

1995

## Weaver v. Brite Music : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

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IN THE UTAH COURT OF APPEALS 50

.A10

DOCKET NO. 950512-0A

JULIE WEAVER AND CATHERINE  
PALMER,

APPELLANTS,

-vs-

BRITE MUSIC ENTERPRISES,  
INC.,

APPELLEE.

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Case No. 950512-CA

BRIEF OF APPELLANTS

On Appeal from the Third Judicial District Court  
of Salt Lake County, State of Utah  
The Honorable Glenn K. Iwasaki, District Judge

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FILED

Priority Classification: 15

DEC 11 1995

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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	:	
APPELLANTS,	:	
	:	Case No. 950512-CA
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-vs-	:	
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BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT

This appeal is brought pursuant to Rule 3 of the Utah Rules of Appellate Procedure, which provides in essential part that an appeal may be taken from a District Court to the Appellate Court from all final orders and judgements. Jurisdiction is based upon Utah Code Annotated, Section 78-2-2(j), 1953 as amended, which grants the Supreme Court appellate jurisdiction over appeals from judgments of any court of record for which the Court of Appeals does not have original appellate jurisdiction. Utah Code Annotated, Section 78-2a-3 does not grant the Court of Appeals original jurisdiction over this matter.

This case has been transferred to the Court of Appeals pursuant to Section 78-2-2(4).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

a. Whether the trial court erred in ruling that the provisions of the parties' contract regarding "carry-over points" as a matter of law and within the four corners of the agreement, was clear and unambiguous? (Preserved in Transcript for Motion for Directed Verdict p. 31; and in Memoranda supporting Appellants' post-trial motions R. 733-734, 773).

b. Whether the trial court erred in application of the standard for consideration of the Appellee's motion to dismiss the case at the end of the presentation of the Appellants' evidence in the jury trial of this matter? (Preserved in Transcript for Motion for Directed Verdict p. 17-18).

c. Whether the trial court erred in ruling that the provisions of the contract between the parties regarding "carry-over points" were not ambiguous? (Preserved in Transcript for Motion for Directed Verdict p. 31; and in Memoranda supporting Appellants' post-trial motions R. 730-731, 734).

d. Whether the trial court erred in construing the parties' contract as a matter of law and in not construing the parties contract against the Appellee, which was the scrivener of the contract? (Preserved in Transcript for Motion for Directed Verdict pp. 31, 50; and in Memoranda supporting Appellants' post-trial motions R. 730).

e. Whether the trial court erred in failing to interpret the "carry-over points" provision of the contract in a manner consistent with the eight year course of dealing between the



parties, and the representations and admissions of the Appellee's executive officers, including one of the principal founders of the Appellee, who was also the principal executive officer of the Appellee? (Preserved in Transcript for Motion for Directed Verdict p. 21).

f. Whether the principles of estoppel and waiver preclude the Appellee from now asserting that the Appellee also had the right to exercise the "carry-over points" redemption provision? (Preserved in Transcript for Motion for Directed Verdict p. 54; and in Appellants' post-trial motions R. 698).

#### Standard of Review on Appeal

In deciding a motion for a directed verdict, the Court must consider the evidence in the light most favorable to the Appellants, against whom the motion was directed, and must resolve every controverted fact in their favor. Boskovich v. Utah Constr. Co., 123 Utah 387, 259 P.2d 885 (1953).

A directed verdict is tantamount to granting a motion for a nonsuit. On appeal it must be reversed, if the evidence is such that reasonable men could arrive at a different conclusion. Rhiness v. Dainsie, 24 Utah 2d 375, 472 P.2d 428 (1970).

The Appellate Court should give no deference to the factual findings or legal conclusions of the trial court, but should review the facts and apply the proper legal standard de novo. Canfield v. Albertsons, 841 P.2d 1224 (Ut. App. 1992).

## STATEMENT OF THE CASE

### Nature of the Case

This case is a claim made by the Appellants, Julie Weaver and Catherine Palmer for the breach of sales representative contracts which they had entered into with the Appellee, Brite Music Enterprises (Brite). Pursuant to the sales representative contracts, Julie Weaver and Cathy Palmer could derive various forms of compensation. One of the components of compensation allowed the accumulation of "points". Pursuant to the use of these points on monthly basis, the sales representative could maintain her commission at the highest possible level. The contract also provided that excess points ("carry-over points") could be accumulated for "as long as you [the sales representative] desire".

The contract provided that a sales representative could, in the alternative, cash in her carry-over points pursuant to a redemption provision available to the sales representative. This redemption right of the sales representative was used periodically over an eight year period of time.

In early 1991, Brite announced that it also had the right to exercise the redemption provision, and tendered checks for the relatively small redemption price to Weaver and Palmer. Brite then denied Weaver and Palmer the right to use their carry-over points as they had previously done, thereby causing Weaver and Palmer substantial monetary loss. The Appellants assert that the actions of Brite constitute a breach of their written agreement.

### Course of Proceedings

The original complaint of Julie Weaver and Catherine Palmer was filed on May 16, 1991 (R. 2-16). The matter was tried to a jury on December 6-8, 1994.

At the conclusion of the presentation of the case in chief of Weaver and Palmer, Brite moved for a directed verdict (see Transcript of Motion for Directed Verdict p. 5). Upon the conclusion of the argument of the motion, the trial court found that there was no breach of the sales representative contract and the motion of Brite was granted (Transcript of Motion for Directed Verdict p. 60).

On January 27, 1995, the trial court entered its Final Order of Dismissal (R. 687 and Exhibit D attached hereto). Such order stated that the trial court found the contract provision to be unambiguous. Further that trial court found that Brite also had the right to exercise the carry-over redemption provision. In such case, the trial court concluded that Brite had not breached its agreement with Julie Weaver and Catherine Palmer.

Post-trial motions were briefed to the trial court and oral argument on the motions was conducted on April 24, 1995 (R. 795). An Order Denying Plaintiffs' Post-Trial Motions was entered on May 1, 1995 (R. 795-796), and this appeal followed.

### Facts

In the decade of the eighties, the Appellants, Julie Weaver ("Weaver") and Catherine Palmer ("Palmer") were two of the most successful independent sales representatives (Palmer p. 55, 66;

Brady pp. 38, 33, 53; Vassel pp. 60)<sup>1</sup> of the Appellee, Brite Music Enterprises, Inc. ("Brite"). Brite is engaged in the development and marketing of music products, including music tapes and books. Weaver and Palmer are both residents of Davis County and were actively involved in developing sales organizations pursuant to the Brite marketing program. Weaver became a sales representative in 1980 and Palmer became a sales representative in 1982. The trial court found that a contractual relationship did exist between the parties based upon the 1982 marketing program (the "Program") implemented by Brite (see Final Order of Dismissal, January 27, 1995, paragraph 1; R. 687 and Exhibit D attached hereto).

The Program provided that the sales representatives would receive compensation based upon the sales volume of the representative, and of the sales organization or "down-line" of the sales representative. The second key component of the Program provided that a sales representative could accumulate "points" from various sources identified in the Program.

The principal source for the accumulation of points was the sales volume of the sales organization of a representative. The accumulated points were applied to a graduated point level of 300, 600, 900 or 1200 points. The point level at which a representative conducted business for a month determined the percentage for the computation of the compensation of a sales representative (i.e., at

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<sup>1</sup> Reference to the trial record is designated by the letter R and the page number of the referenced material in the record; e.g. (R. 687). Reference to testimony given at trial is made by designating the surname of the witness and the page in the transcript of the testimony of the witness; e.g. (Palmer p. 28).

the 1200 point level, the percentage of the sales commissions earned by the sales representative would be greater than at lower point levels) (Palmer p. 26, lines 9-13).

The third component of the compensation structure of the Program was that a sales representative could earn more points in a month than were required to achieve a particular compensation level. These excess points could be accumulated for use in future months (Palmer p. 27, Brady p. 17). These accumulated points are referred to in the Program as "carry-over points."

The critical aspect of the contractual relationship of the parties, and of this case, hinges on the fact that the carry-over points could be applied to satisfy the requirements of achieving a certain compensation level in a month when the sales representative did not earn the requisite points during the month. For example, it would be possible for a sales representative who had accumulated sufficient points, to wholly cease personal sales operations for several months, and yet be entitled to receive compensation at the highest point level from the sales made by her sales organization or down-line (Palmer p. 27 lines 10-16, Vassel p. 21).

The trial court found that "the relevant provision of the 1982 marketing Program concerning "carry-over points" provided<sup>2</sup>:

As you continue to exceed 1200 points per month, the increasing carry-over points may accumulate for as long as you desire; however, each increment of 5,000 carry-over points is redeemable for a check from Brite for \$100. Redeeming points in this manner does not affect your life-time point accumulation or the benefits you may eventually derive therefrom." (emphasis added by Appellants)

The forgoing contractual provision provided both for the accumulation of carry-over points and for a cash redemption right by the sales representative. The last sentence of this paragraph, although also directed to the sales representative (and therefore helpful to the construction of the paragraph), relates to other benefits and rewards based on a lifetime accumulation of points (Brady p. 31, lines 6-14). Though this other reward program is not central to the matter now before the Court, this final sentence completes the thought of the entire paragraph which describes only rights of the sales representatives. The paragraph, by its terms, grants no rights to Brite, but only the obligation to accumulate the points or pay the redemption price, if the redemption option is exercised by the sales representative.

