement “shall perform” obligates Defendants to market Plaintiff in a specific way. Defendants argue that the Marketing Agreement at issue here does not require Defendants to perform any specific promotion, and that therefore Defendants are not in breach of the contract.

This case comes down to interpretation of the language of the contract. To withstand a motion to dismiss on a contract claim, a plaintiff must allege “(1) a contract, (2) performance by the party seeking recovery, (3) breach of the contract by the other party, and (4) damages.”⁵ Plaintiffs have appropriately alleged the existence of a contract, performance, and damages.

¹ State v. Apotex Corp., 2012 UT 36, ¶ 42 (citing *Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 8).

² Williams v. Bench, 2008 UT App 306, ¶ 20.

³ *Apotex*, 2012 UT 36, ¶ 42 (citing *Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 8).

⁴ Colman v. Utah State Land Bd., 795 P.2d 622, 624 (Utah 1990).

⁵ Bair v. Axiom Design, L.L.C., 2001 UT 20, ¶ 14, 20 P.3d 388, 392.

What remains is for this Court to determine whether Plaintiffs have appropriately alleged, or can appropriately allege, a breach under the asserted facts.

When interpreting a contract, “the intention of the contracting parties is controlling.”⁶ Further, when a contract’s language “is unambiguous, the intention of the parties may be determined as a matter of law based on the language of the agreement.”⁷ A contract’s language is only ambiguous where “it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms or other facial deficiencies.”⁸ The Court may only “consider extrinsic evidence of the parties’ intentions,”⁹ when a contract is ambiguous.

Here, the Court finds the contract to be unambiguous, and so extrinsic evidence is unnecessary. The phrase in the Marketing Agreement at issue here states:

Each party shall perform the following activities as the “Marketing Partner” at their sole cost and expense, and under their own exclusive control.¹⁰

This sentence consists of two clauses, an independent clause and a dependent clause. First, “[a] clause is a group of words that includes a subject and a predicate.”¹¹ An independent clause is different from a dependent clause in that “[a]n independent clause can stand alone as a sentence, while a dependent clause must be accompanied by an independent clause.”¹² Further, a dependent clause can also be a restrictive modifying clause. A “[a] restrictive modifying clause (or essential clause) . . . is essential to the meaning of a sentence because it limits the thing it

⁶ Peterson v. Sunrider Corp., 2002 UT 43, ¶ 18, 48 P.3d 918.

⁷ *Id.*

⁸ *Id.* at ¶ 19.

⁹ *Id.* at ¶ 18.

¹⁰ *Marketing Agreement*, at Exhibit “A”, ¶ 1.

¹¹ University of Illinois, *Grammar Handbook: Independent and Dependent Clauses*, <http://www.cws.illinois.edu/workshop/writers/clauses/> (last visited Mar. 25, 2015).

¹² *Id.*

refers to. The meaning of the sentence would change if the clause were deleted.”¹³

In this instance, the clause “Each party shall perform the following activities as the ‘Marketing Partner,’” forms the independent clause. This is the clause that Plaintiff argues includes obligatory language. Generally, “shall perform” is indeed obligatory language that imposes a duty upon a party, and would do so in this case were the sentence to end there. However, in this case, this sentence includes the dependent clause “at their sole cost and expense, and under their own exclusive control.” This dependent clause is a restrictive modifying clause, changing the entire meaning of the independent clause. This clause turns all exercise of any activities referred to in the independent clause over to the “exclusive control” of the exercising party, essentially negating the phrase “shall perform.” Because each party maintains exclusive control over any activities performed under the Marketing Agreement, each party retains the right to perform any amount of marketing that the party chooses, including no marketing at all. Because Defendants have no affirmative duty to perform any marketing activity under the Marketing Agreement at all, they cannot be in breach of contract for performing no marketing activity.

Because Plaintiffs’ causes of action all rely on the contractual relationship between Plaintiffs and Defendants, Plaintiffs’ causes of action are dismissed. The first cause of action, breach of contract, is dismissed because, as was just explained, Defendants did not breach the Marketing Agreement, and therefore Plaintiffs are not entitled to relief under these facts.

