ORIGINAL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE 162

IN AND FOR NEW CASTLE COUNTY

RYPAC PACKAGING MACHINERY INCORPORATED,

Plaintiff and
Counterclaim-Defendant,

and

JOSEPH POGES,

Counterclaim-Defendant,

v. Civil Action No. 16069

DANIEL COAKLEY and PACKAGE AUTOMATION COMPANY,

Defendants and
Counterclaim-Plaintiffs,

PAUL OSBORNE, ROBERT WISCHHUSEN and PENNDEL PACKAGING, INC.,

Applicants for Intervention.

MEMORANDUM OPINION

Date Submitted:, November 19, 1999
Date Decided: May 1, 2000

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JACOBS, VICE CHANCELLOR

In this action the plaintiff, Rypac Packaging Machinery Incorporated ("plaintiff' or "Rypac"), claims that defendant Daniel Coakley ("Coakley"), a Rypac former director and officer, breached his fiduciary and contractual duties to Rypac by competing with Rypac after he purported to resign from it. Rypac also charges Coakley with various tort violations. Named as a co-defendant is Package Automation Company ("PAC"), a company that Coakley owns and controls.

PAC has asserted counterclaims against Rypac and Joseph Poges ("Poges"), Rypac's sole remaining officer, for wrongfully causing Rypac to withhold commissions due Coakley on sales that Coakley made before he resigned from Rypac.

Thereafter, Robert Wischhusen ("Wischhusen") and Paul Osborne ("Osborne"), two sales representatives who also had left Rypac, (collectively, "Intervening Defendants") intervened in this action.' The Intervening Defendants claim that Rypac owes them commissions that Poges wrongfully withheld. In response, Rypac has asserted a claim against the Intervening Defendants for aiding and abetting Coakley in breaching his fiduciary duties to Rypac.

This is the Opinion of the Court after a trial on the merits of all these claims. For the reasons discussed below, I conclude that all but one of Rypac's claims lack

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[1]A third Intervening Defendant is Penndel Packaging, Inc. ("Penndel"), a Wischhussen-owned company.

merit, and will therefore grant judgment for the defendants and Intervening Defendants on those claims. The sole exception is the plaintiffs claim to recover certain commissions diverted from Rypac by Coakley and the Intervening Defendants, on which claim I will grant judgment for Rypac. Lastly, I determine that the defendants and Intervening Defendants are entitled to judgment on their counterclaims, except for their Delaware Wage Act claim for liquidated damages.

I. RELEVANT FACTS

In 1986, Daniel Coakley and Joseph Poges left their employment with Professional Packaging Associates ("PPA"), to start their own business. They formed a partnership named "Rypac." In their new capacities as Rypac partners, Coakley and Poges acted as independent sales representatives for manufacturers of packaging machinery in substantially the same territories they had previously serviced for PPA. Poges covered New Jersey, and Coakley covered New York and Connecticut.[2] Both partners agreed that each would be responsible for generating all sales within his assigned territory, and that each would receive 80% of the gross commissions due them based upon the sales they respectively generated. The remaining 20% of the gross commissions would be paid to Rypac

[2]TR Poges 19; TR Coakley at 264.

to defray joint expenses and to make contributions to each partner's individual retirement account.[3]

In December 1987, because of concerns about individual liability risks, Poges and Coakley decided to incorporate Rypac.[4] Accordingly, they formed a Delaware corporation named Rypac, to which they transferred the partnership assets. The two former partners each received 50% of Rypac's stock, and also were elected as Rypac's sole directors and officers, with Coakley serving as President and Poges as Vice-President and Secretary/Treasurer.' Coakley and Poges also agreed to, and later did, enter into a Shareholder's and Officer's Agreements with Rypac. The relevant provisions of the Officer's Agreement are discussed infra in greater detail.[6]

After incorporating Rypac, Coakley and Poges continued operating the business as they did when Rypac was a partnership, except that eventually Coakley and Poges each employed subagents to help expand their respective (and

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[3]TR Coakley 265.

[4]TR Poges 8-9; TR Coakley 266-67.

[5]PX 30; DX4; PX 31.

[6]Id.

separate) territories.[7] Coakley brought into the firm as subagents his brother Donald Coakley as well as Andy Grospin ("Grospin") and Rick Marshall ("Marshall"). Poges brought into his firm as subagents Osborne, Wischhusen and Dan Willis ("Willis").[8]

Coakley and Poges each continued to be exclusively responsible for the sales in his respective territory, and neither received any income from sales generated by the other.[9] As compensation for their sales efforts, Coakley and Poges received 75% of the gross commissions collected on their individual sales, payable within 30 days after Rypac received the commissions.** Of the remaining 25% of gross commissions, 10% was deposited in the retirement plan of the person responsible for the sale, and 15% was paid to Rypac to defray expenses that Rypac incurred."

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[7]TR Coakley 267.

[8]PX 1 to 5 and 10-12.

[9]TR Coakley 267.

[10]Although the Officer's Agreement provided that each officer would receive 80% of the gross payments, at some point Coakley and Poges informally agreed to receive 75%, thereby amending the Agreement in that respect. TR Poges 17-l 8.

[11]Id. Coakley and Poges compensated their subagents differently, however. Poges' subagents received 90% of each gross commission that they earned with the remaining 10% going to Rypac for expenses, whereas Coakley's subagents received 75% with the remaining 25% going to Rypac for expenses. TR Osborn 346; TR Wischhusen 426.

Rypac did not retain the amounts that were contributed to it for expenses.[12] That is because expenses were classified as either corporate (in which case they were shared equally between Coakley and Poges)[13] or individual[14] (in which case they were allocated among, and paid by, Coakley, Poges and their subagents).[15] Once Rypac's expenses were thus allocated, if the total contributions to Rypac for expenses exceeded the amount of expenses Rypac actually incurred, the excess was distributedpro rata as additional compensation to Coakley and Poges.[16] If, on the other hand, the amounts contributed by each officer and his subagents fell short of the total expenses attributed to that officer's "side" of the business, that officer would pay Rypac the difference.[17]

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[12]TR Poges 116-24.

[13]Corporate expenses included items such as professional fees, licenses and permits, lease and office expenses, and taxes. Typically, these expenses amounted to approximately $40,000 per year. DX 39; TR Poges 121-22.

