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Drug Testing Compliance Group v. DOT Compliance Service Appellant's Brief 1 Dckt. 43458

IN THE SUPREME COURT OF THE STATE OF IDAHO

DRUG TESTING COMPLIANCE GROUP, LLC, Plaintiff-Respondent, vs. DOT COMPLIANCE SERVICE, JEFF MINERT, DAVID MINERT and RYAN BUNNELL, Defendant-Appellants.	)	Case No. 43458-2015 APPELLANT'S BRIEF

APPELLANT'S BRIEF

Appeal from the District Court of the
Fourth Judicial District for Ada County

Honorable Richard D. Greenwood, District Judge, Presiding

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I. STATEMENT OF THE CASE

A. Nature Of The Case

This appeal raises questions of law related to application of the Idaho Telephone Solicitation Act to claims by an unregistered telephone solicitor, Appellee Drug Testing Compliance Group, LLC ("DTC Group") against its competitor, Appellant DOT Compliance Service ("DOT Compliance"). DTC Group obtained a verdict at trial based on allegations that DOT Compliance informed DTC Group customers of their statutory right to cancel purchases under the Idaho Telephone Solicitation Act and encouraged them to do so. The jury's verdict must be set aside because (1) DTC Group did not present evidence of intentional interference that caused a breach of any contract because, under the Idaho Telephone Solicitation Act, customers have a statutory right to cancel purchases within three days; and (2) DTC Group's failure to register as a telephone solicitor renders its contracts "null and void" as a matter of law.

DTC Group also claims that DOT Compliance breached a contract by disparaging DTC Group in violation of a non-disparagement provision in a Settlement Agreement. The jury found no damages for breach of contract. However, the jury awarded damages against DOT Compliance's owners, Jeff Minert and David Minert, for breach of the implied covenant of good faith and fair dealing for reporting DTC Group's illegal price-fixing proposal to federal law enforcement officers, which resulted in an FBI investigation. That verdict must be set aside because (1) DTC Group concedes that it did not present any evidence that Jeff Minert or David Minert disparaged DTC Group in violation of the Settlement Agreement; (2) any call to the FBI does not violate the Settlement Agreement and, in fact, occurred prior to execution of the Settlement Agreement; and (3) DTC Group failed to present any evidence of damages.

B. Statement Of Facts And Course Of Proceedings

1. Defendant/Appellant DOT Compliance

DOT Compliance provides drug and alcohol testing programs and other services that help transportation companies comply with Department of Transportation licensing requirements and reporting regulations. *See* Reporter's Transcript ("Tr."), 436:9-25. DOT Compliance was established in March of 2011 and, during the relevant time frame, was owned and managed by Jeff Minert and David Minert. *Id.* at 431:21 - 433:4-22. The Minert also own a related drug testing company, which has been in the drug testing business for 25 years. *Id.*

DOT Compliance markets its services through telephone solicitations to newly registered trucking companies. *Id.* at 433:1 - 436:25. Each day, the names and contact information of approximately 400 newly registered owners/operators are made publicly available. *Id.* DOT Compliance calls those newly registered trucking companies and offers to sell them services related to drug testing, driver qualification files and related compliance services required by Department of Transportation regulations and licensing requirements. *Id.*

There are only a couple other companies that offer services in competition with DOT Compliance. *Id.* at 440:24 - 441:14. In addition to providing what it believes is the best service in the industry, DOT Compliance sells its services for a lower price than its competitors. *Id.* at 499:1-4; 584:23 - 585:1. DOT Compliance's business model is to compete on service and price, and it openly tells potential customers that its prices are lower than its competitors' prices. *Id.*

2. Plaintiff/Appellee DTC Group

DTC Group is owned by David Crossett. *Id.* at 443:20-24. Crossett learned about DOT Compliance's business plan from a friend who worked as a janitor in DOT Compliance's office

building and had access to DOT Compliance's business records. *Id.* at 272:17 - 274:23. Crossett offered the janitor an ownership interest in DTC Group in exchange for information about DOT Compliance's business. *Id.* DTC Group then approached two DOT Compliance employees and offered them jobs. *Id.* at 275:7 - 276:11; 277:19 - 279:12. The employees informed DTC Group that they had signed non-compete agreements. *Id.* DTC Group had legal counsel review the non-compete agreements and hired the employees anyway because "after speaking to legal, we were willing to challenge it." *Id.* at 279:13-17.

3. The First Litigation

DOT Compliance filed suit against DTC Group and Crossett on July 12, 2013 (the "First Litigation"). *See* Trial Exh. 500. DOT Compliance's complaint included claims for tortious interference with contract related to the hiring of individuals who had signed non-compete agreements with DOT Compliance. *Id.* DTC Group and Crossett asserted counterclaims for slander and tortious interference with contracts, similar to the claims in this appeal. *Id.*

4. DTC Group's Price-Fixing Proposal and the Federal Investigation

In June of 2014, Crossett called David Minert and proposed that DOT Compliance and DTC Group agree not to compete against each other so they could each raise their prices. Tr., 480:18 - 482:21. David Minert contacted an attorney to look into what he believed was an illegal price fixing scheme. *Id.* at 483:15 - 484:6. Two days later, the Department of Justice, Antitrust Division, contacted DOT Compliance and asked it to assist in an investigation. *Id.* at 484:7 - 485:7. The Department of Justice provided the Minerts with a wire and two monitoring devices and asked the Minerts to set up a meeting with Crossett and ask him to explain his proposal. *Id.*

at 485:8-25. The Minerts did as the Department of Justice requested and set up a meeting with Crossett on July 10, 2014. *Id.* at 486:1 - 487:23.

In that meeting, Crossett proposed a "first call wins" agreement under which each company would agree not to compete for the other's customers so each party could freely raise its prices. *Id.* Crossett stated he was going to raise DTC Group's prices that weekend, which would allow DOT Compliance to raise its prices to the same level. *Id.* at 487:24 - 489:16. DTC Group did, in fact, raise its prices shortly after the proposal. *Id.* at 300:18-1; 495:23 - 496:4.

5. The Settlement Agreement

On July 11, 2014, DTC Group and Crossett entered into a Settlement Agreement (the "Settlement Agreement") with DOT Compliance, David Minert and Jeff Minert. *See* Trial Exh. 500. The Settlement Agreement contained a mutual release of all claims pertaining to "any activities or conduct occurring before the Effective Date of this Agreement, including, but not limited to ... interference with prospective economic relations or advantages, ... for breach of the covenant of good faith and fair dealing, for slander, libel or defamation." *Id.*

The Settlement Agreement contained a "No Disparagement" provision as follows:

> (a) The Parties will not disparage each other in their communications with third parties relating to the character, reputation, profession, business, practices, operations, services, facilities, presence, plans, or conduct of another Party, and shall not cause, encourage or suggest disparaging statements to be made by a third party regarding a Party. *Id.*

6. The Idaho Telephone Solicitation Act

a) The Statutory Three-Day Cancellation Period

The Idaho Telephone Solicitation Act (I.C. § 48-1001 *et seq.*) applies to all telephone solicitors making telephone solicitations to or from locations within Idaho. *See* I.C. § 48-

1002(2). The Idaho Telephone Solicitation Act requires telephone solicitors to give purchasers an unqualified right to cancel a purchase within three days "without any penalty or obligation whatsoever." I.C. § 48-1004. To ensure that all purchasers are fully aware of this right, the statute requires that telephone solicitors (1) orally inform purchasers of the cancellation right at the time of purchase and (2) send written notification of the cancellation right following sale. *Id.*

DTC Group acknowledges that it is subject to the Idaho Telephone Solicitation Act and, therefore, is statutorily required to give all purchasers an unqualified right to cancel within three days of purchase. *Id.* at 312:2 - 313:4; 338:17 - 339:23. DTC Group claims that it orally informs purchasers of their cancellation right at the time of sale. *Id.* at 605:9-19. However, when customers attempt to cancel they are often told they cannot cancel. *Id.* at 312:8 - 316:4.

DOT Compliance sometimes calls companies that have just recently been contacted by one of its competitors. DOT Compliance salespeople tell those customers that (1) the customer has a statutory right to cancel its purchase within three days and (2) DOT Compliance offers the same or better services for a lower price. Tr., 502:5 - 503:5; 587:2-19.

b) DTC Group's Failure to Register as a Telephone Solicitor

The Idaho Telephone Solicitation Act mandates that all telephone solicitors "[r]egister with the attorney general at least ten (10) days prior to conducting business in Idaho." I.C. § 48-1004. DOT Compliance is registered with the Idaho Attorney General. Tr., 574:12-17. DTC Group is not registered with the Idaho Attorney General, even though it acknowledges that it is required to do so by the Idaho Telephone Solicitation Act. *Id.* at 603:17 - 605:22.

The registration process requires that telephone solicitors submit an application, along with proof that its website contains a written three-day cancellation policy consistent with the

Idaho Telephone Solicitation Act. *Id.* DTC Group attempted to register with the Idaho Attorney General's Office shortly before trial, but its application was denied because DTC Group's website does not include a sufficiently clear three-day cancellation policy. *Id.*

The consequence of violating the Idaho Telephone Solicitation Act, including failure to register with the attorney general, is that contracts resulting from telephone solicitations are "null and void." *See* I.C. § 48-1007 ("If a telephone solicitor violates any applicable provision of this chapter, any contract of sale or purchase is null and void and unenforceable.").

