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2/7/2019 11:05 AM
Idaho Supreme Court
Karel Lehrman, Clerk of the Court
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Docket No. 46133-2018

IN THE SUPREME COURT OF THE STATE OF IDAHO

BRIAN D. TRUMBLE,
Plaintiff/Appellant,

vs.

FARM BUREAU INSURANCE SERVICE COMPANY OF IDAHO,
WESTERN COMMUNITY INSURANCE CO., AND
FARM INSURANCE BROKERAGE CO. INC.,
Defendants/Respondents/Cross-Appellants.

APPELLANT'S REPLY BRIEF AND RESPONSE TO CROSS-APPEAL

Appeal from the District Court of the Fourth Judicial District Court
for Ada County, State of Idaho

The Honorable Nancy A. Baskin, District Judge, Presiding

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I. INTRODUCTION

This is both a Reply in support of Appellant/Cross-Respondent Brian D. Trumble's ("Trumble") Appeal and a Response to Respondents/Cross-Appellants Farm Bureau Insurance Service Company of Idaho, Western Community Insurance Co., and Farm Insurance Brokerage Co., Inc.'s (collectively, "Farm Bureau") Cross-Appeal.

A. REPLY/RESPONSE TO FARM BUREAU'S STATEMENT OF CASE.

Farm Bureau's statement of the case is generally accurate, but Farm Bureau takes great liberty with its description of relevant facts. For instance, Farm Bureau begins by stating that this "case also involves the improper use of **proprietary client information**." Respondent's Brief, p. 4 (emphasis added). This is false. Trumble never used Farm Bureau's "proprietary client information." While Trumble did create a list of names and addresses of people he would solicit business from after his 90 day non-compete expired, such list did not include any "proprietary client information"—the list only contained names and addresses. (R. pp. 642, 655).

Farm Bureau also wrongfully states that Trumble claims he was "terminated illegally." Respondent's Brief, p. 4. Trumble is unsure what is meant by "illegally," but Trumble has never asserted any employment based claims. Trumble's allegations are (and have always been) that Farm Bureau breached its contract and that certain contractual terms are unenforceable.

Farm Bureau finally states that "[d]ue to **conduct** and actions that Farm Bureau learned about," Farm Bureau terminated Trumble's contracts. *Id.* (emphasis added). That undescribed "conduct" was specifically labelled by Farm Bureau at the time of termination as dishonest

and/or unethical conduct (which was ultimately proven to be untrue). Farm Bureau's attempt to marginalize the "conduct" for which Trumble was terminated cannot go unnoticed. Farm Bureau specifically used the words "dishonest/unethical" for one reason: to not pay Trumble $251,431.96. (R. pp. 850-52). Farm Bureau is clearly trying to distance itself from its decision and representations by generically referring to "conduct."

B. STATEMENT OF FACTS.

Since this is both a reply and response, the relevant facts will be addressed in two separate sections: facts related to Trumble's Appeal, and facts related to Farm Bureau's Cross-Appeal.

1. Facts Related to Trumble's Appeal.

Farm Bureau first argues that Trumble cited to the wrong Commission Schedule. Respondent Brief, p. 8. This argument is somewhat confusing and ultimately irrelevant because both parties agree that the 2011 Career Agent's Service Bonus Commission Memorandum of Understanding (the "Commission Contract") is the contract at issue. Appellant's Brief, p. 4.[1]

Farm Bureau next asserts that the Commission Contract "states that a Service Bonus Commission is not 'earned.'" Respondent Brief, p. 9. This argument is false. The words "not earned" do not appear anywhere in the Commission Contract. (R. pp. 122-23). Moreover, a reading of the entire Commission Contract establishes that service bonus commissions are clearly earned (this is discussed in greater detail in Part II.C., *infra*).

[1] Trumble cited to the 2011 Commission Contract but also improperly cited to the previous version of that contract, namely the 2010 version. Despite this error, the only difference between the two contracts is changing the words "he or she" to "they" in the first paragraph and "his/her" to "the agent" in the penultimate paragraph. *Compare* (R. pp. 122-23) *with* (R. pp. 213-14). The contracts are identical, other than these pronoun changes.