[14]DX 39.

"For example, DX 36 and DX 39 show how each representative was charged separately for the amount of time Rypac's secretary, Linda Newberger, spent working on its projects.

[16]TR Poges 116-24. In calculating the amount of any such distribution, Coakley and Poges were each charged with the expenses allocated to all their subagents in their respective territories. TR Poges 116-24; TR Coakley 269-27; DX 36-DX 39.

[17]TR Poges 18-19; TR Coakley 271.

By the very nature of this expense allocation system, at the end of each year Rypac always had no income.[18]

A. The Sales Representative's Role

In this industry, persons associated with companies such as Rypac typically serve as independent sales representatives for manufacturers of packaging machinery. Those manufacturers are called "principals."" A sales representative's role involves not only negotiating the sale, but also working closely with the customer and the principal to customize the specifications for the customer's particular process.[20] Typically, a potential sale is identified by a principal, who then contracts with a sales representative at a company like Rypac to call upon the potential customer and negotiate an order.[21] After an order is placed, the sales representative continues to serve as the contact between the principal and customer, to coordinate the delivery and installation of the equipment ordered, and to respond to any customer questions or problems in

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[18]TR Poges 117; TR Willis 226 (stating that "year to year the corporation was run as a zero sum gain").

[19]TR Poges 5-8; TR Coakley 266.

[20]TR Poges 5-6, 59-65.

[21]TR Poges 59-65.

connection with the sale.[22] The sales representative has the authority to bind the principal throughout the entire process, which may take months to conclude.[23] Given the importance of the independent sales representative's role, the principal has a strong interest in choosing a sales representative with experience and a record of good relationships with customers.[24]

Principals and sales representatives frequently enter into agreements that give the sales representative an exclusive right to market the principal's machinery. But, such agreements are usually terminable on thirty days notice.[25] Under the industry practice, once an exclusive agreement is terminated, the principal is free to choose a new sales representative to complete the sale on which the former representative had been working. Unless he receives "commission protection," the former representative loses any right to a commission generated by that sale.[26]

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[22] Id.

[23] Id.

[24] TR Wolford 382; TR Fissel415.

[25] TR Poges 98, 196-97; TR Willis 226-27; TR Fissel 405; PX 12; DX 68; IDX 45; IDX 43, ¶ 16.

[26] TR Wolford 393-94.

To protect his commission interest, a sales representative often will request "commission protection," which usually takes the form of a fixed contractual time period during which the sales representative is allowed to, and must, complete the contract in order to receive the commission.[27]

B. Coakley Leaves Rypac

In September 1997, Coakley decided to leave Rypac and continue in the business of selling packaging machinery through his own company.[28] On October 10, 1997, Coakley met Poges for breakfast and told Poges that he had been unhappy with their relationship for some time, that he was resigning from Rypac, and that he would continue working in the packaging machinery industry in competition with Rypac.[29] Poges voiced no objection.[30]

Coakley then called Rypac subagents Donald Coakley, Wischhusen, Osborne, and Grospin, to inform them that he had resigned.[31] Coakley also sent a letter to certain principals, advising them of his resignation.[32]

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[27]TR Poges 137, 140-41; TR Wolford 393-94; TR Fissel 406-407.

[28]TR Coakley 276-79. That company later became PAC.

[29]TR Poges 29; TR Coakley 282.

[30]TR Poges 127-29; TR Coakley 283.

[31]TR Coalcley 283.

[32]TR Coakley 282-83.

3. Events After Coakley's Resignation Announcement

1. Wischhusen and Osborne Resign

On October 11, 1997, all of Rypac's employees went to Las Vegas to attend a trade show.[33] After arriving, Coakley met with Wischhusen, Osborne and others for a previously arranged golf outing.[34] Coakley was asked about his resignation from Rypac and about his future plans, but felt it was inappropriate to discuss the matter at the golf outing.[35] Coakley scheduled a breakfast meeting to discuss his plans with Wischhusen and Osborne for the following Monday, October 13, 1997.[36]

At that breakfast meeting, Coakley outlined his plans, and invited Wischhusen and Osborne to join his new firm, PAC. Both agreed to join Coakley.[37] Wischhusen and Osborne then sought out Poges, who was also attending the trade show, and told Poges that they were resigning from Rypac.[38] Osborne and Wischhusen were free to do that, since neither had ever entered into a

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[33] TR Coakley 284.

[34] Id.

[35] TR Coakley 285-86.

[36] TR Coakley 285-87; TR Osborne 366; TR Wischhusen 432,444.

[37] Id.

[38] TR Osborne 366-67; TR Wischhusen 433.

non-compete agreement with Rypac.[39]

2. Rypac and PAC Compete

Over the next three weeks, Coakley and Poges each made presentations to Rypac principals, including those who had retained Rypac on an exclusive basis.[40] As the sales manager of one principal (Hi-Speed) explained, it was important for the principals to decide quickly who would represent them, to assure that they would not lose business.[41]

Certain of Rypac's exclusive agreements permitted the principal to terminate the contract if there was a change in Rypac's ownership. For example, Rypac's exclusive agreement with Mateer-Burt permitted Mateer-Burt to terminate "immediately on notice to [Rypac] in the event that . . . (ii) either Poges or Coakley ceases to own, individually, shares of [Rypac] which represent at least 26% of the regular voting power of [Rypac], (iii) Poges or Coakley ceases to participate actively [Rypac's] activities pursuant to this Agreement. . ."[42] Rypac's exclusive agreement with SASIB was similarly subject to immediate termination

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[39]TR Poges 23-24; TR Osborne 346; TR Wischhusen 425-26.

[40]TR Poges 43-44; 127-29; TR Coakley 292; TR Fissel 410-15; TR Wolford 387-92.

[41]TR Wolford 387.

