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Drug Testing Compliance Group v. DOT Compliance Service Appellant's Brief 2 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 REPLY BRIEF

APPELLANT'S REPLY 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. INTRODUCTION

DTC Group accuses DOT Compliance of tortious interference with its contracts. It is true that DOT Compliance competes on price and encourages customers to purchase services from DOT Compliance instead of DTC Group or any other competitor. However, DOT Compliance did not tortiously interfere with DTC Group's contracts, as established by two legal principles rooted in the Idaho Telephone Solicitation Act.

First, under the Idaho Telephone Solicitation Act, DTC Group's contracts are "null and void" because of DTC Group's failure to register as a telephone solicitor with the Idaho Attorney General's office. Void contracts -- as opposed to contracts that are merely voidable -- cannot serve as the basis of a tortious interference claim as a matter of law.

Second, as DTC Group has conceded on appeal, no customer breached a contract with DTC Group because the Idaho Telephone Solicitation Act gives customers an unqualified right to cancel their purchase within three days, "without any penalty or obligation whatsoever." I.C. § 48-1004. DTC Group's argument that it need not establish the breach of an underlying contract has been expressly rejected by the Idaho Supreme Court. For either of these reasons, the District Court erred in denying the JNOV motion on DTC Group's claim for tortious interference with contract.

The District Court similarly erred in denying DOT Compliance's JNOV motion on the claim for breach of the implied covenant of good faith and fair dealing. In denying that motion, the District Court concluded that the jury's verdict was supported by evidence that David Minert and/or Jeff Minert reported DTC Group to the FBI with regard to a price-fixing proposal. On appeal, DTC Group concedes that the District Court's conclusion was wrong because the call to

the FBI occurred prior to execution of the Settlement Agreement and because the District Court had expressly excluded any damages that DTC Group allegedly incurred addressing the FBI investigation and grand jury proceedings. Even though it has now disavowed any claim arising out of the FBI report, DTC Group claims that the Minerts breached the implied covenant of good faith and fair dealing when they "wrongfully attempted to 'implicate' Mr. Crossett for criminal price fixing" during the July 10th meeting recorded at the urging of the FBI. DTC Group's argument contradicts well-established public policy encouraging citizens to participate in law enforcement investigations. It also ignores the fact that the July 10th meeting occurred prior to execution of the Settlement Agreement. In any event, neither the call to the FBI nor any participation in the FBI investigation violates any express or implied obligation in the Settlement Agreement. Thus, it cannot serve as the basis of claim for breach of the implied covenant of good faith and fair dealing.

Finally, the District Court's award of attorney fees should be reversed because DTC Group did not prevail on any claim that arises out of a commercial transaction between the parties.

II. ARGUMENT

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

1. The District Court Erred in Denying JNOV on the 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

DTC Group claims that DOT Compliance tortiously interfered with its contracts by informing DTC Group customers of their statutory cancellation rights and encouraging them to cancel. R., 000236-237. That claim fails as a matter of law because DTC Group's contracts are

"null and void" as a result of DTC Group's failure to register as a telephone solicitor with the Idaho Attorney General's Office.

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 Idaho Attorney General's Office, even though it acknowledges that the Idaho Telephone Solicitation Act requires it to do so. Tr., 603:17 - 605:22. Under the clear language of the Idaho Telephone Solicitation Act, DTC Group's failure to register renders its contracts "null and void." I.C. § 48-1007.

DTC Group does not dispute on appeal the fact that it failed to registered as a telephone solicitor with the Idaho Attorney General's Office. *See* Respondent's Brief, p. 6. Instead, it echoes the District Court's erroneous conclusion that DOT Compliance lacks "standing" to challenge DTC Group's contracts as void. In support of that argument, DTC Group relies upon *Barlow v. Int'l Harvester Co.*, 95 Idaho 881 (1974). However, *Barlow* does not hold that a defendant lacks standing to raise the fact that a contract at issue in an intentional interference claim is void. To the contrary, *Barlow* holds that a void contract cannot be the subject of an intentional interference claim as a matter of law.

Barlow did not involve a void contract. Instead, the defendant in *Barlow* sought dismissal of an intentional interference with contract claim on grounds that the payment term in the underlying contract was so "uncertain" that the contract was rendered "unenforceable." *Id.* at 893. DTC Group selectively quotes this Court's holding as follows:

> Whether or not such alleged uncertainty of a term would have rendered the contract unenforceable in an action brought by one of the parties to the contract is irrelevant to the question of whether the plaintiffs established a prima facie case of the tort of

> interference with contract. Protection is extended against unjustifiable interference with contracts even though the contract is **voidable** [omitted footnote] or **unenforceable** in an adversary proceeding.

Id. (emphasis added).

