NO. 05-10-00590-CV

IN THE COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS
AT DALLAS

ADVOCARE INTERNATIONAL, L.P.,

Appellant

v.

KAREN FORD, SHERRY T. BRADSHAW, STEPHANIE MURPHY, RODNEY G. POWELL, JR., LARRY MCDANIEL, ROB DEBOER, HERB AND DIANE HEFLIN AND DARRELL BROWN,

Appellees.

ON APPEAL FROM THE 298TH JUDICIAL DISTRICT COURT
OF DALLAS COUNTY, TEXAS

BRIEF OF APPELLEES AND CROSS-APPELLANT KAREN FORD

KILGORE & KILGORE, PLLC
3109 CARLISLE
DALLAS, TEXAS 75204
214/969-9099 - TELEPHONE
214/953-0133 - FAX

W. D. MASTERSON
SBN 13184000
JOHN H. CROUCH
SBN 00783906

THEODORE C. ANDERSON
SBN 01215700
ROBERT M. BEHRENDT
SBN 24012270

ATTORNEYS FOR APPELLEES

ORAL ARGUMENT REQUESTED

ORAL ARGUMENT STATEMENT

Appellees and Cross-Appellant concur with Appellant that oral argument will aid in the Court's decisional process.

TABLE OF CONTENTS

INDEX OF APPENDIX
TO BRIEF OF APPELLEES AND CROSS-APPELLANT KAREN FORD

TAB

A. Case Documents.

1. AdvoCare's 1995 Policies - PX -599.

2. Larry McDaniel Affidavit - DX-104

3. AdvoCare Termination Notices - DX-13; DX-26 (Request for retail sales); DX-35; DX-58; DX-62; DX-78.

4. AdvoCare's Guiding Principles - PX-595.

5. AdvoCare's Redacted Responses to Plaintiffs' Interrogatories with listing on page 16 of upline parties benefitting from terminations of Plaintiffs - PX-619.

6. Demonstrative Trial Chart of Changes in Revenues of AdvoCare and Plaintiffs

B. Opinions.

1. *Wheeler v. Box*, 671 S.W.2d 75 (Tex. App.—Dallas 1984, no writ).

2. *Texas Cookie Corp. v. Hendricks & Peralta,* 747 S.W.2d 873 (Tex.App. - Corpus Christi 1988, writ denied).

3. *Clary Corp. v. Smith,* 949 S.W.2d 452 (Tex. App.—Fort Worth 1997, writ denied).

TABLE OF AUTHORITIES

Statutes

STATEMENT OF THE CASE

Nature of the Case.

After AdvoCare terminated their distributorships, the Plaintiffs/Appellees sued AdvoCare with claims of breach of contract, DTPA violations, common law fraud, quantum meruit/unjust enrichment, and promissory estoppel. The Plaintiffs sought damages for the value of their distributorships on the dates of their terminations.

Trial Court and Judge.

298th Judicial District of Dallas County, Texas, the Honorable Emily Tobolowsky, Judge Presiding, Cause No. 06-11122-M.

Trial Court Disposition.

By a 10-2 verdict, the jury found for Plaintiffs under the DTPA that AdvoCare engaged in false, misleading or deceptive acts or practices that Plaintiffs relied on that were a producing cause of damages, and that the termination provisions of the distributor agreements were unconscionable and a producing cause of damages. The jury found actual damages as to each plaintiff, and further found that AdvoCare's conduct was committed knowingly. The jury also found attorney fees for each Plaintiff. (Appendix B to Appellant's Brief). Based on these findings and a finding regarding the date Karen Ford discovered the conduct, the court rendered judgment in favor of all Plaintiffs, except for Ford. (Appendix A to Appellant's Brief).

In This Court.

Both Plaintiff Karen Ford and AdvoCare perfected appeals. This appeal is a consolidation of No. 05-10-00890-CV and 05-10-00590-CV with a re-alignment of the parties.

ISSUES PRESENTED

Appellees' Counter Issues

1. The Plaintiffs are entitled to recover under the Texas Deceptive Trade Practices because:
   a. their claims arise from a consumer transaction;
   b. there is sufficient evidence of false, misleading or deceptive practices which were a producing cause of damages;
   c. the integration clause in the distributor agreement fails to negate reliance and causation; and
   d. the jury's findings of unconscionability and knowing conduct support the judgment and are supported by the evidence.
2. There is competent evidence of damages because there was no market value and the Plaintiffs' testimony is properly based on value within their knowledge and experience.
3. The judgment in favor of Darrell Brown is valid because his sole heir represented him at trial, and his DTPA claims survived his death.
4. Plaintiffs are entitled to attorneys' fees because they are consumers who have prevailed in a DTPA action and the attorneys' fees awarded are properly supported by the evidence.

Appellant Karen Ford's Crosspoint

1. Limitations does not bar Karen Ford's claim because of the savings clause in the DTPA.

STATEMENT OF FACTS

I. AdvoCare's Business

The Plaintiffs in this case are former AdvoCare distributors whose distributorships were terminated at different times and based on different facts for allegedly violating AdvoCare's company policies.

AdvoCare is a pyramid-type multilevel organization which pays distributors compensation in 5 ways:

- retail commissions - purchase at a 20 -40 % discount and sell at retail.
- wholesale commissions - purchasing at the 40% discount and selling at the 20%.
- overrides - a percentage of the volume of a distributor's downline.
- leadership bonus - a percentage of downline volume.
- incentive bonuses and trips - offered during the course of a year.

Levy 3RR 116 - 118

Commencing in 2002 AdvoCare's business began encountering major problems. Prior to 2002 AdvoCare's number one product was an Ephedra-based product that was a huge seller for AdvoCare. Levy 4RR 40. AdvoCare took the product off the market in 2002 due to safety and medical problems. Id. 41. There were also lawsuits over a product with an ingredient commonly known as PPA. Id. 43. In 2003 AdvoCare fired its product formulator and product trainer Rich Scheckenbach, who was very popular among the distributors, and filed suit against him. Id. 46.

In addition to product and formulator problems, AdvoCare experienced major leadership problems. AdvoCare's General Counsel Ms. Levy testified that AdvoCare had 5 presidents/managers from 2001 -2007:

- 2001 - Founder Charlie Ragus dies

  Todd Cash - fired in February, 2005

  Lance Wimmer (manager) - fired after 4 months
- 2005 - Bob Ulrich - fired in May, 2007
- 2007 - Richard Wright

Levy 3RR 96-98

As a result of AdvoCare's major problems AdvoCare's General Counsel Levy testified that AdvoCare's revenues collapsed from 2002 - 2006 as follows:

- 2002 - $260 million
- 2003 - $180 million
- 2004 - $130 million
- 2005 - $110 million
- 2006 - $100 million

Levy 3RR 93 -94, 96. (See Appellees' App. A-6)

When a distributor is terminated in the AdvoCare pyramid sales organization the compensation of the terminated distributor is paid to the upline distributors; in certain cases where a distributor is close to the top of the pyramid the compensation is paid to AdvoCare itself. Levy 3 RR 119-121. Further, when a distributor is terminated AdvoCare keeps the terminated distributor's entire downline organization of salespersons which can number in the many thousands. Levy 3RR 121-123. This

was never disclosed to distributors, who thought they were building businesses which they owned that would continue for their lifetimes and could be inherited under AdvoCare policies.

Terminated distributorship commissions flowed upline for 3 levels as shown in the following chart taken from PX-619 (Appellees' Appendix A-5):

Plaintiff	**First Level**	**Second Level**	**Third Level**
Ford	Norma Gillespie	AdvoCare	
Powell	Diane McDaniel	Corey Graham	Leitgeb/Sick et al
McDaniel	Marcy O'Hickey	Mark Leitgeb	AdvoCare
De Boer	Christine Paulsen	Mark Leitgeb	AdvoCare
Heflin	Diane McDaniel	Corey Graham	Leitgeb/Sick et al
Brown	Diane McDaniel	Corey Graham	Leitgeb/Sick et al

The rule of following the money to understand causation is readily apparent: Mark Leitgeb, one of 2 Million Dollar Men (see infra), profited from 5 of the 6 terminations, Diane McDaniel, the wife of Danny McDaniel, the other Million Dollar Man, profited from 3, and AdvoCare itself profited from 3.

Danny McDaniel claimed that he saw no conflict of interest in terminating 3 of his best friends and former football heros when their earnings then flowed up to his wife, because he had been instructed ("convicted") to do so by the Lord. McDaniel 8RR 222-227.