[42]PX 12, ¶ 12.2.

by SASIB "upon a change in ownership, management or geographical location of [Rypac]. . ."[43]

After hearing presentations from PAC and Rypac, three principals decided to terminate their exclusive contracts with Rypac and enter into new exclusive contracts with PAC.[44] At that point, Poges and Rypac became free to -- and did -- seek commission protection on sales that Rypac was currently pursuing for SASIB, Mateer-Burt and Hi-Speed, and they received such protection on some of the projects on which Poges was working.[45] Importantly, Poges did not ask for (or receive) commission protection on the ongoing projects of the sales representatives who were leaving Rypac to join Coakley.[46]

Shortly after PAC and Rypac began competing against each other, Poges

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[43]IDX 45, ¶ 10.D. Rypac's agreement with Hi-Speed did not literally provide for termination upon a change in ownership of Rypac, but it did define the representative, Rypac, as "consisting of Daniel P. Coakley located at 23 Dingle Brook Lane, Newtown, Connecticut 06270 and Joseph Poges located at 27 Warren Cutting, New Jersey 07930." In this way, the practical effect of a change of Rypac's ownership would be the same. DX 68.

[44]TR Coakley 292-93. Hi-Speed, chose PAC because Rypac's presentation "was not clear enough for Hi-Speed to feel comfortable" with Rypac's ability to support continued sales growth. TR Wolford 381, 387-92. Hi-Speed was also concerned with the fact that Poges, who was requesting to continue the relationship with Hi-Speed, did not take the lead in presenting Rypac's proposal. TR Wolford 388-89. Another principal, Mateer-Burt, felt that the personnel at PAC could obtain more business for Mateer-Burt based on their experience, relationships with customers and knowledge of equipment. TR Fissel 415.

[45]TR Poges 137-38.

[46]TR Poges 137-41.

began withholding -- from Coakley and the other sales representatives who had left Rypac -- commissions earned on sales that had been completed before their resignations but that were paid to Rypac after their departure.[47] In an effort to resolve this dispute, Coakley tied to contact Poges by telephone and letter on several occasions, but Poges refused to communicate with him.[48]

Coakley reacted to Poges' stonewalling by writing letters to certain Rypac principals, asking them to send commission checks on sales they had completed under Rypac, directly to Coakley rather than to Poges.[49] Coakley intended to deposit those checks in a bank account he had created in the name of Rypac, and from that account he would disburse funds in the manner Rypac had historically employed to compensate Rypac's representatives.[50]

In an apparent further effort to procure the release of the withheld commissions, Coakley wrote a letter to Poges on December 11, 1997, stating that he had "not terminated [his] presidency or officers [sic] position with Rypac."[51]

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[47]TR Coakley 297-302.

[48]Id.

[49]TR Coakley 297-302, 335-36; PX 38; PX 39.

[50]TR Coakley 297-302, 335-36.

[51]TR Coakley 301-302; PX 45.

This lawsuit by Rypac followed.

II. THE CONTENTIONS

Each side has asserted numerous claims against the other. The plaintiff, Rypac, claims that Coakley: (1) breached his fiduciary duty by usurping a corporate opportunity belonging to Rypac, (2) breached the provision of the Officers' Agreement that required Coakley to devote his time exclusively to performing his duties as a Rypac officer, (3) committed tortious interference with Rypac's existing contracts, and (4) unfairly competed with Rypac. The plaintiff also claims that the Intervening Defendants aided and abetted Coakley's breaches of duty.

The defendants counterclaim that Rypac wrongfully withheld commissions that Coakley had earned before his resignation. The Intervening Defendants claim that they also are owed commissions that Rypac has wrongfully withheld.

These claims are now addressed.

III. THE PLAINTIFF'S CLAIMS

All of the plaintiffs liability theories are asserted as a basis for Rypac's claim to recover the commissions earned by Coakley and PAC through December **22,** 1997.

A. The Corporate Opportunity Claim

Rypac's first claim is that Coakley usurped corporate opportunities belonging to it by causing his corporation, PAC, to acquire several of Rypac's contracts between October 10, 1997 and December 22, 1997. Rypac claims that because Coakley did not validly resign until December 22, 1997, Coakley continued to owe a fiduciary duty to Rypac until that time, and that he breached that duty by obtaining contracts from Rypac principals in competition with Rypac.

Coakley responds that he had no fiduciary duty to Rypac after October 10, 1997 because he validly retired on that date, and not on December 22, 1997 as the plaintiffs contend. The defendants argue that there is no evidence that Coakley appropriated any opportunity or contract from Rypac before October 10, 1 997,[52] and that after that date Coakley was no longer prohibited from competing with Rypac. Alternatively, the defendants argue that even if Coakley did not retire until December 22, 1997, the plaintiff has failed to establish that Rypac's contracts with the third party principals were "corporate opportunities."

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[52]That argument is valid. Coakley testified that the only actions he took before meeting with Poges on October 10, 1997 were to discuss his plans with his wife and brother and to prepare letters to certain principals advising them of his resignation. TR Coakley 277, 282-83. That testimony is uncontroverted.

These contentions raise two issues. The first issue is when did Coakley retire -- October 10 or December 22, 1997? The second issue is whether Rypac's contracts with principals which the principals terminated after October 10, 1997, were "corporate opportunities."

1. When Coakley Resigned

The first dispute concerns when Coakley resigned. Rypac claims that Coakley did not resign until December 22, 1997. The defendants contend that Coakley resigned on October 10, 1997 and from that point on was free to compete with Rypac, because after October 10 Coakley no longer owed Rypac any fiduciary duties.

To aid the analysis of this issue, it is helpful to set forth the relevant events in chronological order, as follows:

October 10, 1997 -- Breakfast meeting where Coakley tells Poges that he had been unhappy with their relationship for some time and was resigning from Rypac.

- October and November 1997 -- Poges removes Coakley from the Rypac telephone recording, as a signatory on Rypac's bank accounts, and from Rypac's health plan.

- October 16, 1997 -- Coakley sends Poges a letter stating that he is in the "process [of] terminating [his] relationship with Rypac."

- November 1997 -- Coakley holds himself out to third parties as Rypac's president.

– December 8, 1997 -- Poges sends Coakley a letter stating that "[y]ou have terminated your relationship with Rypac and are no longer an officer or director of the company."

– December 11, 1997 -- Coakley responds that he had "not terminated [his] presidency to officers [sic] position with Rypac."

– December 22, 1997 -- Coakley sends Poges a formal resignation letter.

Despite this somewhat erratic sequence of events, I conclude that Coakley resigned on October 10, 1997. During the October 10 breakfast meeting, Coakley told Poges that he was resigning.[53] Poges and Coakley both understood that to mean that Coakley was resigning all his positions in the company, including President, director, and employee, effective immediately.[54] Poges's subsequent conduct was consistent with that understanding. Poges immediately advised sales representatives and principals that Coakley had resigned," and he also removed

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[53]TR Poges 29-32.