DTC Group conveniently omits from its quotation a footnote that states the rule of law at the heart of this issue on appeal -- the bright-line distinction between "void" and merely "voidable" contracts. After stating the general rule that "voidable" contracts may be the subject of an intentional interference claim, the Court clarified footnote omitted by DTC Group that "[t]he rule is otherwise with regard to contracts void ab initio." *Id.* at 893, footnote 2. This Court just recently re-affirmed the rule of law 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." *Silicon Int'l Ore, LLC v. Monsanto Co.*, 155 Idaho 538, 551 (2013); *see also AMX Int'l, Inc. v. Battelle Energy Alliance, LLC*, 744 F. Supp. 2d 1087, 1093 (D. Idaho 2010) (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").

The District Court failed to apply this important distinction and did not analyze whether DTC Group's contracts were "void" or merely "voidable." Instead, it held -- contrary to this Court's repeated pronouncements that a "void" contract cannot serve as the basis of an intentional interference claim as a matter of law -- that DOT Compliance lacked standing to raise the fact that DTC Group's contracts are void. *See* Tr., 654:12-15.

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. I.C. § 48-1007. Under this Court's rulings in *Barlow* and *Silicon Int'l Ore*, alleged interference with a "void" contract cannot support a claim for tortious interference with contract as a matter of law. Accordingly, the District Court erred in denying DOT Compliance's motion for directed verdict on DTC Group's claims for tortious interference with contract.

DTC Group attempts to divert the Court's attention from the real issue by asserting that DOT Compliance also was not registered with the Idaho Attorney General's Office for a period of time. However, once informed of the registration requirement, DOT Compliance registered as a telephone solicitor with the Idaho Attorney General's office as required by law. Tr., 574:12-17. DTC Group did not. 603:17 - 605:22. When DTC Group finally got around to registering just prior to trial, the Idaho Attorney General's Office rejected its registration application because it did not have a clearly stated cancellation policy as required by the Idaho Telephone Solicitation Act. Tr., 603:17 - 605:22. In any event, the only issue before this Court is whether DTC Group's contracts are "void" or merely "voidable" as a result of its failure to register. Given that the Idaho Telephone Solicitation Act declares those contracts "null and void," the District Court erred in denying DOT Compliance's JNOV motion.

2. The District Court Erred in Denying DOT Compliance's Motion for Directed Verdict on the Claim for Tortious Interference with Contract Because DTC Group's Customers had a Statutory Right to Cancel within Three Days

"[A] prima facie case of the tort of interference with contract requires the plaintiff to prove: (a) the existence of a contract; (b) knowledge of the contract on the part of the defendant; (c) intentional interference **causing a breach of the contract**; [and] (d) injury to the plaintiff

resulting from the breach." *Idaho First Nat. Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 283-84 (1991) (emphasis in original) (quoting *Barlow*, 95 Idaho 881).

DTC did not (and could not) establish the third element of a claim for tortious interference with contract -- intentional interference "causing a breach of the contract." DTC Group recognizes this element in its Amended Complaint by pleading that DOT Compliance influenced customers to cancel their contracts, thereby "causing the individual with whom DTC has contracted to **breach** a term of the contract." R., 000237 (Amended Complaint, ¶ 45) (emphasis added). As a matter of law, however, the customers did not breach their contracts when they terminated those contracts because the Idaho Telephone Solicitation Act gives customers an unqualified right to cancel their purchase within three days, "without any penalty or obligation whatsoever." I.C. § 48-1004.

DTC Group has conceded that, as a result of the Idaho Telephone Solicitation Act, no breach of contract occurs when a customer cancels its contract:

> 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?
>
> A. Correct.

Tr., 338:22 - 339:23; *see also* Respondent's Brief, p. 31 (acknowledging that, "[i]f a contract is terminable at the will of a party to the contract and that party terminates the contract, that party has not breached the contract but has only exercised their right to terminate.").

DTC Group did not present evidence to establish an essential element of its intentional inference claim -- "intentional interference ***causing a breach of the contract***." *Bliss Valley Foods*, 121 Idaho at 283-84. Accordingly, the District Court erred in denying DOT

Compliance's motion for directed verdict on DTC Group's tortious interference claim and the jury's verdict must be set aside.

DTC Group does not address this issue in its Respondent's Brief. Instead, it asserts that DOT Compliance did more than just inform customers of their statutory right to cancel, i.e., that DOT Compliance sales staff made "defamatory" statements to customers. That assertion is not relevant to the issue on appeal of whether DOT Compliance caused customers to "breach" a contract with DTC. In any event, DTC Group did not bring a defamation claim against DOT Compliance. It asserted a claim for breach of the non-disparagement clause in the Settlement Agreement, but the jury concluded that DTC Group failed to establish any damages related to that claim. R., 000329-330.

