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97-694

COMMONWEALTH OF KENTUCKY
BOONE CIRCUIT COURT
CASE NO. 98-CI-76

FILED

JAN 21 1998

PAT GUTZEIT, CLERK
BOONE CIRCUIT/DISTRICT COURTS
BY: *ma* D.C.

KARIN FLEDDERMAN

PLAINTIFF

v.

FINKE HOMES, INC.
3180 Burlington Pike
Burlington, Kentucky 41005

SERVE: Mr. George Finke
3180 Burlington Pike
Burlington, Kentucky 41005

DEFENDANT

* * * *

VERIFIED COMPLAINT with JURY DEMAND

Plaintiff Karin Fledderman states for her cause of action as follows:

1. Plaintiff Karin Fledderman served as a sales representative for Finke Homes, Inc. from March, 1996, until her termination from her job on December 2, 1997, pursuant to an oral contract regarding both her duties, work place assignments and compensation.
2. Defendant Finke Homes, Inc. is a Kentucky corporation with it principal location at 3180 Burlington Pike, Boone County, Kentucky 41005.
3. As an employee of Defendant Finke Homes, Inc., Plaintiff Fledderman received wages as defined in KRS 337.011 which were calculated as commissions on sales of homes she made for the benefit of Defendant. Plaintiff earned a commission of two percent (2%) on the sales price of every home she sold for Defendant. Plaintiff received one percent (1%) when the buyer's loan application was approved and the remaining one percent (1%) at the closing of the home purchase.

4. On the date of her termination (12/2/97), Plaintiff had earned, but not received, sales commissions totalling \$16,617.00. Plaintiff's failure to receive these wages is contrary to both her contract of employment with Defendant and the provisions of KRS §§ 337.055 and 337.060. But for her termination, Plaintiff would have received \$12,678.05 worth of these commissions at closings scheduled within two weeks of her termination date. Another \$1267.95 of earned commissions due Plaintiff result from the approval of a loan application which occurred prior to her termination on 12/2/97. The balance of the commissions due Plaintiff (\$2671.00) are for homes which she sold for Defendant and which are still under construction.

5. Despite repeated demands from Plaintiff Fledderman to Defendant Finke Homes, Inc., Defendant has refused and failed to remit the wages earned by Plaintiff during her employment with Defendant to Plaintiff.

6. Defendant's failure to pay to Plaintiff the \$16,617.00 in commissions she earned while in the employ of Defendant is a breach of Plaintiff's oral employment contract, for which Finke Homes is liable.

7. Defendant's failure to pay Plaintiff the wages she earned as a sales representative for Defendant resulted from Defendant's bad faith toward Plaintiff, as contemplated in KRS 337.385.

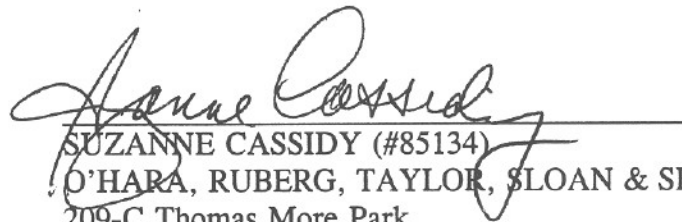
8. Plaintiff's damages in this case are in excess of the minimal jurisdictional requirements of this Court.

WHEREFORE, Plaintiff Karin Fledderman demands as follows:

A. For a judgment against Defendant Finke Homes in the amount of \$16,617.00;

- B. For an award of prejudgment and post-judgment interest on the judgment to which Plaintiff is entitled;
- C. For liquidated damages in an amount equal to the wages unlawfully withheld from Plaintiff by Defendant;
- D. For her costs incurred in bringing this suit, including reasonable attorney's fees; and
- E. For all other relief to which this Court believes she is entitled.

Respectfully submitted,



SUZANNE CASSIDY (#85134)
O'HARA, RUBERG, TAYLOR, SLOAN & SERGENT
209-C Thomas More Park
P. O. Box 17411
Covington, KY 41017-0411
(606) 331-2000
ATTORNEYS FOR PLAINTIFF

O'HARA, RUBERG,
TAYLOR, SLOAN
& SERGENT
Attorneys at Law
209 Thomas More Park
Suite C
P.O. Box 17411
Covington, Kentucky
41017-0411
(606) 331-2000

VERIFICATION

I, Karin Fledderman, hereby verify that I have read the foregoing Verified Complaint with Jury Demand and the facts contained herein are true and correct to the best of my knowledge and belief.



KARIN FLEDDERMAN

STATE OF Kentucky :

:SS

COUNTY OF Kenton :

Sworn to and subscribed in my presence by Karin Fledderman, this 12th day of January, 1998.



NOTARY PUBLIC

My Commission Expires: 2/27/00

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O'HARA, RUBERG,
TAYLOR, SLOAN
& SERGENT
Attorneys at Law
209 Thomas More Park
Suite C
P.O. Box 17411
Covington, Kentucky
41017-0411
(606) 331-2000

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COMMONWEALTH OF KENTUCKY
BOONE CIRCUIT COURT
CASE NO. 98-CI-00076

FEB 06 1998
PAT GUTZEIT, CLERK
BOONE CIRCUIT DISTRICT COURTS
BY: *me* O.C. PLAINTIFF

KARIN FLEDDERMAN

vs.