The factual issue before the Court of Appeals is whether or not both contracting parties had the right to exercise the cash redemption provision, or whether the redemption right was solely that of the sales representative. The legal issue for

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<sup>2</sup> See final Order of Dismissal, January 27, 1995, paragraph 1, R. 687, and Exhibit D attached hereto. See also, Palmer p. 31, lines 9-15.

determination by the Court of Appeals is whether the trial court erred in failing to submit this factual issue to the jury, by resolving this issue as a matter of law on Brite's motion for a directed verdict at the end of the plaintiffs' case.

The evidence produced at the time of the trial of this case indicated that, at the end of calendar year 1986, Weaver had accumulated 51,568.84 carry-over points and that Palmer had accumulate 79,099.68 carry-over points at the end of calendar year 1987 (Trial Exhibits P-29 and P-57 ;see Exhibits A and B attached hereto; Palmer p. 72, lines 18-20).

Early in her experience with Brite, Palmer had exercised the cash redemption provision. At trial, however, she confessed that a management employee at Brite had pointed out to her that the right to use the carry-over points to maintain the highest point level of compensation was at her option, as a sales representative (Palmer p. 32). The Brite manager noted that it was foolish for her to redeem 5,000 carry-over points for a mere \$100 under the cash redemption provision of the contract when it would have considerably greater value when used to maintain the highest commission level for more than four months. When she realized the full import of her error, Cathy Palmer stated (Palmer p. 33, lines 19-23):

My gosh, 15,000 points I have cashed in for \$300. That is one full year of retirement, one full year of retirement, of bonuses on my management, on my down-line organization which could have been worth 10-\$15,000 to me.

The reference to "a full year of retirement" relates to the representations made by Brite owners and management during the years from 1982 to 1990 regarding the uses of the carry-over points. Ted Brady, the president and a founder of the Appellee corporation, had instructed the sales representatives of the company that they could use their carry-over points during periods of personal sales inactivity as a result of sickness (Brady p. 18, 19), pregnancy (Brady p. 18) or church missionary service (Brady p. 19).

Although Mr. Brady failed to acknowledge that he had also said that the carry-over points could be used for retirement (Brady p. 18, lines 14-18), Mr. Vassel, the executive vice president of Brite, said that he had explained the marketing program to groups of 50 to 200 sales representatives at a time in sales meetings throughout the United States. In these meetings he and others had specifically taught that the carry-over points could be used for retirement (Vassel pp. 19-22). This fact was confirmed by other witnesses, including Cathy Palmer (Palmer p. 36). Both Cathy Palmer and Mr. Vassel testified that the use of carry-over points for retirement purposes was personally explained to them by Mr. Brady (Palmer p. 36, lines 18-25; Vassel p. 22, lines 9-13).

Contrary to every notion ever presented to the sales representatives by Brite, its owners and its executive officers, both past and present (Palmer p. 86, lines 9-12), if Brite could exercise the right to redeem the carry-over points, the whole concept of pregnancy leave, sick leave, missionary finances and



retirement would be a virtual nullity. For the sum of \$300 Brite could gobble up an entire year of retirement, and for one or two thousand dollars Brite could destroy a decade or a lifetime of work. In Cathy Palmer's case, Brite sought to eliminate 39 months of carry-over points at the highest compensation level (1,200 points a month) for only \$900 (Palmer pp. 85-86). These were the points accumulated by arguably Brite's most recognized sales person over an eight year period of intensive work.

Beginning as early as 1987, Weaver and Palmer began to use their carry-over points in the manner for which they were actually intended, that is; to maintain the highest point and compensation level, while devoting less time to personal sales activity (Palmer p. 84, lines 12-24). This was a well recognized practice for the years 1987 through 1990. Brite honored the proper use of carry-over points for Palmer in the amount of 27,070.33 points (Palmer p. 73, pp. 84-85). Over a four year period beginning in 1986, Brite honored the proper use of carry-over points by Weaver in the amount of 34,268.09 points (Trial Exhibit P-57 and Exhibit B attached hereto).

Beginning in 1982, with the adoption of the carry-over point component of the Program, until the end of 1990, the parties established a clear course of dealing between Brite and its sales representatives with regard to the meaning of the cited contractual provision. During this eight year period of time, only sales representatives exercised the redemption provision for cash (Palmer p. 86, p. 90, lines 2-3; Brady p. 58; lines 14-18). Those points

that were not redeemed for cash, at the election of the sales representatives, were used to maintain the point and compensation level which offered the sales representative the highest monthly remuneration.

Ted Brady, the principal executive and one of the two principal founders of Brite, explained the marketing program to Weaver and Palmer. He was also present when other executive employees of Brite were both trained and then conducted seminars to recruit and encourage new sales representatives (Vassel p. 22). Each training session and each promotional seminar was devoid of any reference to the notion that Brite also had a right to exercise the cash redemption provision of the sales representative contract (Brady p. 29, lines 17-20; Vassel p. 39; Palmer p. 86, lines 9-15).

Weaver and Palmer, as two of the most successful sales representatives in the history of the company, were engaged extensively in the recruitment process and were major presenters at promotional seminars (Palmer p. 59, lines 23-25). Brite portrayed Julie Weaver as the archetypical successful sales representative and made a recruiting video featuring her (Vassel p. 20). Weaver and Palmer also sat on the executive board of Brite (Palmer p. 39, line 9). Their only instruction, throughout this entire period of eight years, was that it was solely the right of the sales representative to accumulate and use the carry-over points, or exercise the cash redemption provision.

At the end of calendar year 1990, ostensibly for reasons of a downturn in the business of Brite, Mr. Brady announced that Brite

was going to redeem all outstanding carry-over points at the rate of \$100 for each 5,000 points accumulated. Not only was the carry-over point component eliminated for the period after the announced program change, but the carry-over points were eliminated retroactively (Palmer p. 74, lined 18-25).

Brite tendered checks to the sales representatives, asserting that Brite had the right to exercise the carry-over point redemption provision. This announcement by the president of the corporation was the first time that anyone had ever asserted that Brite had the right to exercise the cash redemption provision. The draconian elimination of all accumulated carry-over points, and the elimination of the carry-over point concept entirely from the Program, shocked the entire independent sales representative network of the company, caused substantial monetary damages to Weaver and Palmer, and essentially destroyed the independent representative marketing structure of the company (Palmer p. 103).

There was no testimony given at the time of the trial that (a) Brite had the right to redeem the carry-over points, or (b) that both the sales representatives and Brite had the right to redeem the carry-over points. Appellee relied solely on the argument of counsel and the legal construction of the carry-over point provision of the contract, as a matter of law, without any other factual support.

Although Brite was the sole scrivener of the document (Brady p. 10, lines 8-16), the trial court found "that the foregoing marketing program language is unambiguous and that the

use of the term "However" at the beginning of the second sentence thereof acts as a qualification to the accumulation provision contained in the first sentence. Thus, the ability of the plaintiffs [Weaver and Palmer] to continue accumulating carry-over points indefinitely is limited by the redemption wording in the second sentence" (see paragraph 2 of the January 27, 1995 Final Order of Dismissal; Exhibit D attached).

Upon a motion for directed verdict at the end of the Appellants' case, the trial court ruled, as a matter of law, that Brite also had the right to exercise the cash redemption provision of the cited contractual language.

#### Summary of Arguments

1. On appeal from a directed verdict, the Appeals Court must examine the evidence in the light most favorable to the Appellants. If there is a reasonable basis in the evidence and in the inferences to be drawn therefrom that would support a judgment in favor of the Appellants, the directed verdict cannot be sustained.

2. It is fundamental that doubtful language in the contract should be interpreted against Brite, who was the party that selected the language and drafted the document.

3. If the interpretation of the doubtful language of a contract is to be determined as a matter of law by the words in the agreement, a cardinal rule in construing such a contract is to give effect to the intentions of the parties. Such contract should be interpreted so as to harmonize all of its provisions and all of its

terms, and all of its terms should be given effect if it is possible.

4. The doubtful language of the contract between the parties is ambiguous. The factual issues presented by the parol evidence admitted in this matter must be submitted to the jury and not determined as a matter of law.

5. The doubtful language of the contract between the parties is to be interpreted in a manner consistent with the eight year course of dealing between the parties. This course of dealing establishes the fact that only the Appellant sales representatives had the right to exercise the carry-over redemption provision of the contract. Such factual matters are to be presented to the jury and not determined as a matter of law.

6. Brite has waived its right to claim, and is now estopped from asserting, that it also has a right to exercise the carryover point redemption provision.

#### Argument

##### POINT I

THE TRIAL COURT ERRED IN FAILING TO SUBMIT TO THE JURY THE ISSUE OF WHETHER OR NOT BOTH THE APPELLANTS AND THE APPELLEE HAD THE RIGHT TO EXERCISE THE CASH REDEMPTION PROVISION OR WHETHER THE REDEMPTION RIGHT WAS SOLELY THAT OF THE APPELLANTS.

The basis of the trial court's granting of Brite's motion for a directed verdict is the court's determination that Brite had the right to redeem the carry-over points of the Appellants, Weaver and Palmer. If Brite did not have this right, and only the sales representatives of Brite could exercise the redemption right, the

trial court's judgment would be in error. If a question of material fact exists as to which party to the contract had the right to exercise the redemption provision, a directed verdict cannot be sustained and that material fact must be submitted to the jury for determination.