[54]At trial, Poges admitted that he understood that Coakley had resigned as of October 10, 1997:

> Q. Now at what point, on October 10 or thereabouts in 1997, in your mind did you actually think that Mr. Coakley had resigned?
> A. Yes. (TR Poges 31-32.)
> * * *
> Q. Now, as you previously testified, you understood that when Dan Coakley met with you on October 10, 1997, that he had resigned from Rypac as an office and director, correct?
> A. Correct. (TR Poges 127.)

[55]TR Wischhusen 428; TR Fissel 408.

Coakley from Rypac's telephone message recording, bank accounts and health plans.[56]

Although his actions were ill-advised and possibly actionable on noncontractual grounds, Coakley's representations to third parties that he was Rypac's president and his December 11, 1997 letter, did not legally alter the fact that Coakley had resigned on October 10, 1 997.[57] At most, that conduct would have constituted a unilateral, revisionist attempt by Coakley to rescind his termination for strategic reasons known only to him. Because both parties had relied on the resignation that Coakley orally communicated a month and a half before, and because they understood that communication to mean that Coakley's resignation was effective immediately, Coakley was powerless to rescind that resignation unilaterally and six weeks later without Poges' concurrence, which was never granted.[58]

Accordingly, I conclude that the only legally sensible interpretation of the

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[56]TR Poges 130-35.

[57]In his December 1 lth letter, Coakley wrote, "I have terminated my sales position with Rypac, but I have not terminated my presidency or officers [sic] position with Rypac." TR Coakley 301-302; PX 45.

[58]Eleven days later, Coakley sent Rypac a formal letter of resignation which, as a purely legal matter, was superfluous. TR Coakley 301-302.

evidence is that Coakley resigned on October 10, 1997, and that Poges, Rypac's only other shareholder, knew that.

2. Whether Rypac Contracts Were "Corporate Opportunities"

Even if one could conclude that Coakley did not resign until December 22, 1997, the corporate opportunity claim must fail, because Rypac's sales contracts with principals were not "corporate opportunities." In approaching this fact-intensive issue, several factors must be considered, including the availability of the opportunity to the corporation; the corporation's interest or expectancy in the opportunity; and whether by taking the opportunity the corporate fiduciary has placed himself in a position adverse to the interests of the corporation."

Neither side disputes that the pre-resignation ongoing sales contracts fell within Rypac's "line of business," and would have been advantageous to Rypac's officers. But, those contracts contained terms that negated the other elements of a corporate opportunity; that is, the readily terminable nature of the contracts deprived them of the status of an "interest or expectancy" to which Rypac had an equitable ownership claim.

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[59] 1 R. Franklin Balotti & Jesse A. Finkelstein, The Delaware Law of Corporations & Business Organizations § 4.36 (2d ed. 1999); see also Balin v. Amerimar Realty Co., Del. Ch., C.A. No. 12896, Jacobs, V.C., Mem. Op. at 6 (Nov. 15, 1996).

As earlier stated, given the sales representative's important role in negotiating and facilitating the contracts,[60] principals in this industry have a strong interest in choosing for themselves who will represent them in these transactions. Although principals sometimes enter into exclusive agreements for companies such as Rypac to represent them in specified geographic areas, such agreements are typically terminable on only thirty days notice to enable the principals to change sales representatives quickly. When an exclusive agreement is terminated, the principal is free to choose a new sales representative to complete the sale on which the former representative had been working, with the new representative being entitled to collect the commission.[61]

Thus, even if instead of competing, Coakley had simply stopped doing business after his resignation, it cannot be assumed that the principals would have permitted Rypac to complete the sales Coakley was pursuing before he resigned. Given the national and highly competitive nature of this particular market, there is

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[60]See pages 6-7, supra.

[61]The exception arises in cases where representatives seek commission protection, which takes the form of the principal agreeing that once the sales representative begins working on a particular project, the sales representative has a fixed period of time in which to complete the sale and earn the commission. Poges' own conduct after Coakley and the other representatives resigned evidences that Poges did not consider the contracts at issue as opportunities belonging to Rypac. After four principals terminated their exclusive agreements with Rypac, Poges requested commission protection only on those sales that he was pursuing. Poges never asked for protection on the sales being pursued only by Coakley or his subagents. TR Poges 137-41.

no basis to assume that any principal would have automatically chosen Rypac to complete the sales.

Moreover, Rypac's manner of operating undercuts its claim that the potential sales were corporate opportunities. As this Court recognized in Balin v. Amerimar Realty Co.,[62] where the corporation could never have profited from or been advantaged by the claimed opportunity, the opportunity cannot be fairly said to be one belonging to the corporation.

In this case, Rypac was an umbrella entity for two separate businesses, one operated by Coakley, the other by Poges. Coakley and Poges were each responsible for sales in their respective territories, and Rypac earned no profit from those sales. Commissions that Coakley and Poges earned were immediately paid to the individual responsible for the sale, except for a small percentage that was paid to Rypac as reimbursement for its expenses. Rypac never profited from the sales of its subagents. Rather (as with Coakley and Poges) commissions earned by the subagents were paid immediately to the responsible subagent, again with a percentage going to Rypac for expenses. To the extent the amounts

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[62] Balin v. Amerimar Realty Co., Del. Ch., C.A. No. 12896, Jacobs, V.C. (Nov. 15, 1996). In Balin, the Court rejected the claim that real estate investments represented opportunities belonging to the corporation on the basis that the corporation was formed and always operated solely as an "overhead" entity to centralize costs, and was never intended to nor did it earn a profit from the investments in question.

contributed to Rypac exceeded the expenses, the excess was distributedpro *rata* to Coakley and Poges. Because under this arrangement Rypac was little more than a disbursing agent with no business of its own, it is not practically meaningful to characterize Rypac's contract with a principal as a Rypac "corporate opportunity."

For these reasons the corporate opportunity claim must be rejected.