7. Procedural Posture

a) The Complaint

On August 18, 2014, DTC Group filed a Complaint against DOT Compliance, Jeff Minert and Ryan Bunnell (a DOT Compliance salesperson). R., 000014-27. A subsequent Amended Complaint adds David Minert as a Defendant. R., 000229-243. The Amended Complaint asserts claims for (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3) tortious interference with contracts; (4) tortious interference with prospective economic advantage; (5) unfair competition; and (6) civil conspiracy. *Id.*

b) Trial

DTC Group's trial theme was that DOT Compliance attempted to "put [DTC Group] out of business." *Id.* at 118:3-5; 112:19-22. In its opening statement, DTC Group told the jury that DOT Compliance reported DTC Group to law enforcement agencies in furtherance of its goal to put DTC Group out of business. *Id.* at 117:16-21.

Crossett testified about the late-June of 2014 conversation with the Minerts in which they discussed their competing businesses. *Id.* at 177:20 - 183:6. According to Crossett, he made

only an "off-hand comment that I'd been wanting to raise my prices for a long time." *Id.* at 183:21-23. However, Crossett insists that he did not propose any price-fixing. *Id.* at 359:20-21. Crossett then met again with the Minerts on July 10, 2014 -- the day before signing the Settlement Agreement. *Id.* at 185:18 - 186:4. Unbeknownst to Crossett, that conversation was recorded at the urging of federal law enforcement officers. *Id.* at 485:8-25.

In describing his conversations with the Minerts, Crossett testified that he did not ever suggest any price-fixing. In fact, Crossett testified that the Minerts were the ones who proposed the price-fixing scheme. *Id.* at 186:24 - 189:9. Consistent with DTC Group's trial theme, Crossett then asserted that the call to the FBI was "frivolous" and part of a larger plan to put DTC Group out of business. *Id.* at 359:10-21.

Crossett's testimony DOT Compliance's call to the FBI was "frivolous" is demonstrably false because the FBI recorded the July 10th meeting on video. After Crossett testified falsely that it was the Minerts who proposed to fix prices, DOT Compliance subpoenaed the video recording from the FBI and called an FBI agent to authenticate the video at trial. Tr., 466:20 - 475:6. The purpose of introducing the FBI's video recording was to impeach Crossett's testimony in which he asserted that DOT Compliance proposed a price-fixing scheme and then frivolously reported DTC Group to the FBI in an attempt to put it out of business.

The District Court did not allow DOT Compliance to call the FBI witness or play the video for the jury. Tr., 466:20 - 473:25. In excluding that evidence, the District Court ruled that it was "impeachment on a collateral issue." *Id.* at 471:23-25. Part of the District Court's rationale for excluding the impeachment evidence was that DTC Group was not permitted to

claim damages as a result of the FBI investigation. *Id.* at 471:7-8 ("Well, he's not claiming damages for that [the report to the FBI] either").

Crossett attempted to testify as to the "damages" DTC Group suffered as a result of the FBI investigation, including the time, resources and attorney fees it spent in connection with the investigation. *Id.* at 191:4 - 192:14. DOT Compliance objected to that testimony on grounds that DTC Group had not disclosed that claim for damages in its Complaint or in discovery. *Id.; id.* at 206:19 - 214:17. The District Court sustained that objection and did not allow Crossett to testify as to damages allegedly sustained as a result of the FBI investigation. *Id.* at 214:17.

Even though the District Court precluded DTC Group from presenting damages related to the FBI investigation, DTC Group's counsel again emphasized the call to the FBI in her closing arguments. 739:19 - 740:5. Counsel referenced the order excluding damages related to that call, but asked the jury to consider the excluded damages in calculating damages for lost customers:

> And, remember, although -- remember I told you about there was these non-monetary or damages that David couldn't really quantify. Those things being like ... administrative time, time to respond to the FBI investigation, things of that nature that we're not going to be able to recoup because we lost that third bucket. But just keep in mind that those damages were there for David. And he endured all this at the same time that he was trying to run his business. *Id.*

c) Motion for Directed Verdict

DOT Compliance moved for directed verdict at the conclusion of DTC Group's case in chief and again at the conclusion of trial. Tr., 415:15 - 429:3; 651:6 - 655:4. The motions sought dismissal of DTC Group's tortious interference with contract claims because (1) DTC Group failed to present evidence that any Defendant caused customers to breach a contract in light of the statutory three-day cancellation period; and (2) DTC Group's contracts were "null

and void" as a matter of statutory law for failure to register as a telephone solicitor with the Idaho Attorney General's Office. *Id.* The District Court denied the motions. *Id.*

At the conclusion of trial, the District Court dismissed DTC's Groups claims for civil conspiracy and tortious interference with prospective economic advantage for lack of evidence. Tr. 643:14 - 644:13; 687:22 - 688:5. The tortious interference with contract claim against David Minert and Jeff Minert were also dismissed because of a lack of evidence that either of them made disparaging comments to DTC Group customers. Tr., 699:14 - 700:8. The District Court did not dismiss the tortious interference with contract claim against DOT Compliance and Ryan Brunell, the salesman who allegedly made disparaging comments to DTC Group customers. *Id.* The District Court had dismissed the unfair competition claim before trial. *Id.* at 75:8-12.

d) Jury Instructions

The District Court instructed the jury on the remaining claims: (1) breach of contract against DOT Compliance, David Minert and Jeff Minert; (2) breach of the implied covenant of good faith and fair dealing against DOT Compliance, David Minert and Jeff Minert; and (3) tortious interference with contract against DOT Compliance and Ryan Brunnell. R., 000329-334.

DOT Compliance attempted to call Brett Delange, the Deputy Attorney General who enforces the Idaho Telephone Solicitation Act, as a witness at trial. Tr., 457:8 - 466:18. Mr. Delange was expected to testify that he sent an enforcement letter to DTC Group explaining that DTC Group is subject to the Idaho Telephone Solicitation Act and that, under the statute, customers have a three-day right of cancellation. Tr., 458:23 - 459:1; 461:19 - 462:6.

The District Court excluded Mr. Delange from testifying on grounds that it was the District Court's job to instruct the jury on the law. *Id.* at 459:13-16. The District Court indicated that it would instruct the jury on the Idaho Telephone Solicitation Act, including its provision that customers have an unconditional right to cancel within three days:

> As I said, if you want an instruction that the law says that, under the law, a telephone customer is entitled to cancel without penalty -- or however you want to phrase it -- within three days of entering in the transaction, I'd be happy to consider it and probably would give the jury such an instruction. *Id.* at 464:5-16.

DOT Compliance submitted proposed jury instructions that mirrored the relevant provisions of the Idaho Telephone Solicitation Act. R., 000287-295. Despite its prior statement that it would probably instruct the jury on the Idaho Telephone Solicitation Act, the District Court refused to issue DOT Compliance's proposed instructions or any instructions whatsoever explaining the Idaho Telephone Solicitation Act. Tr., 647:4-13.

With regard to jury instructions on the claim for tortious interference with contract, the District Court declined to issue the standard jury instruction approved by the Idaho Civil Jury Instructions Committee, IDJI 4.70, which requires proof that "[t]he defendant intentionally interfered with the contract, **causing a breach**." R., 000266; Tr., 658:22 - 660:12. Over DOT Compliance's objection, the District Court modified the jury instruction to state that DTC Group need only prove that a defendant "intentionally interfered with the contract, causing a breach **or termination**." R., 000318 (emphasis added).

e) The Verdict

The jury returned special verdict forms on each of DTC Group's remaining claims. The jury returned a "zero" verdict on the breach of contract claim. R., 000329-30. Although the jury

found that DOT Compliance, David Minert and Jeff Minert breached the Settlement Agreement, it determined that DTC Group did not prove any damages as a result of the breach. *Id.*

With regard to the claim for breach of the covenant of good faith and fair dealing, the jury determined that DOT Compliance, Jeff Minert, and David Minert breached the covenant of good faith and fair dealing. R., 000334-335. The jury again determined that DTC Group did not prove any damages caused by DOT Compliance. *Id.* The jury did award $20,000 in damages against Jeff Minert and David Minert, individually. *Id.*

Finally, the jury returned a verdict in favor of DTC Group on its claim for tortious interference with contract and awarded $500 in damages against Ryan Bunnell and $20,000 in damages against DOT Compliance. R., 000331-32.

f) JNOV Motion

DOT Compliance moved for judgment notwithstanding the verdict ("JNOV") on grounds that no evidence was presented at trial that David Minert or Jeff Minert personally engaged in conduct that violated the Settlement Agreement as required to establishing such a claim. R. 000430-442. The District Court denied that motion in an oral ruling from the bench. Tr., 806-826. In doing so, the District Court concluded that the jury's verdict against Jeff Minert and David Minert for breach of the implied covenant of good faith and fair dealing was supported by the fact that they reported DTC Group to the FTC -- even though the District Court had expressly excluded damages for that call and even though the call to the FBI occurred prior to execution of the Settlement Agreement. *Id.* at 817:9 - 818:17 ("And I think in this case the jury could infer that the Minerts and thereafter their company were responsible for the calls to the Department of Finance, the calls to the FBI … and that was the basis for their finding of liability.").

The fact that the jury's implied covenant verdict was based on the call to the FBI is further made clear by the jury's special verdict forms. DTC Group played recorded conversations at trial that it claimed contained disparaging comments made by DOT Compliance employees (e.g., Ryan Bunnell), but DTC Group has conceded that no evidence was presented at trial of disparaging comments made by Jeff Minert or David Minert. Tr., 344:13 - 345:1; R., 000530 (conceding that "DTC Group had no phone recordings in which Dave Minert or Jeff Minert actually defamed DTC Group to a customer"). The jury's verdicts found that DOT Compliance breached the Settlement Agreement and violated the covenant of good faith and fair dealing. R., 000329-330; 000333-334. However the jury returned "zero" verdicts against DOT Compliance because DTC Group did not prove any damages caused by DOT Compliance. *Id.* Thus, the award of damages against Jeff Minert and David Minert was based on something other than the allegedly disparaging comments made to DTC Group customers -- the call to the FBI.

g) Award of Attorney Fees

DTC Group moved for an award of attorney fees based on Idaho Code § 12-120(3) and the terms of the Settlement Agreement, which provides for an award of fees to the prevailing party in an action based on a breach of the Settlement Agreement. R., 000335-371. DOT Compliance, David Minert and Jeff Minert also moved for attorney fees because they prevailed on the breach of contract claim. R., 000376-429.