3. The Tortious Interference Jury Instruction Misstated the Law

Over DOT Compliance's objection, the District Court issued a jury instruction that misstated the elements of an intentional interference claim. Specifically, the District Court removed from the standard IDJI 4.70 jury instruction the requirement that DOT Compliance "intentionally interfered with the contract, causing a breach," and replaced it with an instruction requiring only that intentional interference caused "termination" of the contract. R., 000318.

DTC Group argues that the modification to the jury instruction finds support in *Wesco Autobody Supply, Inc. v. Ernest*, 149 Idaho 881(2010). However, that case did not eliminate the requirement that the defendant's intentional interference caused a breach of a contract. After noting that "[l]iability may arise for tortious interference with a contract even where the contract is terminable at will," the Court reiterated that the plaintiff still must establish "intentional interference **causing a breach of the contract**" as an essential element of a tortious interference

claim. *Id.* at 895 (emphasis added). The Court then affirmed the district court's entry of summary judgment because, although P&E influenced Wesco employees and customers to terminate their contractual relationships with Wesco, there was "no evidence in the record to suggest that Wesco [employees or customers] **breached** their [contracts] with Wesco and, therefore, Wesco cannot maintain this action against Defendants." *Id.*

DTC Group summarizes the Court's holding in *Wesco* as follows: "That Court simply found that because the employees didn't breach their employment agreements, there was no interference claims." Respondent's Brief, p. 31. That is exactly right; there can be no claim for intentional interference without evidence showing that the "intentional interference caus[ed] a breach of the contract." *Id.* at 895

Oddly, DTC Group cites *Idaho First Nat. Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266 (1991) in further support of its position. That case explains exactly why the District Court's jury instruction was erroneous. In *Bliss Valley Foods*, Robert Erkins ("Erkins") asserted that First National Bank tortiously interfered with his contractual relationships by (1) interfering with his consulting contract with Bliss Valley Foods and (2) interfering with his receipt of lease payments from real property he had leased to Bliss Valley Foods. *Id.* at 283. Much like the District Court here, the trial court in *Bliss Valley Foods* issued a jury instruction that omitted the third element of a tortious interference claim as set forth in *Barlow* -- "intentional interference **causing a breach of the contract**." *Id.* (emphasis in original).

Instead of mirroring the elements of a tortious interference claim as set forth in *Barlow*, the trial court in *Bliss Valley Foods* issued a jury instruction replacing the third element of the tort -- "intentional interference causing a breach of the contract" -- with an instruction requiring

only "intentional interference with the contract or prospective economic advantage without justification." *Id.* The jury found in favor of Erkins based on that instruction.

On appeal, this Court concluded that the jury instruction was erroneous because it "misstates the prima facie elements of the tort of interference with contract by a third party as set forth by this Court in *Barlow*." *Id.* at 284. "The *Barlow* case clearly requires the claimant to prove, and the jury to find, an 'intentional interference **causing a breach of the contract**....'" *Id.* (emphasis in original).

This Court then went on to explain that liability for tortious interference with contract turns on whether the consulting contract was terminable without causing a breach. Specifically, the Court explained that, if the consulting contract was "terminable without the other having a claim against it for breach of contract, then Erkins' claim based on the loss of those consulting services would not be the tort of interference with contract as set out in *Barlow*...." *Id.* at 286. "Only if Erkins had a contract with Bliss Valley which would subject Bliss Valley to damages for breach of contract if it terminated the consulting contract with Erkins would Erkins have a claim for tortious interference with a contract under *Barlow*." *Id.*

This Court held that the jury instruction issued in *Bliss Valley Foods* was erroneous and constituted reversible error because it "omitted the requirement from *Barlow*, in the tortious interference with the contract claims, that the bank's conduct was an 'intentional interference **causing a breach of the contract**.'" *Id.* (emphasis in original). Accordingly, the Court set aside the jury's verdict.

The same analysis applies here. Just as in *Bliss Valley Foods*, the District Court's jury instruction constitutes reversible error because it "omitted the requirement from *Barlow*, in the

tortious interference with the contract claims, that the bank's conduct was an 'intentional interference ***causing a breach of the contract.***'" *Id.* (emphasis in original). Accordingly, the jury's verdict on the intentional interference with contract claim must be set aside.

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

In its Amended Complaint, DTC Group alleged that DOT Compliance, Jeff Minert and David Minert violated the implied 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. Consistent with the pleadings, the District Court's jury instruction provided that jury could only issue a verdict against a defendant who "unfairly disparaged plaintiff to others so as to nullify or impair the benefits of the plaintiff under the contract," causing damage to DTC Group. R., 000316 (Jury Instruction No. 17). 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. However, the jury did not issue a verdict against DOT Compliance because of a lack of damages. *Id.*

"[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's verdict must be set aside because there is simply no evidence in the record that David or Jeff Minert "unfairly disparaged plaintiff to others so as to nullify or impair the benefits of the plaintiff under the contract" as required by Jury Instruction No. 17.