FINKE HOMES, INC.

DEFENDANT

ANSWER

Comes now the Defendant, FINKE HOMES, INC. (hereinafter "FINKE"), by and through counsel, and for its Answer to the Plaintiff's Complaint, hereby states as follows:

FIRST DEFENSE

1. Plaintiff's Complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

2. Defendant admits those allegations contained in paragraphs one (1), two (2) and three (3) of Plaintiff's Complaint.

3. Defendant denies those allegations contained in paragraphs four (4), five (5), six (6), seven (7) and eight (8) of Plaintiff's Complaint.

THIRD DEFENSE

4. According to its well-established Sales Policy (copy attached as Exhibit "A"), which Sales Policy was provided to Plaintiff (along with all other individuals hired by Defendant as

ADAMS, BROOKING,
STEPNER,
WOLTERMANN &
DUSING
Attorneys and
Counselors at Law
421 Garrard Street
P. O. Box 861
Covington, KY 41011
(606) 291-7270

8100 Burlington Pike
Suite 400
P. O. Box 576
Florence, Kentucky 41042
(606) 371-6220

sales persons), and which Plaintiff was required to read upon being hired by Defendant, Plaintiff forfeited all unpaid commissions when her employment with Defendant was terminated.

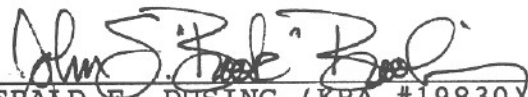
FOURTH DEFENSE

5. Defendant raises and relies upon the affirmative defenses of accord and satisfaction, estoppel, failure of consideration, fraud, illegality, laches, payment, release, statute of frauds, statute of limitations and waiver.

6. Defendant reserves the right to raise and rely upon any additional affirmative defenses, should the same become known to exist through ongoing investigation and discovery herein.

WHEREFORE, Defendant FINKE respectfully prays as follows:

- (1) That Plaintiff's Complaint be dismissed, with prejudice;
- (2) For its costs and reasonable attorney fees incurred herein; and
- (3) For any and all other relief to which it may appear entitled.


GERALD F. DUSING (KBA #19830)
JOHN S. "BROOK" BROOKING (KBA #83669)
ADAMS, BROOKING, STEPNER,
WOLTERMANN & DUSING
8100 Burlington Pike, Suite 400
Florence, Kentucky 41042
(606) 371-6220
Attorney for Defendant


ADAMS, BROOKING,
STEPNER,
WOLTERMANN &
DUSING
Attorneys and
Counselors at Law
421 Garrard Street
P. O. Box 861
Covington, KY 41011
(606) 291-7270

8100 Burlington Pike
Suite 400
P. O. Box 576
Florence, Kentucky 41042
(606) 371-6220

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of February, 1998,
a true and correct copy of the foregoing was mailed, by regular
U.S. Mail, postage pre-paid to:

Suzanne Cassidy, Esq.
O'HARA, RUBERG, TAYLOR, SLOAN & SERGENT
209-C Thomas More Park
P.O. Box 17411
Covington, Kentucky 41017-0411
Attorney for Plaintiff


GERALD F. DUSING
JOHN S. "BROOK" BROOKING

ADAMS, BROOKING,
STEPNER,
WOLTERMANN &
DUSING

Attorneys and
Counselors at Law
421 Garrard Street
P. O. Box 861
Covington, KY 41011
(606) 291-7270

8100 Burlington Pike
Suite 400
P. O. Box 576
Florence, Kentucky 41042
(606) 371-6220

Burlington
Estates INC.

3180 Burlington Pk.

Burlington, KY. 41005

(606) 586-7583



SALES POLICY

REGARDING COMMISSIONS AFTER TERMINATION

(Voluntary or Non Voluntary)

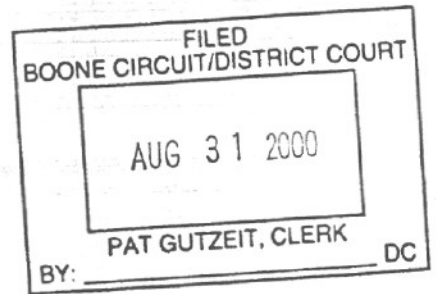
When a sales person voluntarily leaves the company or is terminated by the company, all commissions not paid at that time are forfeited.

This is to protect the company and the new agent who will have to finish servicing the customer.

Compensation for the new agent who takes over the account will be considered by management. This will be determined by how much service to the customer remains.

Effective 1-18-93

COMMONWEALTH OF KENTUCKY
BOONE COUNTY CIRCUIT COURT
CASE NO. 98-CI-00076



KARIN FLEDDERMAN
PLAINTIFF

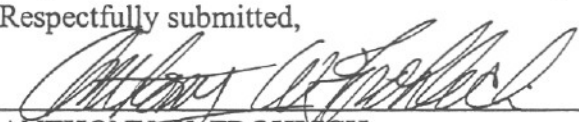
VS.

MOTION TO CONFIRM
MASTER COMMISSIONER'S REPORT

FINKE HOMES, INC.
DEFENDANT(S)

COMES NOW THE MASTER COMMISSIONER AND MOVES this Court for an
Order confirming the Master Commissioner's Report.