As their incomes collapsed along with AdvoCare's revenues, the Plaintiffs attempted to maintain their incomes by working other marketing companies along with AdvoCare, as they were entitled to do under the AdvoCare contracts. The last thing

Plaintiffs wanted to do was cause their downlines to quit AdvoCare by cross-recruiting or making distruptions, because this would only further reduce their declining incomes.

In contrast AdvoCare attempted to increase its revenues and keep its Million Dollar Men happy by terminating successful distributors like Plaintiffs and taking their incomes and downlines for free. This scheme turned the AdvoCare legal department into a profit center since it handled terminations. Appellees' App. A-3. Only the filing of this suit by Plaintiffs and the Badgett suit put a stop to the terminations.

II. Who Are the Plaintiffs

All six of the plaintiffs at trial (5 plaintiffs had settled out before trial) were recognized in AdvoCare's Power Trends magazine as people that AdvoCare held out as examples of how to work an AdvoCare business. Levy 4RR 118-120.

Unfortunately, Plaintiffs' success marked them as targets for firing when times went bad, because AdvoCare could take everything they had with the stroke of a pen.

According to Ms. Levy 9 out of the about 100 distributors featured favorably in AdvoCare's Power Trends magazine were terminated by AdvoCare and Ms. Levy, including the 6 Plaintiffs. Levy 4RR 120.

Plaintiffs' Termination Dates

Distributor	**Date of Joining AdvoCare and Distributor Application**	**Termination Date and Alleged Reason** (See Appellees' Appendix for Termination Letters)	**Complainant**

Darrell Brown	No Distributor Application February 8, 1998 Brown Depo., p. 10, ll. 13-14	First Suspension: 8/12/05 Cross Recruiting and Disruption Second Suspension: 5/31/06 Retail sales in excess of product purchases	Danny McDaniel
Rob DeBoer	February 2, 2001	May 3, 2006 Cross Recruiting and Disruption	Mark Leitgib
Karen Ford	No Distributor Application Joined in July 1994. 7RR 201	June 23, 2004 Cross Recruiting	Mitch Creel
Herb Heflin	No Distributor Application Joined February 1998. 4RR 204	May 18, 2005 Cross Recruiting and Disruption	Danny McDaniel
Diane Heflin	No Distributor Application Joined February 1998. 4RR 204	None	None
Larry McDaniel	No Distributor Application Joined February 1995. 7RR 35	April 11, 2005 Cross Recruiting	Mark Leitgib
Rodney Powell	No Distributor Application Joined December 29, 1997. 7RR 139	August 2, 2005 Cross Recruiting and Disruption	Danny McDaniel

Levy 3RR 95-96

III. The AdvoCare Witnesses.

Plaintiffs called two of the five AdvoCare witnesses in Plaintiffs' case-in-chief, AdvoCare's present General Counsel Allison Levy, and the immediately preceding

General Counsel, Brent Kugler. The two General Counsels performed all the terminations. See the termination letters in Appellees' Appendix A-3.

The other three witnesses AdvoCare called in AdvoCare's case-in-chief were the three complainants against Plaintiffs, Mitch Creel, Mark Leitgib and Danny McDaniel. Creel complained against Karen Ford, Danny McDaniel complained against Powell, Brown and Herb Heflin (not Diane), and Mark Leitgib complained against Larry McDaniel and Rob DeBoer.

Leitgib and McDaniel were the only two Platinum (top) distributors in the AdvoCare hierarchy. Leitgib. 8RR 164.

Leitgib testified he made over $1 million from AdvoCare in 2008, the year prior to his testimony. Leitgib 8RR 179. He testified he made more than $12 million from AdvoCare since 1994. Danny McDaniel testified he made more than $1.4 million from AdvoCare in 2008 (8RR 217) and has made more than $1 million from AdvoCare for each of 9 years.

Leitgib and McDaniel are AdvoCare's "Million Dollar Men," so their complaints are given considerable weight by AdvoCare.

The AdvoCare pyramid structure is extremely deceptive in promising to deliver overrides and bonuses from the huge downlines, which flow up the pyramid. But this advantage became a huge liability when AdvoCare failed to keep its promises of ever increasing sales of ever better products, and AdvoCare' s upline sponsors wanted downline distributors terminated in order to appropriate their incomes and organizations. AdvoCare is at the mercy of frontline sponsors like Leitgib and

McDaniel, who control so much of AdvoCare's business. If they left with any significant part of their downline organizations AdvoCare would suffer large losses.

In the AdvoCare pyramid override and bonus money flowed up, and below Powell - Brown - Heflin were 3 distributors who sold so much product they were called "fireballs": Ward-Brandt-Delgado. D. Heflin 4RR 213.

In the AdvoCare compensation scheme commissions only flow up from 3 levels down, so for the McDaniels to profit from the fireballs, they had to remove Powell-Brown-Heflin, which they did. Id.

AdvoCare never even claimed Diane Heflin did anything wrong, they just fired her without any explanation. D. Heflin 4RR 214.

In May of 2005 AdvoCare fired the Heflins, then went after Rodney and Darrell in August 2005. Id. 216.

Just as McDaniel took out Powell-Brown-Heflins, Leitgib took out Larry McDaniel to get to Holley - Godwins - Denise Stephens, all fireballs (7 RR 74-75).

IV. AdvoCare' s Contract Terms And Related Conduct Were Deceptive and Misleading.

A. The Guiding Principles Omission

The contract documents in AdvoCare's Appendix omit arguably the most important part of the contractual scheme, AdvoCare's Guiding Principles adopted in Chapter 5 of the Policies, where AdvoCare agrees to follow its Guiding Principles. Appellees' App. A-4.

Ms. Levy admitted AdvoCare' s Guiding Principles established a trust relationship between AdvoCare and its distributors (3RR 113). Thus AdvoCare bore a fiduciary relationship to its distributors, and bore them fiduciary duties.

She further acknowledged that AdvoCare was obligated to "continually expand our market by providing the most effective and highest quality products and services available," as provided in §10 of the Guiding Principles. 3RR 114.

B. <u>The Multiple Contracts Confusion</u>

Defendant AdvoCare offered in evidence 9 different policies and procedures, DX-2 - DX-7; DX-111-113. 1RR 35-44. Plaintiffs joined AdvoCare at different times, and were fired at different times, and AdvoCare makes no effort in its Brief to attempt to differentiate among different policies, which have very different terms. This is confusing now and was no doubt confusing to the jury. The 1995 policies were totally different from the later policies in various respects, including terminations and AdvoCare did not comply with the terms. PX-599, Appellees' App. A-1.

Although AdvoCare changed its policies over time Plaintiffs did not receive updates as required of AdvoCare. Diane Heflin 5RR 23; De Boer 6RR 133; McDaniel 7RR 42-43; Powell 7RR 141; Ford 7RR 212.

Further, although AdvoCare wants to rely on its misleading and deceptive contract terms Plaintiffs were told they needed to spend their time selling, not reading AdvoCare's contracts. AdvoCare President Todd Cash produced a CD entitled "Bringing Your A Game" to be used by AdvoCare distributors like Rob De Boer in

which he said if a distributor spent time reading AdvoCare's distributor kit, he was reading the wrong thing and wasting his time. De Boer 6RR121, 126.

Rodney Powell was solicited to join AdvoCare by Danny McDaniel, the former water boy for Powell's high school football team. When Powell called McDaniel to ask McDaniel a question about AdvoCare's policies, McDaniel told him to put the book up and just do what McDaniel told him. 7RR 141.

Danny McDaniel, a Million Dollar Man, testified that he had read the AdvoCare policies "zero" times in the past year or so. McDaniel 8RR 217.

AdvoCare freely disregarded its policies when it chose to. For example, when Plaintiff Powell's wife died without a will AdvoCare refused to let her children inherit her distributorship. 7RR 14607. Only later did AdvoCare change its policy that inheritance had to be by will. Id.

C. At Will Termination Deception

Neither the AdvoCare distributor contracts nor its policies state that Plaintiffs as distributors of AdvoCare could be terminated at will. Nevertheless, AdvoCare's General Counsel admitted that has always been AdvoCare's position. Levy 3RR 89-90. Distributors were never told their distributorships were only at will. McDaniel 7RR 40; De Boer 7RR 23; Herb Heflin 6RR 39.

This position is highly misleading and deceptive in view of the following Policy provisions:

- Chapter 3 - Permitting distributors to renew annually and indefinitely without application by paying a renewal fee of $50.