In denying DOT Compliance's motion for JNOV, the District Court held that the jury verdict against David and Jeff Minert was based on and supported by evidence of two facts: (1) that David and/or Jeff Minert reported DTC Group to the FBI with regard to its price-fixing proposal; and (2) that Jeff Minert disparaged DTC Group to a customer in a recorded call. Tr., 817:23 - 818:17.

DTC Group has now conceded that the District Court was wrong as to both of those facts. The call to the FBI occurred prior to execution of the Settlement Agreement and the District Court expressly excluded any damages (i.e., time, resources and attorney fees) that DTC Group allegedly incurred addressing the FBI investigation and subsequent grand jury proceedings. Tr., 467:22-25 (conceding that "[T]he report to the FBI took place well, before the July 10th meeting...."); *Id.* at 191:4 - 192:14; 206:19 - 214:17 (excluding evidence of the "time and money having to spend away from the company dealing with a grand jury investigation that in our mind was frivolously alleged" because DTC Group had not disclosed such a claim for damages in its Complaint or in discovery).

DTC group acknowledges on appeal that the call to the FBI cannot support the verdict and now expressly disavows that theory. Respondent's Brief, p. 20 ("As a point of clarification, DTC Group did not claim that [David or Jeff Minert] defamed DTC Group, or breached the Settlement Agreement with DTC Group, when they reported DTC Group to the Department of Justice on claims of criminal price fixing."). DTC Group similarly concedes that the District Court was wrong in its statement that Jeff Minert disparaged DTC Group to a customer in a recorded call. *Id.* at p. 27 ("DTC Group never asserted that Dave or Jeff Minert themselves actually made customer calls.").

The question presented squarely on appeal is whether DTC Group presented evidence that David and Jeff Minert "unfairly disparaged plaintiff to others so as to nullify or impair the benefits of the plaintiff under the contract," causing damage to DTC Group. R., 000316 (Jury Instruction No. 17). No such evidence was presented at trial, and DTC Group does not contend otherwise. Instead, DTC Group now offers a handful of new and novel theories, none of which involve evidence disparaging comments made by David or Jeff Minert and none of which support a verdict against David or Jeff Minert for breach of the implied covenant of good faith and fair dealing.

1. Allegations of Pre-Contract Bad Faith Do Not, as a Matter of Law, State a Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing

First, DTC Group argues that, although neither David nor Jeff Minert made disparaging comments or otherwise breached the Settlement Agreement, they "entered the Settlement Agreement in bad faith with no intention of ever complying with its terms after its execution." Respondent's Brief, p. 20. That argument fails for several reasons. As an initial matter, there is no evidence that David or Jeff Minert failed to comply with the terms of the Settlement Agreement. DTC Group presented no such evidence at trial and they point to no such evidence now.

Moreover, an assertion that a party entered into an agreement in bad faith does not, as a matter of law, state a claim for breach of the implied covenant of good faith and fair dealing. The implied covenant of good faith "only requires that the parties perform in good faith the obligations imposed by their agreement." *Silicon Int'l Ore,* 155 Idaho at 552. "Thus, before a party can breach this covenant there must be a contract." *Id.* As one court recently explained:

> [N]o claim for breach of the duty of good faith and fair dealing will lie for conduct occurring prior to, or during, the formation of a contract. In the present case, the plaintiffs repeatedly alleged that the defendants made material misrepresentations and omissions of fact regarding the structured settlements that induced them to enter into the agreements at issue. Because the challenged conduct underlying the plaintiffs' complaint thus took place at the negotiation and execution stage, rather than at the performance stage of their contracts, the defendants owed the plaintiffs no duty of good faith and fair dealing. In the absence of any other identifiable conduct that occurred subsequent to the contracts' formation and arose independent of the defendants' initial misrepresentations, we conclude that the plaintiffs have alleged insufficient facts upon which to base a claim for breach of the duty of good faith and fair dealing.

Macomber v. Travelers Prop. & Cas. Corp., 261 Conn. 620, 638-39 (2002); *see also* 27 Williston on Contracts § 70:48 (4th ed.) ("The general duty of good faith and fair dealing extends only to the performance and enforcement of a contract and does not apply to the negotiation stage prior to the formation of the contract. Therefore, a failure to act in good faith and in accordance with reasonable standards of fair dealing during precontractual negotiations does not amount to a breach.").

2. DTC Group's Call to the FBI and Subsequent Meeting with Crossett Occurred Prior to Execution of the Settlement Agreement, and the District Court Excluded Damages Related to the FBI Investigation

Next, even though it has now disavowed a claim arising out of the FBI report, DTC Group claims now for the first time on appeal that David and Jeff Minert breached the implied covenant of good faith and fair dealing when they "wrongfully attempted to 'implicate' Mr. Crossett for criminal price fixing." Respondent's Brief, p. 22. It appears that DTC group is trying to draw a distinction between the original "report" to the FBI -- which occurred a few weeks prior to execution of the settlement agreement -- and the subsequent July 10th meeting

recorded on video at the direction of the FBI. Of course, that meeting still occurred prior to execution of the settlement agreement and thus cannot support a claim for breach of the implied covenant of good faith and fair dealing. *See* Respondent's Brief, p. 22 (explaining that the video recorded meeting occurred "one day before [the Minerts] knew Mr. Crossett was going to and did sign the Settlement Agreement").