Respectfully submitted,



ANTHONY W. FROHLICH
Master Commissioner Boone Circuit Court

NOTICE:

All parties will take notice that the above motion will come on for hearing in the Boone Circuit Court, Burlington, KY, 41005 on the 12th day of September, 2000 at the hour of 9:00 o'clock a.m. before Judge Joseph Bamberger.

CERTIFICATE OF SERVICE:

I, ANTHONY W. FROHLICH, Master Commissioner, do hereby certify that I have this
the 31st day of August, 2000 mailed a copy of the foregoing
to the following:

O'HARA, RUBERG, TAYLOR,
SLOAN & SARGENT
Hon. Suzanne Cassidy
P.O. Box 17411
Covington, Kentucky 41017-0411

BROOKING & BROOKING
Hon. John S. Brooking
P.O. Box 426
Florence, Kentucky 41022-0426



ANTHONY W. FROHLICH
MASTER COMMISSIONER

**COMMONWEALTH OF KENTUCKY
BOONE COUNTY CIRCUIT COURT
CASE NO. 98-CI-00076**

FILED BOONE CIRCUIT/DISTRICT COURT	
AUG 31 2000	
BY: _____	DC

**KARIN FLEDDERMAN
PLAINTIFF**

VS.

**FINKE HOMES, INC.
DEFENDANT(S)**

MASTER COMMISSIONER'S REPORT

This matter came on for hearing before the Master Commissioner, Anthony W. Frohlich on July 7th, 2000. Present was the Plaintiff Karin Fledderman who was represented by her attorney the Hon. Suzanne Cassidy. Also present was the Defendant Finke Homes, Inc. through its Vice-President, Ted Seiter, and represented by its attorney the Hon. John S. "Brook" Brooking. Pursuant to the authority granted to the Master Commissioner by Civil Rule 53.06(4) the Master Commissioner submitted a draft report to counsel for comments. Based upon the evidence presented by the parties the Master Commissioner makes the following report to the Court.

FINDINGS OF FACT

1. The Plaintiff, Karin Fledderman, is a real estate agent and broker. She has been a real estate agent since 1986.
2. The Defendant, Finke Homes, Inc., is a builder of residential homes.
3. George Finke is the owner of Finke Homes, Inc., and was responsible for the hiring of sales representatives.
4. The Plaintiff was employed by the Defendant through George Finke in March of 1996. The Plaintiff and George Finke met and the Plaintiff was

employed at said time. There was no written contract. The parties orally agreed that the Plaintiff would work for the Defendant on a commission basis. The commission was set at 2% of the sale price. The commission would be paid 1% upon a buyer's loan approval. The remaining 1% would be paid upon closing of the contract with the buyer.

5. If a sales contract between Finke Homes, Inc. and the buyer did not close and the Plaintiff had already received a 1% commission, then the Plaintiff would be responsible for returning the commission to the Defendant.
6. The Plaintiff was given a black binder by a secretary for the Defendant after she left the meeting with George Finke. This binder contained various information about the company, including information on sales, floor plans, and other company policies. No one from the Defendant went over the policies with the Plaintiff. The Plaintiff does not recall ever reviewing the binder in detail.
7. It was standard operating procedure for the binder to contain the following policy document:

**Sales Policy
Regarding Commissions after Termination
(Voluntary or Non-Voluntary)**

When a sales person voluntarily leaves the company or is terminated by the company, all commissions not paid at that time are forfeited.

This is to protect the company and the new agent who will have to finish servicing the customer.

Compensation for the new agent who takes over the account will be considered by management. This will be determined by how much service to the customer remains.

8. No one can specifically remember whether this policy was in the binder the Plaintiff received.
9. The testimony established that the Plaintiff was specifically aware of this policy by at least January, 1997.
10. Plaintiff's employment with Finke Homes, Inc. was terminated by Vice-President Ted Seiter on December 2nd, 1997.
11. The parties have stipulated that the Plaintiff was an employee and not an independent contractor.
12. The Plaintiff was an employee whose oral contract was terminable at will by the Defendant.
13. At the time of the firing of the Plaintiff by the Defendant the Plaintiff had the following sales contracts pending:
 1. Stephens—This was scheduled to close in January, 1998. Upon closing the Plaintiff would have earned a commission of \$1,403.00.
 2. Wormald—This is a lease purchase agreement upon which Plaintiff had not been paid a commission. Upon closing the Plaintiff would have earned a commission of \$2,390.00
 3. Kloeker—This contract was scheduled to close in December, 1997. Upon closing the Plaintiff would have received a commission of \$1,378.00.
 4. Ricotta—This contract was scheduled to close in December, 1997. The Plaintiff would have earned a commission of \$2,060.00.
 5. Soward—This contract was scheduled to close in December, 1997. The Plaintiff would have earned a commission of \$1,440.00
 6. Holton—This contract was scheduled to close in December, 1997. Plaintiff would have earned a commission of \$2,535.00.

7. Clayton—This contract was scheduled to close in December, 1997. Plaintiff would have earned a commission of \$2,670.00.

8. Kennedy—This contract was scheduled to close in December, 1997. The Plaintiff would have earned a commission of \$2,740.00.

14. The evidence established that the Ricotta contract did not close.

15. The Holton contract had a loan approval date of November 24th, 1997. The Defendant has not paid the Plaintiff the 1% commission of \$1,267.50.