DOT Compliance objected to DTC Group's fee request because (1) DTC Group did not prevail on the breach of contract claim -- the only claim arising out of a commercial transaction; and (2) DTC Group's fee request did not apportion its fees between claims that did and did not arise out of a commercial transaction. Tr., 789:25 - 790:7; 792:15-20. The District Court

awarded DTC Group the entirety of its attorney fees and declined to apportion fees between the claims that did and did not arise out of a commercial transaction. *Id.* at 824:10 - 826:10.

On August 3, 2015, the District Court entered Final Judgment against DOT Compliance in the amount of $20,000; Jeff Minert in the amount of $20,000; David Minert in the amount of $20,000; and Ryan Bunnell in the amount of $500. R., 000559-560. The District Court also entered judgment against DOT Compliance, Jeff Minert and David Minert, jointly and severally, for fees and costs in the amount of $87,414.14. *Id.*

8. The FTC Complaint and the Consent Agreement

At trial, Crossett testified that the FBI "closed" its investigation and that "no wrongdoing was found." Tr., 351:11-14. That testimony was part of DTC Group's trial theme that DOT Compliance violated the covenant of good faith and fair dealing by making a "frivolous" report to the FBI. *Id.* at 359:17-21. After trial, the Federal Trade Commission ("FTC") issued a formal complaint against DTC Group ("FTC Complaint"). The FTC Complaint alleges as follows:

> DTC Group and Competitor A market and sell similar services in direct competition. Beginning in 2013 and continuing to date, DTC Group and Competitor A have competed for one another's customers by offering lower prices for similar services....
>
> On or about July 10, 2014, Mr. Crossett met with the principals of Competitor A. Mr. Crossett proposed that the firms agree not to solicit or compete for one another's customers. Specifically, Mr. Crossett proposed that DTC Group and Competitor A should reciprocally agree to refrain from selling or attempting to sell a service to a customer if the rival firm had previously arranged to sell the same service to the customer. Mr. Crossett referred to this arrangement as "First Call Wins," and explained that such agreement would allow each company to sell its services to customers without fearing that its rival would later undercut it with a lower price.

The FTC Complaint alleges that DTC's Group's actions "constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended."

In an FTC Public Notice published December 18, 2015 in the Federal Register / Vol. 80, No 243, the FTC explained that "Mr. Crossett's communication to Competitor A is an attempt to arrange a customer allocation agreement between the two companies" that, "if accepted, would be a per se violation of the Sherman Act." The FTC Public Notice further advises the public that DTC Group has agreed to a Consent Agreement and a Consent Order mandated that, for a period of four years, DTC Group provide a copy of the FTC Complaint and Order to every person who becomes an employee or officer of DTC Group and to periodically submit compliance reports to the FTC. As explained in the FTC's published notice, the proposed Consent Agreement is subject to a 30 day public comment period expiring January 13, 2016, after which the proposed Consent Agreement will become final.[1]

II. ISSUES PRESENTED ON APPEAL

(1) Whether the District Court erred in denying the motion for directed verdict on DTC Group's claim for tortious interference with contract

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1 Each of the documents referenced in this section are official public documents available on the FTC's website at https://www.ftc.gov/enforcement/cases-proceedings/151-0048/drug-testing-compliance-group-llc-matter and referenced in the FTC notice published in the Federal Register. Pursuant to I.R.E. 201, this Court may take judicial notice of these FTC proceedings. *See Trautman v. Hill,* 116 Idaho 337, 340 (Ct. App. 1989) (judicial notice "may be taken at any stage in the proceeding, at the trial or appellate level and extends to official reports of the federal government...."); *United States v. Merck-Medco Managed Care, L.L.C.*, 336 F. Supp. 2d 430, 446 (E.D. Pa. 2004) (taking judicial notice of an FTC complaint and an FTC press release regarding an antitrust settlement between a party and the FTC).

(2) Whether the District Court erred in denying the JNOV motion on DTC Group's claim for breach of the implied covenant of good faith and fair dealing

(3) Whether the District Court erred by failing to instruct the jury on the Idaho Telephone Solicitation Act and by misstating the law on tortious interference with contracts

(4) Whether the District Court erred in excluding the FBI recording

(5) Whether the District Court erred in awarding DTC Group attorney fees and denying Appellants' motion for attorney fees

(6) Whether Appellants are entitled to an award of attorney fees on appeal

III. STANDARD OF REVIEW

"In determining whether a district court should have granted a [JNOV] motion, this Court employs the same standard the district court used in ruling on the motion." *High Valley Concrete, L.L.C. v. Sargent*, 149 Idaho 423, 427 (2010). A JNOV motion should be denied only "if there is evidence of sufficient quantity and probative value that reasonable minds could have reached a similar conclusion to that of the jury." *Id.* Thus, a verdict should be set aside if it is not "supported by substantial and competent evidence." *Id.* Similarly, the Court "exercises free review" when reviewing the denial of a directed verdict to determine "whether there was sufficient evidence to justify submitting the claim to the jury, viewing as true all adverse evidence and drawing every legitimate inference in favor of the party opposing the motion for a directed verdict." *Enriquez v. Idaho Power Co.*, 152 Idaho 562, 565 (2012).

"The correctness of jury instructions is a question of law over which this Court exercises free review, and the standard of review of whether a jury instruction should or should not have been given, is whether there is evidence at trial to support the instruction." *Smith v. Mitton*, 140 Idaho 893, 899 (2004). The standard of review is "whether the instructions, as a whole, fairly and adequately present the issues and state the law." *Id.*

IV. ARGUMENT

A. The District Court Failed to Apply the Idaho Telephone Solicitation Act

The most significant error at the trial court level was in the District Court's failure to apply the Idaho Telephone Solicitation Act. The Idaho Telephone Solicitation Act contains two requirements that directly impact DTC Group's claims. First, it mandates that all individuals who purchase a product or service from a telephone solicitor be given an unqualified right to cancel the purchase within three days, "without any penalty or obligation whatsoever." I.C. § 48-1004. Second, it requires all telephone solicitors to "[r]egister with the attorney general at least ten (10) days prior to conducting business in Idaho." I.C. § 48-1004. Application of either of these provisions requires setting aside the jury's verdict for tortious interference with contract. Pursuant to I.A.R. 35(f), copies of the relevant statutes are included in an addendum to this brief.

1. DTC Group Did Not Establish a Claim for Tortious Interference with Contract Because DTC Group's Customers had a Statutory Right to Cancel within Three Days

a) The District Court Erred in Denying DOT Compliance's Motion for Directed Verdict on the Tortious Interference Claim

The Idaho Telephone Solicitation Act mandates that all individuals who purchase a product or service as a result of a telephone solicitation be given an unqualified right to cancel the purchase within three days, "without any penalty or obligation whatsoever." I.C. § 48-1004. Telephone solicitors are required to "[o]rally inform the purchaser at the time the purchase is completed of his right to cancel." *Id.* at § 48-1004(d). The Idaho Telephone Solicitation Act further requires that the telephone solicitor send a written notice to purchasers as follows:

NOTICE OF CANCELLATION

> You may cancel this transaction, without any penalty or obligation whatsoever, within three business days of the date in which you receive this written confirmation.
>
> If you cancel, all payments or other consideration which may have already been made by you will be returned within ten business days following receipt by the telephone solicitor of your cancellation notice.

Id. at § 48-1004(2). DTC Group acknowledged at trial that, as an Idaho telephone solicitor, it is required to give purchasers this unqualified right to cancel within three days. Tr., 312:2 - 313:4.

The District Courted erred by failing to apply this provision of law to DTC Group's tortious interference claim. To establish a claim for tortious interference with contract, a plaintiff must prove four elements: "(1) the existence of a contract; (2) knowledge of the contract on the part of the defendant; (3) intentional interference **causing a breach of the contract**; and (4) injury to the plaintiff resulting from the breach." *Bybee v. Isaac*, 145 Idaho 251, 259 (2008).

DTC Group's tortious interference claim was based solely on evidence that DOT Compliance Group advised DTC Group customers of their statutory three-day right to cancel and encouraged them to do so.[2] As a matter of law, that conduct cannot support a tortious interference claim because it did not and could not "caus[e] a breach of the contract," -- an essential element of a tortious interference claim. *Id.* In fact, DTC Group conceded at trial that no breach of contract occurs when a customer cancels within three days after their purchase:

> Q. ....And so if a customer -- if any of these customers called you within three days after they purchased and wanted to cancel, that customer has not violated their -- or breached their contract with you, right?

---

2 No evidence was presented that DOT compliance encouraged DTC Group customers to cancel outside of the statutory three-day cancellation period or to otherwise breach a contract.

A. Correct.

Tr., 338:22 - 339:23.