Moreover, any damages related to the FBI investigation -- whether resulting from the original "report" or the later meeting "implicating" Crossett -- were excluded by the District Court. *Id.* at 191:4 - 192:14; 206:19 - 214:17 (excluding evidence of the "time and money having to spend away from the company dealing with a grand jury investigation" because DTC Group had not disclosed such a claim for damages in its Complaint or in discovery). Thus, the jury's verdict cannot be supported either by the FBI report or any alleged attempt to "implicate" Crossett in the price-fixing scheme. Even now, DTC Group does not identify any damages associated with its claim that the Minerts "implicated" it in a price-fixing scheme.

Finally, even if the July 10th meeting had not occurred prior to execution of the settlement agreement, and even if the District Court had not excluded damages related to the FBI investigation, it still could not serve as the basis of a claim for breach of the implied covenant of good faith and fair dealing. The Settlement Agreement does not address, much less prohibit, the Minerts from participating in an FBI investigation. Any such inference would fly in the face of 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). Allowing the verdict to stand based on the call to the FBI or any participation in the investigation would have a

chilling effect and deter citizens from reporting criminal activity out of fear of personal liability. The Minerts recorded the July 10th meeting at the FBI's direction and with equipment provided by the FBI. 484:7 - 485:7. That recorded meeting lead to a formal complaint by the FTC, and ultimately DTC Group stipulating to a Consent Agreement and a Consent Order.

3. There is No Evidence in the Record that David of Jeff Minert Instructed Employees to Disparage DTC Group or Otherwise Breached the Settlement Agreement

DTC Group asserts that the jury's verdict is supported by an inference that "Dave and Jeff Minert continued to instruct DOT sales staff to defame DTC group and/or take DTC Group's customers." Respondent's Brief, p. 24. As an initial matter, the jury's verdict for breach of the implied covenant of good faith and fair dealing cannot be based on allegations of DOT Compliance "tak[ing] DTC Group's customers" because that was the basis of DTC Group's claim for tortious interference with contract -- for which it was awarded $20,000 in damages. R., 000236-237 (Amended Complaint, ¶¶ 41-46). Otherwise, DTC Group would receive a double recovery. *See e.g,* R., 317 (Jury Instruction No. 18, instructing that jury that damages awarded for breach of the implied covenant of good faith and fair dealing "must be distinct from any damages awarded for breach of contract.").

Moreover, taking customers from DTC Group cannot constitute a violation of the implied covenant of good faith and fair dealing because the Settlement Agreement does not prohibit DOT Compliance from competing for customers. *See Van v. Portneuf Med. Ctr.*, 147 Idaho 552, 562 (2009) (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]").

Nor is there any evidence in the record that David or Jeff Minert instructed DOT Compliance sales staff to defame or disparage DTC Group. In support of its position, DTC Group cites the testimony of Colby Porter, an individual who worked for DOT Compliance until March of 2014, after which he went to work for DTC Group -- four months before execution of the Settlement Agreement. Tr., 378:7-12. Mr. Porter did not testify that he was instructed to disparage DTC Group. To the contrary, Mr. Porter testified that he was instructed in writing not to make disparaging remarks about competitors. *Id.* at 387:7-16. There is simply no evidence in the record that David of Jeff Minert instructed employees to disparage DTC Group or otherwise breached the Settlement Agreement.

4. A Verdict Against David and Jeff Minert Cannot be Supported by Allegations Against Other DOT Compliance Employees

On a related theory, DTC Group argues that David and Jeff Minert, as principals of DTC Group, are individually liable for any disparaging comments made by DTC Group employees in violation of the Settlement Agreement. *See* Respondent's Brief, p. 29 (citing Jury Instruction No. 23 for the proposition that, "As principles of and for DOT Compliance, Dave and Jeff Minert are liable for their own actions and the actions of their agents.").

As an initial matter, DTC Group has misstated the law of agency. As set forth in Jury Instruction No. 23, an employer company (the principal) is liable for the actions of its employees (agents). R., 000322. However, that rule of agency does not make the individual owners of a limited liability company individually liable for the actions of the entity's employees. David and Jeff Minert are members of DOT Compliance, which is an Idaho Limited Liability Company. R., 000229 (Amended Complaint, ¶ 2). Absent a piercing of the corporate veil (which was never alleged, much less factually supported), limited liability company members are not individually

liable for the alleged torts of a limited liability company or its employees as a matter of law. *See I.C. § 30-6-304* ("The debts, obligations or other liabilities of a limited liability company, whether arising in contract, tort or otherwise: (a) Are solely the debts, obligations or other liabilities of the company; and (b) Do not become the debts, obligations or other liabilities of a member or manager solely by reason of the member acting as a member or manager acting as a manager."). Thus, while DOT Compliance could potentially be held liable for the actions of its employees, David and Jeff Minert cannot as a matter of law.

