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IN THE SUPREME COURT OF THE STATE OF UTAH

LLOYD'S UNLIMITED, a corporation,	)	
Plaintiff-Appellant,	)	860311-CA
vs.	)	Case No. 20928
NATURE'S WAY MARKETING, LTD a corporation,	)	Category No. 13b
Defendant-Respondent.	)	

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, HONORABLE DEAN E. CONDER

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NATURE OF RELIEF SOUGHT ON APPEAL

Defendant-Respondent seeks to have the judgment sustained on appeal.

ISSUES STATED BY APPELLANT

The first three issues as set forth in Appellant's brief at pages 1 and 2 are argumentative and set out incorrect factual assumptions.

The initial statement of each issue is generally correct. Unfortunately, the statement of the issue is then generally followed by an argumentative, misplaced assertion of fact or facts in which the asserted facts are generally incorrect.

With respect to the first issue, there is no basis whatsoever for the assertion that the terms of the handwritten agreement and the typewritten agreement were materially different. Further, there is no justification at all for the statement that there were undisputed evidence and stipulations prior to and during trial that both parties intended commissions to be paid according to the rate structure alleged by the Plaintiff. The trial court in fact found no such undisputed evidence or stipulations. With respect to the second issue, Defendant never admitted in its Answer, or in its Response to Plaintiff's Motion For Partial Summary Judgment, or at the hearing on the Motion For Partial Summary Judgment and pre-trial conference, or at the first day of trial that there was no dispute concerning the

rate structure as alleged by Plaintiff. The Defendant contended and the trial court in fact found that the rate structure was that which was set forth in the typewritten integrated agreement. Further, Plaintiff's statement concerning what the trial court ordered at the pre-trial settlement conference is incorrect. The trial court did not order that the amounts prayed for by Plaintiff would be deemed accurate unless Defendant advised Plaintiff prior to trial with respect to any offsets or adjustments to which Defendant claimed it was entitled. What was stated in an order, which was never signed by the trial court, was that the amounts prayed for by Plaintiff "shall be deemed accurate unless Defendant advises Plaintiff prior to trial hereof of any facts, documents or information upon which Defendant intends to rely with respect to any offsets or adjustments in said amount to which Defendant claims it is entitled" (R. 174) Defendant fully complied with the unsigned order. Plaintiff was always advised that the typewritten agreement was to be relied upon, and the typewritten agreement states explicitly the applicable rate structure and conclusively disproves the amounts for which Plaintiff had prayed.

With respect to the third issue, Plaintiff states that the Defendant had previously admitted that the rate structure alleged by Plaintiff was accurate and that there was no real dispute as to the amount of the debt. This is

simply not true. The Defendant at all times disputed the amount of the debt and at all times relied upon the typewritten agreement as being an integrated contract which explicitly set forth the applicable, correct rate structure.

CORRECTIONS IN APPELLANT'S STATEMENT OF FACTS

The facts set out in the Statement of Facts in Appellant's brief from pages 9-14, are substantially correct. However, some of the facts set forth by Appellant in that section of the brief are contested, and it is believed essential for Respondent to at least point out the contested nature of those facts.

Appellant states that Burningham and Dowdle initially agreed that Lloyd's would receive $1.00 for every pound of coffee extender product sold to Yurika. Dowdle testified that such an agreement had been made, but Burningham testified to the opposite. (Tr. 481) Mr. Burningham testified that there was no meeting of the minds as to the commissions that would be paid to Lloyd's Unlimited until the handwritten agreement was executed. (Tr. 479-480) Such a conclusion is certainly consistent with both parties actions up to and including the signing of the written agreements.

With respect to the rate structure in the handwritten agreement, Appellant states that Lloyd's claims that the rate on the handwritten agreement is 35¢ and not .35¢. This may by Lloyd's contention, but the court is referred to

the document itself, i.e., Exhibit 2. Surely this court will come to the same conclusion as the trial court. The rate (.35 ¢) for the 2 lb. bulk pack on the handwritten agreement is clear and unambiguous.

Appellant claims in its brief, supposedly as a fact, that Dowdle had made a mistake in writing the rate structure in the handwritten agreement. However, Dowdle's actual testimony was contradictory. Dowdle testified that he drew up the handwritten agreement and that it was in his handwriting. (Tr. 424,636) Dowdle testified that the notes or additions were in his handwriting. (Tr. 630, 636) Dowdle testified that the addition of the commission rates schedule was made after presenting the handwritten agreement to Burningham and after a discussion was had between he and Burningham about the change. (Tr. 424,425) Dowdle testified that he had agreed to the addition of the commission rate schedule in the handwritten agreement and that both parties initialed the change or addition. (Tr. 426)

Appellant states in its brief that the typewritten agreement was ambiguously or erroneously prepared with respect to the commission rate schedule. There is no support for such a statement. In fact, Dowdle testified that he had the typewritten agreement prepared, that the typewritten agreement was copied from the handwritten agreement and further that the commission rate schedule was taken directly from the handwritten original. (Tr. 634,637)

Dowdle testified that he read the typewritten agreement after it was typed and that the typewritten agreement contained the complete understanding of the terms of the agreement. (Tr. 637).

The Statement of Facts from page 14 to page 19 of Appellant's brief becomes highly argumentative. Allegations set forth as facts are hotly contested at best and simply incorrect at worst.