16. There was no evidence to show that the contracts closed, and if so, on what dates, or whether any new agents were paid any sums of money on these contracts.

17. The Plaintiff was the third sales representative employed by the Defendant on a straight commission basis.

18. The first sales representative employed on a straight commission basis was Peggy Stradler, who testified in this case. She was hired on January 9th, 1994. Prior to that time sales representatives were hired on a salary or upon a draw/commission basis. When Peggy Stradler was employed by Finke Homes, Inc., George Finke offered her either of these two choices or a third choice on a straight commission basis. Mrs. Stradler chose a straight commission basis. The Defendant gave Mrs. Stradler the employee's handbook and Mrs. Stradler refused to take the job because of the subject policy regarding termination. Mrs. Stradler was told the 1993 policy was applicable to people on salary and she could throw the book away. Her testimony was inconsistent, as she also testified later that when she quit her job on May 30th, 1997, by which time she was also the Defendant's sales manager, she understood she was subject to the termination policy in issue. However, the testimony also established that Peggy Stradler was paid commissions after her effective date of termination. The evidence established

that on June 6th, 1997, she was paid on the Bruening sales contract (closed May 29th, 1997) and the Lewis sales contract (closed May 30th, 1997). The Defendant argues that Stradler received these commissions because they were “earned” prior to her termination date although not “paid” before termination. The evidence also shows that the Sorensen contract closed on June 18th, 1997, and Stradler was paid a commission on June 27th, 1997. The Defendant cannot adequately explain this course of conduct although Mrs. Stradler believes she had not really “left” Defendant’s employ yet and was still coming in during June, 1997, although her official termination date was May 30th, 1997. The evidence further established that Stradler was paid a “loan approval” commission on June 6th, 1997, on the Walton sales contract, although it did not close until July 28th, 1997. Additionally, her husband, who was also a sales representative for the Defendant, was paid the balance of the Walton commission on September 17th, 1997.

19. The second straight commission sales representative employed by the Defendant was a gentleman by the name of Jim Helton. He was employed on November 1st, 1994, and he quit on December 24th, 1996. He was paid commissions on December 24th, 1996, for the Trenkamp sales contract (closed December 18th, 1996), the Gabbard sales contract (closed December 18th, 1996) and the Porter sales contract (closed December 20th, 1996). The Mallory sales contract was closed on January 14th, 1997, yet Helton was paid a commission on January 24th, 1997. The Shelton sales contract closed on January 9th, 1997, and yet Helton was paid a sales commission on January 17th, 1997. The Burchfield sales contract closed on January 17th, 1997, and Helton was paid a sales commission on January 24th, 1997.
20. After Jim Helton left the Defendant’s employment the Plaintiff and another

Employee, Esther Macke, worked on finishing Helton's contracts. After completion the Plaintiff and Esther Macke requested compensation for their efforts from the Defendant. George Finke directed that their request be done in writing. The Plaintiff and Ms. Macke requested compensation as follows:

Shelton	closed 1-9-97	141,000	pd
Mullory	closed 1-14-97	142,899	pd
<hr/>			
30 Days .25			
Poole	closed 2-21-97	135,823	
Hopgood	closed 2-21-97	198,115	
Keitz	closed 2-28-97	<u>117,704</u>	
		451,642	\$1,129.00
More Than 30 Days .50			
Smithers	closed 3-27-97	155,389	
Bray	closed 4-25-97	140,053	
Crawley	closed 5-97	137,370	
Campana	closed 6-97	140,963	
Cross	closed 6-97	<u>233,538</u>	
		807,333	\$4,036.00
		1,129	
		<u>4,039</u>	
		5,165 ÷ 2 =	\$2,582

The Defendant paid the Plaintiff and Ms. Macke \$832.94 apiece for their work from the sales contracts for Smithers, Bray, Crawley and Cross.

21. Sales representatives were required to procure buyers, represent the Defendant in showing the house, write contracts, assist clients in making selections, watch the progress of the house and assist the builder and purchaser in keeping them on the "right track", attend Monday sales meetings, and work model houses at hours scheduled by the Defendant.
22. The Plaintiff worked approximately 45 hours per week for the Defendant in

providing services.

23. The majority of the work performed by a sales representative was done prior to the last few weeks before closing.
24. The Defendant did not require sales representatives to attend closings and generally sales representatives did not attend closings.
25. The sales policy in issue was not a part of the sales contract between the Plaintiff and the Defendant.
26. The sales policy in issue was not ever applied according to the written terms of said policy to employees who left the employment of Defendant.
27. Sales agents who left the employment of the Defendant and were compensated for closings that occurred after their termination date, all closings were within ten (10) days of the date of the termination date. All were paid within thirty (30) days of the termination date.