Perhaps more importantly, the jury expressly rejected DTC Group's claim of liability based on allegations of disparagement on the part of other DOT Compliance employees. DTC group asserted a claim for breach of the implied covenant of good faith and fair dealing against DOT Compliance separate from its claims against David and Jeff Minert. That claim was based on the allegations that DOT Compliance employees disparaged DTC Group in violation of the Settlement Agreement. R., 000235 (Amended Complaint, ¶ 30-34). The jury expressly found that DTC Group suffered no damages as a result of DOT Compliance's alleged breach of the implied covenant of good faith and fair dealing. R., 000333-334. Thus, the verdict against David and Jeff Minert cannot be supported by allegations that other DOT Compliance employee's violated the covenant of good faith and fair dealing by disparaging DTC Group in breach of the Settlement Agreement.

5. The District Court Declined to Issue a Spoliation Instruction

Finally, DTC Group argues that David and Jeff Minert should be held liable for breach of the implied covenant of good faith and fair dealing for failing to produce recordings of customer calls. This issue is a red herring. DTC Group asked the District Court to issue a spoliation

instruction because 8x8, the vendor that records both DTC Group's and DOT Compliance's customer calls, accidentally deleted certain call recordings.[1] Tr., 515:6-19. The District Court denied that motion and declined to instruct the jury on spoliation. *Id.* at 701:15 - 703:25. DTC Group did not file a cross-appeal on that issue. Thus, DTC Group cannot now argue that the jury drew or should have drawn an adverse inference based on alleged spoliation.

Even if a spoliation instruction had been issued, that issue is not relevant to the verdict against David and Jeff Minert. Again, the question on appeal is whether any evidence supports a finding that David and Jeff Minert "unfairly disparaged plaintiff to others so as to nullify or impair the benefits of the plaintiff under the contract." The call recordings referenced by DTC Group are not of David or Jeff Minert. *See Id.* at p. 27 ("DTC Group never asserted that Dave or Jeff Minert themselves actually made customer calls.").

In summary, there is no evidence in the record that David or Jeff Minert "unfairly disparaged plaintiff to others so as to nullify or impair the benefits of the plaintiff under the contract," as required by the applicable jury instruction. Accordingly, the District Court erred in denying DOT Compliance's JNOV motion with regard to the jury's verdict against David and Jeff Minert 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

The District Court abused its discretion when it precluded DOT Compliance from playing for the jury a video of the July 10, 2014 meeting during which Crossett outlined his price-fixing scheme on grounds that it was "impeachment on a collateral issue." *Id.* at 471:23-25. DTC

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[1] The Spoliation motion does not appear to be in the Record on Appeal.

Group now asserts that the July 10, 2014 meeting is irrelevant and collateral and that DOT Compliance is just trying to "bring in what they perceived as 'bad facts' that weren't relevant to any issue." *See* Respondent's Brief, p. 34. However, it was DTC Group -- not DOT Compliance -- that raised the FBI call and investigation as an issue at trial and opened the door to impeachment evidence. In its opening statement to the jury, 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 then testified falsely that the Minerts proposed the price-fixing scheme and then made a frivolous report to the FBI that Crossett proposed an illegal price-fixing scheme. *Id.* at 186:24 - 189:9; *Id.* at 359:10-21. In its closing argument, DTC Group specifically asked the jury to consider the time DTC Group had to spend "to respond to the FBI investigation" when considering its damages award, even though the Court had excluded all alleged damages related to the FBI investigation because they were not disclosed prior to trial. *Id.* at 739:19 - 740:5.

The parties gave two completely different accounts of the July 10th meeting and the events leading up to it.[2] Crossett testified that the Minerts proposed a price-fixing scheme, frivolously and falsely reported to the FBI that Crossett proposed the price-fixing scheme and

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2 DTC Group takes issue with DOT Compliance's characterization of Crossett's trial testimony as "insist[ing] that he did not propose any price fixing." Respondent's Brief, p. 34. DTC Group asserts that "upon review of Mr. Crossett's testimony he made no such allegation." *Id.* Yet, that is exactly what Crossett stated in his trial testimony in response to questioning from its counsel:

> Q: Were you price fixing?
> A: Absolutely not.

Tr., 359:20-21.

then somehow "implicated" Crossett during the July 10th meeting. The Minerts testified that Crossett proposed an illegal price-fixing scheme and detailed his price-fixing scheme during the July 10th meeting. The only way for the jury to know what really happened during the meeting was to watch the video recording of the July 10th meeting.

