IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

MELALEUCA, INC., Plaintiff, v. RICK FOELLER and NATALIE FOELLER, Defendants.	Case No. CV-2009-2616 OPINION, DECISION, AND ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

10 DEC -1 P3:58
7TH JUDICIAL DISTRICT COURT
BONNEVILLE COUNTY, IDAHO

I.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Melaleuca is an Idaho corporation that produces and markets various nutritional and cosmetic goods. The defendants Rick and Natalie Foeller case are former Melaleuca contractors residing in Ontario, Canada.

The Foellers entered into an Independent Marketing Executive Agreement with Plaintiff in September 1999. The IMEA requires contractors to pay $39 CDN, for which they receive literature and are eligible to receive commissions and prizes for selling Plaintiff's products and for enrolling other independent marketing executives with Melaleuca. The Foellers received monthly commission checks from Melaleuca until November 2008, when they ended their relationship with Melaleuca.

The IMEA contains a non-compete clause and several provisions dealing with competition and solicitation.

At some point, Melaleuca learned that the Foellers were involved with a competing corporation, Max International, during their time with Melaleuca. The IMEA expressly allows Melaleuca contractors to work for other companies, but does not allow contractors to recruit existing Melaleuca customers into any other organizations. It now appears that the Foellers enrolled a number of Melaleuca customers in Max programs while receiving Melaleuca commissions.

On April 29, 2009, Melaleuca filed this lawsuit in Bonneville County, seeking an injunction requiring the Foellers to comply with the non-solicitation provisions of the IMEA and seeking damages for refunds of commission money paid to the Foellers since June 2008.

Following lengthy procedural wrangling, Melaleuca filed this motion for summary judgment on July 9, 2010. Melaleuca argues that it is entitled to a return of commissions paid out to the Foellers from the time they first violated the IMEA in June 2008, and that no question of fact remains on that issue. The Foellers argue that the amount requested by Melaleuca is incorrect, and that the provision cited by Melaleuca is unenforceable.

Following responsive briefing, this matter was called up for hearing on October 4, 2010. Following argument from counsel, the court took the matter under advisement.

After considering the court's file, pleadings, depositions, admissions, affidavits, and the argument of counsel, the court renders the following opinion.

II.

STANDARD

Rule 56(c), Idaho Rules of Civil Procedure, provides that "summary judgment shall be

granted forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *DBSI/TRI V v. Bender*, 130 Idaho 796, 801, 948 P.2d 151, 156 (1997) (citing *Mutual of Enumclaw Ins. Co. v. Roberts*, 128 Idaho 232, 234, 912 P.2d 119, 121 (1996)).

When assessing the motion for summary judgment, all controverted facts are to be liberally construed in favor of the nonmoving party. Furthermore, the trial court must draw all reasonable inferences in favor of the party resisting the motion. *Litz v. Robinson*, 131 Idaho 282, 283, 955 P.2d 113, 114 (Ct.App.1998) citing *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991) and *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994). However, where the evidentiary facts are not disputed and the trial court rather than a jury will be the finder of fact, summary judgment is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences. *Riverside Development Co. v. Ritchie,* 103 Idaho 515, 519 (Idaho 1982). If reasonable people could reach different conclusions based on the evidence, the motion must be denied. *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994); *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 720, 791 P.2d 1285, 1299 (1990).

The nonmoving party "may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided..., must set forth specific facts showing that there is a genuine issue for trial." I.R.C.P. 56(e). In attempting to establish such facts, "a mere scintilla of evidence or only slight doubt as to the facts" is insufficient to create a genuine issue of material fact. *Samuel v. Hepworth, Nungester &*

Lezamiz, Inc., 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). In other words, "the party opposing the motion must present more than a conclusory assertion that an issue of fact exists." *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 401, 987 P.2d 300, 313 (1999).

III.

ANALYSIS

Melaleuca argues that summary judgment is appropriate on its claim for a repayment of $31,860.64 CDN paid to the Foellers from June 2008 until they left Melaleuca. The Foellers argue that Melaleuca has failed to establish that $31,860.64 is an accurate sum under the IMEA and that the provision in the IMEA is an unenforceable forfeiture clause.

Amount Sought

Melaleuca originally requested the repayment of $31,860.64 in commissions. Melaleuca initially alleged that Tracy Leigh was among the Melaleuca customers improperly recruited to Max by the Foellers. However, at oral argument, Melaleuca conceded that the Foellers did not improperly enroll Leigh, and that the $8,004.23 related to her sales should not be considered against the requested repayment. This lowers the requested amount to $23,856.41.

The Foellers also argue that Melaleuca improperly calculates the amount paid to the Foellers. The Foellers allege that they were never paid for October 2008, commissions that would have amounted to $7,968. Melaleuca argues that the $7,968 for October was never included in its calculations.

Examining the testimony and evidence presented by Melaleuca, it appears that Melaleuca never included the $7,968 in its calculations. The final commission payment that Melaleuca seeks was issued on October 17, 2008 for $7,853.98, representing commission payments for September 2008. The Foellers do not appear to argue that they are entitled to the $7,968 in

commission payments for October 2008.

$23,856.41 appears to be an accurate sum representing the repayments currently sought by Melaleuca.

Policy 20

The parties' chief disagreement concerns the applicability and legality of Policy 20 of the IMEA.

Policy 20 is a lengthy section of the IMEA entitled Non-Solicitation and Conflicts of Interest. It forms the basis of Melaleuca's complaint against the Foellers. The Foellers argue that Policy 20 contains an illegal liquidated damages provision and that Melaleuca's cause of action is barred under Idaho law.