Appellant attempts to establish as fact that Nature's Way had admitted that the rate structure as advocated by Lloyd's applied to any commissions to which Plaintiff was entitled. This simply is not so. There is no basis for such a "fact".

Appellant refers to the Answer and Counterclaim in which Defendant by affirmative defense alleged that the agreement was unenforceable because of failure of consideration. So what? Defendant also made a general denial of Plaintiff's complaint putting Plaintiff to its proof of all allegations in the complaint.

Appellant refers to Defendant's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment wherein Defendant stated that it had no objection to what Plaintiff had set out as uncontested facts. Defendant at that time did not mention the controversy over the rate structure. Again, so what? Defendant successfully argued that there was ambiguity in the agreement and that

summary judgment was inappropriate. Defendant may have made a tactical miscalculation by placing all its eggs in one basket at that time, but there was never an intent to stipulate as to all other aspects of the case.

Appellant states as a "fact" that defendant stipulated at the hearing on Motion for Summary Judgment that the rate schedule proposed by Defendant was true and correct and refers to Plaintiff's Statement of Proceedings of Unreported Hearing (Appendix C of Appellant's brief). However, there was no stipulation made by Defendant, and the court is referred to Defendant's Objection to Plaintiff's Statement of Proceedings of Unreported Hearing (Appendix A to this brief) and to the trial court's Findings on Statement of Proceedings of Unreported Hearing (Appendix B to this brief).

Appellant further states as "fact" that the trial court ordered at the hearing on January 22, 1985, "[t]he amounts prayed for in Plaintiff's Motion for Partial Summary Judgment shall be deemed accurate unless Defendant advises Plaintiff prior to trial hereof of any facts, documents or information upon which Defendant intends to rely with respect to any offsets or adjustments in said amount to which Defendant claims it is entitled." The trial court never signed the proposed order. (R 713, 174) It was only a proposed order. Evidently, the trial court did not agree with such an order.

Further, Appellant states as "fact" that Defendant failed to advise Plaintiff prior to the trial of any adjustments to which it claims it was entitled. Such a statement is simply not true. Even if the proposed order had been signed by the trial court, it would have called for Defendant to advise Plaintiff "prior to the trial hereof of any facts, documents or information upon which Defendant intends to rely with respect to any offsets or adjustments in said amount to which Defendant claims it is entitled." Defendant certainly did so advise Plaintiff. The general denial of Plaintiff's complaint put the amounts owed, if any, as commissions in dispute. The agreement itself was used to establish the correct rate schedule, and the agreement was certainly brought to Plaintiff's attention prior to the trial.

Appellant states as "fact" that Defendant stipulated at trial that the amounts alleged by Plaintiff due as commissions were accurate. This again is simply not true. Defendant did not stipulate as to the monetary amounts which Plaintiff might recover if Plaintiff prevailed at trial. That was left for the Judge to determine from the evidence which was given, including Plaintiff's exhibit of the rate schedule and amounts determined thereunder by their accountant. Defendant did not object to the entry of Plaintiff's exhibits, but there was certainly no stipulation as to the amounts which were alleged to be due as damages.

Damages were to be determined by the trial court from all the evidence. Defendant did stipulate as to the quantities of product sold, but there was no stipulation as to amounts owing Plaintiff. (Appendix A and B) At trial, Defendant specifically stated that there was no objection "to what the exhibit shows unless for some reason we can show that [there] was a duplicate or for some other reason for saying that's not an accurate amount." (Tr. 430) The trial court saw the real issue. In talking about the accounting, Judge Conder stated, "The real issue here is what was the agreement." (Tr. 404) In other words, what did the agreement show as proper damages.

STATEMENT OF POINTS

POINT ONE: THE EVIDENCE FULLY SUPPORTS THE FINDINGS BY THE TRIAL COURT SUPPORTING THE CONCLUSION THAT THE AGREEMENT WAS AN INTEGRATED AGREEMENT WITH DEFENDANT BEING LIABLE FOR COMMISSIONS IN ACCORDANCE WITH THE EXPLICIT TERMS OF THE TYPEWRITTEN AGREEMENT.

POINT TWO: THERE IS NO BASIS FOR ESTOPPING DEFENDANT FROM ASSERTING THAT THE AGREEMENT IS GOVERNED BY THE ACTUAL RATE STRUCTURE WHICH WAS EXPLICITLY GIVEN IN THE INTEGRATED, TYPEWRITTEN AGREEMENT, AND THE TRIAL COURT WAS CLEARLY NOT IN ERROR IN CONSIDERING EVIDENCE CONCERNING THE EXPLICIT RATE STRUCTURE INCLUDED AS PART OF THE INTEGRATED, TYPEWRITTEN AGREEMENT.

POINT THREE: THERE IS NO BASIS FOR REFORMATION OF THE TYPEWRITTEN INTEGRATED AGREEMENT AND, THUS, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING LLOYD'S LEAVE TO FILE AN AMENDED COMPLAINT AND TO ASSERT A CAUSE OF ACTION FOR REFORMATION OF THE TYPEWRITTEN AGREEMENT.

POINT FOUR: THE TRIAL COURT DID NOT ERR IN FAILING TO FIND A MUTUAL MISTAKE BETWEEN THE PARTIES OR IN REFUSING TO REFORM THE TYPEWRITTEN, INTEGRATED AGREEMENT.