On an appeal from a directed verdict, the Appellate Court should give no deference to the factual findings or legal conclusions of the trial court, but should review the facts and apply the proper legal standard de novo. Canfield v. Albertsons, 841 p. 2d 1224 (Ut. App. 1992).

In this Court's recent decision of Klienert v. Kimball Elevator Company, 1995 WL 613775, 275 Utah adv. Rep. 44, (Ut. App. 10/19/95), this Court held that:

On appeal from a directed verdict, 'we must examine the evidence in the light most favorable to the losing party, and if there is a reasonable basis in the evidence and in the inferences to be drawn therefrom that would support a judgment in favor of the losing party, the directed verdict cannot be sustained.' Gourdin v. Sharon's Cultural Educ. Rec. Ass'n., 845 p.2d 242, 243 (Utah 1992) (quoting Graystone Pines, 652 P.2d at 898). Where there is any evidence that raises a question of material fact, no matter how improbable the evidence may appear, judgment as a matter of law is improper. See Hill v. Seattle First Nat'l Bank, 827 P.2d 241, 246 (Utah 1992). emphasis added

In the evidence presented at trial on the question of who had the right to exercise the redemption provision, it was not only probable that only the sales representatives had the right, the evidence was nearly compelling that such was the case. In her

testimony at the time of the trial, Cathy Palmer testified as follows (Palmer p. 87, lines 9-15):

Q And all the time that you were with Brite, was there any-- did they every tell you that Brite could redeem those points, or was it your option?

A Not at any time. Not at any times. It states clearly in the printed material that that was your [i.e. the sales representative's] option. You could redeem them from Brite. Not by Brite. From Brite. emphasis added

This testimony of Catherine Palmer, alone, is sufficient to justify submitting to the jury in this case the question of whether Brite also had the right to exercise the redemption clause or whether the redemption provision option was solely the right of the sales representatives.

Palmer testified elsewhere that she was told by management representatives of the Company that the redemption option was hers (Palmer p. 33). Bruno Vassel, hired as the executive vice president of Brite and trained by its president, Ted Brady, stated that the option was obviously that of the sales representative (Vassel p. 39). Most compelling, however, is the fact that the record of the trial proceedings fails to include a single statement by any witness asserting that Brite also had the right to exercise the redemption provision.

In this regard, it should be noted that the Appellants called Mr. Brady as an adverse witness to ask him this very question. Further, the same question had been asked of Mr. Brady at the time of his deposition and the opportunity for him to provide contradicting testimony was afforded to him.

At the trial, Appellants' counsel asked Mr. Brady to read from his deposition and answer the question again. The trial transcript records as follows (Brady p. 29, lines 15-20):

A Let's see, your question?

Q Yes

A 'I want you to think about it again. You don't have any recollection about that being discussed, whose options (sic) it was.'  
I said 'no'.

The immediate subsequent question of Appellants' counsel afforded Mr. Brady a third opportunity to declare that it was also the right of Brite Music to redeem the carry-over points. In referring to the redemption language in the contract, Appellants' counsel asked":

Q Now, if in drafting these terms that you've indicated so far, Mr. Brady, if Brite Music could redeem at will for \$100, wouldn't that be incon -- if the right was in Brite to redeem for \$100 wouldn't that be inconsistent with the term 'as long as you desire?' Wouldn't that be inconsistent?

A I'm not sure I can answer that (Brady p. 29, lines 21-25, p. 30, lines 1-2).

Having squarely placed this issue within the scope of cross-examination in presenting Appellants' case in chief, Brite's counsel did not elicit any testimony from Mr. Brady that either Mr. Brady or anyone on behalf of Brite had said, implied or intimated that Brite also had the right to exercise the redemption option.

Based upon the testimony in this case, and the clear legal authority affirmed by this Court, the trial court erred in failing to submit to the jury the factual issue of whether or not Brite



also had the right to exercise the carry-over point redemption option.

Reasonable individuals could differ in their conclusions regarding these matters which should not be determined as a matter of law by the trial court. A directed verdict is tantamount to granting a motion for a nonsuit. On appeal it must be reversed, if the evidence is such that reasonable individuals could arrive at a different conclusion. Rhiness v. Dainsie, 24 Utah 2d 375, 472 P.2d 428 (1970).

## POINT II

THE REDEMPTION OPTION PROVISION OF THE SALES CONTRACT MUST BE CONSTRUED AGAINST BRITE, THE SOLE SCRIVENER OF THE DOCUMENT.

The first principle in the construction of a contract is provided for in 17 AmJur 2d, Contracts, §348, which states as follows:

It is fundamental that doubtful language in a contract should be interpreted most strongly against the party who has selected that language, especially where he seeks to use such language to defeat the contract or its operation, unless the use of such language in the contract is prescribed by law. Also, in case of doubt or ambiguity a contract will be construed most strongly against the party who drew or prepared it, or supplied a form for the agreement, or whose attorney drew or prepared it.

In the case of Abbott v. Christensen, 660 P.2d 254, 257 (Utah 1983), the Supreme Court affirmed the basic law in Am Jur. that doubtful terms in a contract should be interpreted against the party who has chosen such terms.

In the case of Wingets, Incorporated v. Bitters, 500 P.2d 1007, (Utah 1972), the Supreme Court also affirmed the basic proposition that a contract must be strictly construed against whoever drafts the contract.

The testimony identifying the party who drafted the sales representative contract is unequivocal. Brite was the sole scrivener. The president of Brite testified (Brady p. 10, lines 8-16):

Q Thank you. Are the words and the language and the terms your language? The language of Brite Music?

A The language of Brite Music, yeah.

Q And it was drafted and the language you chose was the language of you and Mr. Perry?<sup>3</sup>

A Correct.

Q These two ladies [the Appellants] had nothing to do with choosing the language or the program, did they?

A I think they did not.

As the sole author of the sales representative contract, and its terms providing for the redemption of carry-over points, the provision is to be construed against the interpretation urged by Brite.

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<sup>3</sup> Mike Perry was the vice-president of Brite or the first executive officer of the company under Mr. Brady in 1982 when the carryover points concept was drafted into the sales representative agreement (Palmer p. 31, lines 16-24).

### POINT III

THE TRIAL COURT ERRED IN FAILING TO INTERPRET THE REDEMPTION OPTION PROVISION OF THE SALES CONTRACT SO AS TO HARMONIZE ALL OF THE TERMS OF THE PROVISION.

A second significant principle of construction is that a contract is to be interpreted so as to harmonize all of its terms and provisions, and all of its terms and provisions should be given effect, if possible. Buehner Block Co. v. UWC Associates, 752 P.2d 892, 895 (Utah 1988). In the Buehner Block case, the Utah Supreme Court re-emphasized certain basic principles of the construction of contractual provisions. At page 895 of its opinion, the Court states:

The interpretation of a written contract may be a question of law determined by the words in the agreement. In this regard, a cardinal rule in construing such a contract is to give effect to the intentions of the parties, and if possible, these intentions should be gleaned from an examination of the text of the contract itself. Additionally, it is axiomatic that a contract should be interpreted so as to harmonize all of its provisions and all of its terms, and all of its terms should be given effect if it is possible to do so.

In light of these principles, we are to examine what the trial court did in this matter. In the second numbered paragraph of the Final Order of Dismissal (Exhibit D attached hereto), the trial court found that the language of the sales representative contract was unambiguous. It therefore appears that it was the position of the trial court that it could determine the interpretation of the contract provision by the words of the agreement only.

The matter of the existence of ambiguity in the contract provision is addressed in Point IV below. For purposes of argument in this portion of Appellants' Brief however, let us consider that the provision is unambiguous. In such event, the cardinal principles of contract interpretation referenced above in the Buehner Block case still apply.

Further, the standard of review in such a case is also stated clearly by the Court in Buehner Block at page 895:

If a trial court interprets a contract as a matter of law, as was obviously the case here, we accord its construction no particular weight and review its actions under a correction-of-error standard.

Inviting the Appeal Court's attention to the language to be construed (the "Subject Paragraph"), Appellants quote the relevant language from paragraph one of the referenced Final Order of Dismissal:

As you continue to exceed 1200 points per month, the increasing carry-over points may accumulate for as long as you desire. However, each increment of 5,000 carry-over points is redeemable for a check from Brite for \$100. Redeeming points in this manner does not affect your life-time point accumulation or the benefits you may eventually derive therefrom. (emphasis added by Appellants)

Careful analysis of this contract provision is aided by considering each of the components of the paragraph and the parties referred to in the paragraph. This contract is between Brite Music Enterprises on the one hand and the sales representative on the other. The company is referred to once in the subject paragraph as "Brite". The sales representative is referred to several times

throughout the agreement by the use of the pronouns "you" or "your".

The three separate segments or components of the paragraph may be analyzed as follows. The first sentence of the paragraph (the "First Component") refers to the right to accumulate carry-over points. The Second Component of the paragraph is contained in the second sentence and relates to a right to redeem 5,000 carry-over points for the sum of \$100. The Third Component for analysis is the third and final sentence of the paragraph which refers to a "life-time point accumulation".

Although the key component for purposes of this appeal is the Second Component consisting of the second sentence, the Buehner Block case states that we must harmonize the provisions of the entire paragraph. Special consideration should be given to the Second Component of the paragraph regarding the redemption rights. The language of this component is as follows:

However, each increment of 5,000 carry-over points is redeemable for a check from Brite for \$100."

