



Inc. (hereinafter "FGI"),<sup>1</sup> file this Amended Motion for Partial Summary Judgment, and would show as follows:

I.

**INTRODUCTION**

Pursuant to TEX. R. CIV. P. 166a, Farmers and FGI move that this Court grant them partial summary judgment that Sawyer take nothing by his claim for breach of contract for an Underwriting Contract Value Bonus. In support of their amended motion, Farmers and FGI would show that based on the deposition and affidavits attached hereto, there is no genuine issue of material fact that none of the Defendants breached a contract with Sawyer for an Underwriting Contract Value Bonus for the year 1995 and that Farmers and FGI are entitled to a partial summary judgment as a matter of law. Under the summary judgment evidence, Sawyer's claim for an Underwriting Contract Value Bonus in 1995 does not give rise to a cause of action for breach of contract, because Sawyer did not accept the offer of Farmers for an Underwriting Contract Value Bonus in 1995. As a result, no contract was made between Farmers and Sawyer for an Underwriting Contract Value Bonus in 1995, and all of the elements are missing for a cause of action for breach of contract.

Sawyer's claim for an Underwriting Contract Value Bonus for 1995 is also barred by the four year contract statute of limitations.

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<sup>1</sup> Farmers Group, Inc. also has filed its no-evidence motion for partial summary judgment as to the contracts Plaintiffs allege they have with Farmers Group, Inc.

## II.

### SUMMARY JUDGMENT EVIDENCE

For its summary judgment evidence in support of its amended motion for partial summary judgment, Farmers and FGI would show the Court the following:

Exhibit SJ1: Affidavit of John McLaren.

Exhibit SJ2: Affidavit of John Steins.

Exhibit SJ3: Underwriting Contract Value Bonus Excerpts, and Rules and Quality Standards from Achievement Awards Brochures 1995.

Exhibit SJ4: Pages I-134 through I-139 of the Agents Guide produced by Michael Sawyer.

Exhibit SJ5: Excerpts from Deposition of Michael Sawyer.<sup>2</sup>

## III.

### FACTS

Sawyer was appointed as an Agent in Texas for Farmers, and in 1984, executed the Farmers Insurance Group of Companies Agent Appointment Agreement (Form 32-1106).<sup>3</sup> This contract is between the Agent and Farmers. FGI is not a party to the Agent Appointment Agreement. The agreement between Sawyer and Farmers provides in pertinent part:

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<sup>2</sup> Significantly, following his deposition Leonard submitted "corrections" to the deposition, which drastically changed his original testimony. Specifically, Leonard purports to make 67 changes to his testimony. His explanation for such wholesale rewriting of his testimony are one word recitals for each change, which fail to comply with the letter of TEX. R. CIV. P. 203.1(b) requiring the deponent to give a complete "statement for the reasons for making the change." Moreover, Leonard's purported changes violate the spirit of TEX. R. CIV. P. 203. A deposition is not a take home examination. *Thorn v. Sundstrand Aerospace Corporation*, 207 F.3d 383, 389 (7<sup>th</sup> Cir. 2000). Under the circumstances, Farmers and FGI cite herein to Leonard's original testimony, with footnote references to his purported "corrections" where applicable.

<sup>3</sup> See Exh. SJ1 at Exhibit "A".

2017/12/10/17-01

## UNDERWRITING CONTRACT VALUE BONUS

An Agent who meets the underwriting bonus qualifications established by the Companies will be awarded an Underwriting Contract Value Bonus in accordance with programs and schedules published from time to time by the Companies. Entitlement to the Underwriting Contract Value Bonus will be evidenced in certificates issued to qualifying Agents annually. These certificates shall state said bonus in terms of percentages and shall be fully vested when received, based on the Contract Value at the time of termination, in accordance with the bonus program. Upon vesting, the percentage of Underwriting Contract Value Bonus will inure to the benefit of the Agent, his heirs and assigns, and may not be reduced.

The Underwriting Contract Value Bonus will be paid in accordance with this paragraph G. However, where there is a sale pursuant to paragraph F, said Bonus will be paid to the selling Agent in one lump sum.