Conclusions of Law

1. As in many oral contracts there is an essential dispute between the parties as to the terms thereof. The Master Commissioner has found that the sales policy in issue as written was not made a part of the contract of employment between the Plaintiff and the Defendant. The Master Commissioner concludes as a matter of law that the Defendant had the burden of proof on this issue and failed to carry same.
2. The Defendants own course of conduct in this case established that the sales policy as written does not apply and that in fact the policy itself did not actually mean what the plain written wording said. Whereas the policy says all commissions not paid at the time of termination are forfeited the

Defendants own key witness, namely, Ted Seiter, maintains that the term actually meant "earned". Explicit examples of the Defendants course of conduct were established by the evidence. For example, the Defendants had no problem with Ms. Stradler being paid on the Bruening and Lewis contracts even though she was not paid until after she had left. Another example is that Jim Helton was paid on contracts that even closed after his termination date. Defendant's witness further established that the explicit purpose of the sales policy was to provide adequate means of compensation for persons completing a sale after an agent has quit or been fired.

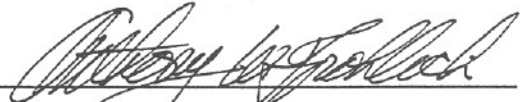
3. The Master Commissioner concludes the evidence established the Plaintiff is entitled to commissions earned prior to her termination. This is consistent with the practices and policies of the Defendant of which Plaintiff was aware. The evidence established that if a sale was closed shortly after the termination of employment the commission would be deemed "earned" and Defendant would pay the commission. This will require testimony as to the closing dates on the contracts upon which Plaintiff seeks compensation and testimony on the services rendered on the specific contracts by Plaintiff prior to termination as compared to services rendered by others after termination.
4. Pursuant to Civil Rule 53.06 (2) the Court has the power to recommit the case to the Master Commissioner with instructions. The Master Commissioner recommends to the Court that additional evidence be taken on the remaining issues as set forth above.
5. The Master Commissioner concludes that KRS 337.385 is inapplicable to the facts of this case. The Plaintiff has yet to prove she is entitled to any commissions. There is certainly no proof the Defendant failed to act in good faith.

Recommended Judgment

WHEREFORE, Your Master Commissioner recommends to the Court that the above findings be adopted by the Court and that the matter be recommitted to the Master Commissioner for the purposes of taking additional testimony on the issue of the amount of compensation actually "earned" by the Plaintiff prior to her termination by the Defendant.

DATED: 8-30, 2000.

Respectfully submitted,



ANTHONY W. FRÖHLICH
MASTER COMMISSIONER

Copies to:
O'HARA, RUBERG, TAYLOR,
SLOAN & SARGENT
Hon. Suzanne Cassidy
P.O. Box 17411
Covington, Kentucky 41017-0411

BROOKING & BROOKING
Hon. John S. Brooking
P.O. Box 426
Florence, Kentucky 41022-0426

COMMONWEALTH OF KENTUCKY
BOONE CIRCUIT COURT
CASE NO. 98-CI-00076

KARIN FLEDDERMAN

PLAINTIFF

vs.

FINKE HOMES, INC.

DEFENDANT

**DEFENDANT'S SUGGESTIONS REGARDING
MASTER COMMISSIONER'S REPORT**

Comes now the Defendant, FINKE HOMES, INC. (hereinafter "FINKE"), by and through counsel, and as requested by the Master Commissioner via letter dated July 18, 2000, respectfully submits the following suggestions regarding the Master Commissioner's draft Report:

INTRODUCTION

The Master Commissioner's draft Report was tendered to the parties' respective counsel under cover of letter dated July 18, 2000. It is the understanding of counsel that such draft Report has not yet been filed of record. Accordingly, by agreement of counsel, the parties' respective suggestions/proposed changes to such Report are being submitted for consideration to the Master Commissioner in pleading form, but are not being filed of record with the Boone Circuit Court.

Substantively, it is Defendant's understanding that, although indicating there is some question, the Master Commissioner has nonetheless concluded that the Sales Policy was indeed made a part of terms and conditions of Plaintiff's employment (why else would the draft Report address and discuss the purported ambiguity, if the Policy that supposedly contains such ambiguity was not part of the agreement by and between the

parties?). Based upon the evidence, it is certainly *more likely than not* that the Sales Policy was distributed to the Plaintiff when she was hired, and made a part of the contract. Defendant suggests that this conclusion should be made clear in the Master Commissioner's Final Report.

Having determined that the Sales Policy was part of the contract, the draft Report next concludes that there is an ambiguity between how such Policy was worded (commissions "not paid") and how it was actually applied (commissions "not earned"). Based upon such alleged ambiguity, the draft Report construes the Sales Policy to require forfeiture of all commissions "not earned"¹, which determination must be made on a *quantum meruit* basis. As discussed in more detail below, FINKE disagrees with such conclusions:

1. Initially, it must be questioned exactly where the ambiguity is -- all of the witnesses (including FLEDDERMAN herself), testified consistently with each other both that the Policy required the forfeiture of commissions "not earned", and that this was the general understanding among all of the FINKE Sales Representatives. Quite simply, there is no ambiguity where the parties have a mutual understanding.
2. In addition, the Sales Policy clearly required two (2) specific triggering events – loan approval and closing, before a commission is actually earned. Such Policy therefore delineated very definite criteria upon which the payment of commissions was based. If these criteria are met, the commission is paid; if these criteria are not met, the commission is not paid. The Sales Policy does not require the application of *quantum meruit*, an equitable doctrine reserved for situations where the triggering events cannot be readily determined.

The Master Commissioner's Final Report should reflect not only that the Sales Policy was part of the agreement, but also that it clearly defined the manner in which the commissions were to be paid.