- Chapter 3 - Permitting distributorships to be held in corporations and LLCs with perpetual life.
- Chapter 3 - Permitting distributorships to be passed by will or inheritance.

D. The Cross-Recruiting Deception

AdvoCare through its officers mis-represented to distributors the position AdvoCare now takes with respect to cross-recruiting. The term "cross-recruiting" does not even appear in the contract. Yet "cross-recruiting" was the alleged breach AdvoCare used against each Plaintiff. Brent Kugler, the AdvoCare General counsel prior to Ms. Levy, testified he told distributors they had to take affirmative steps to recruit in order to be guilty of cross-recruiting. Kugler 4RR 141. As long as somebody comes to a distributor and asks about other opportunities a distributor could talk about them and it was ok with AdvoCare. Kugler 4RR 143.

Bruce Badgett, the plaintiff in the first AdvoCare trial, testified in this case that he had been a Diamond distributor at AdvoCare. 8RR 60. Badgett was worried about possible termination, so he held a conference with then General Counsel Brent Kugler. Id. at 61. Kugler told him that he could be a distributor with other pyramid marketing firms, but should not solicit AdvoCare distributors. Id. at 63. However, if an AdvoCare distributor asked him what he was doing he could tell them, provided he did not solicit the contact. Id. at 63.

Although AdvoCare argues that cross-recruiting is a serious breach of AdvoCare's policies, permitting AdvoCare to terminate a distributor as its "sole

discretion," no distributor terminated his AdvoCare distributorship as a result of anything a plaintiff did. De Boer 6RR 165; Diane Heflin 5RR 79.

AdvoCare's General Counsel testified that AdvoCare cannot put a dollar amount on any damages that any Plaintiff caused AdvoCare. Levy 3RR 88-89.

AdvoCare's true intentions and motivations with respect to cross-recruiting and disruption are demonstrated by the fact that AdvoCare ignored cross-recruiting even when it knew about it. Jared Burnett testified as an AdvoCare distributor that he has been a distributor for other multilevel marketing companies. He said he had been called by AdvoCare with Ms. Levy on the phone line and asked not to recruit AdvoCare distributors into another company. Burnett 4RR 134. Burnett refused and continued to recruit people into other companies. Id. 135. AdvoCare did nothing. Id.

Ms. Levy admitted that she knew Jared Burnett, an AdvoCare distributor, recruited AdvoCare distributors to another multilevel company, but AdvoCare did nothing. Levy 3RR 107.

E. The Disruption Policy Deception

Plaintiffs DeBoer, Heflins, and Powell were terminated by AdvoCare for alleged "disruption to the conduct of the normal business of AdvoCare and that of AdvoCare Members." A typical consumer would assume that "disrupt" has the meaning ascribed to it in Webster's Third New International Dictionary (1993 Edition) as follows: "to break apart." It is clear from the evidence cited hereafter that Plaintiffs did not "disrupt" AdvoCare's business or the business of its members by breaking their

businesses apart. Yet AdvoCare claimed the right to terminate Plaintiffs based upon its "sole opinion" and at its "sole discretion."

There was no "disruption" by Plaintiffs as would be understood by a consumer because AdvoCare could not point to any damages sustained by AdvoCare as a result of the Plaintiffs' actions. Diane Heflin 5RR 79; Levy 3RR 88-89.

As applied by AdvoCare the term "disruption" was used to serve the purposes of a non-compete and non-solicitation agreement by the Plaintiffs. It is uncontested by AdvoCare that Plaintiffs had the right to join other enterprises and to compete with AdvoCare. See Appellees' App. A-5, p. 15. It was therefore highly misleading and deceptive to use a disruption clause as a non-compete and non-solicitation of customers agreement, which was in direct conflict with the rights of Plaintiffs under the Policies, which did not prohibit either competition or solicitation of customers.

F. <u>The No Noncompete Deception</u>

Ms. Levy admitted that AdvoCare distributors were "free to join other companies" because there is no noncompete in the AdvoCare contract. Levy 3RR 128. AdvoCare further admits distributors could compete with AdvoCare. See Appellees' App. A-5, p. 15.

Despite the admitted rights of AdvoCare distributors to work for other sales companies and compete with AdvoCare, AdvoCare went after distributors like Plaintiffs who did so. Regardless of the fact that the AdvoCare policies deceptively gave distributors the right to work for other multilevels at the same time they were working for AdvoCare, Leitgib, a Million Dollar Man, testified that it wouldn't work

because "you can't be a servant to two masters." Leitgib 8RR 193. Leitgib even admitted that "technically" AdvoCare's policies permitted a distributor to work for other multilevels. Leitgib 8RR 194.

G. The Purchase of a Business Deception

From attendance at AdvoCare training sessions Plaintiffs believed they had bought a business, or even an empire, if they wanted it. Powell 7RR 142; De Boer 6RR 123, 125; Diane Hefllin 5RR 11; 18.

In fact, according to AdvoCare, the only thing its distributors actually owned, after years of hard labor, was the $40 distributor kit they purchased at the outset. Diane Heflin 5RR 18-19. This was never disclosed at the training schools run by AdvoCare. 5 RR 19.

H. The AdvoCare/American Dream Deception

General Counsel Levy testified that the AdvoCare Power Trends magazine (PX-606) represented to distributors a powerful message that "The AdvoCare Story is the story of an American dream come true." Levy 3RR 99-102. She affirmed that AdvoCare told distributors that it was committed to them, all the time. 3 RR 101-102. In fact, the name AdvoCare comes from the company's promise to advocate and care for its distributors. De Boer 6RR 118.

To the contrary, Plaintiffs' AdvoCare experiences were financial disaster nightmares. Plaintiffs lost everything they had worked for.

I. The Unconscionable Contract

The AdvoCare contracts were unconscionable in many respects. For example,

the terms of the Arbitration Clause in the AdvoCare renewal contracts are so lop-sided, including a limitation of total damages to $2,495.00, that AdvoCare did not even attempt to enforce arbitration. *See* DX-9, 24, 33, 52, 74, and 95. This is just one example of the unconscionability of the AdvoCare contract. Other examples include the "sole opinion" and "sole discretion" termination provisions.

V. The Terminations of the Plaintiffs' Distributorships Were Deceptive and Unconscionable

The whole issue of terminations should be prefaced with the facts that Plaintiffs did not induce a single distributor to leave AdvoCare (6RR 165-6; 5RR 79) and it would have been against their interest to do so, since it would only have aggravated the declining incomes of the Plaintiffs further. AdvoCare admitted at trial that it could not prove even a penny of actual damage caused by any Plaintiff to AdvoCare's business. Levy 3RR 88-89.

Mitch Creel, a downline distributor to Karen Ford, called Plaintiff Ford and complained about the drop off in his AdvoCare income. Ford 7RR 221. Creel asked Ford about how he could become involved with Tidal Wave, a multilevel sales company selling nonsurgical facelifts. Ford 7RR 224. Thus Ford was not a solicitor and did not violate the cross-recruiting policy as alleged.

The secret tape recording used by AdvoCare to fire Plaintiff Ford was not a complete recording of any one of the many conversations that Ford had with Creel, but only had the setup statements Creel and AdvoCare wanted without the background circumstances. Ford 8RR 7-8. Creel admitted that he sent AdvoCare a single tape that in fact had 2 telephone conversations on it. Creel 8RR 151.

Mark Leitgib was upline to Larry McDaniel, and suggested McDaniel was making "m ass e-mailings" to downline distributors promoting a travel agency. 7RR 62-63. Leitgib stood to profit from McDaniel's firing. Id. In fact, McDaniel sent only 3 emails, 2 upline (including one to Leitgib), and 1 downline, about travel to AdvoCare conventions. Id.

Although Diane Heflin was fired on May 18, 2005, for cross-recruiting, she testified she never engaged in cross-recruiting. 4RR 206. There was no evidence to the contrary, and in any event the term "cross-recruiting" does not even appear in the AdvoCare contract or policies. Diane Heflin understood cross-recruiting to be crossing distributorship lines into another leg of the pyramid, an entirely different definition than the one used by AdvoCare. 4RR 211-212.

The Heflin distributorship was in Diane's name as well as Herb's. 5RR 36, 40. There have never been any charges against Diane, but her distributorship was cancelled. 5RR 37.