The central issue of this appeal is resolved by answering the question; "Who has the right to exercise the redemption provision?" For purposes of analysis and construction of the Second Component, Appellants state that there are only three possible interpretations of the phrase. These three possibilities are listed below. The underlined language has been added by the Appellants to facilitate the analysis of the phrase.

#### FIRST POSSIBILITY

However, each increment of 5,000 carry-over points is redeemable by you for a check from Brite for \$100;

OR

#### SECOND POSSIBILITY

However, each increment of 5,000 carry-over points is redeemable by you or by Brite for a check from Brite for \$100;

OR

#### THIRD POSSIBILITY

However, each increment of 5,000 carry-over points is redeemable by Brite for a check from Brite for \$100.

For purposes of argument, and in light of the fact that there are only two parties to the agreement, the foregoing phrases are the only logical possibilities which may be considered. The Third Possibility can, in all likelihood, be eliminated. No one has asserted this position, either in testimony at the time of the trial, or in argument on Brite's motion for directed verdict. Further, the matter of the course of dealing between the parties and the admissions of the president of Brite, as addressed in Point V below, should eliminate this possibility. However, if analyzed strictly as a logical argument based on construction only, the Third Possibility would be considered one of only three constructions which could be accepted by this Court.

Because the Second Possibility is the position asserted by Brite in its motion for directed verdict and because the First Possibility is the position asserted by the Appellants in response to Brite's motion for directed verdict and in this appeal, Appellants' analysis will focus on the first two alternatives to the Second Component of the Subject Paragraph.

If this Court should determine that the Subject Paragraph is unambiguous, then the Appeals Court should analyze the Subject Paragraph and the language of the Second Component thereof in light of the principles enunciated in the Abbott case discussed in Point II of this Brief and according to the principles enunciated in the Buehner Block case cited above.

If the Appeals Court believes that the First Possibility is the correct interpretation, then the trial court erred and this matter should be remanded to the trial court with instructions that only Weaver and Palmer are able to exercise the redemption provision, and the balance of the case relating to the breach of the contract by Brite and the damages suffered by the Appellants should be submitted to the jury.

In the event that the Appeals Court determines that the Second Possibility is the correct interpretation, then Brite also had the right to redeem the accumulated carry-over points; its actions in tendering checks to the Appellants to purchase their carry-over points was sanctioned by the agreement between the parties and the ruling of the trial court should be affirmed.

If, however, the Appeals Court should determine that the Subject Paragraph and the Second Component thereof are ambiguous, then this matter should be remanded to the trial court for submission to a jury with proper instructions on the construction of the Subject Paragraph as set forth in Points I through VI of this Brief. In such event, the jury should rightfully determine this matter which cannot properly be resolved as a matter of law by the trial court.

Continuing with a strictly legal construction of the First and Second Possibilities, the Appeal Court's objective is to determine the persons or entities entitled to exercise the redemption right consistent with the principles of Abbott and Buehner Block. To harmonize the provisions of this section, it is first important to notice that the pronoun you is the antecedent to each bestowed of a right. The Subject Paragraph provides: "you continue to exceed..." regarding the accumulation of points. The paragraph states that this may be done as long as "you desire". The redemption does not "affect your life-time point accumulation", and the paragraph concludes with the reference to "benefits you may eventually derive...". The only reference to Brite relates not to a benefit or a right, but relates to an obligation of Brite to pay for the cash redemption price for the points, if redeemed. In reading the paragraph as a whole, and in harmonizing its various parts, one must conclude that the antecedent for the redemption right is also "you", the sales representative.



Although the logical consistency of this argument is apparent, the inverse analysis of the paragraph is more compelling. There is absolutely no basis in the language of the paragraph which would indicate that Brite is the one that had the right to redeem the carry-over points. The Second Possibility, which is the position urged by Brite, is as follows:

However, each increment of 5,000 points is redeemable by you or by Brite for a check from Brite for \$100.

There is nothing in the balance of the paragraph which can support the notion of inserting the language by Brite into the Second Component of the paragraph.

The second analysis for harmonizing the ideas expressed in the Subject Paragraph comes from focusing on the first two sentences as a whole. The concept that Brite had the right to exercise the redemption provision is inconsistent with the phrase contained in the first sentence of the paragraph that says that the sales representative may accumulate the carry-over points "for as long as you [the sales representative] desire". In construing the paragraph, particularly in construing it against the scrivener of the paragraph, we cannot give effect to the desires of the sales representative if Brite can unilaterally take away the carry-over points.

The third analysis for harmonizing the provisions of the Subject Paragraph is in harmonizing the concepts of the paragraph with the contract as a whole and the intended uses of the carry-over points. As indicated in greater detail at pages 14 and 15 in

the factual summary, the carry-over points were to be used to maintain the highest point level of compensation during periods of personal sales inactivity. This included times of sickness (Brady, p. 18, 19), pregnancy (Brady, p. 18), church missionary service (Brady p. 19) and retirement (Vassel pp. 19-22 and Palmer p. 36).

If Brite could exercise the right to redeem the carry-over points, the whole concept of pregnancy leave, sick leave, missionary finances and retirement would be illusory. For the sum of \$300, Brite could eliminate an entire year of retirement or missionary service. In Cathy Palmer's case, Brite wrongfully sought to eliminate 39 months of carry-over points for only \$900 (Palmer p. 85-86). On a conservative basis Palmer testified that, when used as provided in her sales representative contract, these carry-over points had a value in excess of 31,000 (Palmer p. 85, line 22).

To accord the trial court's determination as a matter of law the fullest possible scope, we must consider the misplaced reliance that the trial court bestowed upon the word "however" that joins the First and Second Components of the Subject Paragraph. In the second paragraph of the Final Order of Dismissal (Exhibit D attached hereto), the trial court states that: *"the term 'However' at the beginning of the second sentence thereof acts as a qualification to the accumulation provision contained in the first sentence. Thus, the ability of plaintiffs to continue accumulating carry-over points is limited by the redemption wording in the*

*second sentence*" [i.e. the Second Component].

This analysis is not dispositive of the question at issue here for at least two significant reasons. To designate the word "however" as a word of "qualification" still does not answer the question as to who had the right to "qualify" the on-going accumulation of carry-over points. The First and Second Components of the Subject Paragraph provide that the points will accumulate unless they are redeemed. If the accumulation is qualified by the redemption, that qualification would properly be a function of the sales representative's election to redeem the carry-over points. If a sales representative elected to redeem some of her carry-over points, her right to use those points to maintain the highest compensation level would be qualified. This fact does not grant Brite the right to exercise the redemption option.

Admitting for purposes of argument that the use of points for the highest compensation level would be "qualified" by the cash redemption of those points (thereby making them unavailable for use to maintain the highest compensation level), Appellants assert that this characterization of the word "however" does not answer the question of who had the right to trigger the qualification of the accumulation of carry-over points by the cash redemption.

For example, Possibility One and Possibility Two, as referenced above, both contain the word "however". If "however" is treated as a word of "qualification", it may be said that in both instances the ability to continually accumulate carry-over points is qualified by the cash redemption provision of the Second

Component of the Subject Paragraph. In the First Possibility, only the sales representative can exercise the cash redemption provision. In the Second Possibility, both the sales representative and Brite can exercise the cash redemption provision. In neither instance does the word "however" assist in the analysis of determining of who has the right to exercise the cash redemption provision.

The second basis for Appellants' objection to the trial court's undue emphasis on the word "however" is that the Appellants disagree with the assertion that the word "however" is a word of qualification. As presented in the motion of Weaver and Palmer for a new trial and their motion to set aside the verdict, the Appellants respectfully disagreed with the trial court regarding the import of the term "however". In the memorandum supporting their motion, Appellants provided the Webster's Dictionary explanation of the word (R. 732). This treatment is instructive on appeal. *Websters New Collegiate Dictionary* 1973 Ed., defines the word "however" not as a word of limitation, but as a conjunction. "Conjunction," implies the joining of alternatives or other courses.

Reading the First and Second Components of the Subject Paragraph together, Appellants submit that a sales representative had the right to accumulate the carry-over points for as long as she desired, or, in the alternative or as a second course of action, she could give up those points and receive a cash redemption price. These alternatives, or different courses of

action, are at the election of the sale representative.

Construing the Subject Paragraph as a whole, and such paragraph together with the entire sales representative agreement, Appellants respectfully submit that only the sales representative had the right to exercise the cash redemption provision. Construing the paragraph as a whole, and harmonizing its various parts, the First Possibility is the only proper interpretation of the Subject Paragraph.

#### POINT IV

THE FACTUAL ISSUES PRESENTED BY THE ADMISSIONS OF PAROL EVIDENCE REGARDING ANY AMBIGUITY IN THE REDEMPTION OPTION PROVISION OF THE SALES CONTRACT MUST BE SUBMITTED TO THE JURY, AND NOT DETERMINED AS A MATTER OF LAW.

Point III of the Appellant's Brief addresses the strict legal construction of Subject Paragraph relating to whose right it is to exercise the carry-over point redemption. This analysis was undertaken by reason of the trial court's conclusion that the language of the Subject Paragraph was "unambiguous" (Final Order of Dismissal, paragraph 2; Exhibit D attached hereto). Prior to making this determination at the conclusion of the case in chief of Palmer and Weaver, the trial court had admitted a plethora of parol evidence. This testimony was admitted without objection of Brite's counsel, and even with such counsel's full participation (See cross examination of Vassel and Palmer at Vassel p. 52, lines 1-14; p. 53, lines 12-24; Palmer p. 104, lines 1-7).

