

1. Plaintiffs object to paragraph 1 of Fenina Fink's Affidavit and the attached Life Performance reports for Mike Leonard for the period ending March 31, 1995 through December 31, 1995 (Exhibit "A" attached to the Affidavit of Fenina Fink, SJ2) to the extent that such reports are offered to vary the terms of the Achievement Awards Booklets. Such use would violate the Parole Evidence Rule. *Hubacek v. Ennis State Bank*, 159 Tex. 166, 169-170, 317 S.W.2d 30, 31 (1958); *Hartford Ins. Co. v. Commerce & Ind. Ins. Co.*, 864 S.W.2d 648, 651 (Tex. App.—Houston [1st Dist.] 1993, writ denied); *Cerritos Valley Bank v. Stirling*, 97 Cal. Rptr. 2d 432, 437 (Cal. App. 2nd Dist. 2000). Defendants admitted that the terms contained within the Achievement Awards Booklets are not ambiguous and are true and correct. Each of the Achievement Awards Booklets state that the qualifying period is from January 1 to December 31 of each year. Therefore, parole evidence, such as the Fink Affidavit is not admissible to show the parties intent. Evidence of custom or usage is not competent to contradict unambiguous terms of an express contract or to vary explicit language of the contract. *Corso v. Carr*, 634 S.W.2d 804 (Tex. App. -- Fort Worth 1982, writ ref'd n.r.e.); *Monesson v. Champion International Corp., Del-Mar Division*, 546 S.W.2d 631 (Tex. App. -- Tyler 1976, writ ref'd n.r.e.); *Cerritos*, 97 Cal. Rptr. 2d at 437.¹

2. Plaintiffs further object to the Fink Affidavit and attached Exhibits to the extent that they are offered as summary judgment evidence in support of an argument that the 1996-1999 Life Performance Bonus is quarterly, not annual, in that such argument

¹ If a written contract is so worded that it can be given a certain or definite legal meaning or interpretation, it is not ambiguous. It follows that parole evidence is not admissible to render a contract ambiguous, which on its fact, is capable of being given a definite legal meaning. This rule applies even to the extent of prohibiting proof of circumstances surrounding the transaction when the instrument involved, by its terms, plainly and clearly discloses the intention of the parties, or is so worded that it is not fairly susceptible of

and evidence in support thereof attempts to contradict Defendants' responses to request for admissions. Farmers Group, Inc.'s Answers to Michael Leonard's First Set of Requests for Admissions (Request No. 12 and 13). Defendant Farmers Group, Inc. admits in the same responses to having drafted, created and promulgated the Achievement Awards Booklets (Request No. 11). And, in response to request nos. 12 and 13 above, they admit that the Achievement Awards Booklets state that the qualifying period is from January 1 to December 31 and that the qualifying period for the Life Performance Bonus was from January 1 to December 31 (as well as for all other bonuses). All Defendants have admitted that the Achievement Awards Booklets contained offers for various contracts and that each offer became a binding contract upon an agent's acceptance of the offer. *See* Defendants' Answers to Michael Sawyer's Fifth Set of Requests for Admissions (Request Nos. 308-313). Defendants all further admit that all prior representations made by Defendant Farmers Group, Inc. to Sawyer and Leonard were truthful and accurate. *See* Defendants' Answers to Michael Sawyer's Fifth Set of Request for Admissions (Request No. 50). Defendant Farmers Group, Inc. also admits that the terms of the Achievement Awards Booklets are unambiguous. *See* Defendant Farmers Group, Inc.'s Answers to Michael Sawyer's First Set of Requests for Admissions (Request No. 6). Plaintiffs further object to such summary judgment evidence to the extent that Defendants are using it as a basis to support an argument of laches, as laches is an affirmative defense upon which Defendants have not plead nor based their Motion for Summary Judgment. TEX. R. CIV. P. 94.

more than one legal meaning or construction. *Morison v. Champion International Corp., Del-Mar Division*; 546 S.W.2d 631 (Tex. App. -- Tyler 1976, writ ref'd n.r.e.).

3. Plaintiffs object to paragraph 4.3 of Fenina Fink's Affidavit and the attached Life Performance reports for Mike Sawyer Agency for the period ending June 30, 1995 through the period ending March 31, 2000 (Exhibit "C" to the Affidavit of Fenina Fink SJ2) to the extent that such reports are offered to vary the terms of the Achievement Awards Booklets. Plaintiffs incorporate the same objections as set forth in nos. 1 and 2, above.