The Underwriting Contract Value Bonus is not payable to the Agent until the termination of the Agent Appointment Agreement.<sup>4</sup> This bonus is expressed as a percentage of Contract Value. The formula for calculating Contract Value upon termination is set forth in paragraph G of the Agent Appointment Agreement.

For each of the years 1995 through 1999, three bonuses were available to an Agent who met the qualifications published in the Achievement Awards Brochures. An Agent could earn a bonus of 1%, 2% or 3% of future Contract Value in each year. The maximum Underwriting Contract Value Bonus that could be earned in any given year is 3% of future Contract Value.<sup>5</sup>

In the year 1995, in order for Sawyer to accept the offer from Farmers for an Underwriting Contract Value Bonus, Sawyer was required (by the terms specified in the offer) to have his

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<sup>4</sup> See Exh. SJ1 at Exhibit "A".

<sup>5</sup> See Exh. SJ3.

Experience Analysis show an underwriting dollar gain for his Farmers Auto policies. The qualification in the 1995 Achievement Awards Brochure provides<sup>6</sup>:

**Basic Bonus**

Eligible Agents can qualify for Basic Contract Value Bonus when their Experience Analysis for the calendar year shows an underwriting dollar gain for their Farmers Auto policies during the bonus year.  
*[emphasis added.]*

Under the terms of the offer from Farmers, and the “rules of the contest,” Sawyer’s Experience Analysis did not show an underwriting gain, rather it showed an underwriting loss of \$249,935 in 1995.<sup>7</sup> Accordingly, he did not comply with the terms of the offer.

Any cause of action for breach of contract that Sawyer may have had accrued on January 1, 1996, and is barred by the four year contract statute of limitations.

**IV.**

**ARGUMENT AND AUTHORITIES**

*A CAUSE OF ACTION FOR BREACH OF CONTRACT REQUIRES A BREACH OF A DUTY UNDER THE CONTRACT AND DAMAGES.*

When a plaintiff alleges a cause of action for breach of contract, the plaintiff has the burden of proving that a contract exists between plaintiff and defendant, that the contract created duties, that defendant breached a duty under the contract, and that the plaintiff sustained damages as a result.<sup>8</sup>

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<sup>6</sup> See Exh. SJ3 at 1995.

<sup>7</sup> See Exh. SJ2.

<sup>8</sup> See *Snyder v. Eanes I.S.D.*, 860 S.W.2d 692, 695 (Tex. App. — Austin 1993, writ den.)

The fundamental flaw with Plaintiff's claim is that he does not allege a breach of a duty owed to him under the contract. Plaintiff's complaints about the Underwriting Contract Value Bonus go to the specifications or qualifications contained in Farmers' offer. In making its offer of this bonus, Farmers can specify anything in the offer it pleases. It is not until that offer is accepted, in strict accordance with its terms, that a contract is created. Until a contract comes into existence between Farmers and Sawyer, Farmers owes no contractual duty to Sawyer.

It is well settled contract law that the formation of an enforceable contract requires an offer and acceptance, supported by consideration.<sup>9</sup> In this case, the Achievement Award Brochures furnished by Farmers to their Agents are not "bonus contracts" as alleged by Plaintiffs. Rather, the materials published by Farmers to its Agents constitute an offer of an Underwriting Contract Value Bonus, which does not ripen into a contract until the Agent performs the specific acts required in that offer.<sup>10</sup>

Another fundamental principle of contract law is where the offeror (Farmers) makes an offer, it can specify any mode of acceptance it pleases.<sup>11</sup> The acceptance of the offer must be strictly in accordance with the terms of the offer, and the offeree (the Farmers' Agent) may not change or qualify the terms of that offer, or his acceptance is invalid.<sup>12</sup> Put another way, the Agent's acceptance cannot alter or vary from the terms of Farmers' offer. When an offer contains a specific mode of

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<sup>9</sup> *Nickerson v. E.I.L. Instruments, Inc.*, 874 S.W.2d 936, 939 (Tex. App. — Houston [1<sup>st</sup> Dist.] 1994, writ denied).