Danny McDaniel was told to stop preaching at AdvoCare meetings or else lose his distributorship, but McDaniel wouldn't, so he resigned his distributorship in favor of his wife and continued preaching. 7RR 155. Unlike the case with Diane Heflin, no action was taken against McDaniel's wife.

Rodney Powell had been a high school quarterback, who had recruited his center Darrell Brown, who signed up Herb Heflin, the tight end. D. Heflin 4RR 209-210. They were all below the water boy, Danny McDaniel, in the pyramid. Id.

Powell told Mark Kohler about AGEL only on condition that Kohler agreed Powell was not trying to recruit him out of AdvoCare. 7RR 148. This met all the conditions Mr. Kugler testified to as a non-violation of the policies. People with AdvoCare who joined AGEL contacted Powell, so there was no violation of the anti-solicitation rules. Powell 7RR 170-174.

Mark Leitgib was the ultimate upline of Rob De Boer. 6RR 139. De Boer's income rolled up to Mark Leitgib. Id. Leitgib turned in a document to Levy to get De Boer fired which De Boer did not author 6RR 147, 149. Leitgib also sent an email to the then president of AdvoCare which defamed De Boer (PX-151). 6RR 154-157. Levy confirmed that Mark Leitgib sent Ms. Levy the email that led to termination of Plaintiff De Boer. Levy 4RR 120.

Rick Loy, an officer of AdvoCare, told Rob De Boer that if he wanted to work for another multilevel company he could resign and leave the distributorship in his wife' s name. 6RR 142. On September 14, 2005, De Boer attempted to resign before he became involved with Burn Lounge, another multilevel in the music business, even though he was entitled to work for both multilevels. 6RR 143. De Boer never recruited AdvoCare distributors to leave AdvoCare and go to Burn Lounge, but was fired anyway. 6RR 144.

Darrell Brown was terminated in August, 2005, for allegedly cross-recruiting, but he was subsequently reinstated in good standing as stated in AdvoCare's Brief at p. 7, since there was no evidence. Nevertheless, Brown's income during suspension was forfeited. However, AdvoCare (and Danny McDaniel) again went after

Brown in May, 2006, and again suspended him, this time for alleged failure to file retail sales reports. DX-26. Brown testified that his reports had been taken and thrown away by his wife in connection with a divorce. Brown Depo. P. 41, ll.1-16. However, Brown's customers were retail customers who ordered directly from the AdvoCare website, so AdvoCare already had the sales information it wanted on its website. Brown Depo. p. 4, ll. 22-24.

Although AdvoCare now claims it cancelled Brown's distributorship, there is no termination letter in evidence, and clearly the suspension was wrongful, so AdvoCare owes the accrued income to Brown's successor, Jana Barnard, his sister and sole heir.

SUMMARY OF THE ARGUMENT

Response to Appellant's Issues

In the space of only two months two separate Dallas juries found AdvoCare guilty of multiple violations of the DTPA in this case in Judge Tobolowsky's Court and in the earlier companion case of Badgett, et al v. AdvoCare International, L.P. in Judge Slaughter' s court, which is now pending in this Court on the Plaintiffs/Appellees' Motion to Dismiss as Cause No. 05-10-00917-CV. The concurrence of two separate juries even though the cases were tried with different counsel for AdvoCare supports the deceptive, unconscionable and knowing conduct which AdvoCare continues to deny.

AdvoCare has argued throughout this case and the Badgett case that as a matter of law the plaintiffs had no standing as consumers to sue under the DTPA. The

trial court ruled to the contrary after hearing AdvoCare's Motion for Directed Verdict, as did Judge Slaughter in Badgett, following a fresh reading of *Texas Cookie Co.*, to determine that the products and services purchased by plaintiffs from AdvoCare were not merely ancillary to the purchase of their distributorships.

There is competent evidence of damages in the record of this case under governing case law, some of which AdvoCare cites but then disregards. As AdvoCare itself argues, there is no evidence in the record that there has ever been a market for plaintiffs' distributorships to support its argument that market value is the applicable legal standard.

AdvoCare's points arguing no evidence of a DTPA violation are contrary to the evidence summarized herein. There is ample evidence in the record, including testimony from AdvoCare's own witnesses, of both DTPA violations and knowing conduct.

Darrell Brown's DTPA claims survived his death. Judge Boyle's contrary conclusion with different facts in Launius relied upon by AdvoCare notes that the Courts of Appeal decisions are in conflict, and that the Texas Supreme Court has not decided the issue. Judge Boyle placed great reliance on the fact that a decedent could not " . . .testify as to mental anguish suffered or to his own peculiar situation and sensibilities." However, in this case Darrell Brown did exactly that by means of his video deposition played to the Court and jury.

It was not necessary for Plaintiffs' counsel to segregate the attorneys' fees in this case between fees incurred for the DTPA claims which the jury found for

Plaintiffs and the contract and fraud claims which the jury found for AdvoCare. The Tony Gullo Motors case cited by AdvoCare did not overrule the "inextricably intertwined" exception to the rule of segregation, it only modified it. In Gullo the Supreme Court was reviewing a situation where the plaintiff had to elect between a breach of contract claim where fees were allowed, and a fraud claim, where fees were not allowed. However, the rule still covers the situation presented in this case where the only liability award is for a DTPA claim, where attorneys' fees are recoverable, because the DTPA claims incorporate both the contract and fraud claims, as pointed out by Judge Boyle in Launius. Therefore all the legal work was necessarily "inextricably intertwined," to advance all three claims simultaneously.

Cross-Appellant Karen Ford's Crosspoint

Plaintiff Karen Ford is a cross-appellant because the Trial Court entered a take-nothing judgment against her based upon limitations. But Ford's claims are not barred by the DTPA's statute of limitations as ruled by the Trial Court because the DTPA expressly grants a 180 day extension which applied as a matter of law under the facts and circumstances of this case.

ARGUMENT AND AUTHORITIES

Standards and Scope of Review

In general, Appellees and Cross-Appellant Karen Ford agree with Appellant's statement of the Standards and Scope of Review applicable to this appeal.

I.

THE PLAINTIFFS' CLAIMS ARE BASED ON CONSUMER TRANSACTIONS

A. Plaintiffs Were Consumers

AdvoCare has conceded in its Brief on file herein that there are "more than 60,000 active AdvoCare distributorships". Brief p. 9. Further, AdvoCare admits selling approximately 350,000 distributorships since 2003. Id. The sheer numbers of customers alone militate in favor of classifying the distributors as consumers.

Under the DTPA a "consumer is an individual, a partnership, a corporation, the State of Texas, or a subdivision or agency of the State, that seeks or acquires goods or services by purchase or lease." Tex. Bus. & Com. Code §17.45(4).

O' Connor's Texas Causes of Action 2008 contains an extensive table of authorities dealing with the question of when a claimant is a consumer. Entries numbers 108 and 110 establish that Plaintiffs are consumers as follows:

CAUSES OF ACTION
CHAPTER 8
DECEPTIVE TRADE PRACTICES ACT

8-1. CONSUMER STATUS UNDER DTPA (CONTINUED)

Goods or service		Plaintiff	Defendant	Is plaintiff a consumer?	Case
108	Dealership agreement	Authorized dealer	Manufacturer	Yes. Defendant provided services in connection with dealership agreement	*Nelson,* 762 S.W.2d 744, 746 (S.A. 1988, denied).

* * *

8-1. CONSUMER STATUS UNDER DTPA (CONTINUED)

110	Distributor-ship	Pallet businessman	Company with pallet-repair system	Yes. (1) Plaintiff sought to acquire services by investing in partnership that would purchase the distributorship. (2) The services associated with the distributorship (factory leads, trade-show support, etc.) were the object of the transaction.	*Clary*, 949 S.W.2d 452, 464-65 (S.W. 1997, denied).

B. Wheeler v. Box

In this Court's leading case of *Wheeler v. Box*, 671 S.W.2d 75 (Dallas Civ. App. 1984), the Dallas Court found that although the parties specifically recognized that the business bargained for was basically a concept, rather than physical property, nevertheless the seller provided to the plaintiffs "an operations manual, wordprocessing programs, and art work and logo including negatives, together with an initial supply of presentation folders." *Id.* at 78. The court further pointed out that "additionally, the contract provided that [sellers] would provide a guide and checklist enumerating needed office supplies, equipment furnishings and space requirements, and up to 10 days on site assistance and training in Boxes' Dallas office." *Id.* at 78. Based upon these factors, the Dallas Court of Appeals found that the purchasers were indeed consumers under the DTPA.