4. Plaintiffs object to paragraph 4.5 of Fenina Fink's Affidavit on the basis that it is an improper attempt to introduce evidence regarding course of dealings to vary the terms of the Achievement Awards Booklets and such evidence is therefore barred by the Parole Evidence Rule. Further, such evidence is contradictory to the admitted Requests for Admissions as set forth above, and should be stricken from the summary judgment record. Plaintiffs incorporate the same objections as set forth in nos. 1 and 2 above.

5. Plaintiffs object to paragraph 4.7 of Fenina Fink's Affidavit and Exhibit E thereto on the basis that said paragraph and exhibit are an improper attempt to vary the terms of the Achievement Awards Booklets and are thus inadmissible under the Parole Evidence Rule. Corporate Representatives have testified at length that the terms of the offers for the bonuses, including the Life Performance Bonus, are contained within the Achievement Awards Booklets and that those terms "govern" the awards programs. Plaintiffs also object to paragraph 4.7 of Ms. Fink's Affidavit and Exhibit E thereto on the basis that they are an improper attempt to contradict admitted facts and in that regard, Plaintiffs incorporate the same objections as set forth in nos. 1 and 2 above.

6. Plaintiffs object to paragraph 4.8 of Fenina Fink's Affidavit and Exhibit "F" attached thereto on the basis that said paragraph and exhibit are an improper attempt to vary the terms of the Achievement Awards Booklets and as such are inadmissible under the Parole Evidence Rule. Exhibit "F", a field bulletin dated three years before the 1996 Achievement Awards Booklet, contains terms inconsistent with the 1996-1999 Achievement Awards Booklets. The Achievement Awards Bonus programs changed from year to year. Evidence regarding rules of previous years which directly contradict published rules of the disputed contract years is barred by the Parole Evidence Rule and is not relevant to any material issue. Further to the extent that such field bulletin contains facts which contradict the admitted Requests for Admissions, as set forth above, such facts are inadmissible and should be stricken from the summary judgment record. Plaintiffs incorporate the same objections as set forth in nos. 1 and 2 above.

7. Plaintiffs object to paragraph 4.9 of Fenina Fink's affidavit and Exhibit "G" attached thereto on the basis that said paragraph and Exhibit are an improper attempt to vary the terms of the Achievement Awards Booklets and as such are inadmissible under the Parole Evidence Rule. Exhibit "G", a field bulletin dated more than three years before the 1996 Achievement Awards Booklet, contains terms inconsistent with the 1996-1999 Achievement Awards Booklets. The Achievement Awards Bonus programs changed from year to year. Evidence regarding rules of previous years which directly contradict published rules of the disputed contract years is barred by the Parole Evidence Rule and is not relevant to any material issue. Further to the extent that such field bulletin contains facts which contradict the admitted Requests for Admissions, as set forth above, such facts are inadmissible and should be stricken from the summary

judgment record. Plaintiffs incorporate the same objections as set forth in nos. 1 and 2 above.

8. Plaintiffs object to paragraph 4.10 of Fenina Fink's Affidavit and Exhibit "H" attached thereto on the basis that said paragraph and Exhibit are an improper attempt to vary the terms of the Achievement Awards Booklets and as such are inadmissible under the Parole Evidence Rule and Best Evidence Rule. The Exhibit, a Field Bulletin dated before the 1996 Achievement Awards Booklet, contains terms inconsistent with the 1996-1999 Achievement Awards Booklets. The Achievement Awards Bonus programs changed from year to year. Evidence regarding rules of previous years which directly contradict published rules of the disputed contract years is barred by the Parole Evidence Rule and is not relevant to any material issue. Further to the extent that such Field Bulletin contains facts which contradict the admitted Requests for Admissions, as set forth above, such facts are inadmissible and should be stricken from the summary judgment record. Plaintiffs incorporate the same objections as set forth in nos. 1 and 2 above.

9. Plaintiffs objects to paragraph 5 of Fenina Fink's Affidavit on the basis that both it and Exhibits "A" and "C" thereto are inadmissible pursuant to the Parole Evidence Rule to the extent that they seek to vary the terms of the Achievement Awards Booklets and, are inadmissible to the extent that they contradict the admitted Requests for Admissions as set forth above. Plaintiffs incorporate the same objections set forth in nos. 1 and 2 above. Plaintiffs further object on the basis that said paragraph is conclusory, and not readily controvertible. TEX. R. CIV. P. 166a(c).