POINT FIVE: THE TRIAL COURT DID NOT ERR IN FINDING THAT THE HANDWRITTEN AGREEMENT CONTAINED A COMMISSION RATE STRUCTURE AT THE RATE OR .35¢ RATHER THAN THE RATE OF 35¢

POINT SIX: THERE WAS NO ABUSE OF DISCRETION IN THE TRIAL COURTS REFUSAL TO AWARD PLAINTIFF COSTS OF DEPOSITIONS AND OF A SUBPOENA ISSUED FOR TAKING THE DEPOSITION OF THE PRESIDENT OF DEFENDANT.

ARGUMENT

POINT ONE

THE EVIDENCE FULLY SUPPORTS THE FINDINGS BY THE TRIAL COURT SUPPORTING THE CONCLUSION THAT THE AGREEMENT WAS AN INTEGRATED AGREEMENT WITH DEFENDANT BEING LIABLE FOR COMMISSIONS IN ACCORDANCE WITH THE EXPLICIT TERMS OF THE TYPEWRITTEN AGREEMENT.

Mr. Justice Wolfe in Stanley v Stanley 97 Utah 520, 94 p.2d 465, 470, (1939), stated that the rule, with respect to the duty of the Supreme Court in view of an Equity case, was as follows:

> "Our duty is to make an independent examination of the record. If after that we find
> (1) The preponderance of the evidence supports the trial court's findings of fact, or
> (2) If there is coubt in our minds as to where the preponderance lies, or
> (3) We think the evidence as revealed by the record may slightly preponderate against its conclusions but such preponderance may well be offset in favor of his conclusions by having seen the witnesses and been able to judge by their demeanor as to their credibility, then we will not reverse."
>
> See also Boccalero v Bee, 102 Utah 12, 126 P.2d 1063, (1942).

Respondent earnestly believes this Court will find the relevant evidence clearly preponderates in favor of the Respondent in this action. Even in the unlikely situation wherein this Court has a doubt or believes that the evidence may slightly preponderate against the findings of the trial court, the rule set out in the Stanely case still dictates that the decision by the trial court should not be reversed. This is because even if there is a question in this Court's minds as to where the preponderance lies or even if in this Court believes there may be a slight preponderance against the findings of the trial court, such questions should be offset in favor of the trial court due to the trial court having seen the witnesses and been able to judge by their demeanor as to their credibility.

Appellant recognized that to mount a successful attack on the trial court's findings of fact that it must marshall all of the evidence in support of the trial court's findings

and then demonstrate that the evidence is insufficient to support the findings even in the light most favorable to the court below. Appellant has failed to marshal all the relevant evidence and has not shown that that evidence is insufficient in a view most favorable to the court below to support the trial court's findings.

Paragraphs 3 through 6 of the Findings of Fact are said by Appellant to be inaccurate, inconsistent and against the weight of evidence. This is clearly not so.

As to finding number 3, the relevant evidence includes the testimony of Dowdle that he prepared the handwritten agreement, that there was a discussion wherein Burningham suggested changes to add the commission rate schedule, that Dowdle, incorporated in his own handwriting the rate schedule into the agreement and that both parties agreed to the handwritten rate schedule and initialed the added rate schedule. (Tr. 424-425, 630, 636). Burningham testimony was essentially the same. (Tr. 474-481, 490-492, 584-590)

With respect to findings Nos. 4 and 5 concerning the rates in the rate schedules of the handwritten and typewritten agreements, the documents themselves show the rate schedules, and this court can readily determine that there was clear basis for the findings concerning the rate structures within the rate schedules.

With respect to finding number 6 that the intent of the parties did not change between the execution of the

handwritten and typewritten agreements, the testimony by both parties as mentioned in the second paragraph above clearly establishes that the typewritten agreement was prepared from the handwritten agreement and that the intent of the parties did not change between the execution of the handwritten and typewritten agreements.

Appellant attempts to cast a doubt on the findings, numbers 3-6, by way of irrelevant, unrelated material in the form of a red herring. Appellant states that Dowdle testified that the original oral agreement between the parties provided a commission rate of $1.00 per pound. Even if that were so, so what? The parties specifically set down and negotiated the written integrated agreements. The rate schedule of the written integrated agreements was negotiated and certainly took the place of any nebulous, oral commission rate that may have previously been discussed between the parties. It is here further pointed out that Burningham totally denied that he ever orally agreed to a commission of $1.00 per pound. (Tr. 480-481) Appellant makes a dubious claim that Burningham later admitted the existence of an earlier oral agreement providing a commission of $1.00. Appellant cites the Record or Transcript at page 593. It is interesting to quote from that page. The questions are by Appellant's trial counsel and the answers are by Burningham.

> Q. Do you recall any conversation where you asked him who was involved in this new multi-level, national food sales program?

A. Mr. Dowdle wouldn't tell me who was involved.

Q. He wouldn't tell you, right --

A. No.

Q. -- until he had a deal on a dollar a pound, isn't that true?

A. That's correct, un huh. That's true, uh, huh.

Respondent will leave it to this court as to whether such an exchange is an admission by Burningham as to a previous oral agreement involving a commission rate of $1.00 a pound or an admission that Mr. Dowdle wouldn't tell Burningham who was involved in the food sales program.

Appellant brings up the fact that a check for $500.00 was paid to Lloyds. This is totally unrelated to the findings numbers 4-6. In addition, Appellant concedes that the $500.00 was paid without any formal accounting.