Farm Bureau next argues that the Commission Contract "states in four (4) different paragraphs that in order to be **eligible** for the Service Bonus Commission the agent must satisfy the 1-year non-competition clause." Respondent Brief, p. 9 (emphasis added). Farm Bureau's attempt to use the word "eligible" in conjunction with the non-compete is misplaced.

The Commission Contract treats "eligibility" and "payment" differently. The eligibility provisions are found in paragraphs 2, 3, 4, and 5 of the Commission Contract and begin as follows:

> CONDITIONS OF SERVICE BONUS COMMISSION. Only a qualifying agent for [Farm Bureau] is **eligible** for a service bonus commissions under this plan. A qualifying agent is a career agent licensed in all lines by [Farm Bureau] and whose performance level for each service year meets the qualifying requirements established by [Farm Bureau].

(R. p. 122) (emphasis added). Besides the opening paragraph of the commission Contract, the word "eligible" is only located in paragraphs 2, 4, and 5. Paragraphs 2, 4, and 5 do not mention and have nothing to do with payment or the non-compete.

The non-compete provisions are located in paragraphs 6, 7, and 8 of the Commission Contract. Not coincidentally, paragraphs 6, 7, and 8 are the only paragraphs where the substantive payment and non-compete terms are discussed:

> Paragraph 6: "The commission credit . . . will not become **payable** . . . until the agent complies with . . . the no competition requirements."
>
> Paragraph 7: "A violation of the no competition restriction will result in **forfeiture** of the service bonus commission."
>
> Paragraph 8: "The service bonus commission will be **paid** one year after the agent terminates their contract."

(R. p. 123) (emphasis added). A *full* review of the Commission Contract establishes that the contract treats "eligibility" and "payment" differently, and the non-compete is only tied to payment (this is discussed in further detail in Part II.A., *infra*).

The final fact that needs to be addressed is related to the doctrines of quasi estoppel, anticipatory repudiation, and futility and is found in Farm Bureau's argument section, in which Farm Bureau states:

> [Trumble] "claims" that he would have complied with the 1-year noncompetition clause to receive his Service Bonus Commission but for the statements made to him by Farm Bureau. However, this testimony contradicts his earlier admission that his financial situation was poor and that he simply cannot live off [a settlement amount] of $50,000 for a year while supporting his family.

Respondent's Brief, p. 35. First, this is at best a dispute of fact, which must be resolved in Trumble's favor at summary judgment. Second, does Farm Bureau really believe there is no difference between receiving $50,000.00 now and $251,431.96 in one year? Third, the payment of $50,000 was conditioned upon Trumble not competing—how could he "support his family" if he agreed to not compete for a year and why would Trumble do that if he was not receiving the entire $251,431.96? This entire argument by Farm Bureau is puzzling.

2. *Facts Related to Farm Bureau's Appeal.*

Trumble's argument below is broken into two sections: one in support of his reply and the other focusing on Farm Bureau's Cross Appeal. To avoid confusing the issues, Trumble discusses the full facts relevant to Farm Bureau's Cross Appeal in Part III.A below. While those facts will not be restated here, Trumble must address Farm Bureau's repeated misrepresentation of the record that Trumble created the Subject List (defined below) while Trumble was under

contract with Farm Bureau.

Trumble was under contract with Farm Bureau from 1994 to May 4, 2016. (R. pp. 116-17, 112). In 2014, Trumble made a list of all of his customers with the help of a contractor Trumble personally paid. (R. p. 641). The list that was created in 2014 had in excess of 1,200 names, and was kept on Trumble's personal computer (the "2014 List"). (R. p. 641, ¶ 4). Trumble discusses the creation of the 2014 List in pages 141 to 148 of his deposition. (R. Aug. at pp. 63-65).