The second cause of action, breach of implied covenant of good faith and fair dealing,

¹³ University of Illinois, *Grammar Handbook: Restrictive and Nonrestrictive Clauses*, <http://www.cws.illinois.edu/workshop/writers/restrictiveclauses/> (last visited Mar. 25, 2015).

likewise fails. Plaintiffs rely on the “best efforts” or “Good and Workmanlike Manner”¹⁴ clause to claim that because Defendants stopped marketing Plaintiffs’ products, they failed to use their best efforts in performance of the agreement. Here again, because Defendants retain exclusive control over any marketing activity, Defendants had no obligation to do any marketing at all. Plaintiffs cannot invoke this covenant to “create obligations ‘inconsistent with express contractual terms.’”¹⁵ Even Defendants’ previous course of dealings cannot invoke this covenant to create new obligations inconsistent with express contractual terms.¹⁶ Though Defendants in the past may have marketed Plaintiffs in the way Plaintiffs prefer, that “does not itself establish a binding legal covenant to [continue to] do so.”¹⁷ Thus, under the language of the contract, Defendants’ best efforts at marketing could include no efforts. Therefore, Defendants are not in breach of contract under this clause either, and there has been no breach of this covenant.

The third cause of action, conversion, fails as well. Defendants argue that the economic loss doctrine bars this claim. In Utah, “the economic loss doctrine bars all tort claims seeking recovery for economic losses when the claims are not based on a duty independent of the contractual obligations between the parties.”¹⁸ Plaintiffs argue that the tort of conversion is not precluded by the economic loss doctrine because their claim of conversion is not based on the Marketing Agreement. Plaintiffs argue that by failing to remit subscription funds to Plaintiffs, Defendants have “co-opted the Plaintiffs’ website and have made it available to individuals for which Plaintiffs have not received subscription funds . . . convert[ing] the Plaintiffs’ website for

¹⁴ *Marketing Agreement*, ¶ 2.

¹⁵ *Young Living Essential Oils, LC v. Marin*, 2011 UT 64, ¶ 10, 266 P.3d 814 (citation omitted).

¹⁶ *See Id.* at ¶ 15.

¹⁷ *Id.* at ¶ 15.

¹⁸ *Anapoell v. Am. Express Bus. Fin. Corp.*, No. 2:07-CV-198-TC, 2007 WL 4270548, at *6 (D. Utah Nov. 30, 2007) (unpublished).

their own use and benefit.”¹⁹

This court finds that the economic loss doctrine precludes Plaintiffs’ conversion claim. First, after reviewing the *Complaint*, the court cannot find where Plaintiffs allege that Defendants have co-opted Plaintiffs’ website. The *Complaint* only outlines a claim that Defendants converted subscription funds to which Plaintiffs are allegedly entitled. These subscription funds flow directly from the Marketing Agreement and cannot be said to be extra-contractual in nature. This claim appears in actuality to be a claim for consequential damages. Consequential damages are part and parcel of a contract claim, and cannot be claimed in tort, clearly being barred by the economic loss doctrine. Further, even if Defendants claim that Plaintiffs co-opted their website were in the *Complaint*, it would also fail as a matter of law. Plaintiffs provided Defendants access to their website pursuant to the Marketing Agreement. Having done so, Plaintiffs cannot now complain that Defendants have access to Plaintiffs’ website. In any case, this claim also clearly flows from the Marketing Agreement, and is thus barred by the economic loss doctrine. Therefore, Plaintiffs are not entitled to relief under any state of facts which could be proved in support of their conversion claim.

The fourth cause of action, intentional interference with prospective economic relations, was dismissed without prejudice per stipulation of the parties.

The fifth cause of action, punitive damages, relies on the Marketing agreement which allows punitive damages for breach of contract that is “a result of gross negligence or willful misconduct.”²⁰ Here again, because there has been no breach of contract, there is also no gross negligence or willful misconduct. Therefore, Plaintiffs are not entitled to relief for this claim.

¹⁹ Plaintiffs’ Memorandum in Opposition of Defendants’ Motion to Dismiss the Complaint, at 14.

²⁰ Marketing Agreement, ¶ 4.

IV. Conclusion

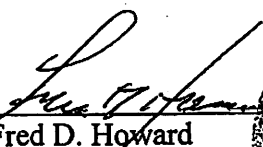
Therefore, because Plaintiffs' claims fail as a matter of law, the Court grants Defendants' *Motion to Dismiss*, and the following causes of action are dismissed with prejudice:

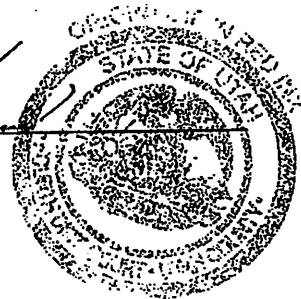
1. Breach of Contract
2. Breach of Implied Covenant of Good Faith and Fair Dealing
3. Conversion
5. Punitive Damages

Plaintiff's fourth cause of action, Intentional Interference with Prospective Economic Relations, was dismissed without prejudice at oral argument on March 9, 2015. Counsel for Defendants is directed to prepare an order consistent with this Ruling.