In footnote 11 on page 895 of the case of Buehner Block Co. v. UWC Associates, 752 P.2d 892, 895 (Utah 1988), the Utah Supreme

Court addresses the proper manner of proceeding in a case regarding the construction of a contractual provision. The Supreme Court stated that a trial court should first determine whether an ambiguity exists and then having determined the existence of an ambiguity, admit parol evidence. The footnote provides:

[W]hether ambiguity exists is question of law to be decided by trial court before parol evidence admitted; Morris, 658 P.2d at 1201; Big Butte Ranch, Inc. v. Holm, 570 P.2d 690, 691 (Utah 1977) "[T]he court should first examine the language of the instruments and accord to it the weight and effect which it may show was intended and if the meaning is ambiguous or uncertain then consider parol evidence of the parties' intentions." (footnote omitted.).

Nevertheless, the matter of the ambiguity of the Subject Paragraph was addressed to the trial court (R. 726 Memorandum in Support of Motion for a New Trial and Motion to Set Aside Verdict; and Transcript of Motion for Directed Verdict p. 31), and this issue is presented on appeal. Appellants will therefore first address the existence of an ambiguity in the Subject Paragraph and secondly consider the parol evidence admitted at trial.

Admitting the parol evidence to aid construction of the Subject Paragraph and afterwards concluding that the provision was unambiguous is error by the trial court. However, neither Appellants or Appellee objected to such procedure in the trial court.

A contract is considered ambiguous if the words used to express the meaning and intention of the parties are *"insufficient in a sense that the contract may be understood to reach two or more*

*plausible meanings."* Metropolitan Property and Liab. Ins. Co. v. Finlayson, 751 P.2d 254, 257 (Utah Ct. App. 1988), quoting Central Sec. Mut. Ins. Co. v. DePinto, 235 Kan. 331, 681 P.2d 15, 17 (1984).

Because the existence of ambiguity is a question of law, the Appeals Court is to accord no particular weight to the trial court's interpretation and the matter is to be reviewed under a correction-of-error standard (Buehner Block supra p. 895).

Appellants submit that any possibility of ambiguity could have been eliminated by Brite, the scrivener of the Subject Paragraph, if it had expressly stated the antecedent to the words "is redeemable" in the Second Component of the Subject Paragraph. Brite failed to do so. This leaves for de novo consideration by this Appeals Court whether the First, Second or Third Possibility listed on page 28 of this Brief is the proper construction of the Subject Paragraph.

Because the antecedent to the two verbs prior to the redemption provision in the Subject Paragraph is the pronoun "you" (i.e. "you continue to exceed" and "...you desire"), it would be appropriate as a matter of law for this Court to determine that "you" [the sales representative] is the antecedent to the next verb in the Subject Paragraph (i.e. "is redeemable"). The Appeals Court could therefore determine, as a matter of law, that the redemption right is exclusively that of the sales representative.

If the Appeals Court is unable to make such determination as a matter of construction and as a matter of law, the Appellants

submit that the Second Component is, in fact, ambiguous and that the selection among the three possibilities of proper construction of this paragraph must be aided by consideration of the parol evidence admitted at the trial. Further, the existence of this ambiguity would necessitate the consideration of the course of dealing between the parties as addressed in Point V below.

With regard to the potential ambiguity in the Subject Paragraph, Mr. Vassel's testimony on cross-examination by Brite's counsel is instructive (Vassel p. 51, lines 25 and p. 52, lines 1-19).

Q I want to clarify that we are not talking about accumulating points here. We are talking about redeeming those points?

A Okay.

Q Clearly, and I have no problem with the fact that a marketing associate can elect to redeem if they choose to, right?

A Right.

Q Is there anything in this that says that the company cannot redeem also?

A Doesn't say either way.

Q Right. Just says they [the carry-over points] can be redeemed, doesn't it?

A This is written to the representatives or distributors?

Q I appreciate that but there's nothing that says the company can't redeem, is there?

A No, and I think it would be out of context if there was because this is written to the distributors about what they can so. (emphasis added)

By Mr. Vassel's testimony and the statement of Brite's



counsel, the redemption language of the Subject Paragraph "doesn't state either way" whether Brite had the right to redeem the carry-over points. Yet, on its analysis of the language the trial court ruled as a matter of law that Brite did possess such right. Appellants submit that, if the language of the Subject Paragraph does not state either way whether Brite may redeem the carry-over points, then the language is ambiguous as to such right. In that event, parol evidence and the course of dealing of the parties is essential, and all of these factual issues are to be submitted to the jury for determination.

On the issue of parol evidence, Appellants direct the attention of the Court to the testimony of Palmer at page 86, lines 9-15:

Q And all the time that you were with Brite, was there any-- did they every tell you that Brite could redeem those points, or was it your option?

A Not at any time. Not at any times. It states clearly in the printed material that that was your [i.e. the sales representative's] option. You could redeem them from Brite. Not by Brite. From Brite. (emphasis added)

Palmer further discussed Mr. Brady's instructions to her as follows (Palmer p. 36, lines 18-25 and p. 37, lines 1-8):

A . . . And I asked Ted specifically, I said, "Ted, now you need to make sure this is absolutely clear in my mind, because I'm telling my new prospects, my new distributors this. I want to make sure that I'm telling them accurately that they can build up carry-over points, as many and as long as they want to for any reason that they deem necessary, be it retirement," and there was never any age spoken of for retirement. Just retirement, sickness, illness, a family tragedy, vacation, anything you wanted to do.

And Ted said, "Absolutely. That's the flexibility

and the benefit of the point system and the carry-over points."

Q. Did he indicate at that time whether you could carry them over indefinitely?

A. Absolutely.

See also Palmer's testimony at page 39, lines 2-12:

Q. Do you recall on other occasions at that time in management meetings when this question came up on the issue of allowing a person to use their carry-over points?

A. I don't recall a single managers' meeting that at least some of us didn't discuss carry-over points, retirement, the benefit. It was a huge issue. It was a very important issue to us as what we called, and the company called -- referred to us as career executives. We weren't part-timers. We were in this serious. We were building for our future. There was a career for us, not just a part-time job.

It is not the Appeals Court's purpose here to make a finding of fact based upon the parol evidence cited here or elsewhere in this Brief. The objective here is to determine if, in fact, there were factual issues that should have been submitted to the jury. In this regard, reference is again made to Kleinert v. Kimball Elevator Company supra. At page two of its opinion, this Court stated that:

Where there is any evidence that raises a question of material fact, no matter how improbable the evidence may appear, judgment as a matter of law is improper.

In further analysis of the parol evidence presented at trial, is the substantial testimony regarding the fact that the cash redemption price was significantly less than the amount that could be earned by the representative through the use of the carry-over

points to maintain the highest level of compensation (e.g. Palmer p. 33 lines 19-23). This testimony makes the notion that Brite also had the right to redeem carry-over points wholly inconsistent with the stated purposes for the carry-over points. This inconsistency demonstrates that these material factual issues are to be submitted to the jury for determination, and not decided as a matter of law.

In this regard, the attention of the Appeal Court is directed to the testimony of Bruno Vassel, the former executive vice-president of Brite. Mr. Vassel had been a senior executive at Avon products where he was responsible for Human Resources in 22 countries and subsequently responsible for world-wide training for a million and a half Avon sales representatives (Vassel pp. 5-6).

In questioning regarding the carry-over point aspect of the marketing program, Mr. Vassel testified:

A I was aware of a provision where if a distributor wanted to redeem or turn in their points they would get some money for those points. I was also aware of the fact that it was so ludicrously little that nobody hardly ever did it.

Q I see. Did you ever tell the people in - the representatives who's right it was to redeem, whether it was the company's right or the representatives' right?

A No, that never came up because it wasn't an issue. It was obvious.

Q Define the term obvious.

A Well, it was obvious that the distributor had the right to use their points whenever they wanted to, or not use them whenever they wanted to.

Note that Mr. Vassel testified that it was the right of the

sales representative to exercise the redemption provision and that no one would do so because it was "ludicrously little". Clearly the amount to be paid was too small to satisfy the benefits of the carry-over points as taught by Mr. Vassel in his national training meetings for Brite. In these meetings, he referred to the accumulation of carry-over points as storing them in a "special box". He described his presentation to the sales representatives as follows, (Vassel pp. 21-22, beginning at line 4):

A So I'd say, 'Here's where the company is so wonderful. It's as if you have a little box over here you take those other 800 [points] and you put it in your special box to be used at some point in the future.' And then I said, 'Now, in times of sickness or if you're a woman and you are pregnant and you want to take six months or a year off, or people -- for example, LDS men and many -- most of the people were LDS in the organization; not all. I would say, 'If you want to go on a mission, for the LDS church,' I said, 'There's examples of people in the company, distributors who have taken six month off, or who have had a baby, or who have gone on a mission, and have been able to dip into this box of carry-over points that they have developed over time, and they have been able to take those points and use them, 1,200 per month to permit them to continue to get those down-line commissions even though they weren't working right then.

They had earned it in the past. And so I said to people, look, this is a form of developing for a retirement in the future. And I told them, 'We have examples of people who hit an age where they want to retire, and for the next several years some of them have earned enough points and the company has agreed to keep those in that little box, if you will, so that then those people on retirement, or whatever, could use those. And we have examples in the company of people over the next several years who have used that.'