DTC Group did not present evidence to establish an essential element of its intentional inference claim -- "intentional interference **causing a breach of the contract**." *Bybee*, 145 Idaho at 259. Accordingly, the District Court erred in denying the motion for directed verdict on DTC Group's tortious interference claim and the jury's verdict must be set aside.

b) The Tortious Interference Jury Instruction Misstated the Law

The District Court compounded its error with a jury instruction that misstates the law. DOT Compliance asked the Court to issue the standard jury instruction (IDJI 4.70) approved by the Idaho Civil Jury Instructions Committee. R., 000266. The standard jury instruction mirrors the elements of a tortious interference claim as set forth in *Bybee v. Isaac*, as follows:

> With respect to the plaintiff's claim for tortious interference with contract, the plaintiff has the burden of proving each of the following propositions:
>
> (1) The plaintiff was a party to an existing contract;
>
> (2) The defendant knew of the contract;
>
> (3) The defendant intentionally interfered with the contract, **causing a breach**;
>
> (4) The plaintiff was damaged as a proximate result of the defendant's interference; and
>
> (5) The nature and extent of damage, and the amount thereof.

See IDJI 4.70 (emphasis added).

Over DOT Compliance's objection, the District Court modified IDJI 4.70 such that it would allow the jury to return a verdict for tortious interference with contract even without a showing that the defendant caused a breach of a contract. Tr., 658:22 - 660:12. Specifically, the

District Court modified subsection (3) of IDJI 4.70 to instruct the jury that DTC Group was required to prove only that "(3) The defendant intentionally interfered with the contract, causing a breach **or termination**." 000318 (emphasis added).

In modifying this instruction, the District Court relied on *Wesco Autobody Supply, Inc. v. Ernest*, 149 Idaho 881(2010). Tr., 658:22 - 660:12. However, *Wesco* does not stand for the proposition that merely influencing a third party to terminate a contractual relationship, absent a breach of a contract, is sufficient to support a claim for tortious interference with contract. In fact, *Wesco* reached the opposite conclusion. In that case, Wesco, an auto body supply store, asserted claims against its competitor, Paint and Spray Supply, Inc. ("P & E") for hiring Wesco's at-will employees and influencing customers to do business with P & E instead of Wesco.

In analyzing the tortious interference with contract claim arising out of P & E's hiring of Wesco's at-will employees, the Court stated in passing that "[l]iability may arise for tortious interference with a contract even where the contract is terminable at will." *Id.* at 895 (citing the Restatement (Second) of Torts § 766 cmt. g. (1979)).[3] Nevertheless, this Court explained that tortious interference with contract still requires four elements, including "intentional interference

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3 Comment g to the Restatement (Second) of Torts § 766 notes that interference with a contract terminable at will is more analogous to a claim for tortious interference with prospective economic advantage, which requires an additional showing that the interference was "wrongful" or "improper." The Comment further explains that interference by a competitor with a contract terminable at will is generally not wrongful. *Id.* (citing Restatement (Second) of Torts § 768, Comment i). In turn, Comment i to Section 768 explains that, when a customer terminates a contract that is "terminable at will," there is no breach of the contract. *Id.* "The competitor is therefore free, for his own competitive advantage, to obtain the future benefits for himself by causing the termination." *Id.* "Thus he may offer better contract terms, as by offering [a better price], and he may make use of persuasion or other suitable means, all without liability." *Id.*

causing a breach of the contract." *Id.* (emphasis added). This Court then affirmed the district court's entry of summary judgment because, although P & E influenced the employees to terminate their at-will employment contracts with Wesco, there was "no evidence in the record to suggest that Wesco employees **breached** their employment contract with Wesco and, therefore, Wesco cannot maintain this action against Defendants") (emphasis added).

This Court also affirmed summary judgment on Wesco's tortious interference claim arising out of the fact that P & E influenced Wesco customers to stop purchasing paint from Wesco and to start purchasing paint from P & E. The customers had contracts with Wesco, but the contracts did not obligate the customers to continue purchasing goods and/or services from Wesco. *Id.* Thus, although P & E influenced Wesco's customers to stop purchasing goods and services from Wesco and start purchasing similar goods and services from P & E, Wesco did not have a claim for tortious interference with contract because P & E did not cause the customers to **breach** any contract. *Id.* (dismissing claim because there was "no other evidence that such Wesco customers then **breached** such a contractual duty as a result of any interference in the contractual relationship by any of the Defendants") (emphasis added).

The same analysis applies here. Even if DOT Compliance influenced customers to terminate a contractual relationship with DTC Group, there simply is no claim for tortious interference with contract because there is no evidence that DOT Compliance caused customers to **breach** a contract. To the contrary, DTC Group has conceded that no breach of contract

occurs when a customer cancels within three days after their purchase because the Idaho Telephone Solicitation Act expressly gives customers that right. Tr., 338:22 - 339:23.[4]

The District Court's misstatement of the law in its jury instruction constitutes reversible error. *Fowler v. Kootenai Cty.*, 128 Idaho 740, 745 (1996) (a district court's jury instruction that contains a "misstatement of the law which may have had a prejudicial or misleading effect on the jury" constitutes reversible error).

Finally, it must be noted that the District Court's misstatement of the law and failure to apply the Idaho Telephone Solicitation Act, has a stifling effect on competition. As the United States Supreme Court as recognized, "competition in respect to price" is "the central nervous system of the economy." *California Dental Ass'n v. F.T.C.*, 526 U.S. 756, 784-85 (1999). "Among the central facets of this system is competition on the basis of price -- a recognition that suppliers can, and often do, offer lower prices to induce buyers to purchase their goods or services rather than those of a competitor." *United States v. Am. Exp. Co.*, 88 F. Supp. 3d 143,

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4 This principle is perhaps most recognizably demonstrated by T-Mobile, which directs it advertising to other carriers' customers in industry standard two-year contracts that allow for cancellation upon payment of early termination fees. T-Mobile openly and aggressively advertises that it will pay "early termination fees for customers who switched from another provider to T-Mobile." *See* In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, 29 F.C.C. Rcd. 15311 (2014), 2014 WL 7339736. Ironically, DTC Group took advantage of this same principle when it hired DOT Compliance's employees to enable it to start its business. Crossett admitted that he knew the employees had signed employment contracts with covenants not to compete. Tr., 275:7 - 276:11. However, based on advice from his lawyer that the contracts were not enforceable, he decided to hire the employees anyway. *Id.* at 279:13-17 ("after speaking to legal, we were willing to challenge it"). Thus, Crossett acknowledged at trial that there is no legal remedy for encouraging a third party to terminate a contract so long as termination does not result in a breach.

208-09 (E.D.N.Y. 2015). So long as it does not induce customers to **breach** a contract, DOT Compliance is free to compete on price and inform customers of their cancellation rights under the Idaho Telephone Solicitation Act. Indeed, one of the stated legislative purposes of the Idaho Telephone Solicitation Act is to "foster and encourage competition and fair dealings among telephone solicitors." *Id.* at § 48-1001(2).

2. DTC Group Cannot Establish a Claim for Tortious Interference with Contract Because DTC Group's Contracts Were Void Ab Initio, as a Matter of Law, for Failure to Register as a Telephone Solicitor

The Idaho Telephone Solicitation Act mandates that all telephone solicitors "[r]egister with the attorney general at least ten (10) days prior to conducting business in Idaho." I.C. § 48-1004. DTC Group is not registered with the attorney general, even though it acknowledges that the Idaho Telephone Solicitation Act requires it to do so. Tr., 603:17 - 605:22.

The Idaho Legislature is very serious about compliance with the Idaho Telephone Solicitation Act, such that "[a]ny violations of the provisions of [the act]" constitutes "an unlawful, unfair, and deceptive act or practice in trade or commerce...." I.C. § 48-1003(2). "If a telephone solicitor violates any applicable provision of this chapter, any contract of sale or purchase is null and void and unenforceable." I.C. § 48-1007. Given that DTC Group violated the Idaho Telephone Solicitation Act by failing to register as a telephone solicitor, its contracts with customers are "null and void." As a matter of law, a customer's termination of a "void" contract cannot serve as the basis of a claim for tortious interference with contract. *See Silicon Int'l Ore, LLC v. Monsanto Co.*, 155 Idaho 538, 551 (2013) ("a claim for tortious interference with a contract .... is available when a contract is voidable or unenforceable but is not available when the contract is void ab initio.").

DOT Compliance raised this issue in a pre-trial summary judgment motion and as part of a motion for directed verdict. R., 000093-106; Tr., 651:7 - 655:4. In denying those motions, the District Court found that DOT Compliance lacks "standing" to raise the unenforceability of DTC Group's contracts. *Id.* at 72:5-16; 654:12-15. Specifically, the District Court stated that the Idaho Telephone Solicitation Act is "not self-executing" and that "the defendants do not have standing to challenge these contracts or to have them declared void." *Id.* In other words, the District Court concluded that a contract entered into in violation of the Idaho Telephone communications Act is merely "voidable" at the urging of the purchaser and not "void."

The District Court's analysis was simply wrong. This Court has drawn a bright-line distinction between contracts that are merely "voidable" at the urging of one party and contracts that are "void." Contracts that are merely "voidable" may serve as the basis of a claim for tortious interference with contract, but "void" contracts cannot as a matter of law. *Barlow v. International Harvester Co.*, 95 Idaho 881, 893, n. 2 (1974) ("Protection is extended against unjustifiable interference with contracts even though the contract is voidable.... The rule is otherwise with regard to contracts void ab initio."); *Silicon Int'l Ore,* 155 Idaho at 551 ("This Court has held that a claim for tortious interference with a contract is available when a contract is voidable or unenforceable but is not available when the contract is void ab initio.").

"Contracts that are void ab initio are deemed never to have existed in the eyes of the law and cannot form the basis for a tortious interference action." *AMX Int'l, Inc. v. Battelle Energy Alliance, LLC*, 744 F. Supp. 2d 1087, 1093 (D. Idaho 2010). "The threshold issue in this case, then, is whether [the underlying contract with which the defendant allegedly interfered] is void ab initio or simply voidable." *Id.* (entering judgment as a matter of law in favor of the defendant

because the non-compete agreement with which it allegedly interfered violated the law and was, therefor, "void" and not merely "voidable").