B. The Officer's Agreement Claim

Next, Rypac claims that Coakley violated Paragraph 3.b of the Officer's Agreement, which (Rypac contends) obligated Coakley not to compete with Rypac until the Agreement was terminated. Paragraph 3.b states:

> Officer shall devote all of his time, attention and energy exclusively to the performance of the duties enumerated in this Agreement and as may be requested by Corporation in connection with Corporation's business.

Rypac argues that the Coakley violated Paragraph 3.b in two different respects. First, Rypac argues that because Coakley devoted some of his time and efforts to his brother's corporation, Rypac N.E., before October 10, 1997, during which time Coakley was a Rypac employee, director and officer, Coakley's Rypac N.E.-related activities violated paragraph 3(b). Second, Rypac claims that the Officer's Agreement was never validly terminated, and therefore Coakley

remained obligated not to compete with Rypac even after his October 10 resignation. Therefore, the plaintiff concludes, all contracts PAC entered into after October 10, 1997 constituted breaches of Paragraph 3.b.

These claims are separately considered.

1. The Rypac N.E. Claim

Beginning in 1993 or 1994, Coakley sold machinery through his brother Donald's company Rypac N.E., to generate additional income for the purpose of funding a second retirement account.[63] Coakley contends that these sales were not competitive with Rypac, because Rypac N.E. provided lines of equipment that Rypac did not sell,[64] and also because Coakley typically spent over sixty hours per week on Rypac business. Coakley also argues that because Poges acquiesced in his Rypac N.E. activities, Poges cannot now be heard to complain of them.

The record shows that Coakley did discuss his involvement in Rypac N.E. with Poges, and Poges told him that it was not a problem.[65] At trial, Poges did not

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[63] TR Coakley 274-75.

[64] TR Coakley 274.

[65] TR Coakley 275-76. Coakley testified that after Paul Osborne and Bob Wischhusen mentioned that they had a meeting with Poges and that Poges was unhappy with Rypac N.E. and activities with Rypac N.E., Coakley confronted him. Coakley testified: "when I saw Joe the next time -- and it was with Bob and Paul -- I asked him if he had any problems. And Joe said that I had no problems." Id. at 276.

deny that he and Coakley had that discussion, and admitted he could not recall ever objecting to Coakley's activities with Rypac N.E.[66] As Rypac's only officers, directors and shareholders, Poges and Coakley also had the power to amend or waive any restriction imposed by the Officer's Agreement. Accordingly, I find that Poges orally waived Paragraph 3(b) with respect to Coakley's activities on behalf of Rypac N.E.

But, even if it is assumed that Coakley's activities with Rypac N.E. violated Paragraph 3(b), Rypac suffered no resulting harm. Coakley regularly devoted over 60 hours weekly to Rypac. Indeed, Poges held Coakley out as an exemplary employee and model for others to mold their work habits.[67] Moreover, Rypac N.E. did not compete with Rypac, because Rypac N.E. sold only machinery that was unavailable through Rypac. For these reasons, the Rypac N.E. claim lacks merit and must be rejected.

2. The Officers Agreement Claim

Rypac's second claim is that Coakley's competitive activity violated the Officer's Agreement because that Agreement (and its "non competition" provision) remained in effect after October 10, 1997. This argument rests upon

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[66] TR Poges 114-15.

[67] TR Coakley 105-106.

Rypac's reading of Paragraph 7 of the Officer's Agreement, which provides that the Agreement "shall be terminated upon purchase of the Officer's stock in the Corporation pursuant to paragraph 4 through 7 of the Shareholder's Agreement."[68] Rypac argues that this provision means that the Officer's Agreement could not be terminated until Coakley "agreed to surrender his Rypac stock pursuant to the buy-back provisions of the Stockholder Agreement," which did not occur until the end of August 1998.[69]

This argument also lacks merit. Paragraph 7 does not state that it is the only method by which the Officers Agreement may be terminated. Rather, that paragraph essentially provides for a stock buy-back if the Agreement is terminated, and is intended to ensure that the Agreement will terminate if an officer sells his Rypac stock to the other stockholder. Paragraph 7 does not preclude a termination of the Agreement in any other manner permitted by Delaware law.[70]

In this case, Coakley implicitly terminated the Officer's Agreement when he resigned from Rypac on October 10, 1997. The first paragraph of the two-page

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[68]PX 30.

[69]Plaintiff's Op. Br. 14.

[70]See Artesian Water Co. v. State, Del. Supr., 330 A.2d 441,443 (1974).

Agreement provides:

> Officer shall be employed by Corporation as President, and as salesperson with such duties as may be determined and assigned to him by unanimous vote of the Board of Directors.[71]

I read that paragraph to require that for the Officer's Agreement to remain in effect, the officer must be employed by Rypac as President and as a salesperson. Coakley ceased to satisfy these requirements when he resigned on October 10, 1997. Therefore, I find that by resigning, Coakley also implicitly terminated the Officers Agreement, because at that point he no longer occupied the positions that formed the premise for the Officers Agreement's applicability.

Poges' behavior from and after the date Coakley resigned was consistent with this understanding. The Officer's Agreement provided that Rypac "shall provide health insurance coverage for [officer] and all family members,"[72] yet Rypac terminated Coakley's insurance coverage after October 10. In addition, on November 17, 1997, Poges sent Coakley a letter that stated, "[t]his letter also serves as a notice of termination of the Officers [sic] Agreement by and between

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[71]PX 30, ¶ 1.

[72]PX 30, ¶ 5(a).

Rypac and you."[73] Poges' actions after Coakley's resignation demonstrate that he thought the Agreement was no longer in effect once Coakley resigned.

Because the Officer's Agreement was no longer effective after October 10, 1997, the breach-of-Ofticer's-Agreement claim must be rejected.

C. The Unfair Competition Claim

Rypac next claims that Coakley engaged in unfair competition with it by (a) diverting Rypac commission checks to himself, (b) inducing a manufacturer not to pay Rypac because of a debt Rypac N.E. owed the manufacturer, and (c) using confidential business information to make sales in competition with Rypac.

The elements of the tort of unfair competition are that the plaintiff has a reasonable expectancy of entering a valid business relationship, with which the defendant wrongfully interferes, and thereby defeats the plaintiffs legitimate expectancy and causes him harm.[74] Each of the plaintiffs' unfair competition claims is evaluated in light of these elements.

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[73]DX 2.