When Trumble's contract was terminated on May 4, 2016, Farm Bureau barred Trumble from his office and confiscated Trumble's computer. (R. pp. 641, 649). While in possession of Trumble's personally-owned computer, Farm Bureau "wiped" the hard drive leading to the destruction of the 2014 List. *Id*.

In the summer of 2016, Trumble made the prospective customer list at issue in this case. The 2016 list included 578 names and was made from Trumble's personal knowledge, contacts on Trumble's personal phone, and approximately 20 to 30 names that came from Trumble's old commission statements (the "Subject List"). (R. pp. 641-42). Trumble discussed the creation of the Subject List in pages 154 to 158 of his deposition. (R. pp. 67-68).

Only the Subject List is at issue in this case. The 2014 List was destroyed by Farm Bureau and never used by Trumble after his contract was terminated.

Given that the aforementioned facts are not in dispute and clearly denoted in Trumble's affidavits and deposition, it is amazing that Farm Bureau states that Trumble created "a list while he was working as an agent for Farm Bureau, **that he then took and used after his contract**

was terminated to solicit current Farm Bureau customers." Respondent's Brief, p. 12 (emphasis added). This allegation is a deliberate misrepresentation of the record. Trumble did not (and could not) have taken any list with him when his contract was terminated because Farm Bureau deleted that list.

Farm Bureau also misrepresents and/or confuses the information Trumble used to create both the 2014 List and Subject List. For instance, Farm Bureau alleges that Trumble used "proprietary renewal notices that his office received from Farm Bureau" to create the Subject List. *Id.*, pp. 13, 42. In support of this allegation, Farm Bureau cites to pages 144 to 147 of Trumble's deposition. *Id.* Pages 144 to 147 of Trumble's deposition clearly discuss the 2014 List, not the Subject List. There is no evidence that Trumble ever used "renewal notices" to create the Subject List. Trumble is unsure if Farm Bureau is simply confused or if Farm Bureau is intentionally misleading the Court. Either way, Farm Bureau's representations about the Subject List are factually false.

The undisputed facts are that: (1) the 2014 List and the Subject List are different, (2) the 2014 List included over 1,200 names and was deleted by Farm Bureau, (3) the Subject List contains 578 names and was created after Trumble was terminated, and (4) the Subject List was only created from three sources: Trumble's personal knowledge, contacts on Trumble's personal phone and approximately 20 to 30 names that came from Trumble's old commission statements (the "Subject List"). (R. pp. 641-42). Any other facts about the Subject List alleged by Farm Bureau are inaccurate.

II. ARGUMENT IN SUPPORT OF TRUMBLE'S APPEAL

A. THE COMMISSION CONTRACT, BY ITS TERMS, ONLY APPLIES IF THE AGENT TERMINATES THE CONTRACT.

Trumble submits that the non-compete in the Commission Contract only applies if an agent (as opposed to Farm Bureau) terminates the contract. This position is based upon the following language:

> As of January 1, 2011, each qualifying, full-time agent under a career agent's contract with Farm Bureau . . . will be eligible to receive a service bonus commission after termination if the agent meets the conditions set forth each year and does not compete with the Companies for a period of one year **after they have terminated**.
>
> . . .
>
> The service bonus commission will be paid one year **after the agent terminates** their contract with [Farm Bureau], provided the no competition restriction is observed.

(R. pp. 145-46) (emphasis added).

Farm Bureau argues that you have to read the Commission Contract as a whole to determine its meaning. Respondent Brief, p. 20. While Farm Bureau correctly states the law, Farm Bureau does not read the Commission Contract as a whole in its analysis. Farm Bureau points to no language in the Commission Contract that conflicts with Trumble's position or otherwise explains away the words "after the agent terminates their contract." More importantly, an examination of the *whole* contract supports Trumble's position.

The Commission Contract sets forth eligibility conditions and payment terms. This was discussed above and it bears repeating here that only paragraphs 2, 4, and 5 discuss eligibility (neither payment nor the non-compete are mentioned), whereas only paragraphs 6, 7, and 8

discuss payment and the non-compete (eligibility is not mentioned).