Q Was this the very same thing that Ted taught you in reference to the program?

A Well, I didn't know it before I got -- Ted taught me. Mary Lou, his marketing person, taught me, and the sales plan taught me.

Appellants submit that all of the foregoing testimony was heard by the jury in this case and that factual issues raised by the ambiguity should have properly been submitted to the jury for its determination.

POINT V

THE TRIAL COURT ERRED IN FAILING TO INTERPRET  
THE REDEMPTION OPTION PROVISION OF THE SALES  
CONTRACT IN A MANNER CONSISTENT WITH THE EIGHT  
YEAR COURSE OF DEALING OF THE PARTIES.

To further aid in the construction of the Subject Paragraph, there is available to this Court the testimony regarding the course of dealing between the sales representative and Brite regarding the redemption and use of the carry-over points. This point was stressed to the trial court at the time of the argument on the motion for directed verdict (Transcript of Motion for Directed Verdict p. 21).

The Utah courts have adopted the general proposition that the course of dealing of the parties is to be used in establishing the proper construction of an agreement. Power Systems and Control v. Keith's Electric, 756 P.2d 5, (Ut. App. 1988) and Hecter, Inc. v. United Sav &. Loan Ass., 741 P.2d 542 (Utah 1987).

Beginning in 1982, with the adoption of the carry-over point component of the Program, until the end of 1990, the parties established a clear course of dealing between Brite and its sales representatives with regard to the meaning of the cited contractual provision. During this eight year period of time, only sales representatives exercised the redemption provision for cash (Palmer p. 86, p. 90, lines 2-3; Brady p. 58; lines 14-18). Those points

not redeemed for cash, at the election of the sales representatives, were used to maintain the point and compensation level which offered the sales representative the highest monthly remuneration.

Ted Brady, the principal executive and one of the two principal founders of Brite, explained the marketing program to Weaver and Palmer, and was present when other executive employees of Brite were both trained and then conducted seminars to recruit and encourage new sales representatives (Vassel p. 22). Each training session and each promotional seminar was devoid of any reference to the notion that Brite also had a right to exercise the cash redemption provision of the sales representative contract (Brady p. 29, lines 17-20; Vassel p. 39; Palmer p. 86, lines 9-15).

Beginning as early as 1987, Weaver and Palmer began to use their carry-over points in the manner for which they were actually intended, that is; to maintain the highest point and compensation level, while devoting less time to personal sales activity (Palmer p. 84, lines 12-24). This was a well recognized practice for the years 1987 through 1990. Brite honored the proper use of carry-over points for Palmer in the amount of 27,070.33 points (Palmer p. 73, pp. 84-85; Trial Exhibit P-29 and Exhibit A attached hereto). Over a four year period beginning in 1986, Brite honored the proper use of carry-over points by Weaver in the amount of 34,268.09 points (Trial Exhibit P-58 and Exhibit B attached hereto).

The eight year course of dealing, and the admissions of Brite regarding such course of dealing, establish that it was the sole

right of the Appellant sales representatives to exercise the carry-over point redemption provision of the subject agreement. Such factual matters are properly to be submitted to a jury for determination and are not to be decided on a motion for directed verdict.

#### POINT VI

THE PRINCIPLES OF ESTOPPEL AND WAIVER PRECLUDE BRITE FROM NOW ASSERTING THAT IT ALSO HAS THE RIGHT TO EXERCISE THE REDEMPTION OPTION PROVISION OF THE SALES CONTRACT.

At the time of the argument on the motion for directed verdict, Appellants' counsel urged the trial court to allow counsel to argue to the jury (at the conclusion of the case), the issues of waiver and estoppel (Transcript of Motion for Directed Verdict p. 54). This issue was raised again in Appellants' post-trial motions R. 698).

An individual is estopped to deny or repudiate his promise made to another when that individual should reasonably expect to induce action or forbearance on the part of the promisee, and does in fact induce such action or forbearance. See Sugarhouse Finance Co. v. Anderson, 610 P.2d 1369, 1373 (Utah 1980).

Based upon the representations and admissions of Brite's president and its other executive officers, Bruno Vassel and Mike Perry, Weaver and Palmer dedicated several years of their lives to accumulating carry-over points because they were told that they could do so for as long as they desired. The language of the Subject Paragraph further documents Brite's inducement regarding this matter of accumulating the carry-over points at the election

of the sales representatives.

The testimony of the promises and representations of Mr. Brady, Mr. Vassel and Mr. Perry has been quoted previously in this Brief, and for purposes of brevity is not repeated here.

The sales representatives were entitled to rely upon the assertion that the right to redeem points was the right of the sales representative. The following testimony of Mike Perry's statements to Palmer was quoted to the trial court in the Appellants' memoranda in support of their post-trial motions (R.770; Palmer p. 31,32).

Q And calling your attention to redemption of points, if any in 1992, did you contact one Mike Perry in reference to redeeming some of your points?

A In 1982. You said 1992. In 1982 I did in a way into a managers' meeting they had asked me to speak at a regular meeting for all the representatives, and I wanted a new dress. So I had so many carryover points. I asked Mike Perry, I said, 'I want to turn in 5,000 of my carryover points because I'd like a check for \$100.' So when I left the managers' meeting he left me that check. and a couple of months latter --

Q Now, can you give us the best time first --

A That would have been probably September of 1982.

Q Thank you.

A So I think probably November of 1982 I still had a lot of carryover points, and I thought this would be a great way to get \$200 extra dollars for Christmas. And so on the way into a managers' meeting that month I told Mike Perry, I said, 'this time I'd like to cash in 10,000 of my carryover points. I'd like a check for \$200.'

He said, 'Fine.' Then after the meeting when I went out to his desk to pick up the check, he said, 'Cathy, I realize that this is your option to do this if you want.'



As to the importance of Brite's promises and Palmer's reliance, Palmer testified: (Palmer p. 39, lines 5-12).

A I don't recall a single managers' meeting that at lease [sic] some of us didn't discuss carryover points, retirement, the benefit. It was a huge issue. It was a very important issue to us as what we called, and the company called -- referred to us as career executives. We weren't part-timers. We were in this serious. We were building for our future. There was a career for us, not just a part-time job.

Based upon their reliance upon the promises of Brite, the Appellants have the right to submit the matters of waiver and estoppel to a jury in this matter.

#### CONCLUSION

Weaver and Palmer submit that the trial court erred in not submitting to the jury the material issues regarding the construction of their sales representative contracts. When all of the terms of the subject agreement are construed in light of the evidence submitted in this case, and when construed against the scrivener of the document, this matter may not be determined as a matter of law.


If the Appeals Court should determine that the Subject Paragraph and the Second Component thereof are ambiguous, then this matter should be remanded to the trial court for submission to a jury with proper instructions on the construction of the Subject Paragraph in accordance with cases cited in this Brief. In such event, the jury should rightfully determine the factual issues bearing on the construction of the agreement of the parties.

If this Court should determine, however, that the Subject Paragraph is unambiguous, then the Appeals Court should analyze the

Subject Paragraph and the language of the Second Component thereof in light of the principles of contract construction enunciated in the cases discussed in this Brief.

If the Appeals Court determines as a matter of law that only the sales representative can exercise the carry-over point redemption provision, then the trial court erred and this matter should be remanded to the trial court with instructions that only Weaver and Palmer are able to exercise the redemption provision. Then the balance of the case, relating to the breach of the contract by Brite and the damages suffered by the Appellants, should be submitted to the jury.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of December, 1995.

  
\_\_\_\_\_  
BRUCE L. DIBB  
JENSEN, DUFFIN, CARMAN,  
DIBB & JACKSON

### Mailing Certificate

I hereby certify that I mailed two copies of the foregoing Brief of Appellants and attached Addendum to the counsel for the Appellee by placing true copies thereof in an envelope addressed to:

Rick J. Sutherland  
P.O. Box 770  
Park City, Utah 84060

postage prepaid, this 11<sup>th</sup> day of December, 1995

Bruce L. Dahl

APPBRF.436

There are no statutes required  
in this Brief.

## **ADDENDUM**

## Exhibit A

# CATHY PALMER

	<u>Total Sales (BV)</u>	<u>Total of Monthly Bonus</u>	<u>Total of Management Bonus</u>	<u>Carry Over Points<sup>1</sup> (Cumulative)</u>	<u>Carry Over Points Used to Maintain Highest Point Level</u>
1984	128,276.61	\$13,914.45	6,486.17	25,088.53	
1985	211,647.47	21,545.93	11,266.24	49,162.83	
1986	282,436.95	23,676.42	15,275.46	69,702.78	
1987	293,724.75	20,134.08	15,243.71	79,099.68	
1988	205,833.23	14,353.92	13,046.56	74,392.53	4,707.15
1989	147,873.76	8,158.55	7,915.68	62,533.40	11,859.13
1990	111,664.55 <sup>2</sup>	5,324.05 <sup>2</sup>	5,324.10 <sup>2</sup>	52,029.35 <sup>2</sup>	10,504.05

Total Carry Over Points Honored by Brite: 27,070.33

Balance of Carry Over Points  
as of February 1, 1991:

~~48,429.35~~  
47,229.35

Minimum number of months remaining at  
highest level of compensation:

~~40.4 months~~  
39.36 month

Value of the balance of the Carry Over Points:

~~\$32,181~~  
\$31,352.43

tbl3.436

<sup>1</sup> Cumulative Carry Over Points as of year end.