[74]International Business Machines Corn. v Comdisco. Inc., Del. Super., C.A. No. 91-C-07-199, Goldstein, J., Mem. Op. at 20, (June 30, 1993).

1. The Claim That Coakley Wrongfully Diverted Rypac Checks and Induced a Manufacturer Not To Pay Rypac.

Coakley admits that he advised certain manufacturers to send commission checks directly to him instead of to Rypac.[75] Coakley also admits that he attempted to offset debts that Rypac N.E. owed the manufacturer by the amount of commissions owed to Rypac and for which Coakley was responsible.[76] Coakley explained these as attempts on his part to assure that Rypac's former sales agents would be paid the commissions Rypac owed them. Coakley stated that he intended to deposit all funds received into a bank account under the name of Rypac, to be distributed from that account in the manner that Rypac historically employed.[77] Finally, Coakley testified that when he took these actions he was not advised by legal counsel, and that his conduct was in reaction to Poges' unresponsiveness.

I conclude that Coakley is not liable on a theory of unfair competition because his competitive activity against Rypac was not "unfair." To express it differently, once Coakley resigned from Rypac he was free to compete with it,

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[75] TR Coakley 297-302, 335-36.

[76] TR Coakley 23 l-32.

[77] Id.

because (i) the principals had lawfully terminated their contracts with Rypac, and (ii) Coakley had done nothing "wrongful" by persuading the principals to terminate their contracts with Rypac and to enter into new contractual relationships with Coakley and PAC.

Although Coakley is not liable on unfair competition grounds, he is liable in contract for diverting commissions properly owed to Rypac. Despite Coakley's efforts to excuse his conduct, Coakley's diversions of Rypac checks to himself, and his inducing a manufacturer to offset the amount it owed to Rypac by the amount Coakley owed the manufacturer, were wrongful.

Under the Officer's Agreement, (as informally amended by the parties) each officer would receive 75% of the gross commission payments, Rypac would receive 15% and 10% would go to fund Coakley's and Poges' individual retirement accounts.[78] To the extent Rypac has not yet received the commission it is owed, Coakley remains liable for that commission. Accordingly, Rypac is entitled to its 15% share of (a) the commission checks that Coakley wrongfully diverted from Rypac, and (b) the commission that Coakley induced the

[78] TR Poges 16-18.

manufacturer not to pay Rypac.[79]

2. The Confidential Information Claim

The plaintiff also claims that Coakley unfairly competed with Rypac because by virtue of his former employment relationship, Coakley had knowledge of the identities and requirements of Rypac's customers and used those "trade secrets" to solicit Rypac's customers. I disagree.

Delaware case law provides that in the absence of a covenant not to compete:

> [A]n employee who achieves technical expertise or general knowledge while in the employ of another may thereafter use that knowledge in competition with his former employer, so long as he does not use or disclose protected trade secrets in the process.[80]

Thus, to succeed on this claim, the plaintiff must show that the information

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[79]Coakley, Osborne, and Wischhusen are liable to Rypac for the percentage of the commission they respectively owe to Rypac, 15% in the case of Coakley and 10% in the case of Osborne and Wischhusen, as follows:

1. Dan Coakley	$29,336.70	This represents the $19,438 and $4,800 deposits in the Connecticut bank (TR Poges 53; PX 44); and a $5,098.70 Rypac check that Coakley gave his brother to cash. PX 43.
2. Paul Osborne	$17,330.30	Ex. 15-17; TR Osborne 373-75.
3. Bob Wischhusen	$ 9,967.50	PX 9.

[80]Wilmington Trust Co. v. Consistent Asset Management Co. Inc., Del. Ch., C.A. No. 8867, Allen, C., Mem. Op. at 7 (March 25, 1987).

constituted a "trade secret."[81] Information rises to the level of a "trade secret" if it derives independent economic value from not being generally known or readily ascertainable by other persons, and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[82]

Under this test the plaintiffs claim fails, because Rypac did not take reasonable measures to protect the secrecy of the contested information. Rypac's own Internet web page disclosed the identities of many of its customers, Rypac made no effort to maintain the secrecy of that information, and it never told its employees that the identities and requirements of its customers was confidential. Rypac's employees never signed confidentiality agreements covering that information, nor did Rypac ever create guidelines or procedures to protect the information.

Accordingly, the plaintiff has failed to establish its unfair competition claim.

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[81] Id.

[82] Marsico v. Cole, Del. Ch., C.A. No. 13 104, Mem. Op. at 4, Chandler, V.C. (Aug. 15, 1995), Interim Health Care v. Fournier, Del. Ch., C.A. No. 13003, Mem. Op. at 7, Jacobs, V.C. (Feb. 28, 1994).

D. The Claim of Interference With a Prospective Contractual Relationship

The plaintiff next claims that the defendants tortiously interfered with prospective contractual relationships. The elements of this tort are: (1) the existence of a valid business relationship or expectancy; (2) knowledge of the relationship or expectancy on the part of the interferer; (3) intentional interference that induces or causes a breach or termination of the relationship or expectancy; and (4) resulting damages to the party whose relationship or expectancy has been disrupted.[83]

Plaintiffs tortious interference claims fails because: (1) given the nature of this particular market, the plaintiff cannot claim to have an "expectancy" of a continuous business relationship with its principals, and (2) in any event, the plaintiff has not shown that it suffered any damages as a result of the defendants' conduct. As previously discussed, given Rypac's internal structure and role in the packaging industry, there is no basis to find that Rypac had a valid expectancy of a continued exclusive relationship with its principals. In this industry, "exclusive" contracts are terminable on relatively short notice, and that is what occurred here.

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[83] Bowl-Mor Co. Inc. v. Brunswick Corp., Del. Ch., 297 A.2d 61, 64, appeal dismissed, Del. Supr., 297 A.2d 67 (1972); Irwin & Leighton, Inc. v. W.M. Anderson Co., Del. Ch., 532 A.2d 983,992 (1987).

Nor did Rypac suffer economic harm, because it was a "pass through" entity -- it never made or retained any profit from sales negotiated by its representatives.