10. Plaintiffs object to paragraph 6 of Fenina Fink's Affidavit to the extent that the allegations contained therein are an improper attempt to vary the terms of the Achievement Awards Booklets by evidence which is barred by the Parole Evidence Rule and by evidence which directly contradicts the admitted Requests for Admissions as set forth above. Plaintiffs would also point out for the Court that the allegations made in this paragraph regarding the "calendar quarter" directly contradict Ms. Fink's own affidavit testimony. See footnote 10 to Plaintiffs' Response to Defendants' Amended Motion for Partial Summary Judgment. Plaintiffs incorporate the same objections as set forth in nos. 1 and 2 above.

11. Plaintiffs objects to paragraph 7 of Fenina Fink's Affidavit on the basis that both it and Exhibits "C" and "D" thereto are inadmissible pursuant to the Parole Evidence Rule to the extent that they seek to vary the terms of the Achievement Awards Booklets and, are inadmissible to the extent that they contradict the admitted requests for admissions as set forth above. Plaintiffs further object on the basis that said paragraph is a conclusion, and not readily controvertible. TEX. R. CIV. P. 166a(c). Plaintiffs incorporate the same objections as set forth in nos. 1 and 2 above.

12. Plaintiffs objects to paragraph 8 of Fenina Fink's Affidavit on the basis that both it and Exhibits "C" and "D" thereto are inadmissible pursuant to the Parole Evidence Rule to the extent that they seek to vary the terms of the Achievement Awards Booklets and, are inadmissible to the extent that they contradict the admitted requests for admissions as set forth above. Plaintiffs further object on the basis that said paragraph is conclusory, and not readily controvertible. TEX. R. CIV. P. 166a(c). Plaintiffs incorporate the same objections as set forth in nos. 1 and 2 above.

13. Plaintiffs object to paragraph 9 of Fenina Fink's Affidavit and Exhibit SJ3 and Exhibits "A", "B", "C" and "D" to Fenina Fink's Affidavit to the extent that such paragraphs and Exhibits seek to vary the terms of the Achievement Awards Booklets as being inadmissible pursuant to the Parole Evidence rule and further, Plaintiffs object to such paragraph and Exhibits to the extent that they contradict admitted Requests for Admissions as set forth above. Plaintiffs incorporate the same objections as set forth in nos. 1 and 2 above.

14. Plaintiffs objects to paragraph 10 of Fenina Fink's Affidavit to the extent that by stating that Sawyer and Leonard only qualified for two and three Life Performance Bonuses, respectively, Defendants are attempting to introduce evidence which varies the terms of the Achievement Awards Booklets in violation of the Parole Evidence Rule and/or to contradict facts admitted in responses to Requests for Admissions as set forth above. Plaintiffs incorporate the same objections as set forth in nos. 1 and 2 above.

15. Plaintiffs object to Exhibit "E" to Fenina Fink's Affidavit to the extent that its terms are introduced as summary judgment evidence for the purpose of varying the terms of the Achievement Awards Booklets on the basis that such would be inadmissible under the Parole Evidence Rule and further, to the extent that such Exhibit contradicts facts admitted in responses to Request for Admissions as set forth above. Plaintiffs incorporate the same objections as set forth in nos. 1 and 2 above.

16. Plaintiffs object to the Affidavit of Fenina Fink in its entirety on the basis that it is not free from contradiction and is not reliable. Ms. Fink testified in her second deposition that the qualifying period sued in regard to production count and commissions

was the premature folio cut-off date. This directly contradicts paragraph 6 of her affidavit in which she alleges that the calendar dates, not folio cut-off dates, were used.

See footnote 10 of Plaintiffs' Response to Defendants' Motion for Partial Summary Judgment (Life Performance Bonus).

17. Plaintiffs object to all summary judgment evidence offered by Defendants, including the testimony of Plaintiffs Leonard and Sawyer, as well as the affidavit of Fink, by which Defendants attempt to vary the terms of the 1996 through 1999 Life Performance Bonus contracts. See Defendants' Motion. Such use of these Exhibits is a violation of the Parole Evidence Rule. See *Hubacek v. Ennis State Bank*, 159 Tex. 166, 169-170, 317 S.W.2d 30, 31 (1958); *Hartford Ins. Co. v. Commerce & Ind. Ins. Co.*, 864 S.W.2d 648, 651 (Tex. App.—Houston [1st Dist.] 1993, writ denied); *Cerritos Valley Bank v. Stirling*, 97 Cal. Rptr. 2d 432, 437 (Cal. App. 2nd Dist. 2000). Further, parole evidence is not admissible to show the parties' intent. Evidence of custom or usage is not competent to contradict unambiguous terms of an express contract or to vary explicit language of the contract. *Corso v. Carr*, 634 S.W.2d 804, 808 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.); see *Cerritos Valley Bank*, 97 Cal. Rptr. 2d at 437. The rules of the Life Performance Bonus are set forth in the Achievement Awards Booklets.² Exhibit 2; Exhibit 10, Stein Depo. at 227:19-228:10; 15:12-20:3; 46:16-47:4; 189:13-190:190:20; Exhibit 11, Swope Depo. at 36:2-18; 66:4-68:3; 68:21-69:4. Defendants have admitted in response to requests for admission that the terms of the Achievement Awards Booklets