DTC Group's contracts are not just "voidable" at the urging of a customer. Instead, the Idaho Telephone Solicitation Act expressly provides that, "[i]f a telephone solicitor violates any applicable provision of this chapter, any contract of sale or purchase is **null and void** and unenforceable." I.C. § 48-1007 (emphasis added). The Idaho Legislature understands the difference between "void" and "voidable" contracts. *State v. Oar,* 129 Idaho 337, 340 (1996) ("when the legislature ... borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed").

Indeed, the Idaho Telephone Solicitation Act is consistent with other Idaho statutes providing that contracts entered into in violation of the statutes are "void," often in the case of statutes requiring registration. *See, e.g.,* I.C. §§ 49-1601, 49-1632 (requiring licensing of motor vehicle dealers and providing that "[a]ny provision of any agreement...which is in violation of any section of this chapter shall be considered **null and void** and without force and effect."); I.C. § 54-4804 (requiring registration of athlete agents and providing that "[a]n agency contract resulting from conduct in violation of this section is **void**....). These statutes can be easily contrasted with other Idaho statutes providing that contracts entered into in violation of statutes are merely "voidable." *See, e.g.,* I.C. § 55-1819 (regulating the sale or disposition of land located outside the states and providing that a disposition "made in violation of any of the provisions of this chapter...shall be **voidable** at the election of the purchaser).

In summary, given the undisputed fact that DTC Group is not a registered telephone solicitor as required by the Idaho Telephone Solicitation Act, its purported contracts with customers are "null and void" as a matter of law. Under well-established Idaho law, interference with a "void" contract cannot support a claim for tortious interference with contract. Accordingly, the District Court erred in denying DOT Compliance's motion for directed verdict on DTC Group's claims for tortious interference with Contract.

3. The District Court Erred In Refusing to Instruct the Jury on the Idaho Telephone Solicitation Act

DOT Compliance attempted to call Brett Delange, the Deputy Attorney General with responsibility for enforcing the Idaho Telephone Solicitation Act, to testify that he sent an enforcement letter to DTC Group explaining that DTC Group is subject to the Idaho Telephone Solicitation Act and that, under that statute, customers have a three-day right of cancellation. Tr., 457:8 - 462:6. The District Court excluded Mr. Delange from testifying on grounds that it was the duty of the District Court, not an expert witness, to instruct the jury on the law. *Id.* The District Court indicated that it would instruct the jury on the Idaho Telephone Solicitation Act, and in particular its provision that customers have a statutory right to cancel within three days:

> As I said, if you want an instruction that the law says that, under the law, a telephone customer is entitled to cancel without penalty - or however you want to phrase it - within three days of entering in the transaction, I'd be happy to consider it and probably would give the jury such an instruction.

Tr., 468:5-16.

DOT Compliance proposed jury instructions that mirrored the Idaho Telephone Solicitation Act. R., 000287-295. Those proposed jury instructions explained the legal concepts described above. For example, DOT Compliance proposed jury instructions explaining that:

- "The Idaho Telephone Solicitation Act requires every telephone solicitor to register with the Idaho Attorney General at least ten days before conducting business." (mirroring I.C. § 48-1004(a)). R., 000291.
- "If a telephone solicitor violates any provision of the Idaho Telephone Solicitation Act, any contract of sale or purchase is null and void and unenforceable." (mirroring I.C. § 48-1007(2)). R., 000295.
- "Unless a telephone solicitor gives the purchaser an unqualified right to return the goods or cancel the services and receive a full refund, a telephone solicitor must send a statement, in writing, to the purchaser, stating that they may cancel the transaction, without penalty, within three business days of the date in which the purchaser receives the written confirmation. Telephone solicitors are also required to orally inform the purchaser at the time the purchase is completed of the customer's right to cancel." (mirroring I.C. § 48-1004(d); 1004(f)(2)). R. 000294.

Despite its prior indication that it would instruct the jury on the Idaho Telephone Solicitation Act, the District Court refused to issue DOT Compliance's proposed instructions or any instructions whatsoever explaining the Idaho Telephone Solicitation Act. Tr., 647:4-13.

The standard of review with regard to jury instructions is "whether the instructions, as a whole, fairly and adequately present the issues and state the law." *Smith v. Mitton*, 140 Idaho 893, 899 (2004). Here the jury was not instructed on the state of the law, including that (1) customers have a statutory right to cancel within three days of a purchase; and (2) a contract entered into by an unregistered telephone solicitor is "null and void." Not knowing the law on these issues allowed the jury to issue a verdict for tortious interference with contract even though (1) customer cancellations within three days do not constitute a breach of contract; and (2) as a matter of law, there was no contract to be breached. Accordingly, the District Court's failure to instruct the jury on the Idaho Telephone Solicitation Act constitutes reversible error.

B. The District Court Erred in Denying the JNOV Motion on DTC Group's Claims for Breach of the Implied Covenant of Good Faith and Fair Dealing

The jury returned a verdict of $20,000 against both David Minert and Jeff Minert, individually, for breach of the implied covenant of good faith and fair dealing. R, 000333-334. The implied covenant of good faith and fair dealing "requires the parties to perform, in good faith, the obligations required by their agreement." *Silicon Int'l Ore,* 155 Idaho at 552. Conduct that "violates, nullifies or significantly impairs any benefit of the ... contract is a violation of the implied-in-law covenant." *Idaho First Nat. Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 288 (1991). Importantly, the implied covenant of good faith and fair dealing "does not create independent obligations, it merely applies to contractual obligations." *Id.* Thus, the implied covenant "only arises in connection with the terms agreed to by the parties, and does not create new duties that are not inherent in the [contract]." *Van v. Portneuf Med. Ctr.*, 147 Idaho 552, 562 (2009). Given that the implied covenant imposes only obligations "consistent with the express terms of an agreement between contracting parties," it does not impose terms not addressed by a contract. *Bank of Commerce v. Jefferson Enterprises, LLC,* 154 Idaho 824, 831 (2013); *see also Wesco*, 149 Idaho at 891-92 (2010) (there can be no implied covenant claim based on solicitation of customers where the contract did not contain a provision prohibiting solicitation); *Wooden v. First Sec. Bank of Idaho*, 121 Idaho 98, 101 (1991) ("there is no basis for Wooden's claim that the agreement imposed on the bank an implied covenant to protect Wooden's property from liens" because the contract contained no such obligation).

The only contract between the parties is the Settlement Agreement. Tr., 306:3-7. DTC Group's Amended Complaint alleges that DOT Compliance, Jeff Minert and David Minert violated the covenant of good faith and fair dealing by disparaging DTC Group to its customers

in violation of the non-disparagement provision of the Settlement Agreement. R., 000235. Specifically, the Amended Complaint alleges that Defendants (1) contractually agreed in the Settlement Agreement that they "would not disparage DTC in communications with third parties"; (2) did "not act in good faith with respect to their agreement to not disparage DTC as specified in the Settlement Agreement"; (3) "impaired DTC's rights under the non-disparagement provision contained in that agreement"; and (4) caused DTC Group damages in the form of cancelled contracts. *Id.*

The District Court's jury instructions mirrored DTC Group's pleading:

> INSTRUCTION NO. 17
>
> With respect to plaintiff's claim for breach of the implied covenant of good faith and fair dealing, the plaintiff has the burden of proving....
>
> 1. that plaintiff and the defendant entered into a contract;
>
> 2. that the defendant **unfairly disparaged plaintiff to others so as to nullify or impair the benefits of the plaintiff under the contract**;
>
> 3. that plaintiff is not attempting to create obligations that are new or inconsistent with the contract; and
>
> 4. that plaintiff has been damaged by the defendant's conduct; and
>
> 5. the amount of the damages.

R., 000316 (emphasis added).

"[T]he sufficiency of the evidence to support a verdict must be based upon the jury instructions. *Mosell Equities, LLC v. Berryhill & Co.*, 154 Idaho 269, 275 (2013). "Whether the evidence was sufficient to support the verdict will therefore depend upon the law as set forth in the jury instructions." *Id.* The jury verdict must be set aside because there is simply no evidence

in the record that Jeff Minert or David Minert "unfairly disparaged plaintiff to others so as to nullify or impair the benefits of the plaintiff under the contract."

DTC Group presented some limited evidence at trial that other DOT Compliance employees (i.e., Ryan Bunnell, but not Jeff or David Minert) made statements to customers that DTC Group characterizes as disparaging and in violation of the non-disparagement provision in the Settlement Agreement.[5] However, DTC Group presented no evidence that Jeff Minert or David Minert personally disparaged DTC Group or otherwise violated, nullified or significantly impaired the non-disparagement provision in the Settlement Agreement. Indeed, DTC Group conceded at trial that it has no evidence that Jeff Minert or David Minert made disparaging comments about DTC Group. As to Jeff Minert, Crossett testified:

> Q. Okay. And can you identify any calls for me that Mr. Jeff Minert made that interfered with your customer contracts?
>
> A. Calls? I cannot make those, no.
>
> Q. Okay. And can you identify for me anything that he did specifically -- I want specific instances of when he breached that non-disparagement clause, Section 4 of that settlement agreement?
>
> A. He specifically as an individual and not as the business owner?
>
> Q. Yes, please.
>
> A. As an individual I don't know that. [sic] I have that evidence.

Tr., 344:13 - 345:1; *see also* R., 000530 (conceding that "DTC Group had no phone recordings in which Dave Minert or Jeff Minert actually defamed DTC Group to a customer").

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5 The jury returned a zero verdict against DOT Compliance on the claims for breach of contract and breach of the implied covenant of good faith and fair dealing -- meaning it found no damages as a result of any such breach. R., 000334.