Appellant says that the trial court erred in its findings as to the commission rate of the handwritten agreement. Appellant contends that no decimal point is included before 35¢. This court is referred to the document itself (Exhibit 2). It is completely evident and there is basis for the finding that there is a decimal point before the 35¢. What else is the marking which appears before the 35¢? Appellant's attorneys raised the possibility in an unreported hearing before the trial court that the mark before the 35¢ is a period. The trial judge

rejected that contention. The judge concluded that the mark was a decimal and that it was before the 35¢.

Appellant, at page 23 of its brief, alleges that Defendant admitted the parties intent was the rate structure set forth by Plaintiff. According to Appellant, such admissions are supposedly in Defendant's Answer, in its response to the motion for Summary Judgment at hearings and on the first day of trial. Yet, interestingly Appellant does not include any references to the record herein to establish such admission. That is quite understandable, there is no such admission.

Appellant contends that findings numbers 4-6 are inherently inconsistent. Appellant points out what is said to be a material difference in the rate structure of the handwritten and typewritten agreements. The typewritten agreement recites .50¢ whereas the handwritten agreement shows 50¢. There is, however, no inconsistency in the trial courts findings. The typewritten agreement was an integration of an superceded the handwritten agreement, and the trial court probably concluded that the intent at the time the handwritten agreement was modified by Mr. Dowdle was to recite .50¢ instead of 50¢. Such a conclusion is certainly not unsupported.

As pointed out above, the unambiguous testimony out of the mouth of Mr. Dowdle certainly stablishes that an arm's

length negotiation occurred relating to the commission rate structure of the handwritten agreement and that Mr. Dowdle prepared the typewritten agreement from the handwritten agreement. Plaintiff did not at any time until after trial, suggest that there was any material difference in the handwritten and typewrittne agreements. The preponderance of evidence clearly supports the findings of the trial court.

POINT TWO

THERE IS NO BASIS FOR ESTOPPING DEFENDANT FROM ASSERTING THAT THE AGREEMENT IS GOVERNED BY THE ACTUAL RATE STRUCTURE WHICH WAS EXPLICITLY GIVEN IN THE INTEGRATED, TYPEWRITTEN AGREEMENT, AND THE TRIAL COURT WAS CLEARLY NOT IN ERROR IN CONSIDERING EVIDENCE CONCERNING THE EXPLICIT RATE STRUCTURE INCLUDED AS PART OF THE INTEGRATED, TYPEWRITTEN AGREEMENT.

Appellant did not raise the question of estoppel. prior to its past trial memorandums and this appeal, and there was no objection made by Plaintiff at trial when evidence was admitted concerning the commission rate structure to be applied under the agreement. By failing to raise the question of estoppel during trial, and by failing to object at trial, Appellant has waived any right to try such issues on appeal. Appellant would apparently like this Court to now act as a trial court and consider the issue of estoppel de novo. Further, inasmuch as Plaintiff made no objection to admitting evidence during trial, Plaintiff is itself

stopped from alleging now that the trial court erred in allowing such evidence.

Applicant has used pretty good imagination in suggesting an issue relating to estoppel. But, even on the merits, there is no basis for estoppel. It is well established that to constitute an estoppel, there must be conduct amounting to a misrepresentation or concealment of material facts, and such facts must be known to the party sought to be estopped and unknown to the party who claims benefit of the estoppel. Cook v Cook, 174 P.2d 434, at 436 (Utah 1946), Coombs v Ouzounian, 465 P.2d 356, at 358 (Utah 1970). Contrary to the allegations made by Appellant, there was no new claim raised by Defendant on the second day of trial. The typewritten agreement contained a specific rate schedule for commissions. Evidence of the specific rates included in that schedule was introduced on the second day of trial, but that certainly did not encompass a new claim. The claim was based on the face of the agreement upon which Plaintiff had brought suit.

There was no misrepresentation or concealment of material facts. The rate schedule included in the agreement was as well known to Plaintiff as it was by Defendant.

Appellant argues that Defendant had admitted to the rate schedule which had been proposed by Plaintiff. This is simply not so. At no time did Defendant agree that commissions should be paid at the rate proposed in

Plaintiff's suggested rate schedule. Appellant does not cite any portion of the record other than a deposition of Burningham for support of its theory. In his deposition, Burningham responded to an ambiguous, theoretical question about what a payment may have been if he had made payment. Unfortunately, Burningham was led into an improvident answer by Plaintiff's counsel, and Burningham's counsel must have been sleeping. However, the vague answer given by Burningham during the deposition in no way estops Defendant from litigating the integrated, written agreement to enforce the the actual commission rate as explicitly given in the integrated agreement. As stated in 8 Wright & Miller, Federal Practice and Procedure Section 2181 at 579, "A party may be embarrassed by his answer to a pretrail interrogatory in which he took a position different from one that he later asserts, and it is right that he should have to explain his change of position, but his answer to the interrogatory should not be a bar to taking a different position at the trial."

POINT THREE

THERE IS NO BASIS FOR REFORMATION OF THE TYPEWRITTEN, INTEGRATED AGREEMENT AND, THUS, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING LLOYD'S LEAVE TO FILE AN AMENDED COMPLAINT AND TO ASSERT A CAUSE OF ACTION FOR REFORMATION OF THE TYPEWRITTEN AGREEMENT.