DATED this 1st day of April, 2015.

BY THE COURT:


Hon. Fred D. Howard
District Court Judge



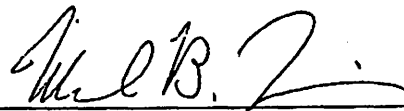
CERTIFICATE OF DELIVERY

I certify that true copies of the foregoing Ruling were mailed, postage prepaid, on the

 1 day of April, 2015 to the following at the addresses indicated:

Mark O. Morris (4636)
Amber M. Mettler (11460)
SNELL & WILMER L.L.P.
15 West South Temple
Suite 1200
Gateway Tower West
Salt Lake City, Utah 84101
Email: mmorris@swlaw.com
amettler@swlaw.com

Robert L. Jeffs
Randall L. Jeffs
JEFFS & JEFFS, P.C.
90 North 100 East
P.O. Box 888
Provo, Utah 84603
rljeffs@jeffslawoffice.com
rzjeffs@jeffslawoffice.com



Deputy Court Clerk

Addendum E

Robert L. Jeffs, #4349
Randall L. Jeffs, #12129
JEFFS & JEFFS, P.C.
90 North 100 East
P.O. Box 888
Provo, UT, 84603
Telephone: (801) 373-8848
Email: rljeffs@jeffslawoffice.com
rzjeffs@jeffslawoffice.com

Attorneys for Plaintiffs

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

Z-CORP, dba OneGreatFamily.com, a Utah
Corporation; and ONEGREATFAMILY,
LLC, a Utah limited liability company,

Plaintiffs,

v.

ANCESTRY.COM, INC., a Utah
Corporation; and ANCESTRY.COM
OPERATIONS, INC., a Utah Corporation,

Defendants.

**OBJECTION TO DEFENDANTS'
PROPOSED ORDER GRANTING
DEFENDANTS' MOTION TO DISMISS
AND DISMISSING PLAINTIFF'S
COMPLAINT**

*Civil No.: 140401466
Judge: Fred D. Howard*

COME NOW Plaintiffs Z-Corp and OneGreatFamily, LLC by and through their counsel, Robert L. Jeffs and Randall L. Jeffs of the law firm Jeffs & Jeffs, P.C., and pursuant to Utah Rule of Civil Procedure 7, hereby submit the following Objection to the Defendants' Proposed Order Granting Defendants' Motion to Dismiss and Dismissing Plaintiffs' Complaint (hereinafter 'Proposed Order').

The Proposed Order omits a critical issue of importance that was before the Court and which deserves the Court's attention. Not only did Plaintiffs bring a cause of action for breach of contract on the theory that the Defendants had failed to appropriately market under the requirements of the Marketing Agreement, but Plaintiffs also alleged that Defendants had breached the contract by failing to render payment to Plaintiffs for funds already received by Defendants under the terms of the Marketing Agreement.

This cause of action for breach of contract is specifically alleged in paragraphs 34 and 46 of the Complaint. The Proposed Order also does not address Plaintiffs' claim for breach of contract on the theory that Defendants failed to allow Plaintiffs access to information in order to allow Plaintiffs to conduct a meaningful audit under the Marketing Agreement. This cause of action for breach of contract is specifically alleged in paragraphs 35, 36, 37 and 46 of the Complaint. Moreover, both of these causes of action were also addressed in the Plaintiffs' Memorandum in Opposition to the Defendants' Motion to Dismiss on pages 4, 8 and 9 of the memorandum, and were raised by Plaintiffs at oral arguments on the Motion to Dismiss.

The Court's Ruling makes no findings as to why either of these causes of action should be dismissed and the Defendants' Proposed Order is likewise silent on these two causes of action. Nonetheless, both the Ruling and the Proposed Order dismiss all the causes of action in the Complaint without specifically addressing these two causes of action. This is error, and therefore the Plaintiffs object to the Proposed Order for these reasons.

DATED and SIGNED this 21st day of April, 2015.

JEFFS & JEFFS, P.C.

/s/ Randall L. Jeffs
Attorney for the Plaintiffs