At trial, Crossett was asked to identify what specific actions Jeff Minert and David Minert took that supported DTC Group's claims against them personally. Tr., 343:15 - 351:21. Crossett identified three actions, none of which involve disparagement or any other violation of the Settlement Agreement:

First, he asserted that Jeff Minert and David Minert acted in bad faith by suing DTC Group three days after it went into business. *Id.* at 346:7 - 347:7. Of course, that lawsuit was filed a year before the Settlement Agreement was executed. *See* Trial Exh. 500. Such pre-contract conduct cannot serve as a basis for a breach of the Settlement Agreement or a breach of the implied covenant of good faith and fair dealing. *See Prof'l Serv. Indus., Inc. v. Kimbrell,* 834 F. Supp. 1305, 1310 (D. Kan. 1993) ("allegations pertaining to conduct occurring *prior* to the formation of the contract cannot be actionable" because "the implied covenant of good faith and fair dealing applies to the *performance* of a contract, not to its formation") (emphasis in original); *Silicon Int'l Ore*, 155 Idaho at 552 ("the covenant only requires that the parties perform in good faith the obligations imposed by their agreement....Thus, before a party can breach this covenant there must be a contract."). Moreover, the Settlement Agreement contains a broad mutual release of all claims pertaining to "any activities or conduct occurring before the Effective Date of this Agreement, including, but not limited to ... breach of the covenant of good faith and fair dealing, for slander, libel or defamation." Trial Exh. 500. As a result, any claims arising out of conduct prior to the Settlement Agreement have been released.

Second, although admitting he had no evidence to support his assertions, Crossett asserted that Jeff and/or David Minert contacted the Department of Labor, triggering an audit of DTC Group. Tr., 347:8-19. *Id.* Any alleged contact with the Department of Labor occurred

prior to the Settlement Agreement, and therefore cannot support a claim that the Minerts breached the covenant of good faith and fair dealing. Tr., 210:10-19; 160:20 - 163:5 (testifying that the Department of Labor audit occurred shortly after depositions in the First Litigation).

Third, Crossett asserted that Jeff and David Minert contacted the FBI, which resulted in a price-fixing investigation. Tr., 344:4-12. More specifically, DTC Group alleges that the Minerts contacted an attorney, who contacted the FBI. *See* R., 000532. No evidence was presented at trial as to any specific comments the Minerts made to the FBI, much less any disparaging comments. In any event, the FBI call occurred **before** the Settlement Agreement was signed on July 11, 2014 ("[A] few days **before** the parties signed the settlement agreement and following a meeting with David Crossett, Dave Minert called his attorney Ms. Shannahan, to 'report' what went on at the meeting and she called the authorities which instigated a grand jury investigation by the U.S. Attorney's Office.") (emphasis added); Tr., 467:22-25 (conceding that "[T]he report to the FBI took place well, **before** the July 10th meeting....") (emphasis added).

Even if the call to the FBI had occurred after execution of the Settlement Agreement, Crossett acknowledged at trial that the call to the FBI was not in violation of the non-disparagement provision or any other provision of the Settlement Agreement:

> A. I'm not sure who called the FBI. I know it was one of them.
>
> Q. Do you think it's a breach of some agreement for him to call the FBI?
>
> A. Not directly.
>
> Q. Okay. Do you think you have -- let's assume he did call the FBI. Do you think you have grounds to sue him for that?
>
> A. No.

Tr., 344:5-12.

In summary, DTC Group presented no evidence of conduct on the part of Jeff Minert or David Minert that violated the non-disparagement provision of the Settlement Agreement. Even assuming that Jeff Minert and David Minert reported DTC group to the Department of Labor and the FBI, none of that alleged conduct supports a jury verdict for breach of the implied covenant of good faith and fair dealing, which requires a showing of conduct that violates or nullifies a contract. All of that alleged conduct took place before the Settlement Agreement was executed, and therefore cannot be a violation of the Settlement Agreement. More importantly, the Settlement Agreement simply does not prohibit any of the alleged conduct. Accordingly, the jury's verdict that Jeff and David Minert violated the covenant of good faith and fair dealing was not supported by substantial and competent evidence and must be set aside.

In an oral ruling from the bench, the District Court denied a JNOV motion on DTC Group's implied covenant claims, reasoning as follows:

> And I think in this case the jury could infer that the Minerts and thereafter their company were responsible for the calls to the Department of Finance, the calls to the FBI, and certainly to -- there was at least one tape where a jury could have found that young Mr. Minert's conversation with the customer was certainly contrary to his stated testimony as to how he talked to customers.
>
> ....
>
> So I think what the jury -- my view is at least the jury could have and did come to the conclusion that the Minerts were not in good faith attempting to fulfill their obligations not to discharge [sic, disparage] under the contract, and that was the basis for their finding of liability.

Tr., 817:23 - 818:17.

The District Court's ruling demonstrates several fundamental flaws. First, the District Court was simply mistaken in its statement that Jeff Minert -- referred to as "the Young Mr.

Minert" -- was on a recorded phone call with customers in which he made disparaging comments. The tape recordings were of DOT Compliance sales staff (e.g., Ryan Bunnell), not Jeff Minert, as DTC Group has conceded. R., 000530 ("…. DTC Group had no phone recordings in which Dave Minert or Jeff Minert actually defamed DTC Group to a customer."); Tr., 344:13 - 345:1 (Crossett conceding that he is not aware of Jeff Minert making disparaging comments to customers or otherwise violating the non-disparagement agreement).

Second, the District Court incorrectly found that the jury's verdict of a violation of the covenant of good faith and fair dealing can be supported by evidence that Jeff Minert and David Minert contacted the Department of Labor and the FBI. As explained above, any such conduct does not violate or nullify the non-disparagement provision or any other provision in the Settlement Agreement, as a matter of law, because the Settlement Agreement does not prohibit that conduct and because the conduct took place before the Settlement Agreement was executed.

Finally, even if the call to the FBI had occurred after execution of the Settlement Agreement, a report to law enforcement cannot possibly be a violation of the implied covenant of good faith and fair dealing, at least where the call resulted in an official FTC Complaint for violations of the Sherman Act and FTC Group's stipulation to a Consent Order. Courts have recognized the sound "public policy intended to encourage private citizens and victims not only to report crime, but also to assist law enforcement with investigating and apprehending individuals who engage in criminal activity." *Kelley v. Tanoos*, 865 N.E.2d 593, 601 (Ind.

2007).[6] Allowing the verdict to stand based on the call to the FBI would have a chilling effect and deter citizens from reporting criminal activity out of fear of personal liability.

For these reasons, the District Court erred in denying the JNOV motion on DTC Group's claims for breach of the implied covenant of good faith and fair dealing.

C. In the Alternative, the District Court Erred in Excluding the FBI Recording

As set forth above, the District Court erroneously concluded that the jury's implied covenant verdict could be supported by the allegation that, prior to executing the Settlement Agreement, Jeff and David Minert reported DTC Group to the FBI, which resulted in an investigation. In the alternative, if the call to the FBI could support a claim for breach of the implied covenant of good faith and fair dealing, the District Court erred in excluding the FBI recording that gave rise to the investigation.

According to Crossett's trial testimony, Crossett and the Minerts met in late-June of 2014 to discuss concerns about customer cancellations as a result of competition. Tr., 177:20 - 183:6. According to Crossett, he "made the off-hand comment that I'd been wanting to raise my prices for a long time." *Id.* at 183:21-23. However, Crossett insists that he did not propose any price-fixing. *Id.* at 359:20-21. Crossett then met again with the Minerts on July 10, 2014 -- the day before signing the Settlement Agreement. *Id.* at 185:18 - 186:4. Unbeknownst to Crossett, that conversation was recorded at the urging of federal law enforcement officers. *Id.* at 485:8-25.

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6 Of course, there are remedies available for false and malicious police reports. "A private citizen who initiated or procured a criminal prosecution could (and can still) be sued for the tort of malicious prosecution-but only if he acted maliciously and without probable cause, and the prosecution ultimately terminated in the defendant's favor." *Kalina v. Fletcher*, 522 U.S. 118, 132-33 (1997). No such circumstances exist here.

In describing his conversations with the Minerts, Crossett testified unequivocally that he did not suggest price-fixing. *Id.* at 186:24 - 189:9. In fact, Crossett testified that the Minerts were the ones who proposed a price-fixing scheme. *Id.* Crossett then asserted that DOT Compliance made a frivolous report to the FBI in an attempt to put DTC Group out of business. *Id.* at 359:10-21.

Crossett attempted to testify as to the "damages" DTC Group suffered as a result of the FBI investigation, including the time, resources and attorney fees it spent in the investigation. *Id.* at 191:4 - 192:14. However, the District Court excluded that evidence of alleged damages because DTC Group had not disclosed such a claim for damages in its Complaint or in discovery. *Id.; see also id.* at 206:19 - 214:17.

After Crossett testified falsely that it was the Minerts who proposed to fix prices, DOT Compliance subpoenaed the FBI video recording and called an FBI agent to authenticate the video at trial. Tr., 466:20 - 475:6. The purpose of introducing the FBI's video recording was to impeach Crossett's testimony that DOT Compliance proposed a price-fixing scheme and then frivolously reported DTC Group to the FBI in an attempt to put it out of business.

The District Court did not allow DOT Compliance to call the FBI witness or play the video recording for the jury. Tr., 466:20 - 473:25. In excluding that evidence, the District Court ruled that it was "impeachment on a collateral issue." *Id.* at 471:23-25. Part of the District Court's rationale for excluding the impeachment evidence was that DTC Group was not permitted to claim damages as a result of the FBI investigation. *Id.* at 471:7-8 ("Well, he's not claiming damages for that [the report to the FBI] either").