¹ Once again, there would be no need for the Master Commissioner to construe the Sales Policy if it were not in fact part of the terms and conditions of the Plaintiff's employment.

ADDITIONAL FINDINGS OF FACT

As noted above, the Master Commissioner's Final Report should clearly indicate that the Sales Policy in question was made a part of the terms and conditions of the Plaintiff's employment. If such Policy were not part of the contract, any ambiguity contained therein would be meaningless. However, by finding it necessary to construe the purported ambiguity (which Defendant suggests is actually non-existent), the Master Commissioner must have concluded that the Policy was indeed part of contract by and between the parties. This conclusion is important, and must be clear in the Final Report.

In addition, Defendant proposes that the Final Report incorporate the following additional Findings of Fact, each of which were established without contradiction at the Hearing on July 7, 2000:

The following facts were established through the testimony of Plaintiff Karin Fledderman (hereinafter "FLEDDERMAN"):

1. FLEDDERMAN received the Black Binder (which contained information on the company, including information on sales, floor plans and company policies) when she was hired.
2. FLEDDERMAN was aware that the Black Binder included company policies (other than sales-related provisions), but chose not to review the contents of such policies.
3. FLEDDERMAN understood that the materials contained in the Black Binder were the guidelines of her employment, and that she was required to follow and adhere to each of these guidelines – they were not discretionary, and FLEDDERMAN was not entitled to pick and choose those that she would follow.
4. FLEDDERMAN's understanding was that the applicable Sales Policy (referenced in the Master Commissioner's draft Report) applied to all Sales Representatives hired after the effective date of such Policy – the effective date of the Sales Policy was January 18, 1993; FLEDDERMAN was hired in March of 1996.

5. Under the applicable Sales Policy, the triggering event that had to occur before a Sales Representative was entitled to receive the second one percent (1%) commission was the actual closing.
6. This was the policy that FLEDDERMAN operated under throughout her employment with FINKE.

The following facts were established through the testimony of Peggy Stadler (hereinafter "Stadler"), the *only* disinterested witness to testify at the Hearing:

1. Every new Sales Representative hired by FINKE received the applicable Sales Policy when hired.
2. When Stadler was hired by FINKE, she received a copy of the applicable Sales Policy.
3. Stadler did not agree with such Sales Policy – however, she nonetheless understood throughout her employment with FINKE that the Policy existed and that it applied to her.²
4. All of the FINKE Sales Representatives were aware of the Sales Policy – such Policy was not only distributed to all Sales Representatives, but discussed openly among the Representatives.
5. FLEDDERMAN was specifically aware of the Sales Policy.
6. Stadler discussed the Sales Policy at length with FLEDDERMAN – while Stadler disagreed with the Policy, FLEDDERMAN specifically agreed with it, and told Stadler that it was common among builders in the area.
7. FLEDDERMAN specifically took advantage of the Sales Policy by receiving commissions on deals worked out by Jim Helton before he left FINKE.

² Contrary to the draft Findings of Fact, there was no inconsistency in Stadler's testimony regarding the Sales Policy in question. Though she always disagreed with it, and refused to sign anything, she nonetheless always understood that such Policy applied, and that it was applicable to her.

8. Stadler *did not* receive any commissions on sales that she initiated but which closed after she left FINKE.³

The following facts were established through the testimony of Ted Seiter (hereinafter “Seiter”):

1. The applicable Sales Policy is standard in the construction/sales industry – this point was uncontroverted by the Plaintiff.
2. FLEDDERMAN was aware of this Sales Policy, and never voiced any objection to such Policy.
3. FLEDDERMAN took advantage of the Sales Policy by receiving commissions on deals worked out by Jim Helton before he left FINKE.
4. Peggy Stadler *did not* receive commissions on deals upon which loan approval was obtained or which closed after she left FINKE – rather, any of the deals she was working on when she left FINKE (including those specifically mentioned in the draft Report) were completed by her husband Rich, who would have then received the commissions on such deals.
5. Jim Helton inadvertently received commissions on deals that closed after he left FINKE. This occurred because Mr. Seiter was not aware that Mr. Helton had left FINKE. At or about the same time FINKE realized that the commissions had been improperly paid, Mr. Helton filed a lawsuit seeking to recover additional commissions. FINKE not only opposed such claim, but also counterclaimed for the recovery of those commissions that had been improperly paid. The litigation resulted in a negotiated settlement – at no time did FINKE concede that the commissions were

³ The draft Findings of Fact (#18) indicate that Stadler received commissions on deals upon which either loan approval or closing occurred after she left FINKE – this is incorrect. At the Hearing, Stadler explained that, at all times during which she and her husband Rich worked together at FINKE, they jointly received a single check for all commissions owed to either of them. Any deal on which Stadler was working at the time she left FINKE (including those specifically discussed in the draft Report) would have been completed by her husband Rich, who would have been paid the commissions due on such deals. Because of the unique nature of the Stadlers’ relationship, FINKE’s internal records continued to reflect the payment of such commissions to Peggy Stadler; however, as testified to by Stadler *without contradiction*, she never received commissions for deals that closed after she left FINKE. In considering the truth and veracity of the various witnesses who testified at the Hearing, the greatest emphasis must be placed upon Stadler – she was the *only* disinterested witness to testify, and despite her disagreement with the Sales Policy in question and her dislike for FINKE, she nonetheless definitively testified that she never received commissions in a manner that was inconsistent with such Policy.