<sup>2</sup> No information for October, November and December of 1990.

## Exhibit B

# JULIE WEAVER

	<u>Total Sales (BV)</u>	<u>Total of Monthly Bonus</u>	<u>Total of Management Bonus</u>	<u>Carry Over Points<sup>1</sup> (Cumulative)</u>	<u>Carry O v e r Points Used to Maintain Highest Point Level</u>
1983	\$368,814.62	\$21,619.08	\$16,726.29	8,700.63	
1984	467,175.25	28,850.36	20,982.28	27,189.33	
1985	737,765.11	43,037.41	34,768.28	47,349.48	
1986	997,581.10	52,383.84	48,260.10	51,568.84	
1987	1,084,949.45	49,484.76	48,050.23	47,710.34	3,858.50
1988	926,432.21	37,147.73	35,620.41	44,836.06	2,874.25
1989	539,785.15	30,750.85	30,650.00	31,159.30	13,676.76
1990	629,213.15	25,672.50	25,598.42	17,300.72	13,858.58

Total Carry Over Points Honored by Brite: 34,268.09

Balance of Carry Over Points  
as of February 1, 1991: 16,100.72

Minimum number of months remaining at the  
highest level of compensation: 13.4 Months

Value of the balance of the Carry Over Points: \$34,196

tbl2.436

<sup>1</sup> Cumulative Carry Over Points as of year end.





## Exhibit C

NOTICE: THIS OPINION HAS NOT BEEN  
RELEASED FOR PUBLICATION IN THE  
PERMANENT LAW  
REPORTS. UNTIL RELEASED, IT IS  
SUBJECT TO REVISION OR  
WITHDRAWAL.

**Deanna KLEINERT, Plaintiff and  
Appellant,**

**v.**

**KIMBALL ELEVATOR COMPANY, a  
Utah corporation; HRB Company aka  
The Boyer  
Company, a Utah corporation; The Boyer  
Company, a general partnership; 185  
South State Associates aka Boyer  
Foothills Partnership, Ltd., a limited  
partnership; Boyer-Gardner Properties  
Partnership, a general partnership; H.  
Roger Boyer, an individual; Kem C.  
Gardner, an individual; and 185 South  
State Owners' Association, a Utah  
corporation, Defendants and Appellees.**

**No. 940485-CA.**

**Court of Appeals of Utah.**

**Oct. 19, 1995.**

**Fred R. Silvester and Clark A. McClellan,  
Silvester & Conray, Salt Lake City, for  
Appellant.**

**S. Baird Morgan and H. Burt Ringwood,  
Strong & Hanni, Salt Lake City, for  
Appellees.**

**Before ORME, P.J., and BENCH and  
BILLINGS, JJ.**

**OPINION**

**BENCH, Judge.**

**\*1 Deanna Kleinert appeals from the trial  
court's grant of the Boyer Company's motion  
for a directed verdict. We reverse and  
remand.**

**BACKGROUND**

[1] In reviewing a grant of a directed verdict, we view all facts and the inferences drawn therefrom in the light most favorable to the nonmoving party. See, e.g., *Management Comm. of Graystone Pines Homeowners Ass'n v. Graystone Pines, Inc.*, 652 P.2d 896, 898 (Utah 1982); *Anderson v. Gribble*, 30 Utah 2d 68, 71, 513 P.2d 432, 434 (1973). We recite the facts accordingly.

In April 1984, Kleinert entered an elevator on the sixth floor of a building owned and operated by the Boyer Company. Kleinert was trapped inside the elevator for about forty minutes while it intermittently and erratically rose and fell. Kleinert was thrown about the elevator striking her head, arms, and legs against the walls, doors, and handrail. Kleinert was finally able to escape by prying the doors open and jumping to the floor below. Kleinert claims to have suffered severe permanent physical injury and pain as a result of this incident.

Kleinert brought a strict products liability claim against Kimball Elevator Company (Kimball). Thereafter, Kleinert amended her complaint to assert a negligence claim against the Boyer Company. Kimball and the Boyer Company separately moved for summary judgment. The trial court granted both motions and Kleinert appealed to this court. See *Kleinert v. Kimball Elevator Co.*, 854 P.2d 1025 (Utah App.1993) (Kleinert I).

This court affirmed the trial court's grant of summary judgment in favor of Kimball, concluding that summary judgment was appropriate because Kleinert had not shown that there was any defect in the elevators at the time Kimball sold them to the Boyer Company. *Id.* at 1027. This court reversed and remanded the trial court's grant of summary judgment in favor of the Boyer Company, concluding that Kleinert had submitted evidence sufficient to raise a genuine issue of material fact as to whether the Boyer Company had notice of a dangerous condition. *Id.* at 1028.

On remand, Kleinert presented the evidence referred to in her appellate brief in *Kleinert I*,



as well as additional evidence of problems or malfunctions with the elevators. Kleinert submitted evidence that some of the problems and malfunctions involving the tripping of governor switches could cause an elevator to stop abruptly. According to Brent Russon, Kimball's district manager, such a stop could cause an occupant of the elevator to lose his or her balance. Russon also testified that the elevators experienced "yo-yoing" problems, as well as problems with earthquake devices and on-board computers. [FN1] Russon further testified that he spoke with a representative of the Boyer Company about the operational problems with the elevators prior to Kleinert's incident.

Edward Williams, a Kimball repairman, testified about specific service calls he responded to in the Boyer Company building prior to Kleinert's incident. Williams testified that he responded to problems with governor switches, "yo-yoing," and people stuck in elevators, as well as problems that had no apparent cause. Williams also testified that when a governor switch is tripped the elevator may stop abruptly.

\*2 Several other witnesses testified that they had been trapped in the elevators prior to the date of Kleinert's incident. One witness testified that she, as well as others in the building, knew the elevators were "bad" and that they were "afraid" of them.

Kleinert submitted copies of Kimball's service logs for the elevators covering the period prior to Kleinert's incident. These logs show numerous reports of elevator problems and malfunctions. Kleinert also submitted evidence indicating that the Boyer Company was aware of the elevator problems prior to the incident. There was testimony presented that Kimball as well as others reported the elevator problems to the Boyer Company.

After the close of Kleinert's case-in-chief, the Boyer Company moved for a directed verdict claiming that there was no evidence that the Boyer Company had knowledge, either actual or constructive, of any defective or dangerous condition in the elevators. The

trial court granted the Boyer Company's motion and this appeal followed.

## ISSUES

Kleinert raises the following issues on appeal: (1) whether the trial court properly granted the Boyer Company's motion for a directed verdict; (2) whether the Boyer Company should be held to the "common carrier" standard of care; and (3) whether this case should be assigned to a different trial judge on remand because the present trial judge is biased against her claim.

## ANALYSIS

### Directed Verdict

[2] Kleinert argues that the trial court erred, in granting the Boyer Company's motion for a directed verdict, by concluding that there was no evidence that the Boyer Company knew, or reasonably should have known, of dangerous conditions in the elevators. We agree.

[3] On appeal from a directed verdict, "we must examine the evidence in the light most favorable to the losing party, and if there is a reasonable basis in the evidence and in the inferences to be drawn therefrom that would support a judgment in favor of the losing party, the directed verdict cannot be sustained." *Gourdin v. Sharon's Cultural Educ. Rec. Ass'n.*, 845 P.2d 242, 243 (Utah 1992) (quoting *Graystone Pines*, 652 P.2d at 898). Where there is any evidence that raises a question of material fact, no matter how improbable the evidence may appear, judgment as a matter of law is improper. See *Hill v. Seattle First Nat'l Bank*, 827 P.2d 241, 246 (Utah 1992).

Property owners generally have "a duty to exercise reasonable care toward their tenants in all circumstances." *Gregory v. Fourthrow Invs. Ltd.*, 754 P.2d 89, 91 (Utah App.1988) (quoting *Williams v. Melby*, 699 P.2d 723, 726 (Utah 1985)). "When a ... claim is based on the owner's failure to repair rather than on affirmative negligence, the plaintiff has the burden of showing the owner knew, or in the exercise of ordinary care should have known, a



dangerous condition existed and the owner had sufficient time to take corrective action." Kleinert I, 854 P.2d at 1028.

\*3 In the present case, Kleinert submitted testimonial and documentary evidence indicating a history of elevator problems and malfunctions. While we make no conclusion with respect to the weight and veracity of Kleinert's evidence, when viewed in a light most favorable to Kleinert, the evidence was sufficient to raise a genuine question of material fact as to whether the Boyer Company "knew, or in the exercise of ordinary care should have known, a dangerous condition existed and ... had sufficient time to take corrective action." Id.

We therefore conclude that because Kleinert submitted evidence sufficient to raise a genuine question of material fact, the trial court erred by granting the Boyer Company's motion for a directed verdict.

#### Standard of Care

[4] Kleinert also argues that the Boyer Company should be held to the common-carrier standard of care. Having submitted evidence sufficient to raise a genuine issue of material fact under the standard of care applicable to property owners generally, Kleinert has also necessarily raised a genuine issue of material fact under the higher standard of care applicable to common carriers. However, since the legal issue of whether an elevator operator should be held to a common-carrier standard of care is likely to resurface on remand, we address the merits of Kleinert's claim. See *State v. Emmett*, 839 P.2d 781, 786 (Utah 1992) (holding it appropriate to address issues that, while not necessary to resolve appeal, may arise on remand).