The District Court abused its discretion in excluding the FBI recording. While "a witness may not be impeached on an immaterial and collateral issue" (*see Mundy v. Johnson*, 84 Idaho 438, 451 (1962)), the July 10th recorded conversation was not immaterial or collateral. DTC Group opened the door by raising the FBI call in its opening statement (Tr., 117:16 - 112:22), and then focusing on it during Crossett's direct testimony (177:20 - 179:1; 182:22 - 183: 23; 359:20-21) and at closing arguments (725:9-24). The effect of the District Court's ruling was that DTC Group was allowed to testify falsely that the Minerts proposed a price-fixing scheme and then frivolously reported to the FBI that DTC Group had proposed a price fixing scheme. However, DOT Compliance was not allowed to play for the jury the video recording of the very conversation out of which DOT's claims and trial theme arose.

The District Court's reasoning is fundamentally flawed. The District Court ruled that (1) DTC Group could not present evidence of damages related to the FBI investigation because those alleged damages had not been disclosed in discovery; and (2) the conversation that resulted in the FBI investigation was a "collateral issue" on which Crossett could not be impeached. Nevertheless, the District Court then concluded in denying the JNOV motion that the jury's verdict was based on and properly supported by the call to the FBI. Tr., 817:9 - 818:17 ("And I think in this case the jury could infer that the Minerts and thereafter their company were responsible for the calls to the Department of Finance, the calls to the FBI ... and that was the basis for their finding of liability").

There are two ways to look at this issue. If a pre-contract call to the FBI can support a claim for breach of the implied covenant of good faith and fair dealing, then the FBI video cannot be an "immaterial and collateral issue" and the District Court erred by excluding it. If the

call to the FBI is an "immaterial and collateral issue" -- i.e., because it was not prohibited by the Settlement Agreement and occurred before execution of the Settlement Agreement, or because DTC Group did not disclose it as a basis for a damages claim -- then it cannot support the jury's verdict. Either way, the jury's verdict must be set aside.

D. In the Alternative, the Jury's Verdicts Must Be Set Aside for Lack of Damages

As set forth above, the District Court erroneously concluded that the jury's verdict against Jeff Minert and David Minert for breach of the implied covenant of good faith and fair dealing was supported by evidence that they reported DTC Group to the FBI. Even if the District Court were correct, the jury's verdict must still be set aside for lack of damages.

A violation of the implied covenant of good faith and fair dealing "does not result in a cause of action separate from the breach of contract claims, nor does it result in separate contract damages unless such damages specifically relate to the breach of the good faith covenant." *Idaho First Nat. Bank*, 121 Idaho at 289. In addition to proving all other elements of an implied covenant claim, a plaintiff must prove damages "with reasonable certainty." *Id.*; R., 000316 (instructing the jury that the plaintiff must prove "the amount of damages" caused by a breach of the implied covenant of good faith and fair dealing"). The party asserting a claim of damages has the burden of proving not only a right to damages but also the amount of damages." *Bratton v. Scott*, 150 Idaho 530, 537 (2011). Thus, "where a plaintiff presents no evidence to support a jury's damage award, the court must grant a JNOV motion in favor of the defendant." *Id.*

The jury's verdict for breach of the implied covenant must be set aside because DTC Group presented no evidence of damages, much less damages in the amount of $20,000 each against Jeff Minert and David Minert. DTC Group did not present any evidence of damages

caused by the call to the FBI. For example, DTC Group did not claim (much less present evidence) that the FBI investigation cost DTC Group customers. Crossett attempted to testify as to the "damages" DTC Group suffered as a result of the FBI investigation, including the time, resources and attorney fees it spent in connection with the investigation, but the District Court excluded that testimony because DTC Group had not disclosed such a claim for damages in its Complaint or in discovery. *Id.* at 191:4 - 192:14; 206:19 - 214:17. The District Court confirmed that ruling later when it stated as part of its rationale for excluding evidence of the FBI recorded conversation that "he's not claiming damages for that either." *Id.* at 471:7-8.

Even though the District Court precluded DTC Group from presenting damages related to the FBI investigation, DTC Group's counsel again emphasized the call to the FBI in her closing statement and referenced the District Court's order excluding damages related to that call, but asked the jury to consider those excluded damages in calculating damages for lost customers:

> And, remember, although -- remember I told you about there was these non-monetary or damages that David couldn't really quantify. Those things being like ... administrative time, time to respond to the FBI investigation, things of that nature that we're not going to be able to recoup because we lost that third bucket. But just keep in mind that those damages were there for David. And he endured all this at the same time that he was trying to run his business.

Id. at 739:19 - 740:5.

The jury did exactly what DTC Group asked it to do -- it awarded damages for the time and attorney fees spent addressing the FBI investigation, even though the District Court ruled that those damages are not recoverable. Accordingly, the District Court erred in denying the motion for judgment notwithstanding the verdict based on the absence of evidence of damages supporting the jury verdict.

E. The District Court Erred in Awarding Attorney Fees to DTC Group

The District Court awarded DTC Group the entirety of its attorney fees incurred in pursuing its claims, even though DTC Group lost on the vast majority of its claims. DTC Group's claims for unfair competition, civil conspiracy and tortious interference with prospective economic advantage were dismissed prior to submitting the case to the jury. DTC Group did not prevail on its breach of contract claim because it did not prove any damages. R., 000329-330. DTC group prevailed only on its claim for breach of the implied covenant of good faith and fair dealing against Jeff Minert and David Minert, and on its tortious interference with contract claim against DOT Compliance and Ryan Bunnell. R., 000331-334.

As an initial matter, if this Court sets aside the jury's verdict, DTC Group would obviously not be the prevailing party. Then the District Court's attorney fee award should be reversed and this case should be remanded to the District Court with instructions to determine an appropriate cost and fee award to Appellants as the prevailing party.

Even if this Court does not set aside the jury's verdicts, the District Court's fee award must still be reversed. The Settlement Agreement contains an attorney fee provision, which provides for a fee award to the prevailing party in an action related to an alleged breach of the Settlement Agreement. *See* Trial Exh. 500. DTC Group did not prevail on its breach of contract claim, however, because the jury found that it did not prove damages. *See Farrar v. Hobby*, 506 U.S. 103, 112-13 (1992). The fact that the jury found a breach, but no damages, does not render DTC Group the prevailing party on the breach of contract claim. *Id.* ("To be sure, a judicial pronouncement that the defendant has violated the Constitution, unaccompanied by an enforceable judgment on the merits, does not render the plaintiff a prevailing party").

The breach of contract claim is the only claim that would trigger fees to DTC Group under the Settlement Agreement or Idaho Code § 12-120(3), which provides for attorney fees to the party that prevails on claims arising out of a commercial transaction between the parties. "Whether an action is based on a commercial transaction is a question of law that this Court exercises free review over." *Sims v. Jacobson*, 157 Idaho 980, 342 P.3d 907, 911-12 (2015). "This Court has stated that Idaho Code section 12-120(3) applies when 'the commercial transaction comprises the gravamen of the lawsuit.'" *Id.* "However, we have interpreted that rule to require courts to consider the gravamen of each claim within the lawsuit." *Id.* "When a lawsuit has multiple claims, courts look at each individual claim to determine what statutory basis allows attorney fees recovery on that claim." *Id.* "In other words, courts analyze the gravamen claim by claim." *Id.* To determine whether the gravamen of a claim is a commercial transaction, "the court must analyze whether a commercial transaction (1) is integral to the claim and (2) constitutes the basis of the party's theory of recovery on that claim." *Id.*

DTC Group prevailed on its claim for breach of the implied covenant of good faith and fair dealing against Jeff Minert and David Minert. However, the verdict was not based on an obligation imposed by the Settlement Agreement or any other commercial transaction between the parties. Instead, as the District Court acknowledged, the verdict was based on the FBI call -- an act that is not governed by the Settlement Agreement and, in fact, occurred prior to execution of the Settlement Agreement.[7]

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7 DOT Compliance acknowledges that a claim for breach of the implied covenant could have resulted in an attorney fee award if DTC Group had prevailed on a theory tied to the Settlement Agreement. DTC Group's Amended Complaint alleged that DOT Compliance violated the covenant of good faith and fair dealing by breaching the non-disparagement

The only other claim on which DTC Group prevailed was its claim for tortious interference with contract. That claim, however, did not arise out of any commercial transaction between the parties. The tortious interference claim in DTC Group's Amended Complaint makes no reference to the Settlement Agreement or any other commercial transaction between the parties. R., 000236-37. Instead, it alleges that DOT Compliance interfered with contracts between DTC Group and its customers. DTC Group took the position in its motion for attorney fees that Idaho Code § 12-120(3) applies to the tortious interference claim because the contracts between DTC Group and its customers are commercial transactions. Tr., 800:1-22. To the contrary, this Court has held that "[T]he action must arise from a commercial transaction **between the parties**." *Syringa Networks, LLC v. Idaho Dep't of Admin.*, 155 Idaho 55, 66 (2013). For that reason, a claim for tortious interference with another party's commercial transactions does not trigger a fee award. *Id.; see also Thirsty's L.L.C. v. Tolerico*, 143 Idaho 48, 51 (2006) ("a prevailing party on a claim for tortious interference is not entitled to attorney fees under I.C. § 12–120(3)" because "[t]ortious interference with a contract is not an action to recover on a contract, nor a commercial transaction").