DTC Group made the July 10th meeting material when, even though the District Court had excluded damages related to the FBI investigation, DTC Group specifically asked the jury to consider those damages when calculating its damages award:

> Let's talk about damages for a minute....
>
> .... And, remember, although -- remember I told you about there was these non-monetary or damages that David couldn't really quantify. Those things 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.

Id. at 739:19 - 740:5.

The jury did exactly what DTC Group asked it to do and awarded damages based on the FBI investigation. Indeed, the District Court denied DOT Compliance's JNOV motion on the specific grounds that the jury's verdict against David and Jeff Minerts for violation of the covenant of good faith and fair dealing was based on the call to the FBI. *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.").

DTC Group is taking two completely inconsistent positions on this issue. On one hand, DTC Group argues that the July 10th meeting is "collateral" and "irrelevant" to any issue in this case. *See* Respondent's Brief, p. 34. On the other hand, although dropping its reliance on the

initial call to the FBI, DTC Group continues to argue that the jury's verdict against David and Jeff Minert is supported by evidence that they "implicated" Crossett for price-fixing during the July 10th meeting. *Id.* at pp. 22-24.

DTC Group cannot have it both ways. If the FBI report or the July 10th meeting can support a claim for breach of the implied covenant of good faith and fair dealing, then the recorded video of that July 10th meeting cannot be an "immaterial and collateral issue" and the District Court erred by excluding it. If the July 10th meeting is an "immaterial and collateral issue" -- i.e., because it was wholly unrelated to 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

In addition to the reasons set forth above, and as explained in DOT Compliance's opening brief, the $20,000 verdicts against David and Jeff Minert for breach of the implied covenant of good faith and fair dealing must be set aside for lack of damages. "[W]here a plaintiff presents no evidence to support a jury's damage award, the court must grant a JNOV motion in favor of the defendant." *Bratton v. Scott*, 150 Idaho 530, 537 (2011).

The District Court concluded that the jury's verdict was supported by the fact that David and/or Jeff Minert reported DTC Group to the FBI. *Id.* at 817:9 - 818:17. However, DTC Group did not establish any damages caused by the FBI Investigation, much less damages in the amount of $20,000. DTC Group attempted to testify as to the "damages" it 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; 471:7-8.

DTC Group did not offer any response to this argument in its Respondent's Brief, even though it continues to assert that the jury's verdict is supported by David and Jeff Minert's attempts to "implicate" DTC Group in the FBI Investigation.

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

If this Court sets aside the jury's verdicts for any of the reasons discussed above, it must also vacate the District Court's attorney fee award because DTC Group will no longer be the prevailing party. *La Bella Vita, LLC v. Shuler*, 158 Idaho 799, 817 (2015) ("Given the reversal of the district court's decision, Shuler and Eikova are no longer the prevailing parties in this case. Thus, the award of attorney fees is vacated.").

Even if this Court does not set aside the jury's verdicts, the attorney fee award must still be reversed. Although DTC Group prevailed on two of its several claims, neither of those claims permit an award of attorney fees under Idaho Code § 12-120(3).

1. DTC Group Did Not Prevail on its Breach of Contract Claim

The Settlement Agreement provides for an award of attorney fees to the "prevailing party" in an "action brought to enforce any provision of this Agreement, including but not limited to actions for breach of Sections 4 and 5 of this Agreement." Trial Exh. 500. DTC Group asserted a breach of contract claim against DOT Compliance, David Minert and Jeff Minert. Specifically, DTC Group alleged that those defendants breached Section 4 of the Settlement Agreement (the non-disparagement provision) by disparaging DTC Group to its

customers. R., 000233 (Amended Complaint, ¶¶ 23-29). If DTC Group had prevailed on its breach of contract claim, it would have been entitled to some award of attorney fees related to that claim. However, although the jury found a breach, it awarded no damages to DTC Group. R., 000329-330. Thus, DTC Group did not prevail on its breach of contract claim because it did not establish damages, an essential element of any breach of contract claim. *See Edged In Stone, Inc. v. Nw. Power Sys., LLC*, 156 Idaho 176, 180 (2014) ("The elements for a claim for breach of contract are: (a) the existence of the contract, (b) the breach of the contract, (c) the breach caused damages, and (d) the amount of those damages.").

DTC Group cites no authority for its argument that it is the prevailing party on the breach of contract claim even though it proved no damages. In fact, that argument has been rejected by the United States Supreme Court. *See Farrar v. Hobby*, 506 U.S. 103, 115 (1992) ("When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief [citation omitted], the only reasonable fee is usually no fee at all."); *Hewitt v. Helms*, 482 U.S. 755, 760 (1987) ("Respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail.").