The eligibility conditions beginning in paragraph 2 start with the following bold faced lettering: "**CONDITIONS OF SERVICE BONUS COMMISSION**." (R. p. 145) (emphasis in original). If an agent meets the "Conditions of Service Bonus Commission" then the agent will receive commission credits that Farm Bureau retains and upon which Farm Bureau pays interest. Here, there is no dispute that Trumble met his *eligibility* conditions because he obtained commission credits.

The *payment terms* of the Commission Contract relate to the non-compete: "The service bonus commission **will be paid** one year **after the agent terminates** their contract with [Farm Bureau], **provided the no competition restriction is observed**." Farm Bureau attempts to make this Court believe that compliance with this sentence was an eligibility condition but that is not what is stated in the Commission Contract nor how commissions were treated. In fact, the Commission Contact states twice that compliance with the non-compete was merely a payment term: "The commission credit . . . **will not become payable** . . . until the agent complies with all other requirements of the plan, terminates, and **fulfills the no competition requirements**." (R. p. 222) (emphasis added).

The distinction between eligibility and payment is crucial.[2] The District Court failed to notice this distinction by wrongfully stating that if Trumble's position were taken as true, "an agent whose contract is terminated by [Farm Bureau] *would not be eligible* to receive any service

[2] Treating eligibility and payment terms differently is not unheard of in the law. For instance, in *Canseco v. Construction Laborers Pension Trust*, 93 F.3d 600, 607 (9th Cir. 1996), the Ninth Circuit Court of Appeals noted that the separation of eligibility and payment "provisions into different articles of the [trust] plan indicates that *eligibility* for retirement benefits is wholly independent from the *payment* of those benefits." (Emphasis in original).

bonus commission, because the [Commission Contract] contains no separate statement defining eligibility under that circumstance." (R. p. 249) (emphasis added). Eligibility is not at issue in this case—the issue is when payment is due. The Commission Contract's silence on when payment is due if Farm Bureau terminates the Commission Contract does not invalidate the agreement, it simply requires that payment be due immediately. In other words, if Farm Bureau terminates the contract the payment condition—complying with the one year non-compete—no longer applies.

Finally, noticeably absent from Farm Bureau's argument is any mention of the fact that Farm Bureau drafted the Commission Contract, which means that it must be interpreted most strongly against Farm Bureau. *Werry v. Phillips Petroleum Co*., 97 Idaho 130, 136, 540 P.2d 792, 298 (1975). Trumble submits that his interpretation is more than reasonable, and as such it should be accepted by this Court and Farm Bureau should be required to pay the service bonus commission immediately since Farm Bureau terminated the contract.

B. THE NON-COMPETE IN THE COMMISSION CONTRACT IS NOT ENFORCEABLE.

Farm Bureau's analysis on this and many other issues generally defers to the District Court's summary judgment opinions. Since responding to the District Court's opinions was the thrust of Trumble's initial Appellant's Brief, Trumble will only briefly comment upon several arguments raised by Farm Bureau.

1. *Anderson v. Farm Bureau Mut. Ins. Co. of Idaho, 112 Idaho 461, 732 P.2d 699 (Ct. App. 1987) is not binding on this Court, is distinguishable, and should not be adopted by this Court.*

Farm Bureau begins its analysis by intentionally misrepresenting Trumble's Appellant's

Brief by stating: Trumble's "argument that the law applied by the District Court is not 'controlling' is incredible. The District Court's reliance on [*Anderson*] is well founded . . . ." Respondent Brief, p. 22. Trumble never argued that *Anderson* was not binding on the District Court. To the contrary, Trumble acknowledged that *Anderson* was binding on the District Court, but Trumble stated that *Anderson* "is not controlling on this Court because *Anderson* was decided by the Idaho Court of Appeals." Appellant's Brief, p. 15 (citing *State v. Skurlock*, 150 Idaho 404, 407, 247 P.3d 631, 634 (2011)). *Skurlock* is of course good law, and *Anderson* is not controlling over this Court.