The trial court found that there was no basis for granting Plaintiff's attempt to reform the typewritten,

integrated agreement. The trial court clearly did not abuse its discretion in denying Plaintiff's leave to file an amended complaint for reformation of the typewritten agreement. There is no basis for reforming the contract, and in fact any such reformation would be in direct opposition to the universal law respecting integrated agreements.

In Plaintiff's own memorandum in support of its Motion for Partial Summary Judgment, it quite adequately set out the law. The following three paragraphs are taken directly from the Plaintiff's previous memorandum:

The universal law with respect to the interpretation of contracts in this state is that the meaning of the contract is to be determined from the instrument itself and the court has the duty to first examine the language of the contract and accord to it the weight and effect which it demonstrates is intended. E.g.,Wingets, Inc. vs. Bitters, 28 Utah 2d 231, 500 P.2d 1007, 1009 (1972); Big Butte Ranch, Inc. vs Holm, 570 P.2d 690, 691 (Utah 1977); Overson vs. United States Fidelity & Guaranty Co., 587 P.2d 149, 151 (Utah 1978).

A corollary to this fundamental maxim is that when the parties have reduced to writing what appears to be a complete and certain agreement, it will be conclusively presumed, in the absence of fraud, that the writing contains the whole of the agreement between the parties. In this

regard, the conclusive presumption also precludes the introduction of any parol evidence of prior or contemporaneous conversations, representations, or statements for the purpose of varying or adding to the terms of the written agreement. State Bank of Lehi vs. Woolsey, 565 P.2d 413, 418 (Utah 1977); Williams vs. Safeway Stores, Inc., 198 Kan. 331, 424 P.2d 541, 548 (1967). The rule has long been established that evidence of prior or concurrent negotiations are inadmissable to contradictive terms of what appears to be a final agreement. Lamb vs. Bangart, 525 P.2d 602 (Utah 1974).

The length to which Utah law will not alter a final contract is identified in Skousen vs. Smith, 27 Utah 2d 169, 493 P.2d 1003 (1972). In that case, Plaintiff brought an action on a promissory note executed by the Defendant. The basis of the Defendant's defense in the action was the word "on" contained in the note was incorrect and should be substituted with the word "of" in its place. The Court refused to allow parol evidence on the matter, and refused to allow the Defendant to allege that the note did not mean what it clearly stated and held:

> "It is axiomatic that the language in a written instrument is interpreted more strongly against the scrivener who executed it. It is equally elementary that parties may be bound by the language they deliberately use in their contracts, irrespective of the fact that it appears to result in improvidence beyond and perhaps in excess of what the mythical, reasonable prudent man might feel constrained to venture."

493 P.2d at 1005. (R. 119-121)

In the memorandum in support of its Motion for Partial Summary Judgment, Plaintiff specifically admitted "The Agreement is a fully integrated final document with clear, unambiguous terms (emphasis added) with respect to commissions to be paid by Defendant to Plaintiff." (R. 124)

It is indeed clear that the terms with respect to commissions were unambiguous and contained no inadvertent error. As pointed out previously, the handwritten and typewritten agreements were both prepared by Mr. Dowdle. Mr. Dowdle was completely consistent each time in the exact figures used in the schedule of commissions contained in the agreements. The explicit terms were deliberately used at least two separate times. As was approximately stated by the Utah Supreme Court in the Skousen vs. Smith decision cited above,

> It is equally elementary that parties may be bound by the language they deliverately use in their contracts, irrespective of the fact that it appears to result in improvidence beyond and perhaps in excess of what the mythical, reasonable, prudent man might feel constrained to venture 493 P.2d at 1005.

Granting reformation in the present situation would be in direct contravention of the universal law relating to integrated documents. There is simply no basis upon which such a drastic action by this court can be supported. The trial court heard the evidence and by the demeanor of the witnesses judged the credibility of the witnesses. The

preponderance of evidence shows as pointed out previously that the addition of the explicit rate schedule was made after arm lengths negotiation. Such evidence certainly shows that the trial court exercised sound discretion, and certainly did not abuse its discretion, in denying Plaintiff's leave to file an amended complaint and to assert a cause of actioan for reformation of the typewritten, integrated agreement.

POINT FOUR

THE TRIAL COURT DID NOT ERR IN FAILING TO FIND A MUTUAL MISTAKE BETWEEN THE PARTIES OR IN REFUSING TO REFORM THE TYPEWRITTEN, INTEGRATED AGREEMENT

There is no basis for reforming the integrated, typewritten agreement. Contrary to Appellant's contention there is no indication whatsoever that there was a mutual mistake or any mistake at all made at the time the typewritten agreement was finally executed. Dowdle testified specifically that he wrote the commission schedule into the agreement from figures which had been supplied by Burningham and which were agreeable to both the parties. (Tr. 425, 632, 633) The figures which Dowdle wrote into the handwritten agreement were exactly those which appear in the typewritten agreement. There was no error in the typewritten agreement.

Further indication that there was no mistake of any kind including a scriveners error, is found in the handwritten and typewritten agreements themselves. Both the

handwritten and the type written agreements show a cent sign (¢) used with the first three rates. A dollar sigh ($) was used with the fourth rate. (Exhibits 2 and 3) Dowdle, having been engaged in the selling profession for at least a substantial portion of his working life, certainly knows the difference between a cent sign and a dollar sign. So does Burningham. The explicit and consistent use of the cent sign and the dollar sign indicate that those signs were used with knowledge and intent to enumerate the specific rates given in the schedule of rates.