2. The Tortious Interference with Contract Claim did Not Arise out of a Commercial Transaction

Idaho Code § 12-120(3) provides for an award of attorney fees to the party that prevails on claims arising out of a commercial transaction between the parties. "Idaho Code section 12-120(3) applies when 'the commercial transaction comprises the gravamen of the lawsuit.'" *Sims v. Jacobson*, 157 Idaho 980, 342 P.3d 907, 911-12 (2015). "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.* Moreover, "attorney fees are not available to the prevailing party under the commercial transaction prong of Idaho Code § 12–120(3), unless the commercial transaction is between the parties to the litigation." *DAFCO LLC v. Stewart Title Guar. Co.*, 156 Idaho 749, 757-58 (2014).

In support of its argument for attorney fees, DTC Group cites *Blimka v. My Web Wholesaler*, LLC, 143 Idaho 723 (2007), for the proposition that a claim sounding in tort can result in an award of attorney fees under Idaho Code § 12-120(3) if the claim arises out of a commercial transaction. DTC Group then argues that its tortious interference claim arose out of a commercial transaction because "DTC Group sued Appellants for 'transacting' with its customers and interfering with contracts with its customers; DOT entered transactions with DTC Group contracted customers for a commercial purpose." Respondent's Brief, p. 38.

While it is true that tort claims arising out of a commercial transaction may trigger attorney fees under Idaho Code § 12-120(3), that is only the case if the tort claims arise out of a contract between the parties, not a contract with some third party. *Printcraft Press, Inc. v. Sunnyside Park Utilities, Inc.*, 153 Idaho 440, 461 (2012) ("Thus, even though fees are available in cases involving a tort claim, a commercial transaction **between the parties to the lawsuit** must form the basis of the claim.") (emphasis in original).

Here, 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 commercial transactions

between DTC Group and its customers by encouraging those customers to cancel their contracts. *Id.*

This Court reversed an award of attorney fees under similar circumstances in *Syringa Networks, LLC v. Idaho Dep't of Admin.*, 155 Idaho 55, 66 (2013). There, Syringa alleged that Qwest tortiously interfered with a commercial contract between Syringa and a third party. The District Court awarded attorney fees to the prevailing party on that claim because numerous commercial transactions were involved. This Court reversed that award of attorney fees because the tortious interference claim did not "arise from a commercial transaction between the parties." *Id.*

3. The Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing did Not Arise out of a Commercial Transaction

A claim for breach of the implied covenant of good faith and fair dealing would usually arise out of a commercial transaction, i.e., the contract between the parties. Here, however, the verdict for breach of the implied covenant of good faith and fair dealing was not based on any 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 call to the FBI -- an act that is not governed by the Settlement Agreement and, in fact, occurred prior to execution of the Settlement Agreement. Tr., 817:9 - 818:17. Indeed, DTC Group has conceded that the call to the FBI did not violate the Settlement Agreement. *See* Respondent's Brief, p. 20 ("As a point of clarification, DTC Group did not claim that [David or Jeff Minert] defamed DTC Group, or breached the Settlement Agreement with DTC Group, when they reported DTC Group to the Department of Justice on claims of criminal price fixing.").

In order for a claim to arise out of a commercial transaction and trigger an award of attorney fees, a commercial transaction between the parties must (1) be "integral to the claim"; and (2) constitute[] the basis of the party's theory of recovery on that claim." *Sims*, 157 Idaho 980, 342 P.3d at 911-12. No commercial transaction was integral to the implied covenant claim or serve as the basis of the claim. Instead, the basis of the claim was a call to the FBI, which DTC Group has conceded is unrelated to any commercial transaction between the parties.

4. The District Court Failed to Apportion Attorney Fees or Analyze which Claims Arise out of a Commercial Transaction

As set forth above, neither claim on which DTC Group prevailed arose out of a commercial transaction between the parties. Accordingly, the award of attorney fees must be vacated.

Even if the Court determines that one or both of the claims on which DTC Group prevailed arose out of a commercial transaction, this case should still be remanded to the District Court to determine an appropriate award of attorney fees based on an apportionment analysis. "When a lawsuit has multiple claims," a trial court is 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 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 even though DTC Group did not prevail on the vast majority of its claims. Tr., 824:10-12. 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]").

5. Appellants Should be Awarded Attorney Fees on Appeal

Upon setting aside the jury's verdict, the Court should award attorney fees on appeal to Appellants pursuant to Idaho Code § 12-120(3) and Idaho Appellate Rules 40 and 41.

III. 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 and the District Court's award of attorney fees vacated. 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.

DATED THIS 2nd day of March, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of March, 2016, I caused to be served a true copy of the foregoing APPELLANT'S REPLY BRIEF by the method indicated below, and addressed to each of the following:

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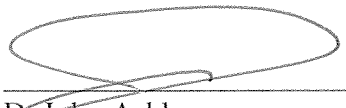

D. John Ashby