As discussed in length in the Appellant's Brief, *Anderson* is factually distinguishable from the present case. The primary difference between this case and *Anderson* is that the service bonus commissions in *Anderson* were paid out each year in full, whereas the service bonus commissions in this case were retained by Farm Bureau for twenty-plus years. This is important because the agent in *Anderson* forfeited at most one year of service bonus commissions if he chose to compete. Under the present Commission Contract, twenty or more years of service bonus commissions are forfeited if an agent chooses to compete. This change clearly impacts whether an agent will abide by the non-compete—in fact, it operates as a defacto covenant not to compete (as opposed to a forfeiture tied to a covenant not to compete) because an agent is more likely to abide by the non-mutually agreed to covenant if the agent would forfeit 20 years of commissions. This distinction was either lost on Farm Bureau or, more likely, Farm Bureau simply choose to ignore it. Either way, Farm Bureau completely ignoring this key differentiating fact is deafening.

Not surprisingly, Farm Bureau also ignored the substantial transformation of the law on forfeitures tied to non-agreed to covenants not to compete over the last fifty (50) years. While Trumble will not restate that law herein, he submits this Court should reject *Anderson* based upon the analysis and evolution of the law set forth in Trumble's Appellant's Brief.

2. Trumble's status as an independent contractor is irrelevant.

Farm Bureau next argues that Trumble's status as an independent contractor somehow affects whether the non-compete is enforceable as a matter of law. Farm Bureau does not cite to a single case holding that reasonableness standards do not apply to independent contractors, presumably because no such case exists.

The only case Farm Bureau cites to in this section of his brief is *Anderson*. Respondent's Brief, pp. 23-25. While *Anderson* does discuss the difference between an employee and independent contractor, this distinction was limited to the *Anderson* plaintiff's claims for employment benefits (which is discussed in Section I of *Anderson*). 112 Idaho at 464-68, 732 P.2d at 702-06. Section II of *Anderson*, on the other hand, which discusses non-negotiated forfeitures tied to non-competes, does not differentiate between employees and independent contractors. *Id.* at 468-71, 732 P.2d at 706-09. These different types of claims (employment based and non-competes) are important because Trumble is not alleging he was entitled to any employment benefits. *Anderson* is therefore unhelpful to Farm Bureau on this issue.

Trumble submits that Farm Bureau breached its contract and that the non-compete provision in the Commission Contract is unenforceable as written. Employment or independent contractor status matters not to Trumble's claims; what matters is that there was a non-compete

clause in the contract. Indeed, Idaho Code § 44-2701, which governs non-compete agreements, specifically acknowledges that such agreements must be reasonable even if applied to independent contractors. Farm Bureau's argument that "reasonableness laws" do not apply to the Commission Contract is without merit.

C. THE FORFEITURE CLAUSES ARE IMPERMISSIBLE LIQUIDATED DAMAGES.

The only argument raised by Farm Bureau on this issue that must be addressed is the statement that the "plain language" of the Commission Contract supports a finding that Trumble did not earn the service bonus commissions. Respondent's Brief, pp. 25-26.

Farm Bureau bases this argument on the following clause in the Commission Contract: "[t]he commission credit made on behalf of each agent and interest will **not become payable** to agent . . . until the agent complies with all other requirements of the plan, terminates, and fulfills the no competition requirements." *Id.*, at p. 26 (quoting the Commission Contract) (emphasis added). There are two fallacies with Farm Bureau's argument: (1) the clause cited by Farm Bureau deals with the payment term, not with eligibility conditions, and (2) despite directing this Court to review the entire Commission Contract, Farm Bureau fails to do so.