After Kleinert I was decided, the Utah Supreme Court decided *Lamb v. B & B Amusements Corp.*, 869 P.2d 926 (Utah 1993), which discussed the standard of care to be applied to amusement ride operators. Id. at 930. In *Lamb*, the supreme court stated that "[t]he heightened standard of care required of

common carriers is predicated on the principle that '[p]ersons using ordinary transportation devices, such as elevators and buses, normally expect to be carried safely, securely, and without incident to their destination.' " Id. (quoting *Harlan v. Six Flags Over Georgia, Inc.*, 250 Ga. 352, 297 S.E.2d 468, 469 (1982) (emphasis added)). The court further discussed the rationale behind the common-carrier standard of care:

The "reasonably prudent person" standard of care is a flexible legal concept requiring a greater or lesser degree of care according to the nature of the circumstances that a reasonably prudent person would consider in assessing possible risks of injury. Common carriers are held to a higher standard of care than the "reasonably prudent person" standard. See *Johnson v. Lewis*, 121 Utah 218, 225, 240 P.2d 498, 502 (1952); see also *McMaster v. Salt Lake Transp. Co.*, 108 Utah 207, 210, 159 P.2d 121, 122 (1945); *Sine v. Salt Lake Transp. Co.*, 106 Utah 289, 296, 147 P.2d 875, 879 (1944). Passengers entrust common carriers with their personal safety, have little if any opportunity to protect themselves from harm caused by a common carrier, and pay the carrier for safe transportation. In addition, the public has an important stake in having the public transportation of persons be as safe as possible.

\*4 Id.

While the court's statement in *Lamb* about elevator owners being common carriers was dictum, a number of other jurisdictions have held that elevator owners are held to the common-carrier standard of care. See, e.g., *Wyatt v. Otis Elevator Co.*, 921 F.2d 1224, 1227 (11th Cir.1991) (stating that "Alabama treats a passenger elevator as a common carrier and requires that one maintaining a passenger elevator must exercise the highest degree of care"); *White v. Sears, Roebuck & Co.*, 242 F.2d 821, 823 (4th Cir.1957) (holding "in Virginia owners of elevators are common carriers and held to the highest degree of care known to human prudence"); *Jardine v. Rubloff*, 73 Ill.2d 31, 21 Ill.Dec. 868, 872-73, 382 N.E.2d 232, 236-37 (1978) (holding "owners of buildings with elevators are viewed



as common carriers who owe their passengers the highest degree of care"); *Cash v. Otis Elevator Co.*, 210 Mont 319, 684 P.2d 1041, 1043 (1984) (holding that elevator owners are subject to the common-carrier standard of care); *Smith v. Munger*, 532 P.2d 1202, 1205 (Okla.Ct.App.1975) (holding "[t]he owner of passenger elevators owes to the passengers using the same the highest degree of care, vigilance, and precaution").

In light of the supreme court's statement in *Lamb*, the preceding authorities, and sound public policy, we believe that elevator owners should be held to the common-carrier standard of care. The elevator performs the function of a common carrier by transporting people from one floor to another. The public places its trust in those who furnish elevators that they will be transported safely from one floor to another. Once passengers enter an elevator, they surrender all control of their situation and place their safety entirely in the hands of the owner. Furthermore, the risk presented when transporting passengers vertically is as great as transporting passengers horizontally in a conveyance such as a bus or train. See *Smith*, 532 P.2d at 1205. We therefore conclude that elevator owners are required to exercise the standard of care applicable to common carriers.

#### Judicial Bias

[5] Kleinert argues, for the first time on appeal, that this case should be remanded to a new trial judge because the present trial judge has developed a bias against her claim.

"We are governed by the general principle that matters not put in issue before the trial court may not be raised for the first time on appeal." *Sukin v. Sukin*, 842 P.2d 922, 926 (Utah App.1992); accord *Wade v. Stangl*, 869 P.2d 9, 11 (Utah App.1994). This principle applies with equal force where the bias or prejudice of a trial judge is alleged for the first time on appeal. *Wade*, 869 P.2d at 11. Rule 63(b) of the Utah Rules of Civil Procedure provides:

Whenever a party to any action or proceeding, civil or criminal, or his attorney

shall make and file an affidavit that the judge before whom such action or proceeding is to be tried or heard has a bias or prejudice, either against such party or his attorney or in favor of any opposite party to the suit, such judge shall proceed no further therein, except to call in another judge to hear and determine the matter.

\*5 "This rule requires that a party alleging judicial bias or prejudice must first file an affidavit to that effect in the trial court." *Wade*, 869 P.2d at 11; accord *Haslam v. Morrison*, 113 Utah 14, 190 P.2d 520, 523 (1948) (holding issue of bias or prejudice a matter determined by trial court "in the first instance," subject to appellate review); *Sukin*, 842 P.2d at 926; see also Utah Code Jud.Conduct, Canon 3(E) (providing examples of potential grounds for disqualification). We will not therefore address the issue of judicial bias because it is raised for the first time on appeal.

#### CONCLUSION

Kleinert submitted evidence sufficient to raise a genuine issue of material fact as to whether the Boyer Company was negligent. The trial court therefore erred by granting the Boyer Company's motion for a directed verdict. On remand, the trial court should apply the common-carrier standard of care to Kleinert's claim. Any claim of bias must be presented to the trial court.

Reversed and remanded for proceedings consistent with this opinion.

ORME, P.J., and BILLINGS, J., concur.

FN1 A Kimball technician, testified that "yo-yoing" is the process whereby an elevator attempts to level off when it reaches a floor. He stated that when an elevator reaches a floor it might overshoot the floor by several inches and then move up and down until it levels off with the floor.

END OF DOCUMENT



## Exhibit D

RICK J. SUTHERLAND #3162  
Attorney for Defendant  
P.O. Box 770  
Park City, Utah 84060  
Telephone (801) 649-4204

FILED DISTRICT COURT  
Third Judicial District

JAN 27 1995

By K. ELLIS SALT LAKE COUNTY  
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

---

JULIE WEAVER AND CATHERINE PALMER,	*	
	*	FINAL ORDER OF DISMISSAL
	*	
Plaintiffs,	*	
	*	
v.	*	
	*	Judge Glenn K. Iwasaki
BRITE MUSIC ENTERPRISES, INC.,	*	
	*	Civil No. 910903124CN
Defendant.	*	

---

The above-captioned matter came on for trial beginning December 6, 1994, and continuing through December 8, 1994. Plaintiffs were represented by their counsel Thomas A. Duffin and Bruce L. Dibb, and defendant was represented by its counsel Rick J. Sutherland. Following jury selection and opening statements, plaintiffs commenced calling witnesses and introducing evidence in support of their claims. At the conclusion of plaintiffs' evidence, defendant, pursuant to Rule 50 of the Utah Rules of Civil Procedure, moved the court for a directed verdict on the basis that plaintiffs had failed to establish that defendant's conduct amounted to a breach of contract.

The court, having considered all the evidence presented by plaintiffs, and having heard defendant's Motion for Directed Verdict and the arguments of plaintiffs' counsel in opposition

thereto, determined that no factual issues existed concerning the breach of contract issue and that defendant was entitled to judgment as a matter of law for the following reasons:

1. Plaintiffs' causes of action were all founded on the underlying contention that defendant's 1991 redemption of "carry-over points" amounted to a breach of contract. The court finds that a contractual relationship did exist between the parties based on the 1982 marketing program implemented by defendant although the precise legal nature of such contractual relationship, for purposes of defendant's motion, need not be defined. The relevant provision of the 1982 marketing program concerning "carry-over points" provided:

"As you continue to exceed 1200 points per month, the increasing carry-over points may accumulate for as long as you desire. However, each increment of 5,000 carry-over points is redeemable for a check from Brite for \$100. Redeeming points in this manner does not affect your life-time point accumulation or the benefits you may eventually derive therefrom."

2. The court finds that the foregoing marketing program language is unambiguous and that the use of the term "However" at the beginning of the second sentence thereof acts as a qualification to the accumulation provision contained in the first sentence. Thus, the ability of plaintiffs to continue accumulating carry-over points indefinitely is limited by the redemption wording in the second sentence.



3. Defendant's redemption of plaintiffs' carry-over points in 1991 was made consistent with the foregoing provision of the 1982 marketing program in that each increment of 5,000 carry-over points held by plaintiffs at that time was redeemed for \$100 from defendant.

4. Plaintiffs have failed to carry their burden of proving that defendant's redemption of plaintiffs' carry-over points in 1991 constituted a breach of the foregoing 1982 marketing program provisions. Plaintiffs' position that the right of redemption is exclusively theirs and cannot be exercised by defendant is not supported by the clear language of the provision itself.

Accordingly, defendant's Motion For a Directed Verdict is HEREBY GRANTED and plaintiffs' Complaint is dismissed, no cause of action, with each party to bear its own costs and fees incurred herein.

DATED this 27<sup>th</sup> day of January, 1995.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Glenn K. Iwasaki", written over a horizontal line.

GLENN K. IWASAKI  
District Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19<sup>th</sup> day of January, 1995, I mailed a true and correct copy of the foregoing FINAL ORDER OF DISMISSAL, postage prepaid, to:

Thomas A. Duffin  
Bruce L. Dibb  
311 South State Suite 380  
Salt Lake City, Utah 84111