C. **Texas Cookie Cutter**

The subsequent case of *Texas Cookie Cutter Company v. Hendricks & Peralta, Inc.*, 747 S.W.2d 873 (Tex. Civ. App. 1988) cites several authorities to reach the same conclusion as the Dallas Court of Civil Appeals in *Wheeler v. Box*, *supra*, which the Cookie Cutter Court also discussed and relied upon. In *Texas Cookie Cutter* a franchiser agreed to provide collateral services in addition to the franchise which included a "company training program, a confidential operating manual, and what was vaguely referred to in the franchise agreement as a 'unique system'. . ." *Id.* at 878. Therefore, the court held that the franchise agreement involved the transfer of goods or services for purposes of the DTPA.

D. **The Omnitrition Cases Are Distinguishable.**

The case of *Rice v. Omnitrition International, Inc.* is a 2001 unpublished opinion and therefore has no precedential value. The unpublished decision by the Federal Court for the Northern District of Texas in *Barnes v. Omnitrition*, is also a 2001 opinion and also therefore has no precedential value. Tex. Rule. Of App. Pro. 47.7 specifically provides that an unpublished opinion prior to January 1, 2003, has " no precedential value." In any event both cases are clearly distinguishable.

It appears from the decision in *Rice* at 2001 Tex. App. LEXIS 4326 that the following factual differences exist:

- The Dallas Court of Civil Appeals found that Rice had not presented a "scintilla of evidence" that he was a consumer. This should be

compared with the long list of defective goods and services complained of by Plaintiffs here.

- Rice had to annually "apply for" a renewal of his distributorship agreement, rather than simply pay a $50.00 annual tax as here. *Id.* at HEADNOTE 10.
- There was a contract provision providing for 30 day termination of the contract (*HN10*).

It should be noted that Rice recovered for damages for breach of contract against Omnitrition, although such damages were limited to damages accruing over the balance of the year of termination in view of the different contract provisions.

In Barnes the Court noted that there was no evidence of the importance of the services furnished or of products purchased for personal use. In this case there is evidence with respect to both the importance of services purchased and the volumes of retail sales and purchases by Plaintiffs.

In contrast to the unpublished and therefore unreliable opinions in *Rice* and *Barnes*, there is an earlier opinion by the Dallas Court of Appeals in connection with the determination of who is a consumer under the DTPA, *Wheeler v. Box*, supra.

E. The Mary Kay Case Is Distinguishable.

In the case of Blackmon-Dunda v. Mary Kay, Inc., 2009 WL 866217 (Tex.App.-Dallas 2009, pet. den., not reported in S.W.2d) cited by AdvoCare in its Brief, this Court held that the plaintiff's DTPA claim based upon being a consumer of defective

services was not before the court because the services claim had not been pleaded in the trial court.

As to the plaintiff's claim based upon products, none of the claims asserted was based upon the purchase of goods from Mary Kay. In this case there are numerous claims based upon products and services purchased from AdvoCare.

F. Clary Corp Is Authoritative

Clary Corporation v. Smith, 949 S.W.2d 452 (Tex.App. -Fort Worth 1997, writ den.) is another case in the line of Wheeler v. Box, supra, and Texas Cookie, supra, both of which are cited in Clary. The Court in Clary distinguished cases involving only a sale of a distributorship and held that the sale of the distributorship in Clary was more than the right to sell Clary products, "it included many services central to the transaction . . . " Id. at 465.

The Court listed the goods and services covered in Clary as follows:

> In this case, the evidence shows that the distributorship encompassed both goods and services. The goods were Clary products. The services included factory leads within the distributorships' territory on a monthly basis, local trade show support, six copies of Clary's sales video, a one percent annual advertising discount, annual prospect lists, engineering testing, a sales support package, and a sales training program.

The Court also referred to the rule of liberal construction to be applied to the DTPA:

> The DTPA's definition of "consumer" includes an individual who "seeks or acquires by purchase or lease, any goods or services . . . " TEX. BUS. & COM. CODE ANN. §17.45(4) (Vernon 1987). We are to liberally construe the DTPA and give it the most comprehensive

application possible without doing damage to its terms. *See Kennedy v. Sale*, 689 S.W.2d 890, 892 (Tex.1985).

G. Plaintiffs' Consumer Claims.

Plaintiffs had claims with respect to both AdvoCare's products and services. Plaintiffs filed affidavits detailing these claims to defend against AdvoCare's Motion for Summary Judgment, and AdvoCare offered the affidavits in evidence as to Plaintiffs. DX-15; 45; 73; 94; 104. The affidavit of Larry McDaniel appears in Appellees' Appendix as A-2 (PX-104).

Larry McDaniel had to be hospitalized as a result of taking AdvoCare products, and gained weight while taking the weight loss products. McDaniel 7RR 128-130.

As stated supra AdvoCare had to take its Ephedra and PPA products off the market, and the replacements were not effective (Powell 7RR 184-5; Heflin 6RR 83), so Plaintiffs' incomes fell precipitously, and they had to search out additional marketing opportunities as they were entitled to do.

In addition to products, Plaintiffs purchased numerous services from AdvoCare which were essential to operating and building their distributorships, including:

A. Accounting services
B. Business forms
C. Commission reports
D. Retail sales reports
E. Downline printouts
F. Override reports
G. Bonus reports
H. Annual renewal services
I. Training Services
   - Success schools
   - Conference calls
J. Product development services
K. Manufacturing services
L. AdvoCare and distributor websites
M. Shipping
N. Communications - Advolink
O. Warehousing

Diane Heflin 5RR 7-12; De Boer 6RR 122-128.

The services provided were deceptive and misleading, as set forth supra with respect to training, contract administration, product development and communications, which led to Plaintiffs thinking that AdvoCare would always furnish the best products, that they owned businesses when all they owned were $40 distributor kits, that they had businesses for life, when they were fired at will, and that they could trust AdvoCare and trust its management, when in fact they were sold down the river to humor and further enrich AdvoCare and its Million Dollar Men.

II.

DECEPTIVE TRADE PRACTICES WERE A PRODUCING CAUSE OF DAMAGES

Jury Question No. 2A submitted DTPA violations as follows:

Question No. 2A:

> Did AdvoCare International, L.P. engage in any false, misleading, or deceptive act or practice that Plaintiffs relied on to their detriment and that was a producing cause of damages to Plaintiffs?

The Plaintiffs testified they relied on one or more of the deceptive acts and practices listed supra in the Statement of Facts, and would not have spent the years it took to build their successful distributorships if they had known the truth from proper disclosures and training.

Diane Heflin testified:

> . . . I – I can't - - I can't explain the mental anguish of eight years working a business; blood, sweat and tears and being away from your family and your husband being gone and living in - - sleeping in other people's homes trying to build a business.
>
> Just the - - I can handle all of that, it's just how – what what it did. It tore our family apart. It changed the lives of our

family. We have survived. We have survived, but it moved my husband away from me, and financially we - - I depleted all of my teacher retirement. My husband depleted all of his retirement just to survive. So I have no teacher retirement. I could go on forever and ever about mental anguish . . .

5RR 64.

She further testified on cross examination:

Q: No. I'm – maybe I didn't make myself clear, Ms. Heflin. I'm saying - - I thought you said you didn't know that AdvoCare could cancel your membership.

A: I don't think I would have worked my butt off for eight years, knowing that AdvoCare could can us like that. No I would not have done that.

5RR 74.

Rob De Boer testified:

Q: Did anybody at AdvoCare ever announce to you that in order for you to continue as an AdvoCare distributor, that you are going to have to give up sole discretion of - - for whether or not you allegedly terminate any provisions in order to continue as an AdvoCare distributor?

A: Like I said, I didn't read my initial kit, but common sense would tell me, if - - if I'm going to introduce my relationships and family and actually promote a product line through my own business, and it can be terminated at the sole discretion of somebody, I would think twice about getting involved. I think, gosh, if you announced that at a conference or at any meeting or a phone call . . .

6RR 132-133.

Rodney Powell testified:

Q: Prior to the time your distributorship was terminated, did anybody with AdvoCare tell you that they could terminate you at any time on their sole discretion?

A: No.

Q: Would you have built up that business if you had known that?

A: No way.

7RR 165.

It is clear from the foregoing testimony that the Plaintiffs relied on the false, misleading and deceptive conduct of AdvoCare and would not have worked for years to build businesses that could be misappropriated by Advocare without payment in the wink of an eye.