The first fallacy was discussed at length in Parts I.B.1 and II.A, *supra*. Turning to Farm Bureau's second fallacy, Farm Bureau's analysis falls flat because a full reading of the Commission Contract establishes that if the payment term is not met, the "accrued" commissions would "revert back" and be "forfeited." These words, which were drafted by Farm Bureau, have meaning that cannot be ignored—that meaning is that the commission credits were earned. If

this was not the case, there would be nothing to "revert back "or be "forfeited." How can interest be accrued and paid on something not earned? It is not without irony that the law revolving around this issue deals with contractual forfeitures, and the language used by Farm Bureau in the Commission Contract is the word "forfeit."

Based upon law from this very Court, namely *Wayne v. Lipsky*, 123 Idaho 253, 846 P.2d 904 (1992), it is undisputable that Trumble earned the commissions at issue (this was discussed in detail in Trumble's Appellant's Brief, pp. 20-22). Since the commissions were earned, the contractual forfeitures contained in the Commission Contract are only legally permissible if they were meant "to compensate [Farm Bureau] for damage" caused by breach. *Magic Valley Truck Brokers, Inc. v. Meyer*, 133 Idaho 110, 117, 982 P.2d 945, 952 (Ct. App. 1992). The forfeitures are not permissible if they were simply "designed to deter a breach or to punish." *Id.*

Here, Farm Bureau did not even attempt to argue that the contractual forfeitures were meant to compensate Farm Bureau for damages or were anything other than penal. Since Farm Bureau chose to ignore this issue, if the Court finds that the Commission Contract contains a contractual forfeiture—which it clearly does since the contract uses the very word "forfeiture"—then the only outcome is to hold that the forfeitures are not enforceable as they are meant solely to punish and deter.

D. THE FORFEITURE PROVISIONS ARE UNCONSCIONABLE.

Farm Bureau's sole argument on this issue is that Trumble allegedly "has cited to nothing in the record to support [his] claim of unconscionability." Respondent's Brief, p. 29. This argument ignores that Trumble cited to the facts of this case and the Commission Contract at

issue, both of which show procedural and substantive unconscionability. Since Farm Bureau chose to not address Trumble's substantive arguments, there is nothing substantively to discuss herein.

There is one procedural point that must be addressed. While the District Court denied Trumble's Motion for Summary Judgment on unconscionability (R. p. 252), the District Court did not grant summary judgment in favor of Farm Bureau on this issue. At a minimum, this case needs to be remanded for the simple fact that there was no decision by the trier of fact (or the District Court) on whether the Commission Contract was unconscionable.

E. FARM BUREAU'S STATEMENTS PRECLUDE THE ENTRY OF SUMMARY JUDGMENT IN FAVOR OF FARM BUREAU.

Even if the above arguments are rejected by this Court, compliance with the one year non-compete was unnecessary based upon Farm Bureau's statements and representations that Trumble would not receive his service bonus commission even if Trumble complied with the non-compete. Before analyzing Farm Bureau's response on this issue, it must be noted that Farm Bureau, on two separate occasions, told Trumble that he would not receive his service bonus commissions even if he waited one year: first, when Trumble was terminated on May 4, 2016, Farm Bureau told Trumble that he would never receive his service bonus commissions because he was being terminated for dishonest/unethical conduct, and second, in the May 9, 2016 letter, Farm Bureau stated that it had no "contractual obligation" to pay Trumble the service bonus commissions.

Farm Bureau does not dispute either of the above facts. Respondent Brief, p. 10. Pausing here for a moment, it needs to be asked whether the above facts, with no other information, create a question of fact as to whether Trumble's compliance with the non-compete was excused under the doctrines of quasi estoppel, anticipatory repudiation, or futility. If a question of fact is created by these two statements—which Trumble submits is clearly the case—then summary judgment was improper as all disputes of fact should have been resolved in Trumble's favor.

Not surprisingly, Farm Bureau does not address the above statements and instead argues that summary judgment was proper because Farm Bureau also told Trumble in the May 9, 2016 letter that: "Further, even if Mr. Trumble were entitled to his service bonus, the Memorandum contains a non-competition clause restricting payment until after compliance for a 12-month period." This sentence does not help Farm Bureau.