<sup>10</sup> See, *First Texas Savings Assoc. v. Jergins*, 705 S.W.2d 390 (Tex. App. — Ft. Worth 1986, no writ); *Bowlerama of Texas, Inc. v. Miyakawa*, 449 S.W.2d 357 (Tex. Civ. App. — San Antonio 1970, *dism'd.*).

<sup>11</sup> *Franklin Life Ins. Co. v. Winney*, 469 S.W.2d 21, 23 (Tex. Civ. App. — San Antonio 1971, *ref. n.r.c.*); *Davidson v. Times Printing Co.*, 116 P.18, 19 (Wash. 1911) (defendant had a right to attach such conditions to the offer as it saw fit, and require strict compliance with the terms).

<sup>12</sup> *United Concrete Pipe Corp. v. Spin-Line Company*, 430 S.W.2d 360, 364 (Tex. 1968).

acceptance, the offeree must convey his acceptance in the precise mode expressed in the offer in order to create a binding contract.<sup>13</sup> Performance of a series of acts is required for the Agent to accept the offer. The performance of this series of acts is the mode of acceptance that was specified by Farmers. One of the specific acts required by Farmers' offer of an Underwriting Contract Value Bonus was the requirement that Sawyer's Experience Analysis for the calendar year show an underwriting gain.

In *Bowlerama of Texas, Inc. v. Miyakawa*,<sup>14</sup> plaintiffs filed suit to recover \$500 as a jackpot prize in a bowling tournament sponsored by Bowlerama. The announcement for the tournament advised entrants that "house rules" would be applicable to the jackpot competition. One of the "house rules" was that the competitor's score had to be kept by a scorekeeper approved by Bowlerama's manager. The "house rules" were in writing and posted on a bulletin board at Bowlerama. The plaintiffs' score had not been kept by an official scorer. The court found plaintiffs had not accepted Bowlerama's offer, holding:

Under these circumstances plaintiffs cannot recover. The rights of a contestant who has performed the act required in the promoter's offer are limited by the terms of the offer, that is, by the conditions and rules of the contest as made public.<sup>15</sup>

In this case, the "rules of the contest" for the Underwriting Contract Value Bonus are embodied in the Achievement Awards Brochures and the Agents Guide, which had been furnished, in writing, to

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<sup>13</sup> *Abraham Investment Co. v. Payne Ranch, Inc.*, 968 S.W.2d 518, 525 (Tex. App. — Amarillo 1998, writ denied).

<sup>14</sup> 449 S.W.2d 357 (Tex. Civ. App. — San Antonio 1969, *dism'd.*)

<sup>15</sup> *Id.* at 359; *See also Galveston County Fair & Rodeo v. Glover*, 880 S.W.2d, 12, 121 (Tex. App. — Texarkana 1994, *denied*) (in order to be entitled to rewards of the contest (offer) it was necessary for contestant to accept the offer by performing all obligations of the offer). *See also Endres v. Buffalo Auto Dealers Ass'n*, 29 Misc.2d 756, 217 N.Y.S.2d 460 (1961); *Scott v. People's Monthly Co.*, 209 Iowa 503, 228 N.W. 263, 67 A.L.R. 413 (1929); Anno.: 87 A.L.R.2d 651, 671 (1963).

Sawyer. Sawyer accepted the offer for an Underwriting Contract Value Bonus for the years 1996-1999, by meeting the qualifications set out in the Achievement Awards Brochures. The Achievement Awards Brochures are not contracts between Farmers and its Agents. This is best illustrated by the fact that the brochures did not impose any contractual duties on Sawyer or Leonard to sell a certain amount of insurance for Farmers each and every year. Similarly, specifications or qualifications set out by Farmers for acceptance of Farmers' offer do not impose a duty on Farmers to calculate underwriting gain or loss by any method other than what has been historically done by Farmers. Plaintiffs may choose to accept the offer or not. Plaintiffs may not re-write the offer.

Moreover, the method of calculating underwriting gain has been in the Agents Guide for Farmers since at least 1993. These are the "house rules." They were published to Sawyer, and he is subject to such rules when he decides whether or not to accept the offer of Farmers.<sup>16</sup> Sawyer's rights are limited by the terms of the offer. In other words, he has no contractual right to alter or vary Farmers' method of calculating underwriting gain.

