The ‘Windfall Gals’ Reject Mfr.’s Contention that Paying the Rep Was a Windfall

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Just months ago, on the fifth floor of the courthouse in a sleepy Philadelphia suburb, an international manufacturing conglomerate squared off for 3½ days against a local sales rep. The battle was over commissions due under the terms of their contract, plus statutory damages. In a first for this counsel (and the seasoned trial judge), a single-sex jury was selected: eight women who, for reasons explained below, would later form a chat group known as the “Windfall Gals.”

# Background

Rigorous Electronics Performers, LLC or REP (not its real name) contracted with Manipulating Financial Results, Inc. or MFR (also a pseudonym) to represent its product line in an Atlantic seaboard territory. MFR’s key personnel knew REP’s salespeople from their joint service at a previous manufacturer. When an opportunity arose to develop sales at a large customer of MFR whom they had all previously called upon, it was only natural for MFR to reach out to the familiar sales professionals at REP.

These familiar faces explained to REP that MFR was owned by a foreign concern with no experience using independent reps, and strongly urged Rep to avoid rocking the boat.

# The Contract

The parties’ written agreement was mostly unremarkable, calling for REP to receive a 5% commission on all sales into its territory. Termination could be affected via certified mail with 30 days’ notice, and payment of all commissions due within 120 days of the notice. Changes to the agreement required the written consent of both parties.

Tucked away in the agreement, however, was one cryptic sentence that read: “Manufacturer reserves the right to reduce commissions on ‘windfall projects.’” Unlike other contract terms like “Products,” “Order,” and “Net invoice price,” the unusual phrase “windfall projects” was not defined.

# The Rep Grows the Business and Pays the Price

REP proceeded to prioritize this project for MFR, and the results were self-evident. After spending years working closely with the customer and building demand for

MFR’s product, REP successfully opened the firehose to a flow of sales that would exceed $50 Million.

Its reward? Just prior to the project entering the production phase, an ominous conference call with certain MFR officials was scheduled.

Because business was booming and MFR had never complained about its performance, REP had no reason to foresee the incoming blow. During a call that MFR’s own witness at trial described as a “one-way discussion,” REP was told its 5% commissions would be slashed for the production phase of this project to only 1.5%. MFR higher-ups had purportedly decided cost cuts were needed for the project to work.

REP responded that this massive 70% reduction was “unacceptable,” but to no avail. The decision had already been made and the conference call was organized merely to convey it.

The true Hobson’s choice that confronted REP is all too common for successful sales reps. A sales rep spends years of time, effort and resources developing and growing business at a major account, and then falls victim to a principal who exploits the rep’s vulnerable position by disregarding the contract terms and reducing commissions.

Unable to affect the decision already made, does a rep, with employees and their families to consider in addition to other costs, quit in protest and walk away from a 1.5% commission of the production volumes? Or does the rep keep its shoulder to the wheel and accept the commissions it can get from a project painstakingly cultivated, and then hope it can protect its contract rights?

# Termination: A Comedy of Errors

To make matters worse for REP, once production sales were well underway, MFR often paid even less than the 1.5% rate. Further, even though REP followed MFR’s advice about not rocking the boat, it still got terminated – as part of a corporate reorg – together with several other reps. REP learned of this when it opened its mail to find a notice of termination dated January 2020 addressed to REP, but stating that MFR “wishes to terminate our current Representative Agreement with” – *a different rep*.

MFR soon recognized its mistake and sent a corrected notice actually terminating REP. Yet, both of these letters were sent U.S. Mail when the parties’ contract, wholly drafted by MFR, required such notices to go out certified mail.

A demand letter on behalf of REP soon issued to MFR seeking to resolve the dispute out of court at the contractual commission rate, and pointing out the ineffective termination notice. In response, MFR made no effort to settle, but in August 2020 sent a new termination by certified mail. This certified mailing referenced and enclosed a copy of the *original* notice terminating a *different* rep, not the corrected notice.

In response to the demand letter, MFR’s counsel asserted for the first time that the commission reduction unilaterally taken was on a “windfall project” that REP had not impacted.

# The Legal Claims

Consistent with Pennsylvania law (and the law in many other states), REP was not required to terminate after suffering MFR’s commission cut to preserve its right to get paid at the contract rate. Instead, after protesting the reduction, it could continue to perform and bring suit following termination to recover the underpaid commissions.

REP claimed not only for breach of contract, but also under the New Jersey Sales Representative Act to recover an additional three times the commissions due, plus attorney’s fees and costs. The statutory claim will likely form the subject of a separate column.

# The Evidence at Trial

The ladies of the jury received evidence of the contract’s terms, including the 5% commission rate and how amendments required both sides to consent in writing. They also heard undisputed testimony about the years-long effort of REP to develop the subject business on a priority basis for MFR to the tune of $50M in sales before termination.

Unable to dispute that the contract called for a much higher rate than it paid, MFR tried defending at trial with two main arguments. By cashing the commission checks at the reduced rate, MFR argued to the jury, REP waived any right to complain about the lower rate. And MFR presented its primary defense that it had a contractual right to lower REP’s commissions on what it claimed was a “windfall project.”

Witnesses for both sides testified that REP pushed back when informed of the massive rate cut by stating it was “unacceptable,” and the jurors accepted that REP then followed MFR’s instructions by not rocking the boat. They easily found no waiver had occurred.

Meanwhile, the jurors took their nickname from listening with disbelief to MFR’s argument that the $50M in sales substantially generated by REP should be viewed as a “windfall project.” Not only did they refuse to allow MFR to define this term for the first time at trial, but they recognized that because this term was never used during REP’s period of service that the only proper means to reduce commissions was via the contract’s amendment process – requiring the consent of both sides.

**The Jury Verdict**

Taking only about two hours to deliberate, including lunch, the jury returned a verdict in favor of REP, and started counting the commissions due 120 days from the August 2020 termination notice, not the invalid January attempt urged by MFR. This yielded a healthy recovery for REP, even before counting the statutory damages and attorney’s fees made available under the New Jersey rep act.

The verdict also provided vindication for one rep’s decision to stand up for itself rather than allowing a manufacturer to ignore key terms in its own contract and wrongfully keep for itself hundreds of thousands in earned commissions. To their credit, the Windfall Gals sent a decisive message against bullying a sales rep.