owed or had been properly paid to Mr. Helton.⁴

6. The most important goal that a Sales Representative must accomplish is making sure the prospective purchasers get to the closing table.
7. Just because a deal is set for closing does not mean that it is ready to close, or that the deal will close as scheduled – in fact, more times than not, the original closing date is postponed; this was the case for most, if not all, of the deals for which FLEDDERMAN claims a commission is owed.
8. The most important time frame in the entire sales process occurs between the time the closing is initially scheduled and the actual date of the closing – the Sales Representative plays a critical role during this time frame, continuing to serve as the prospective purchasers' main contact.⁵
9. Most, if not all, of the deals for which FLEDDERMAN claims a commission is owed, **did not** close within thirty (30) days of her termination by FINKE.

DISCUSSION/ARGUMENT/CONCLUSIONS OF LAW

The draft Report concludes that there is an ambiguity as to whether the Sales Policy was intended to apply as written (all commissions “*not paid*” are forfeited) or as understood by the parties (all commissions “*not earned*” are forfeited). However, FINKE suggests that, in reality, no such ambiguity exists.

Three (3) witnesses (FLEDDERMAN, Stadler and Seiter) all testified consistently with each other regarding their understanding as to how the Sales Policy was intended to apply. Mr. Seiter indicated that the Policy required the forfeiture of commissions *not earned* at the time at the time of termination. Similarly, Ms. Stadler, though disagreeing

⁴The draft Report does not indicate that the payment of commissions to Mr. Helton on the deals specifically listed was *inadvertent*, and resulted in litigation during which FINKE sought the recovery of such commissions. This point was established at the Hearing, and remains absolutely uncontroverted.

⁵ FINKE takes issue with certain of the draft Findings of Fact. Specifically, draft Finding #21 fails to identify the primary duty of the Sales Representatives, as testified to without contradiction by Mr. Seiter – *getting the prospective purchasers' to closing*. Draft Finding #23 likewise ignores Mr. Seiter's undisputed testimony that the work varies from deal to deal, and in many situations, the majority of the work *is not* performed prior to the last few weeks before closing.

with the Sales Policy, nonetheless testified that such Policy referred to the forfeiture of commissions *not earned* at the time of termination. Even FLEDDERMAN, who claims that the Sales Policy did not apply to her (insisting instead that such Policy only applied to Sales Representatives hired after the effective date of the Policy), *does not* dispute the manner in which it is intended to apply, and in fact testified as to her understanding that such Policy applied to commissions *not earned* at the time of termination.

Clearly, the purported ambiguity identified in the draft Report is based exclusively upon the difference between the actual language of Sales Policy as compared to the undisputed understanding of the witnesses. However, it must be questioned exactly where the ambiguity is, when **ALL** of the witnesses had exactly the same understanding. Indeed, it is axiomatic that, where the parties to a contract ascribe a mutual understanding to the terms of such contract, that understanding will control. In this instance, it is clear and uncontroverted that the parties understood the Sales Policy to require the forfeiture of all commissions that had not yet been earned at the time the Sales Representative is terminated. As such, there simply is no ambiguity.

The only issue that the Court must decide is exactly when the commission is actually earned. The draft Report concludes: “[i]f the Defendant concedes that the policy means “earned” and not paid then sales representatives will be entitled to payment for services rendered up to the date of their termination.” This is not accurate.

Clearly, the parties to an employment contract may agree as to exactly how and in what manner the employee shall be paid. This is precisely what has occurred by and between FINKE and its Sales Representatives.

To earn their commissions, FINKE Sales Representatives must satisfy two (2) obligations. First, the Representative must procure prospective purchasers who are able

to and in fact obtain loan approval. Second, the Representative must deliver the prospective purchaser to the closing table. If the Representative leaves before loan approval is obtained, he or she has failed to earn any portion of the commission. Once loan approval is obtained, the Representative has satisfied the first obligation, and he or she has in fact *earned* the first one percent (1%) commission. If the Representative leaves after loan approval but before closing, he or she still receives the first one percent (1%) commission, but not the second one percent (1%) commission. Finally, if the Representative is still employed when the closing occurs, he or she has satisfied the second obligation, and has *earned* the second one percent (1%) commission.

FLEDDERMAN was bound by this exact commission payment structure. Ted Seiter testified as such. Peggy Stadler, though she disagreed with such payment structure, nonetheless confirmed its applicability. Even FLEDDERMAN herself acknowledged this commission structure, claiming only that it did not apply to her.

As is evident from the foregoing, sales commissions are *earned* upon the occurrence of two (2) triggering events, both of which were acknowledged by the Plaintiff herself. The first is the loan approval, the second is the closing and both are easily ascertainable. FLEDDERMAN, like all FINKE Sales Representatives, was entitled to all commissions actually earned at the time her employment was terminated.