Policy 20 allows Melaleuca contractors to participate in other business activities while they work for Melaleuca. However, the IMEA contains a number of limitations on the competing business activities. The relevant limitation is: "During the period that their Independent Marketing Executive Agreements are in force Marketing Exeuctives and all members of their Immediate Household are prohibited from directly, indirectly or through a third party recruiting any Melaeluca Customers or Marketing Executives to participate in any other business ventures." Policy 20 (a)(i).

The IMEA Melaleuca Definitions of Terms defines "recruit" as:

> 1) To attempt to enroll, enlist, or solicit an individual or entity to join a business, program or organization; or 2) to attempt to promote, influence or encourage an individual or entity to join a business, program or organization; or 3) to present, or participate or assist in the presentation of a business, program, organization or its products. To constitute recruiting, such efforts or attempts may be performed either directly through personal contact or indirectly through a third party.

Policy 20 also states:

> Violation of any provision of this Policy 20 constitutes a Marketing Executive's voluntary resignation and cancellatuion of his/her Independent Marketing Executive Agreement, effective as of the date of the violation, and the forfeiture by the Marketing Executive of all commissions or bonuses payable for and after the calendar month in which the violation occurred.
>
> Policy 20(c)(i).

Melaleuca argues that the quoted provisions of the IMEA allow it to demand repayment of all commission payments since June 2008, when the first violation of Policy 20 was alleged to have occurred. The Foellers argue that the forfeiture provision of Policy 20 constitutes a liquidated damages policy and an illegal penalty.

Liquidated damages policies are not per se unenforceable. The Idaho Supreme Court has held:

> Generally speaking, parties to a contract may agree upon liquidated damages in anticipation of a breach, in any case where the circumstances are such that accurate determination of the damages would be difficult or impossible, and provided that the liquidated damages fixed by the contract bear a reasonable relation to actual damages.
>
> *Graves v. Cupic,* 75 Idaho 451, 456, 272 P.2d 1020, 1023 (1954).

Melaleuca argues that the provision is not a liquidated damages policy, because it does not set out a fixed amount the Foellers must pay regardless of the loss suffered by Melaleuca. Rather, the contract calls for the Foellers to now forfeit any commissions they received after violating the contract.

Generally, a provision for liquidated damages will enumerate a specific sum to be paid. *See* 25 C.J.S. Damages § 175 (Citing *Hamming v. Murphy,* 83 Ill. App. 3d. 1130, 404 N.E.2d 1026 (2d Dist. 1980) "It has been held that to be valid, a provision for liquidated damages must be for a certain sum.").

Though the clause in Policy 20 bears some similarity to a liquidated damages clause, it does not require a specific sum to be paid. The purpose of liquidated damages clauses is to allow parties to agree to a reasonable sum where it might otherwise be difficult to determine damages for a breach; here, the IMEA states exactly how the parties will determine what payment should be forfeited. Additionally, as Melaleuca points out, liquidated damages are often valid contract tools.

However, it is not necessary for a provision to be styled as a liquidated damages clause in order for it to be an illegal penalty. "[W]here the forfeiture or damage fixed by the contract is arbitrary and bears no reasonable relation to the anticipated damage, and is exorbitant and unconscionable, it is regarded as a 'penalty', and the contractual provision therefore is void and unenforceable." *Magic Valley Truck Brokers, Inc. v. Meyer,* 133 Idaho 110, 117, 982 P.2d 945, 952 (Ct. App.1999).

Clauses intended to punish a breaching party are not allowed in Idaho contract law. As the Court of Appeals states:

> Historically, courts of equity developed a rule, later adopted by courts of law, that contractual clauses prescribing penalties for a breach of the contract would not be enforced because of the potential for over-reaching and unconscionable bargains. JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS, § 14-31, at 589 (4th ed.1998). Modern courts continue to refuse to enforce contract clauses that appear designed to deter a breach or to punish the breaching party rather than to compensate the injured party for damage occasioned by the breach. CALAMARI & PERILLO, *supra,* § 14.31, at 590. *See also Graves v. Cupic,* 75 Idaho 451, 456, 272 P.2d 1020, 1023 (1954).

Magic Valley Truck Brothers, 133 Idaho at 117.

Melaleuca states that the amount requested is reasonable because it exactly matches the damages Melaleuca suffered as a result of paying commissions to the Foellers. This argument is unconvincing based on the evidence currently before this court. Melaleuca seeks to retroactively

take money paid to the Foellers for sales commissions; there is no argument or evidence that these commissions were not tied to profitable sales as a result of the Foellers' work as contractors for Melaleuca or that these are recognizable damages. Rather, it appears that, lacking other evidence, Policy 20(c)(1) acts solely to "deter a breach or to punish the breaching party."

There remains a genuine issue of material fact as to what damages Melaleuca suffered as a result of the Foellers' recruitment of Melaleuca customers and executives into Max. Summary judgment is not appropriate on this issue and will be denied.

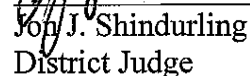
IV.

CONCLUSION

Plaintiff's Motion for Summary Judgment is DENIED.

IT IS SO ORDERED.

Dated this 1st day of December, 2010.



Jon J. Shindurling
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 2 day of December, 2010, I served a true and correct copy of the foregoing OPINION, DECISION, AND ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT upon the parties listed below by mailing, with the correct postage thereon, or by causing the same to be delivered to their courthouse boxes.

Attorneys for Plaintiff

James R. Holman
Thomsen Stephens Law Offices
2635 Channing Way
Idaho Falls, ID 83404

Brent Manning
Manning Curtis Bradshaw & Bednar
170 South Main St., Ste. 900
Salt Lake City, UT 84101

Attorney for Defendants

Richard J. Armstrong
500 Eagle Gate Tower
60 East South Temple
Salt Lake City, UT 84111

Ronald Longmore
Clerk of the District Court
Bonneville County, Idaho

by G Walters
Deputy Clerk