There is no mistake in the present case. The equitable doctrine of reformation has no application in the present situation and certainly cannot overcome the legal principle that parol evidence cannot be used to vary or change the express written provisions in an integrated agreement.

In Sine v Harper, 118 Utah 415, 222 P.2d 571 (1950) this court recognized that the right of reformation whenever allowed is necessarily an invasion or limitation of the parol evidence rule. Recognizing the drastic nature of reformation, this court set out criteria which must be met before reformation can be considered. Justice Latimer stated for the court:

> No such relief, however, can be granted, either when the contract is executory or executed, and no parol evidence can be used to modify the terms of a written instrument, and most emphatically when that instrument is required by the statute of frauds to be in writing, except upon the occasion of mistake, surprise or fraud; one or the other of these incidents must be

> alleged and proved before a resort can be had to parol evidence in such cases. Id. 222 P. 2d at 579.

In the present case, there is no mistake, surprise, or fraud. There is no miscopying of a description as in the Sine v Harper case. Dowdle, the chief officer of Plaintiff corporation, prepared the written agreements. Two handwritten forms were prepared and a final typewritten form. (Tr. 425, 4262, 427, 637) In the two handwritten forms, Dowdle wrote in his own handwriting, the exact schedule of commissions as appears in the final typewritten agreement. Dowdle testified that the rate schedule was negotiated between himself and Burningham and that both he and Burningham had approved and agreed to the rate schedule. There is no mistake. Dowdle deliberately wrote the specific commission schedule in exact terms three separate times.

The second copy of the handwritten agreement, as included in the record at pages 227-229, was submitted after trial in an Affidavit of Burningham. The trial court improperly struck the Affidavit of Burningham, even though allowing an Affidavit of Dowdle. The Affidavit of Burningham was simply a rebuttal to the post trial arguments of Plaintiff. This court is referred, however, to the second copy of the handwritten agreement at pages 227-229 of the Record. As will be seen in the handwriting of Dowdle, the commission rate schedule is precisely and exactly the

same as the commission rate schedule in the typewritten agreement.

As to the burden of establishing that an inadvertent mistake had been made, this court, approving the general rule given in Restatement of the Law of Contracts, Section 511, stated in the Sine v. Harper case:

> It is essential in order to obtain a decree rescinding or reforming a written conveyance, contract, assignment or discharge for mistake, that the fact necessasry for the allowance of the remedy shall be proved by clear and convincing evidence and not by a mere preponderance. (222 P.2d at 580)

This court in the Sine v. Harper case cited with approval, the case of George v Fritsch Loan & Trust Co. 69 Utah 460, 256 P. 400 (1927), wherein Mr. Justice Hansen stated the law in this jurisdiction to be as follows:

> The law is well settled in this and other jurisdictions that a written contract will be reformed to express the agreement of the parties where the proof of the mistake is clear, definite, and convincing, and where the party seeking the reformation is not guilty of negligence in the execution of the contract nor of laches in making timely application for its reformation. 256 P. at 403.

In the present case, there is no showing of mistake, and certainly no showing by clear and convincing evidence as opposed to a mere preponderance. In fact, the preponderance of evidence is that no mistake occurred. Mr. Dowdle wrote the commission rate schedule three separate times, and he testified that the commission rate schedulehad been specifically approved and agreed upon by him and Burningham.

In the dissenting opinion by Chief Justice Pratt in Sine v. Harper, the Chief Justice points out that the mistake in the Sine v. Harper situation was created by the moving party. The Chief Justice would not have allowed the reformation under that situation. The Chief Justice stated:

> We have here a peculiar situation of an agent of the complaining party preparing the instruments in which the error could have been ascertained and corrected by a bit of careful examination of the papers involved. 222 P. 2d at 588.

In the present case, Dowdle, the principal agent of the moving party, wrote the commission rate schedule by hand in the two handwritten agreements and had the typewritten agreement prepared. Dowdle testified that he read and studied the agreements prior to signing them. If there had been any error, he could have ascertained the error and corrected it. The inescapable conclusion is that no mistake was made nor included in the three separate written agreements.

Further, even if there had been a mistake, Plaintiff is clearly guilty of laches in making timely application for its reformation. Mr. Justice Hansen in the George v. Fritsch Loan & Trust Co. case as cited in the Sine v. Harper case, clearly pointed out that the law is well settled that reformation will not be allowed where the party seeking the reformation is guilty of negligence in the execution of the contract or of laches in making timely application for its reformation. In the present case, the

agreements were made in August of 1982, and Plaintiff has delayed until after trial in January of 1985 to ask for reformation of the contract. A clearer instance of laches would be hard to find.

The evidence clearly supports the trial court's decision to reject Plaintiff's attempt to reform the contract. There is no basis for this court to reverse the decision of the trial court.

POINT FIVE

THE TRIAL COURT DID NOT ERR IN FINDING THAT THE HANDWRITTEN AGREEMENT CONTAINED A COMMISSION RATE STRUCTURE AT THE RATE OF .35 CENTS RATHER THAN THE RATE OF 35 CENTS.