Clearly, this does not mean that she is entitled to be paid, on a *quantum meruit* basis, on all deals with which she was involved. Such a conclusion would send shock waves through every sales-commission industry, as employers paying on a commission basis would be absolutely precluded from defining their employees' compensation terms. Under the proposed interpretation, all sales-related employees being compensated on a commission basis would be entitled to receive some or all of their commissions

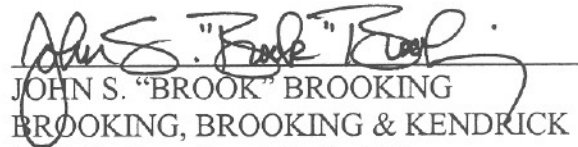
regardless of whether their sales were ever consummated, and despite the specific payment terms to which they might have agreed. As such, a sales person who was completely inept at closing sales could conceivably continue to claim and receive commission payments on deals that either never closed, or that other sales people were required to close. This is not what is contemplated in the sales-commission industry generally, nor under FINKE's commission payment structure specifically.

The bottom line is that the parties to an employment agreement may agree as to the precise manner in which compensation is to be paid. This certainly includes the ability to contract away the right to be paid on an equitable (*quantum meruit*) basis. FLEDDERMAN was hired to sell houses. She was informed of the commission structure (one percent (1%) earned upon loan approval, one percent (1%) earned upon closing), and operated under such structure throughout her employment. She was given the Black Binder, which included the Sales Policy that all parties understood to require that, in order to receive her commissions, she had to remain with FINKE until they were actually *earned*. She was aware of this Policy, and not only agreed with it (in numerous discussion with Ms. Stadler during which she insisted it was standard in the industry), but actually took advantage of it. Now, having failed to satisfy her contractual obligations, and having failed to *earn* the commissions, she seeks to avoid that very Policy she herself was aware of, agreed with and used.

As such, the Master Commissioner's Final Report should conclude, as a matter of law, that the Sales Policy, which was specifically made a part of the terms and conditions of the Plaintiff's employment, defined the precise compensation structure and payment criteria. Such criteria provided an objective and unambiguous method of determining the exact time and manner in which FLEDDERMAN earned her commissions. Plaintiff was

aware of such criteria, agreed with such criteria, utilized such criteria and failed to meet such criteria, and she simply cannot now be allowed to avoid such criteria.

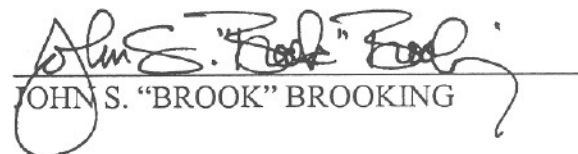
Respectfully Submitted,


JOHN S. "BROOK" BROOKING
BROOKING, BROOKING & KENDRICK
7300 Turfway Road, Suite 430
P. O. Box 426
Florence, Kentucky 41022-0426
(859)282-3900
Attorney for Defendant

CERTIFICATION

I hereby certify that a true and correct copy of the foregoing has been mailed, Ordinary U.S. Mail, postage pre-paid, this 31st day of July, 2000, to:

Suzanne Cassidy, Esq.
O'HARA, RUBERG, TAYLOR,
SLOAN & SERGENT
209-C Thomas More Park
P.O. Box 17411
Covington, Kentucky 41017-0411
Attorney for Plaintiff


JOHN S. "BROOK" BROOKING

SC/jlb
97-694

ENTERED
7/1/20/00
BOONE COUNTY DISTRICT COURTS
COMMONWEALTH OF KENTUCKY
BOONE CIRCUIT COURT
CASE NO: 98-CI-00076

KARIN FLEDDERMAN

PLAINTIFF

vs.

FINKE HOMES, INC.

DEFENDANT

JUDGMENT

This matter having come on for a Supplemental Hearing on November 2, 2000, and all parties being present with counsel, and the Master Commissioner having heard the testimony and reviewed the evidence submitted by the parties and issued his Supplemental Report on November 9, 2000, and no Objections having been filed by the parties and this Court being in all ways sufficiently advised, it is hereby ordered as follows:

1. Plaintiff Karin Fledderman is awarded judgment against Finke Homes, Inc. in an amount of \$7572.50.
2. Finke Homes, Inc. shall pay the costs of this action.
3. The Master Commissioner shall be awarded a fee of \$1150.00 (23.0 hours at \$50.00 per hour to be taxed as costs.
4. The Circuit Clerk shall serve notice of entry hereof in accordance with Civil Rule 77.04.

SO ORDERED this 20 day of Nov, 2000.

Joseph Bamberger
HON. JOSEPH BAMBERGER, JUDGE
Boone Circuit Court

cc. Suzanne Cassidy, Esq.
Attorney for Plaintiff

John S. Brooking
Attorney for Defendant

THIS ORDER PREPARED BY:

Suzanne Cassidy
SUZANNE CASSIDY, ESQ.
O'HARA, RUBERG, TAYLOR, SLOAN & SERGENT
209-C THOMAS MORE PARK
P.O. BOX 17411
COVINGTON, KY 41017-0411

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NOTICE

All parties will take notice that this order was
entered in the Boone County District/Circuit Court
on the 28 day of NOV 2006

JOSEPH BAMBERGER
BOONE DISTRICT/CIRCUIT COURT

JP

CERTIFICATE

I, the undersigned, Clerk of the Boone District/Circuit Court, do hereby certify that the foregoing is a true and correct copy of the foregoing as the same appears on the record at their last filing date of 28 day of NOV 2006

PAUL E. HART
BOONE DISTRICT/CIRCUIT COURT

PH
D.C.