The chain of causation from the false and deceptive acts of AdvoCare to the losses experienced by Plaintiffs is clear. Plaintiffs expended massive efforts to build what they thought were their wholly owned businesses consisting of multilevel sales organizations with thousands of downline members working for Plaintiffs' benefit. No one would have worked so long and hard to build up an asset that could be taken for no payment and given for free to an upline sponsor with more political correctness in the AdvoCare hierarchy.

Similarly, no one would have dedicated their lives and fortunes to an organization that promised to provide them with the best products and training services available, only to learn that their trainers never disclosed the risk of working at the sole discretion of managers who were only too happy to steal the fruits of their labors, and who had to pull products from the market upon which the success of the entire pyramid sales organization had been built.

III.

THE INTEGRATION CLAUSE IN THE DISTRIBUTOR AGREEMENT IS INEFFECTIVE TO NEGATE RELIANCE AND CAUSATION

AdvoCare argues that the integration clause in the Policies, Procedures and the Compensation Plan (the "Policies") alleged by AdvoCare to have been effective with respect to Plaintiffs bars Plaintiffs from relying upon any representations by AdvoCare other than those set forth in the Policies. As a matter of fact, many of the false, and misleading representations and deceptions are set forth in the policies, as set forth in the Statement of Facts. However, DTPA §17.42(a) prohibits waivers of DTPA rights as a matter of public policy, as follows:

> (a) Any waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void; provided, however, that a waiver is valid and enforceable if:
>
> (1) the waiver is in writing and is signed by the consumer;
>
> (2) the consumer is not in a significantly disparate bargaining position; and
>
> (3) the consumer is represented by legal counsel in seeking or acquiring the goods or services.

AdvoCare cites *Prudential Insurance Co. of America v. Jefferson Associates, Ltd.*, 896 S.W.2d 156 (Tex.1995) as authority for its defense. *Prudential* is distinguishable because in *Prudential* the plaintiff, a sophisticated real estate investor, purchased a building with an "as is" clause stating that he was relying upon his own examination of the property. The case is limited to the Court's interpretation of an "as is" clause as follows:

> We think it is too obvious for argument that an "as is"

> agreement freely negotiated by similarly sophisticated parties as part of the bargain in an arm's-length transaction has a different effect than a provision [**15] in a standard form contract which cannot be negotiated and cannot serve as the basis of the parties' bargain.

Id. at 162.

The purchase by Plaintiffs of distributorships from AdvoCare and the various services which the Plaintiffs also purchased with respect to product development and selection, manufacturing, accounting, warehousing, shipping, training, and related services and products was very different from the sale of a building which a sophisticated purchaser agreed to inspect and purchase "as is." Certainly Plaintiffs did not agree to purchase the distributorships from AdvoCare "as is" with AdvoCare to be divorced from operation of the business, since Plaintiffs could not possibly have operated the businesses without the services and products purchased by Plaintiffs from AdvoCare.

IV.

THE JURY'S FINDINGS OF UNCONSCIONABLE AND KNOWING CONDUCT SUPPORT A JUDGMENT AND ARE SUPPORTED BY THE EVIDENCE

A. The Findings of Unconscionable and Knowing Conduct

Jury Question No. 2B submitted unconscionable conduct to the jury as follows:

Question No. 2B:

> Did you find that the termination provisions of the AdvoCare Distributor Agreement are unconscionable and a producing cause of damages to Plaintiffs?
>
> * * *
>
> An unconscionable action or course of action is an act or practice that, to a consumer's detriment, takes advantage of the lack of knowledge,

ability, experience, or capacity of the consumer to a grossly unfair degree.

Jury Question No. 2D submitted knowing conduct as follows:

Question No. 2D:

Did AdvoCare International, L.P. engage in any such conduct knowingly?

"Knowingly" means actual awareness, at the time of the conduct, of the falsity, deception, or unfairness of the conduct in question. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

B. The Evidence of Unconscionable and Knowing Conduct

Since former General Counsel Brent Kugler and present General Counsel Allison Levy testified that they were the decision makers in terminating Plaintiffs, their knowledge is clearly relevant to the determination of whether knowing conduct occurred.

The termination letters included as A-3 in Appellees' Appendix and the conflicts of interest inherent in the terminations by AdvoCare not only as a money recipient but as a surrogate for the Million Dollar Men establish that their acts of terminating Plaintiffs and denying their appeals met the DTPA's standard for unconscionable and knowing conduct:

- Both Kugler and Levy terminated Plaintiffs without any prior warning or opportunity to either cease any alleged offending conduct or be able to defend themselves, when both Kugler and Levy knew as lawyers that there are always two sides to a story. De Boer 6RR 155; McDaniel 7RR 73; Powell 7RR 144; Ford 7RR 227-8.

- Both Kugler and Levy terminated Plaintiffs by letters which simply listed the alleged grounds for termination without identifying accusers or supplying enough information so that Plaintiffs could defend themselves to protect their substantial investments in their distributorships. See Appellees' App. A-3. As lawyers, both Kugler and Levy knew such information was critical for Plaintiffs to be able to defend themselves.
- With respect to Darrell Brown, Levy knew that virtually all of his sales were to longtime customers who ordered direct from AdvoCare, so that AdvoCare had all of the information in its computers that his retail sales receipts could provide. Brown Depo., p. 4, ll. 22-24. Levy also knew that within the year preceding his termination she had tried to terminate Darrell and had been overruled by her own hand-picked AdvoCare employee Appeal Board, yet she went ahead with a second attempt at termination.
- The policies and procedures from the time when Plaintiffs joined AdvoCare (PX-599, A-1 Appellees' Appendix) provide for prior notice of intent to terminate and progressive discipline. Levy and Kugler ignored the safeguards provided in AdvoCare's Polices and terminated Plaintiffs without prior notice or opportunity to cure or the benefit of any of the distributor rights provided in the PX-599 Policies.
- Distributors were never allowed to see any evidence against them. Levy 4RR 128. Nor were they allowed to know who their accusers were. Id.

Nor were they allowed to appear personally before AdvoCare appeals boards, which were comprised of AdvoCare employees. Id.

- Levy knew that the term "disruption" as used in the Polices was left misleading and deceptive without definition so that AdvoCare could apply the term to whatever situation AdvoCare chose. Levy knew when she alleged that Plaintiffs had disrupted AdvoCare's business that AdvoCare had no quantifiable damages as a result of anything the Plaintiffs had done. Levy 3RR 88-89.
- Kugler and Levy knew that Plaintiffs had a right to conduct other businesses and even to compete with AdvoCare (Appellees' App. A-5, p. 15), but nevertheless asserted cross-recruiting and/or disruption as grounds for termination. The use of a disruption clause as a non-competition and non-solicitation agreement was misleading, deceptive, and unconscionable.
- Ms. Levy knew there were serious questions about her judgment on distributor terminations at AdvoCare because out of 24 appeals she admitted to, even her hand picked Appeal Boards had reversed her termination decisions on 8 occasions, one-third of the total. Levy 3RR 180.
- Ms. Levy knew there was an AdvoCare distributor, Jared Burnett, who was cross-recruiting, but she took no action, demonstrating that factors other than just contract enforcement were involved. Burnett 4RR 134.

- Ms. Levy testified that a distributor's income was forfeited during a suspension even though AdvoCare determined there was no basis for a suspension, as in the case of Darrell Brown. Levy 3RR 141-142.

C. The Jury Findings of Unconscionability and Knowing Conduct Support An Award of Damage

The termination provisions of AdvoCare's contract are unconscionable under the facts of this case because they clearly took "advantage of the lack of knowledge, ability, experience, or capacity" of Plaintiffs as consumers to a "grossly unfair degree."

Question No. 2D also found knowing conduct, which means actual awareness of the falsity, deception or unfairness of conduct.

The unconscionable conduct is explicated supra.

V.

THERE IS SUFFICIENT EVIDENCE OF DAMAGES

Contrary to AdvoCare's contentions, there is ample competent evidence of damages in this case.

A. The Charge Submitted the Proper Measure of Damages

AdvoCare argues that this is a misrepresentation case, so the only measures of damage are out-of-pocket and benefit of the bargain. But this case involves at least as many failures to disclose, or omissions, as misrepresentations.

Failures to disclose include the fact that AdvoCare claimed the right to terminate its distributors at will (at AdvoCare's sole discretion), regardless of what they did, and

that AdvoCare claimed cross-recruiting for just discussing supplemental marketing opportunities.