For the year 1995, no contract for an Underwriting Contract Value Bonus was made between Farmers and Sawyer. One of the express terms of the offer was that Sawyer's Experience Analysis show an underwriting dollar gain. Sawyer's Experience Analysis for 1995 did not show the required gain. Again, as stated above, the law is clear that Farmers may specify whatever it pleases in its offer to Sawyer. One of the specifications of the offer was that Sawyer's Experience Analysis show an underwriting gain.

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<sup>16</sup> See Exh. SJ5, Sawyer Deposition, p. 397-401. See also Sawyer errata sheets for p. 397, l. 6 adding "But I did not know at that time Farmers was not calculating the numbers according to the bonus contract.", p. 397, l. 12 adding "It was supposed to be calculated in accordance with the 1994 memo, but it has not been." and p. 401, l. 13 withdrawing original testimony and substituting "I don't know."

Sawyer's deposition testimony confirms that his claim concerning the Underwriting Contract Value Bonus is also barred by the applicable statute of limitations. Specifically, in 1995 Sawyer had the information showing what documents Farmers looked to for eligibility/calculation of this bonus, and was also aware that he did not qualify under Farmers records.<sup>17</sup> Sawyer had also been provided with specific information describing Farmers method of calculating underwriting gain.<sup>18</sup> Finally, Sawyer knew in 1995, and prior to 1995, that Farmers used close dates in keeping its records.<sup>19</sup> Under the circumstances, Sawyer's claim for breach of contract concerning the 1995 Underwriting Contract Value Bonus accrued in 1995, and is barred by the four year statute of limitations for such claims.<sup>20</sup>

WHEREFORE, premises considered, Farmers and FGI pray that they have and recover partial summary judgment against Sawyer, that he take nothing by his claims for breach of contract for an Underwriting Contract Value Bonus for the year 1995 and that Farmers and FGI have such other and further relief as to which they may be entitled either at law or in equity.

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<sup>17</sup> See, Exh. SJ5, Sawyer Deposition, p. 385-387 and 390-397. See also Sawyer errata sheets for p. 385, l. 24 adding "But I dispute their accuracy.", p. 386, l. 2 adding "But I dispute the accuracy of that calculation.", p. 395, l. 23 through p. 396, l. 2 withdrawing original testimony and substituting "I don't recall what I realized at that point in time.", p. 396, l. 10 adding "But I dispute those numbers", p. 397, l. 6 adding "But I did not know at that time Farmers was not calculating the numbers according to the bonus contract." and p. 397, l. 12 adding "It was supposed to be calculated in accordance with the 1994 memo, but it has not been."

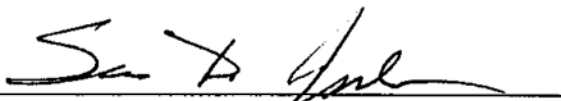
<sup>18</sup> See, Exh. SJ5, Sawyer Deposition, p. 397-401. See also Sawyer errata sheets for p. 397, l. 6 adding "But I did not know at that time Farmers was not calculating the numbers according to the bonus contract.", p. 397, l. 12 adding "It was supposed to be calculated in accordance with the 1994 memo, but it has not been." and p. 401, l. 13 withdrawing original testimony and substituting "I don't know."

<sup>19</sup> See Exh. SJ5, Sawyer Deposition, p. 214-217. See also Sawyer errata sheets for p. 214, l. 20 adding "I do not believe this sets forth all of the information accurately."

<sup>20</sup> TEX. CIV. PRAC. & REM. CODE §16.004.

Respectfully submitted,

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INSURANCE COMPANY, FARMERS TEXAS  
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TEXAS FARMERS INSURANCE COMPANY  
AND FARMERS GROUP, INC.

Certificate of Service

I hereby certify that on this 14th day of March, 2001, a true and correct copy of the foregoing document has been served upon the parties below by facsimile (without exhibits) and Lone Star Overnight Delivery (with exhibits).

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