IV. THE COUNTERCLAIM

Coakley and the Intervening Defendants have counterclaimed for the unpaid commissions owed to them. These include commissions placed into escrow,[84] as well as commissions yet to be paid by manufacturers.[85] In addition, Coakley and the Intervening Defendants claim entitlement to liquidated damages and attorneys' fees under the Delaware Wage Payment and Collection Act (the "Wage Act").[86]

Poges claims that all commissions earned by Coakley and the other subagents while they were employees of Rypac should be awarded to him as damages for Coakley's usurpations of corporate opportunities. Because Poges has failed to establish that the contracts were "corporate opportunities" of Rypac, that argument fails for lack of a valid premise. Accordingly, the plaintiff is liable to

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[84]By Stipulation and Order entered March 3, 1998 the parties agreed to establish an escrow account and to deposit in that account pending the outcome of this litigation (1) funds received by Coakley between October 10, 1997 through December 22, 1997, and (2) funds received by Rypac and Poges attributable to sales made by Coakley and the other sales representatives. Coakley and the Intervening Defendants now seek the latter funds.

[85]The record does not show the precise amounts owed to Coakley and each subagent. The record only contains photocopies of checks for commissions that were deposited into the escrow account, without explaining what portion is owed to which subagent or accounting for tax withholdings.

[86]19 Del. C. §§ 1101-l 115.

Coakley and his subagents, including the Intervening Defendants, as a matter of contract, for all commissions owed to those parties, subject to a set-off equal to the amounts that Coakley owed Rypac for wrongfully diverting and cashing Rypac commission checks.

That ruling does not dispose of all counterclaim issues, however, because Poges also contends, on various grounds, that he is not liable for certain specific commissions addressed in Part IV(A), infra. Moreover, Coakley and the Intervening Defendants have counterclaimed for liquidated damages, costs and attorneys' fees under the Delaware Wage Act. If that statutory claim is valid, Rypac and Poges would be liable for double the commission owed to persons who were "employees" under the Wage Act. Poges contends that (i) Coakley and the Intervening Defendants are not entitled to those statutory liquidated damages, because they were not Rypac "employees," and (ii) even if they were "employees," Rypac is not liable for the statutory penalties because it had "reasonable grounds for dispute."[87] The Wage Act claim is addressed in Part B, infra.

[87] 19 Del. C. § 1103(b).

A. The Four Disputed Commissions

I first address the four disputed commission claims.

1. The Hi-Speed Commission

The Intervening Defendants, while acting as subagents for Rypac on behalf of Hi-Speed, a manufacturer, earned a commission that Hi-Speed withheld from Rypac as a set off against a debt owed by Rypac N.E. (Donald Coakley's company owed the manufacturer). The parties agree that Wischhusen is owed $17,97 1.24, and that Osborne is owed $3,432.00, of the total commission generated by that transaction.[88] The Intervenors request, and I will enter an order directing, that if and when Hi-Speed pays those commissions to Rypac, Rypac shall pay those amounts to Wischhusen and Osborne.

2. The EDL Commission

Rypac and Wischhusen have stipulated that in 1996 Wischhusen earned a commission that the manufacturer paid to Rypac,[89] and that Rypac then mistakenly paid that commission to Coakley. Wischhusen's claim for that commission is valid, and Rypac will be ordered to pay Wischhusen the $5,589.81 amount, Because it was Rypac that erroneously paid the commission to Coakley, Rypac

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**Stipulation Regarding Damages of Intervening Defendants ¶ 4.

[89]IDX 19; TR Poges 181.

may assert any claim it may have for reimbursement directly against Coakley.

3. The Serpa Packaging Commission

Coakley contends that he earned a commission from Serpa Packaging. Poges responds that that commission was paid. The dispute arises out of the sale of a car-toning machine on behalf of Serpa Packaging Solutions to 8-in- 1 Pet Products.[90] The parties agree that Rypac was paid a $2,625 commission on this sale.[91]

Initially Poges refused to pay Coakley, because Poges claimed that the machine had been returned. Poges later admitted that he was mistaken after Coakley testified that he had seen the machine at 8-in-1 Pet on recent visits to its facility.[92] Poges then claimed that the commission was paid to Rypac's account and had been "credited" to Coakley, but Poges could not produce any document or other evidence that Coakley had been paid the commission.[93] I find that Rypac owes Coakley the $2,625 commission.

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[90] TR Coakley 305-306; DX 75.

[91] TR Coakley 305-306; DX 75; TR Poges 458-59.

[92] TR Coakley 305-306; TR Poges 457-58.

[93] TR Poges 457-58.

4. <u>The SASIB Commission</u>

Wischhusen contends that Poges wrongfully sold a machine in Wischhusen's territory without telling Wischhusen, and that as a result, Wischhusen is entitled to 90% of the resulting $18,000 SASIB commission (the sales representative's share). The parties have stipulated that the SASIB commission resulted from the shipment of a machine to a customer located in Wischhusen's sales territory, and that Wischhusen is entitled to some percentage of the commission. The dispute is over how much.

In this industry, the commission earned by a sales representative (here Poges) who sells a machine in another sales representative's (here Wischhusen's) territory is payable in one of three different ways. First, if the seller representative has "poached" in another sales representative's exclusive territory, the sales representative who is assigned the territory where the sale is made is entitled to receive the full sales representative's share of the commission, on the basis that the sale should have been made by the rightful sales representative. "Poaching" occurs where a sales representative obtains an order from a customer in another sales representative's protected territory, and then receives the commission

generated by that sale.[94]

Second, if the sale is a "ship-in," the representative who actually makes the sale (even if it occurs in another representative's exclusive territory) receives most of the commission, and the sales representative who has the territory receives only a nominal portion. A "ship in" occurs when the seller receives a lead from a source outside of the territory, all of the sales work for a machine is done outside the territory, and the machine is then shipped into another territory.

Third, if the seller notifies the sales representative who works the territory where the sale is to occur, and the two representatives work together, then each sales representative receives 50% of the sales representative's share of the commission.[95]

In this case, Poges' actions amounted to poaching. Poges testified that he made a routine call to National Industrial Products in Wischhusen's territory a few weeks before negotiating the sales contract. Because there is no evidence that Poges acted upon a lead, it must be inferred that there was no lead, and that the sale was generated by Poges' admitted routine sales call to a customer in another

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[94]TR Wischhusen 436.