As set forth infra, Texas has specific rules for damages where a business is destroyed. Here, one day Plaintiffs owned a business producing a substantial cash flow, from commissions, overrides and bonuses, with huge customer and downline bases. The next day after termination the Plaintiffs had nothing.

It should be noted that the Texas rules as to damages for destruction of a business are very similar to the benefit of the bargain and lost profits damage models suggested as possible DTPA measures in Texas Pattern Jury Charges (2008ed State Bar of Texas) at pp. 275-276. As stated in the PJC, "[D]amage instructions in DTPA cases are necessarily fact-specific."

The values of the distributorships testified to by Plaintiffs represented what the distributorships would have been worth had they been as represented by AdvoCare under the benefit of the bargain measure. And the formula used by Plaintiffs of applying a 5 year payout to the profits of the distributorship yielded damages similar to future lost profits. The jury also had available to it Plaintiffs' annual 1099's prepared by AdvoCare, and Plaintiffs' federal income tax returns.

The leading Texas case of *Sawyer v. Fitts*, 630 S.W.2d 872, 874-75 (Ft.Worth Civ. App.1982, no writ) holds that where a business has been totally destroyed the valuation standard is as follows:

> We hold that, under the facts in the present case, the present measure of damages for destruction of a business is measured by the difference between the value of the business before and after the injury or destruction. (Emphasis added.)

Id. at 875.

The value of the business is the measure set forth in Question No. 2C of the Court's Charge as follows:

> The value of each Plaintiffs' distributorship as of the date of termination of the distributorship.

Exh. 1 hereto.

In *Community Public Service Co. v. Gray*, 107 S.W.2d 495 (El Paso Civ.App. 1937, no writ) the court held as follows:

> The evidence required the submission of the issue of "actual" or "intrinsic" value, rather than market value, since it was not shown that there was actual buying and selling of such machines on the Fort Stockton market. *Black v. Navarrette* (Tex. Civ. App.) 281 S.W. 1087. "All of the definitions [of market value] presuppose a consensus of buyers and sellers, a current price and numerous sales." *McGilvra v. Minneapolis RY Co.*, 35 N.D. 275, 159 N.W. 854, 858.

Id. at 499.

There is no evidence of market value of the Plaintiffs' distributorships destroyed by AdvoCare. In fact, the Policies which AdvoCare claims were in effect with respect to the Plaintiffs (Appendix D-2, Chapter 6) specifically provide as follows:

> ASSIGNMENT OF AGREEMENT OF MEMBERSHIP
>
> No Agreement of Membership may be assigned to any other person or entity.

Since the Plaintiffs' distributorships were not assignable, there could be no market value. Therefore, under both the *Sawyer* and *Community Public Service* cases, the proper value to be determined by the jury was stated in the question submitted by the Court, being the value to the Plaintiffs.

In its Brief AdvoCare cites an applicable Dallas Civil Appeals case, *Rosenfield v. White*, 267 S.W.2d 596 (Dallas Civ.App. 1954, writ ref'd n.r.e.) which quotes an earlier case as follows:

> "* * * Where property is destroyed and injured which has a market value, this must be shown as the measure of damages; where it has no market value and a real value is shown, this is the measure of plaintiff's recovery; where it has neither a market value nor a real value, but it is shown what it would cost to replace or reproduce the article, then such cost is the measure of damages. But if the article has no market value nor real value, and it cannot be reproduced or replaced, then in that event it would be proper to show what it was worth to the plaintiff; that is to say, what is the actual loss in money sustained by the owner on account of being deprived thereof . . . " (Emphasis added.)

Id. at 599. However, AdvoCare fails to follow the authority of *Rosenfield.*

B. Plaintiffs' Testimony Was Sufficient

Plaintiffs offered competent testimony as to the values of the distributorships destroyed by AdvoCare. Plaintiffs were owners of the AdvoCare distributorships and therefore entitled to testify to value. Plaintiffs were qualified by their training and experience to value their own distributorships.

Diane Heflin has a business degree and two teaching certifications. 4RR 204; 5RR 46-47. Diane is from a four-generation ranching family and valued her distributorship on a five to seven year payout. 5RR 44-45. In the ranching business equipment was customarily purchased on a five to seven year payout. 5RR 46-47. She was active in managing all activities of the distributorship. 5RR 46-47.

Rob De Boer attended the University of South Carolina on a football and baseball scholarship. 6RR 111. He earned a Bachelor's degree in sports business. 6RR 112.

He worked as a financial planner for Merrill Lynch and then opened his own business, the Athlete Factory, a youth training center. 6RR 112. De Boer sold his business, so he had experience in valuing a business. 6RR 172.

Larry McDaniel ran a satellite business, Sensational Satellite, where he looked for a 20-25% return. 7RR 85. He understood that small businessmen sought a 20% return. Id. He valued his distributorship on a 5 year payout to yield a 20% rate of return. 7RR 91-92.

At the time of trial Rodney Powell was working in the Middle East as an electrical construction manager, building a gas plant in the UAE. 7RR 138. He performed all the functions of his distributorship. 7RR 163. He used a 7 year payout for his business, which was consistent with his experience in other businesses. 7RR 164.

At the time of trial Karen Ford was Sales Manager at a retail store and Sales Director for a building contractor. 7RR 201. She was the sole manager of her AdvoCare business. 8RR 10. She used a 5 year cap rate to value her business. 8RR 11.

In general, in arriving at their valuations the Plaintiffs used the cash flow from their distributorships as reported on their Federal Income Tax Returns, and in the IRS Form 1099s prepared by AdvoCare and furnished by AdvoCare to Plaintiffs. Plaintiffs then multiplied the net cash flows for the last full year of their distributorships by capitalization rates established by their own individual experiences and opinions.

A chart reflecting three of the measures of value placed in evidence, with the jury's findings is as follows:

Distributor	Testimony Value	AdvoCare 1099 Revenues for Last Full Year	Business Taxable Income for Last Full Year	Jury Verdict Value
Rodney Powell, Jr.	$133,000.00 7RR 164	$38,072.55 DX-44	$9,806.00 DX-48	$10,353.14
Karen B. Ford	$200,000.00 8RR 11		$24,956.00 DX-91	$14,542.31
Larry McDaniel	$174,000.00 7RR 86		$45,962.79 DX-101	$8,270.60
Rob De Boer	$180,000.00 6RR 175	$44,249.87 DX-10	$49,191.00 DX-19	$10,221.47
Diane* and Herb Heflin	$315,000.00 5RR 49	$86,142.84 DX-54	$29,030.00 DX-69	$17,976.12
Darrell Brown		$46,302.35 DX-27		$39,331.81

*Diane Heflin's testimony as to value was without objection. 5RR 49.

AdvoCare complains that there was no testimony as to market value, but the testimony was that there was no market for the distributorships, so under the case law cited supra any testimony or findings as to market value could not be supported. The AdvoCare Policies at C-2 of Appellant's Appendix provide in Chapter 6 that "[N]o Agreement of Membership may be assigned . . ." so there could not be a market for the distributorships.

Danny McDaniel, one of the "Million Dollar Men" presented by AdvoCare as witnesses testified there was no market for the AdvoCare distributorships. 8RR 220.

The detailed valuation procedures used by Plaintiffs clearly met the applicable legal standard of the value of the distributorships to the owners under Texas case law.

VI.

THE JUDGMENT AS TO DARRELL BROWN IS VALID

A. Darrell Brown Was Represented In The Lawsuit By His Sister

Darrell Brown was alive when this suit was filed, and was deposed by AdvoCare during the course of discovery. A video of his deposition was played at the trial for the jury. 5RR 115; 6RR 6. The court reporter did not transcribe his testimony, but an agreed transcript is in the record. AdvoCare cites Darrell's deposition at page 28 of its Brief.

Darrell's sister Jana Brown Barnard testified at trial in open court without objection that Darrell died on July 9, 2009, that she was his only heir, and that she continued the suit as to Darrell's interest because "this was so important to him. He was such a fan of AdvoCare." Jana Barnard 6RR 7.

Jana was aware that AdvoCare had suspended his income twice because Darrell would come to Jana to borrow money. 6RR 8. Jana knew that Darrell had to hire a lawyer to restore his income after the first suspension. 6RR 9.

Jana carried on the trial as Darrell's representative in Darrell's name as his sole heir. This complied with TRCP 150 and 151. TRCP 151 states that Ms. Barnard "may" have been made Plaintiff, but she elected to continue the suit representing Darrell as Plaintiff as Darrell's successor.