Appellant argues that there is no decimal point before the 35 ¢ in the handwritten agreement. (Exhibit 2). The trial court found in fact that the decimal point did exist. This court need only look at the handwritten agreement (Exhibit 2) to undoubtedly agree that the trial court did not abuse its discretion in making such a finding.

POINT SIX

THERE WAS NO ABUSE OF DISCRETION IN THE TRIAL COURT'S REFUSAL TO AWARD PLAINTIFF COSTS OF DEPOSITIONS AND OF A SUBPOENA ISSUED FOR TAKING THE DEPOSITION OF THE PRESIDENT OF DEFENDANT.

The trial court did not abuse its discretion in failing to award Plaintiff costs of depositions and costs of service of a subpoena upon Burningham, the president of the Defendant corporation.

At the time of the deposition of Burningham, interrogatories had been answered and documents had been produced in response to a request for production. The material produced at trial came from the documents which were produced. Plaintiff also obtained documents directly from the Yurika Corporation concerning sales made by Defendant to Yurika. The deposition of Burningham was not necessary. The deposition was not published nor used at trial.

With respect to the deposition of Webb, the deposition was long and costly. At trial, Plaintiff's counsel admitted that counsel did not propose to interrogate Webb on the stand with respect to "everything in the deposition by far." (Tr. 519) The trial court questioned the relevancy of most of the material of which Webb was to testify. The testimony of Webb was short, and his deposition was not published nor used at tiral.

In First Security Bank of Utah, N.A. v. Wright, 521 P.2d 563 (Utah 1974) this court stated:

> The allowance of such costs is governed by these propositions: The burden is upon the claiming party to establish that they are necessary and reasonable; the determination of whether that burden is met is within the sound discretion of the trial court; and unless it is shown that the refusal to allow them is arbitrary, or a clear abuse of discretion, his ruling will not be disturbed.

In the present case, the trial court undoubtedly found that the discovery could have been accomplished through less

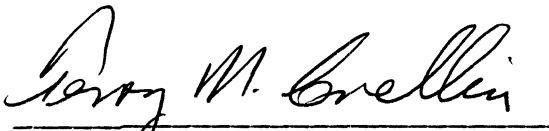
expensive methods, such as interrogatories, requests for production of documents and requests for admissions. The trial court clearly did not abuse his discretion, and his ruling should not be disturbed on appeal.

The trial court was eminently correct in his refusal to award the costs of the service of a subpoena on Burningham. Plaintiff failed to contact counsel for the Defendant corporation to see if the corporation would produce its president Burningham for a deposition. The costs of the service of subpoena could have been avoided by a simple telephone call. There certainly was no abuse of discretion in refusing to allow the costs of service of the subpoena.

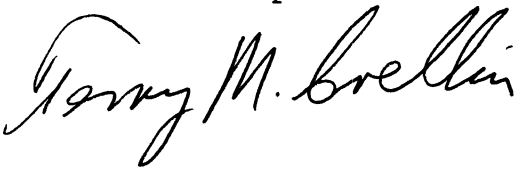
CONCLUSION

The preponderance of the evidence clearly supports the trial court's findings and judgment. Therefore, Respondent respectfully requests this court to affirm the decision of the lower court.

Respectfully submitted,



TERRY M. CRELLIN
Attorney for
Defendant-Respondent



CERTIFICATE OF MAILING

This will certify that four (4) true and correct copies of the foregoing Brief of Respondent on Appeal from the Judgment of the Third Judicial District Court of Salt Lake County, Honorable Dean E. Conder, were mailed, postage prepaid, to the following named individual at the address listed below this 19 day of May, 1986:

KEVIN J. SUTTERFIELD
Law Office of Ray G. Martineau
1800 Beneficial Life Tower
36 South STate STreet
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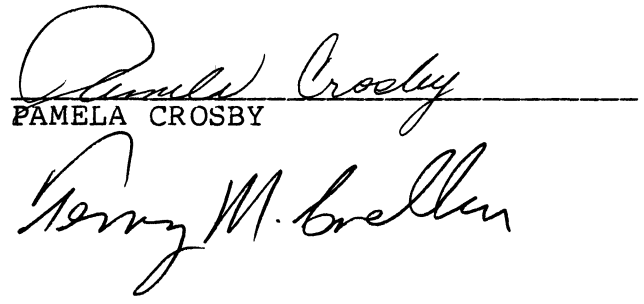

PAMELA CROSBY

APPENDIX "A"

TERRY M. CRELLIN (USB #0755)
Thorpe, North & Western
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Telephone: (801) 566-6633

Attorneys for Defendant-Appellee

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

LLOYD'S UNLIMITED, a corporation, Plaintiff, vs. NATURE'S WAY MARKETING, LTD., a corporation. Defendant.	DEFENDANT'S OBJECTION TO PLAINTIFF'S STATEMENT OF PROCEEDINGS OF UNREPORTED HEARING Civil No. C83-6058 (Judge Dean E. Conder)

Pursuant to Utah R. Ap. P. 11(g), Defendant objects to the proposed statement as to the proceedings of the hearing held before the above-entitled Court on January 22, 1985. Unfortunately, no transcript of the proceedings was made by the Court Reporter, and the Statement of Proceedings, as proposed by Plaintiff, is seriously incorrect and unsubstantiated in many material aspects.