[95]TR Wischhusen 44 l-42.

agent's territory.[96]

Even if Poges did act on a legitimate lead, he should have notified Wischhusen of any lead he received in Wischhusen's territory. At that point Wischhusen would have pursued the lead himself, or he and Poges would have split up the work. Poges never informed Wischhusen, who learned of the sale only while making a call on the customer, and while there, observed a brand-new piece of machinery. Wischhusen asked the customer's president where he purchased the machine. The president told him he had purchased it from Joe Poges of Rypac.[97]

Poges' testimony that "it just never clicked" that the sale was taking place inside Wischhusen's territory is simply not credible.[98] Rypac's territories were assigned geographically. Poges knew that, because he printed brochures designating how these territories were assigned.[99] Wischhusen's territory was

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[96]Mr. Poges testified that he received a lead from Falcon Safety Products, but the only evidence mentioning that company is dated June 13, 1997, a full year after the original proposal resulting in the sale took place. IDX 23. Moreover, in discovery Poges turned over Intervening Defendants' Exhibit Nos. 23 through 36, but neither exhibit evidenced a "lead" from Falcon Safety Products. Nor was any evidence produced that most of the work was completed outside of Wischhusen's territory.

[97]TR Wischhusen at 437.

[98]TR Poges 193.

[99]TR Poges 186-87.

Pennsylvania and Camden, New Jersey, which included zip codes "080" and "081." The proposal (and other documents) contained the address with that zip code, documenting that the customer was in Wischhusen's territory.[100] The fact that those documents contained the address and zip code of the buyer, coupled with the fact that Poges physically visited the seller on at least one occasion, persuade me that Poges must have known that the sale was being made in Wischhusen's territory.

Thus, Poges engaged in poaching by making a routine sales call to a customer in another sales representative's territory and by making a sale to that customer without informing the sales representative specifically assigned to that territory. Wischhusen is therefore entitled to $16,200, the full 90% of the $18,000 commission he would have made on the sale.

B. The Statutory Claim

I now turn to the counterclaim for liquidated damages, costs and attorneys' fees. Under the Wage Act, Coakley and the Intervening Defendants would be entitled to recover the commissions owed plus liquidated damages if: (i) Coakley and his subagents were "employees" of Rypac under 19 Del. C. § 1101 (a)(4), and

[100] IDX 23; TR Poges 192.

(ii) if Poges did not have any reasonable grounds for withholding the commissions. Those are the issues posed by the Wage Act counterclaim.

1. The "Employee" Issue

The Wage Act was enacted by the General Assembly to provide for payment of wages and to enforce their collection."[101] Under 19 Del. C. § 1101 (a)(4), an "employee" is "any person suffered or permitted to work by an employer under a contract of employment either made in Delaware or to be performed wholly or partly therein." The legislative intent was to have the courts decide, on a case-by-case basis, whether a person is an employee for the purposes of the Act.[102]

In Fairfield Builders Inc. v. Vattilana, the Supreme Court articulated three criteria to guide that determination: (1) whether the employer retained control over the means and methods of doing the work, (2) whether the person was taxed like an employee, and (3) whether other benefits consistent with a standard employment contract were provided.[103]

The issue is whether Osborne, Wischhusen and Coakley were Rypac

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[101] State of Delaware v. Planet Insurance Co., Del. Super., 321 A.2d 128, 133 (1974).

[102] Fairfield Builders. Inc. v. Vattilana, Del. Sup., 304 A.2d 58, 60 (1973).

[103] Id.

employees under the Wage Act. Although Osborne and Wischhusen never signed the document, their Subagent Agreement provides that they were "independent private contractor[s] and [are] not employee[s] of Rypac Packaging Machinery Incorporated, as . . . independent contractor[s] [are] responsible for [their] own operating expenses."[104] By its terms, the Subagent Agreement (i) required that they fund their own retirement accounts,[105] (ii) stated that they would not receive any employee benefits from Rypac,[106] and (iii) provided that they would not be taxed as employees.[107] Osborne and Wischhusen testified that the only reason they did not sign the Subagent Agreement was that they objected to its non-compete clause, not because they disagreed with its other provisions. That evidence leads me to conclude that Poges, Coakley, Osborne and Wischhusen orally agreed that Osborne and Wischhusen would not be employees for purposes of the Wage Act or any other purpose.

Donald Coakley, however, was an employee under the Wage Act. He

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[104]PX 2 and 11, ¶ 1.

[105]Id. at ¶ 16.

[106]Id. at ¶ 20.

[107]Id. at ¶ 18. (Providing that Rypac would issue a 1099 miscellaneous tax form to Osborne and Wischhusen every year, which is a form issued for commission owed to non-employees for services.)

signed an Employment Agreement with Rypac, which recited that "Don Coakley (Employees for Rypac) agrees. . ."[108] His Employment Agreement provided that 15% of his sales commission would be allocated to his retirement plan. Although the Employment plan did not describe any health plan, the Officer's Agreement did.

2. Reasonable Grounds to Dispute Payment

Having determined that Donald Coakley was a Rypac employee, I turn to the next issue: whether at the time it failed to pay the commissions, Rypac had any reasonable grounds to dispute its claimed obligation to pay those commissions. Section 1103(b) pertinently provides:

> "If an employer, without any reasonable grounds for dispute, fails to pay an employee wages, as required under this chapter, the employer shall, in addition, be liable to the employee for liquidated damages in the amount of 10 percent of the unpaid wages for each day. . . or in an amount equal to the unpaid wages, whichever is smaller."

Thus, the employee's right to recover liquidated damages for improperly withheld wages depends upon whether the employer had "reasonable grounds for dispute." Rypac argues that the pendency of this lawsuit establishes the requisite "reasonable grounds for disput[ing]" what Donald Coakley claimed was owed.

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[108] PX 22.

I find that Rypac is not liable for the statutory doubling penalty,[109] because it had "reasonable grounds [to] dispute" the commission claim. Those grounds consisted of Rypac's belief that Coakley had breached his fiduciary duties to Rypac by having wrongfully cashed commission checks, and directing third parties not to pay Rypac. On that basis, I conclude that Coakley's statutory claim for liquidated damages under the statute lacks merit.

Accordingly, the counterclaim shall be dismissed.

V. CONCLUSION

Counsel shall promptly confer and submit an appropriate form of order implementing the rulings made herein.

[109] Peirson v. Hollingsworth, Del. Super., 251 A.2d 350 (1969).