The Final Judgment appearing at A-1 in AdvoCare's Appendix states in the first paragraph that Jana Barnard appeared as Darrell Brown's successor. AdvoCare did

not make any objection to the charge in the Trial Court to using Darrell Brown's name, or to the form of the Final Judgment.

The case of Armes v. Thompson, 222 S.W.3d 79, 83-84 (Tex. App. -Eastland 2006, no pet.) does not support AdvoCare's argument that Jana Barnard could not act as Darrell's representative in his name. Armes involved a personal injury claim and the survival statute.

Further, in Armes the plaintiff died before suit was filed, although the petition did not mention that fact and by seeking future damages left the "definite impression" that the plaintiff was very much alive.

The Court in Armes held that the suit failed for lack of jurisdiction because at the time of filing the named plaintiff had died. This reasoning does not apply here because Darrell Brown was alive and well at the time suit was filed and even gave his deposition in this case, which was played at trial.

B. Darrell Brown's DTPA Claim Survived His Death

AdvoCare admits in its Brief that Texas Appellate Courts are split on the issue of whether DTPA claims survive the death of the claimant, citing Launius v. Allstate Insurance Co., 2007 WL1135347 (ND Tex. 2007) (unpublished opinion).

Significantly, in her opinion in Launius Judge Boyle relied upon reasoning that it would be confusing to a juror to be asked to assess mental anguish of a consumer, or punitive damages based on "the situation and sensibilities of the parties" when the consumer was not present in court. *Id.* at *5. However, these concerns are not

present in this case because Darrell Brown testified by video deposition played for the Court and jury, which fully covered the issues which concerned Judge Boyle.

Consequently, since significant concerns which supported Judge Boyle's decision in Launius are not applicable here, and because the DTPA is a remedial statute, this Court should hold that Darrell Brown's claim survives, respect the findings of the jury, and enter judgment for Darrell's successor, his sister Jana Brown, accordingly.

VII.

PLAINTIFFS ARE ENTITLED TO RECOVER ATTORNEYS' FEES

AdvoCare argues that the legal services rendered should be segregated as between the claims submitted to the jury, being contract, DTPA and fraud, citing as authority for such conclusion the Supreme Court opinion in Tony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299, 313-14 (Tex.2006). AdvoCare argues that it is no longer sufficient to allege that the claims are "inextricably intertwined." However, the Supreme Court did not abolish the inextricably intertwined rule, but only modified it as follows:

> Intertwined facts do not make tort fees recoverable; it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated. We modify Sterling to that extent.

Id. at 314.

In Gullo, the Supreme Court was attempting to allocate as between a contract claim for which fees were recoverable, and a tort claim for which fees were not recoverable. However, in this case, the only claim found by the jury for the Plaintiff

was the DTPA claim. With respect to the DTPA claim, it incorporated both the contract and tort claim elements. In the Launius decision, supra, by Judge Boyle relied upon by AdvoCare, Judge Boyle pointed out that ". . . the DTPA embraces many common law causes of action, including breach of contract, fraud and misrepresentation." Therefore, legal services rendered to advance the claims of contract and fraud in this case necessarily also advanced the DTPA claims, so that it was not necessary to segregate as between claims, because the circumstances of this case fall within the modified "inextricably intertwined" rule adopted by the Supreme Court in Gullo.

With respect to any possible need to segregate as between claims, the Supreme Court pointed out that it was not necessary for the Plaintiff's attorneys to keep separate time records, ". . . an opinion would have sufficed stating that, for example, 95 percent of their drafting time would have been necessary even if there had been no fraud claim." *Id.* at 315.

The Supreme Court in Gullo stated that the failure by the plaintiff's attorney to segregate attorneys' fees even when required, does not mean that the plaintiff cannot recover any fees, as argued by AdvoCare, because ". . . unsegregated attorneys' fees for the entire case are some evidence of what the segregated amount should be." *Id.* at 315.

As to segregation as among the individual Plaintiffs, Plaintiffs' counsel testified that the fees charged were allocated among the individual Plaintiffs on an equal per capita basis because after a review of the time records counsel concluded that the

time spent on each Plaintiff's case was about the same. Masterson Trial Testimony, 8RR 79-80. This testimony appears to be well within the standard in Gullo that the Plaintiffs may simply estimate the allocation, which was adopted by the jury in its findings.

Therefore, judgment should be entered for the attorneys' fees as found by the jury.

APPELLANT KAREN FORD'S CROSSPOINT

I. Limitations Does Not Bar Karen Ford's Claim

AdvoCare cites to the Court the two year statute of limitations provided in the DTPA. Tex. Bus. & Comm. Code §17.565. See Exhibit 2 hereto.

However, AdvoCare fails to cite to the Court the 180 day extension provided in the same section as follows:

> The period of limitation provided in this section may be extended for a period of 180 days if the plaintiff proves that failure timely to commence the action was caused by the defendant's knowingly engaging in conduct solely calculated to induce the plaintiff to refrain from or postpone the commencement of the action.

In its termination letter AdvoCare only set forth the alleged grounds for termination. Karen Ford Trial Testimony, 7RR 227-228.

AdvoCare never told Karen what evidence they had to support the charges. 7RR 228; 234-235. No one at AdvoCare would answer Karen's questions or return her calls. *Id.*

Karen even hired a lawyer to appeal her termination. 7RR 236. She wrote Brent Kugler, the General Counsel, a letter requesting the "clear and credible" evidence AdvoCare claimed it had, but never received anything. *Id.*

AdvoCare refused to identify Karen's accuser. 7RR 237. AdvoCare never told her that AdvoCare was basing her termination on an edited version of a tape of a telephone conference between Karen and Mitch Creel. *Id.*

Karen considered Mitch Creel to be a friend for ten years. Ford Testimony, 7RR 220-221. Creel never told Karen he had tape recorded their phone conversations. 8RR 5-6.

AdvoCare obviously knowingly engaged in concealing Mitch Creel's involvement from Karen in order to avoid a lawsuit. If AdvoCare had told Karen that Mitch Creel, one of her front line distributors who had asked for her help to save his income (7RR 221), and who had been her friend for 10 years, had turned her in for attempted recruiting and used an edited, secret tape recording, Karen would obviously have been so incensed she would have gone straight to court. Karen had already hired a lawyer to handle her unsuccessful appeal of her termination. Thus, the statutory extension period clearly applies.

The 180 day extension provided by statute is critical in Karen's case, because her claim was timely filed based upon the 180 day extension. The jury found that she should have known of the false, misleading or deceptive act or practice they found in answer to Question No. 2A and the unconscionable termination provisions found in Question No. 2B by June 29, 2004. Using the date found by the jury plus the 180

day extension allowed by statute, Karen's lawsuit filed in October 2006 was timely, and not barred by limitations.

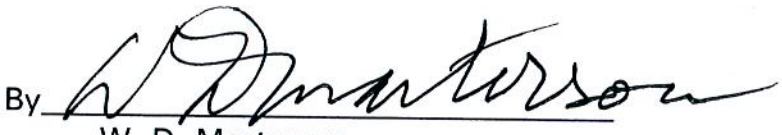
CONCLUSION AND PRAYER

Plaintiffs request the Court to affirm the Trial Court's judgment except as to Karen Ford, which should be reversed and rendered to grant her judgment for the sums awarded to her by the jury, and Appellees and Cross-Appellant Karen Ford ask for general relief.

Dated: November 18, 2010.

Respectfully submitted,

KILGORE & KILGORE, PLLC

By 

W. D. Masterson
SBN 13184000
Theodore C. Anderson
SBN 01215700
John H. Crouch, IV
SBN 00783906
Robert M. Behrendt
SBN 24012270

3109 Carlisle St., Suite 200
Dallas, Texas 75204
(214) 969-9099 - Telephone
(214) 953-0133 - Fax

ATTORNEYS FOR APPELLEES
AND CROSS-APPELLANT

CERTIFICATE OF SERVICE

This certifies that the undersigned served this Brief of Appellees and Cross-Appellant on counsel of record for Appellant via United States Mail, Certified - Return Receipt Requested, on November 19th, 2010.

Cynthia Hollingsworth
Hollingsworth Walker, PLLC
Campbell Center II, Suite 100
8150 N. Central Expressway
Dallas, TX 75206

Daniel J. Sheehan, Jr.
Daniel Sheehan & Associates, LLP
2501 N. Harwood Street, Suite 1280
Dallas, TX 75201

W. D. Masterson