Defendant agrees with the first paragraph of Plaintiff's proposed Statement of Proceedings. At the hearing on January 22, 1985, the Court considered two matters, plaintiff's Motion for Partial Summary Judgment on file herein dated January 4, 1985, and a Pre-trial

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Settlement Conference, pursuant to Court Order dated November 26, 1984, on file herein.

Defendant does not agree with the second paragraph of Plaintiff's proposed Statement of Proceedings. At the hearing, defendant, through its counsel, definitely did not stipulate that there was no issue with respect to the amounts, if any, due and owing by it to plaintiff as sought in Plaintiff's Motion for Partial Summary Judgment on file herein dated January 4, 1985, pursuant to that certain Agreement between plaintiff and defendant dated August 16, 1982. Defendant did agree that there was no dispute as to the number of items which were shipped by defendant. Those figures had been produced by defendant during discovery. At no time, however, did defendant stipulate that there was no issue with respect to the amounts, if any, due for such shipments. This point was again brought up at the very beginning of the trial, wherein defendant agreed to the schedule of items shipped but specifically stated that there was no agreement as to the monetary amounts due even if the contract were found to be valid. Defendant's principal opposition to plaintiff's Motion for Partial Summary Judgment was that the Agreement was unenforceable because there was no indication in the Agreement that any actual consideration for the contract was given by plaintiff. The question of the monetary amounts prayed for by plaintiff, or as to the commissions to be paid by defendant for sales defendant made, were not materially addressed other than

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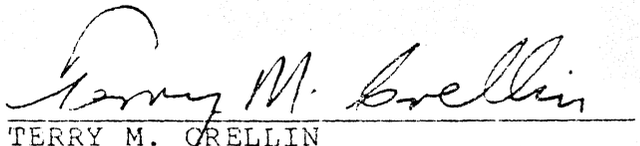
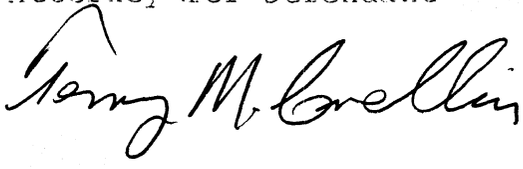
that defendant agreed that there was no dispute as to the number of items shipped by defendant. The major thrust of defendant's arguments was that there were questions of fact concerning the question of consideration and that because of those questions of fact, there could be no valid Partial Summary Judgment in favor of plaintiff. The court agreed, and the plaintiff's Motion for Partial Summary Judgment was denied. Plaintiff's counsel is clearly mistaken in the alleged recollection that defendant, through its counsel, admitted that there was no dispute as to the amounts owing under the Agreement, if the Agreement was found to be enforceable. If anything, the exact opposite contention was maintained, and as pointed out above, the point that defendant did not stipulate to the monetary amounts due was stressed to the Court at the beginning of the trial.

DATED this 18th day of March, 1986.



TERRY M. ORELLIN
Attorney for Defendant



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CERTIFICATE OF MAILING

This will certify that a true and correct copy of the foregoing Defendant's Objection to Plaintiff's Statement of Proceedings of Unreported Hearing was served upon the following, by mailing a copy thereof, postage prepaid, to the address listed below this 18 day of March, 1986:

KEVIN J. SUTTERFIELD
LESLIE W. SLAUGH
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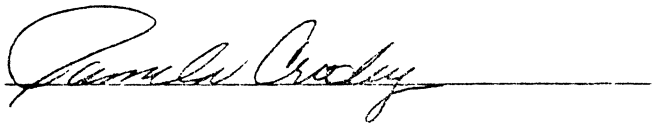
36 South State Street
Salt Lake City, Utah 84111



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APPENDIX "B"

KEVIN J. SUTTERFIELD (USB #3872)
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Telephone: (801) 538-2400

Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

LLOYD'S UNLIMITED, a corporation,	)	
	)	FINDINGS ON STATEMENT OF PROCEEDINGS OF UNREPORTED HEARING
Plaintiff,	)	
vs.	)	
NATURE'S WAY MARKETING, LTD., a corporation,	)	Civil No. C83-6058
Defendant.	)	(Judge Dean E. Conder)

Plaintiff's Statement of Proceedings of Unreported Hearing and defendant's objection thereto came on regularly for hearing before the Honorable Dean E. Conder of the above-entitled Court, on April 1, 1986, plaintiff appearing by and through its counsel, Kevin J. Sutterfield, and defendant appearing by and through its counsel, Terry M. Crellin, and the Court having heard argument of counsel, and having reviewed the file, now makes and enters the following:

THE COURT HEREBY FINDS that defendant stipulated at the hearing held before this Court on January 22, 1985 to

plaintiff's evidence of the quantities of product sold by defendant to the third party upon which the claim for commissions made by plaintiff was based.

THE COURT MAKES NO FINDING as to whether defendant stipulated at the hearing to plaintiff's claim for the amounts owing plaintiff by defendant as set forth in Plaintiff's Motion for Partial Summary Judgment and memorandum and affidavit in support thereof because the Court does not remember whether such a stipulation took place.

MADE AND ENTERED this _____ day of April, 1986:

BY THE COURT:

_____
Dean E. Conder

CERTIFICATE OF MAILING

This will certify that a true and correct copy of the foregoing Findings on Statement of Proceedings of Unreported Hearing was served upon the following, by mailing a copy thereof, postage prepaid, to the address listed below this 8th day of April, 1986.

Terry M. Crellin, Esq.
M. Wayne Western
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Stacey Wilson