The District Court was required to "look at each individual claim to determine what statutory basis allows attorney fees recovery on that claim" and then "bifurcate the claims and award fees pursuant to § 12–120(3) only on the commercial transaction." *Sims*, 157 Idaho 980, 342 P.3d at 911-12. The District Court did not go through that analysis. Instead, it stated in an

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provision of the Settlement Agreement. R., 000235. However, the verdict against Jeff and David Minert was not based on that theory. Instead, it was based on the call to the FBI, which was unrelated to the Settlement Agreement and occurred prior to execution of the settlement agreement.

oral ruling from the bench, without any analysis of the individual claims, that "I don't believe this is an appropriate case for apportioning the fees," and awarded DTC Group the entirety of its attorney fees. Tr., 824:10-12. Accordingly, the attorney fee award must be set aside and remanded for a recalculation of attorney fees based only on claims that arose out of a commercial transaction. *J.R. Simplot Co. v. Rycair, Inc.*, 138 Idaho 557, 565 (2003) (setting aside the district court's attorney fee award and remanding to the district court with instructions to "recalculate the award of fees" and "allocate the attorney fees incurred by Rycair in defending against the breach of contract claims but not include fees incurred in defending [the negligence claims]").

F. The District Court Erred in Denying DOT Compliance's Motion for Attorney Fees

DOT Compliance prevailed on the breach of contract claim -- the only claim that arose out of a commercial transaction between the parties. Accordingly, the District Court erred in denying DOT Compliance's motion for attorney fees under Idaho Code § 12-120(3) and the terms of the Settlement Agreement. *Syringa Networks*, 155 Idaho at 67 (when the defendant prevails on a claimed breach of a commercial contract, the defendant is entitled to an award of attorney fees).

G. The Court Should Award Appellants Attorney Fees on Appeal

Appellants seek an award of costs and attorney fees on appeal pursuant to Idaho Code § 12-120(3), the terms of the Settlement Agreement and Idaho Appellate Rules 40 and 41. Although the jury's verdict for breach of the implied covenant of good faith and fair dealing was not based on a commercial transaction, DTC Group's Amended Complaint framed the claim as a violation of the Settlement Agreement, a commercial transaction. R., 000235. Accordingly, if

the Court sets aside the jury's verdict on appeal, Appellants should be awarded their reasonable attorney fees on appeal.

V. CONCLUSION

For the reasons set forth above, the jury's verdicts for tortious interference with contract and breach of the implied covenant of good faith and fair dealing must be set aside. Upon setting aside the jury's verdicts, the Court should award Appellants their attorney fees on appeal pursuant to Idaho Code § 12-120(3) and Idaho Appellate Rules 40 and 41 and remand to the District Court to determine an appropriate award of costs and attorney fees to Appellants as prevailing parties. Even if the Court does not set aside the jury's verdicts, it should reverse the District Court's attorney fee award and remand to the District Court for a recalculation of attorney fees based only on claims that arose out of a commercial transaction.

DATED THIS 13 day of January, 2016.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By _____
Merlyn W. Clark, ISB No. 1026
D. John Ashby, ISB No. 7228
Attorneys for Defendant-Appellants DOT COMPLIANCE SERVICE, JEFF MINERT, DAVID MINERT and RYAN BUNNELL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13 day of January, 2016, I caused to be served a true copy of the foregoing APPELLANT'S BRIEF by the method indicated below, and addressed to each of the following:

Michelle R. Points
Points Law, PLLC
910 W. Main St., Ste. 222
Boise, ID 83702

☐ U.S. Mail, Postage Prepaid
☒ Hand Delivered
☐ Overnight Mail
☐ Telecopy

D. John Ashby

ADDENDUM
TO
APPELLANT'S
BRIEF

Idaho Statutes

TITLE 48
MONOPOLIES AND TRADE PRACTICES

CHAPTER 10
IDAHO TELEPHONE SOLICITATION ACT

48-1001. LEGISLATIVE FINDINGS AND INTENT. (1) The use of telephones for commercial solicitation is rapidly increasing. This form of communication offers unique benefits, but also entails special risks and the potential for abuse. Many Idaho residents and businesses have lost money or suffered harm primarily as a result of out-of-state telemarketing abuse. For the general welfare of the public and in order to protect the integrity of the telemarketing industry, the following provisions of law are deemed necessary.

(2) It is the intent of the legislature in enacting this chapter to safeguard the public against deceit and financial hardship, to insure, foster and encourage competition and fair dealings among telephone solicitors by requiring adequate disclosure, and to prohibit representations that have the capacity, tendency, or effect of misleading a purchaser. The provisions of this chapter are remedial, and shall be construed and applied liberally to accomplish the above-stated purposes.

(3) This chapter shall be known and may be cited as the "Idaho Telephone Solicitation Act."

History:
[48-1001, added 1992, ch. 27, sec. 1, p. 83.]

Idaho Statutes

TITLE 48
MONOPOLIES AND TRADE PRACTICES

CHAPTER 10
IDAHO TELEPHONE SOLICITATION ACT

48-1003. UNLAWFUL ACTS. (1) It is an unlawful act for a telephone solicitor to:

(a) Intimidate or torment any person of normal and reasonable sensitivities in connection with a telephone solicitation;

(b) Refuse to hang up and free the purchaser's line immediately once requested to do so by the purchaser;

(c) Misrepresent the price, quality, or availability of the goods or services being offered to the purchaser, or not to disclose all material matters relating directly or indirectly to the offered goods or services;

(d) Advertise, represent, or imply that the person has the approval or endorsement of any government, governmental office, or agency, unless such is the fact;

(e) Advertise, represent, or imply that the person has a valid registration number when the person does not;

(f) Utilize any device or method to block or mislead the intended recipient of the call as to the identity of the solicitor, or the trade name of the person being represented by the solicitor on a caller identification telecommunication device;

(g) Fail to comply with the provisions of section 48-603A, Idaho Code;

(h) Violate any applicable provision or requirement of this chapter; and

(i) Send an unsolicited advertisement to a telephone facsimile machine.

(2) Any violation of the provisions of this chapter is an unlawful, unfair, and deceptive act or practice in trade or commerce for the purpose of applying the Idaho consumer protection act, chapter 6, title 48, Idaho Code.

History:
[48-1003, added 1992, ch. 27, sec. 1, p. 85; am. 1997, ch. 224, sec. 1, p. 660; am. 1999, ch. 46, sec. 1, p. 108.]

Idaho Statutes

TITLE 48
MONOPOLIES AND TRADE PRACTICES

CHAPTER 10
IDAHO TELEPHONE SOLICITATION ACT

48-1004. TELEPHONE SOLICITOR DUTIES. (1) Telephone solicitors shall:
(a) Register with the attorney general at least ten (10) days prior to conducting business in Idaho. All registrations shall be valid for a period of one (1) year from the effective date of the registration. Any information reported in the application which has changed during the year shall be reported within two (2) weeks of such change to the attorney general and shall be included in an amended registration form filed at the time the telephone solicitor renews his registration. Registrations may be renewed annually by applying to the attorney general and paying a registration renewal fee;
(b) File with the attorney general an irrevocable consent appointing the attorney general as an agent to receive civil process in any action, suit, or proceeding brought under this chapter;
(c) Provide his registration number to any purchaser who requests the registration number;
(d) Orally inform the purchaser at the time the purchase is completed of his right to cancel as provided in subsection 48-1004(2), Idaho Code, and state the telephone solicitor's registration number issued by the attorney general;
(e) Provide accurate and complete information when making a registration application and possess and maintain a valid registration as required in this chapter; and
(f) Give the full street address, including the telephone number, of the telephone solicitor if a sale or purchase is completed.
(2) Unless the purchaser has an unqualified right to return the goods or cancel the services and receive a full refund, the telephone solicitor shall send a written confirmation to the purchaser, which shall contain the following statement in ten (10) point bold face type, which sets forth a purchaser's right to cancel any agreement made pursuant to a telephone solicitation under this section:

NOTICE OF CANCELLATION

You may cancel this transaction, without any penalty or obligation whatsoever, within three business days of the date in which you receive this written confirmation.

If you cancel, all payments or other consideration which may have already been made by you will be returned within ten business days following receipt by the telephone solicitor of your cancellation notice.

If you cancel, you must return the goods to the telephone solicitor at the address listed below and at the telephone solicitor's risk and expense within twenty-one days of the date

you receive back from the telephone solicitor the payments or consideration you have already made.

To cancel this transaction, deposit in the mail or deliver a signed and dated copy of this cancellation notice or any other written notice to .....(Name of telephone solicitor)....., at .....(Address of seller's place of business)..... not later than midnight of the third business day after which you received this notice.

I hereby cancel this transaction.

(Date)

(Buyer's signature)

History:

[48-1004, added 1992, ch. 27, sec. 1, p. 85.]

Idaho Statutes

TITLE 48
MONOPOLIES AND TRADE PRACTICES

CHAPTER 10
IDAHO TELEPHONE SOLICITATION ACT

48-1007. PRIVATE CAUSES OF ACTION AND REMEDIES. (1) Any person who purchases goods or services pursuant to a telephone solicitation and thereby suffers damages as a result of any act, conduct, or practice declared unlawful in this chapter shall have the same rights and remedies in seeking and obtaining redress under this chapter as those granted under the Idaho consumer protection act, chapter 6, title 48, Idaho Code.

(2) If a telephone solicitor violates any applicable provision of this chapter, any contract of sale or purchase is null and void and unenforceable.

(3) If a telephone solicitor fails to deliver the goods or services contracted for, pursuant to the federal trade commission's "mail order merchandise rule," 16 CFR 435, the contract to purchase is null and void.

(4) Any contract, agreement to purchase, or written confirmation executed by a purchaser which purports to waive any of the purchaser's rights under this chapter is against public policy and shall be null and void and unenforceable.

(5) The remedies provided for in this chapter are not exclusive, and shall be in addition to any other procedures or remedies for any violation or conduct provided for in any other law.

History:
[48-1007, added 1992, ch. 27, sec. 1, p. 88.]