² Exhibit 2 (1995), p. 16; Exhibit 10, Stein Depo. at 15:9-16; 15:22-25; 17:18-18:2; 18:25-19:16; 44:20-24; 45:14-20; 46:16-47:5; Exhibit 11, Swope Depo. at 36:2-18; 66:19-68:3; 68:21-69:4; 130:8-20.

are unambiguous.³ Testimony of custom or usage is inappropriate to vary the terms of the contract.

18. Plaintiffs object to paragraphs 4.1, 4.2, 4.3, 4.4, 4.5, 7 and 8 of the affidavit of Fink that supports Defendants Motion for Summary Judgment on the ground that it is the affidavit of an interested party⁴ and does not meet the standard of Texas Rules of Civil Procedure 166a(c) in that it is not otherwise credible and free from contradictions. At Fink's first deposition, she testified that Defendant Farmers New World Life Insurance Company interpreted the Achievement Awards Booklets provided to them from Farmers Group, Inc. to mean that the Qualifying Period for production count and policies-in-force count for bonus purposes is January 1 through December 31 and used these dates for counting life insurance policies-in-force and production count. Exhibit 12, Fink Depo. at 50:7-53:21; 35:1-20. Even though Farmers New World Life Insurance Company used computer close dates other than December 31 for non-bonus purposes, for bonus purposes it uses December 31 as the proper close date. Exhibit 12, Fink Depo. at 50:7-53:21; 35:1-20. At Fink's second deposition, she recanted her earlier testimony and admitted that Farmers New World Life also cuts short the qualifying period. Exhibit 18, Fink Depo. at 17:12-15; 14:18-15:6; 15:11-12; 17:24-18:2; 22:7-9; 38:23-39:4; 49:11-50:1. In Fink's affidavit that supports Defendants' Motion, Fink contracted her new deposition testimony in her affidavit in support of summary judgment attached to the motion for summary judgment of the life performance bonus on this exact

³ Exhibit 32, Answers of Farmers Group, Inc. to Plaintiff Michael Sawyer's First Request for Admission, Number 6. In fact, Farmers Group, Inc. does not believe a single word is ambiguous. Exhibit 33, Answers of Farmers Group, Inc. to Plaintiff Michael Sawyer's First Set of Interrogatories, Number 2.

⁴ Fenina Fink works for Defendant Farmers New World Life Insurance Company and is involved in the Life Performance Bonus. Exhibit 12, Fink Depo. at 4:24-5:11; 7:19-8:9.

point, testifying that the period cut-off dates are last date of the quarter. Fink Affidavit at ¶4.1, 4.2, 4.3, 4.4, 4.5, 7, and 8. *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989).

19. Plaintiffs object to Defendants Summary Judgment Exhibit 3 on the grounds that it has not been properly authenticated and it is inadmissible hearsay.

Wherefore, Plaintiffs pray that Defendants' Summary Judgment Evidence (Life Performance Bonus) be stricken and for such further relief to which they are entitled.

Respectfully Submitted,

PRYOR & BRUCE

By: 

Bobby G. Pryor
State Bar No. 16373720
Dana G. Bruce
State Bar No. 03232032

302 N. San Jacinto
Rockwall, Texas 75087
Telephone: (972) 771-3933
Facsimile: (972) 771-8343

HUNTER, KALINKE, and BOYD

Bob Kalinke
State Bar No. 11080100
11325 Pegasus Street, Suite 265E
Dallas, Texas 75238
Telephone: (214) 265-0265
Facsimile: (214) 265-1199

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been served upon counsel for Defendants, Thomas T. Rogers, Esq., JACKSON WALKER, L.L.P., 100 Congress Avenue, Suite 1100, Austin, Texas 78701, via federal express (in accordance with the Rule 11 Agreement of the parties) on the ~~29th~~ day of March 2001. The referenced exhibits have been served previously in accordance with the stipulation of the parties.