Trumble first submits that Farm Bureau cannot ambiguously retract its statement after it was made. Once Farm Bureau told Trumble on May 4, 2016 that it would never pay Trumble the service bonus commission due to his alleged dishonest/unethical conduct, Farm Bureau was bound by that statement unless it unequivocally retracted it before Trumble relied upon the statement. The sentence cited by Farm Bureau is hardly an unequivocal retraction and it is unreasonable to assume that Trumble would interpret the sentence—which begins with "even if"—as being a retraction.

Secondly, and most importantly, the sentence cited by Farm Bureau is <u>not a retraction</u> of Farm Bureau's statement and representation that it would not pay Trumble his service bonus

commissions. The sentence does not state, represent, or even hint that Farm Bureau would pay Trumble the service bonus commission if he complied with the non-compete. To the contrary, Farm Bureau states in the very same May 9 letter that it has "no contractual obligation to pay any service bonus to" Trumble "[b]ased upon the dishonesty described to Mr. Trumble" at the May 4, 2016 meeting." (R. p. 384). It is without dispute that as of both May 4 and May 9, 2016, Farm Bureau's position and representations to Trumble were that Farm Bureau would never pay Trumble his service bonus commissions. It was reasonable for Trumble to rely on that position.

Despite the undisputed facts above, Farm Bureau argues that quasi estoppel does not apply because Farm Bureau's position has always been consistent. Respondent's Brief, p. 31. That consistency, according to Farm Bureau, is that "even if dishonesty were not an issue, [Trumble] would still have to fulfill the 1-year non-competition clause eligibility requirement." *Id.*, p. 32. This quote shows the inconsistency in question—since Farm Bureau would not pay Trumble the commissions due to dishonesty, it is inconsistent to require him to abide by the non-compete.

Farm Bureau has never waivered from its position that Trumble would not receive his service bonus commissions due to alleged dishonesty. Would Farm Bureau have paid Trumble if Trumble did not compete for one year? The answer is of course not. The inconsistency at issue is Farm Bureau's refusal to pay Trumble his service bonus juxtaposed with requiring Trumble to not compete for one year and still not paying the service bonus commissions. It cannot be both: either Farm Bureau would honor the payment if Trumble complied with the non-compete or Farm Bureau would not honor the payment. Farm Bureau has never once said it would honor the

bonus payment if Trumble did not compete; thus, Farm Bureau's reliance on the one year non-compete is inconsistent with its statements. Said another way, Farm Bureau cannot state it did not pay Trumble because Trumble refused to honor the non-compete when Farm Bureau already said it would never pay Trumble the commissions.

Farm Bureau gained an advantage from this inconsistency because Trumble competed only based upon Farm Bureau's representations. Had Farm Bureau stated it would pay Trumble his service bonus commission after one year, Trumble would have refrained from competing. (R. p. 854).

Turning to anticipatory repudiation and futility, Farm Bureau's only argument is that Trumble should have "preserved his rights" and refrained from competing for one year and then sued Farm Bureau when it did not pay the service bonus commissions. Respondent's Brief, pp. 34-37. This argument directly contradicts binding legal authority holding that Trumble did not need to wait to bring his suit. *Foley v. Munio*, 105 Idaho 309, 311, 669 P.2d 198, 200 (1983); *Ford v. Lord*, 99 Idaho 580 (1978). Farm Bureau's failure to discuss either *Foley* or *Ford* highlights just how fatal those cases are to Farm Bureau's argument.

Finally, it must be noted that Farm Bureau raising its offer to pay Trumble $50,000.00 in severance is fatal to Farm Bureau. Trumble was reluctant to discuss Farm Bureau's proposed severance agreement because of Idaho Rule of Evidence 408. However, since Farm Bureau raised this issue, it must be noted that the proposed severance included $50,0000.00 upon execution and then another payment after one year. The total amount of the severance was substantially less than the $251,431.96 that Trumble had accrued under the Commission

Contract. The very fact that Farm Bureau did not offer to pay Trumble $251,431.96 after one year (and instead only offered a severance) shows that Farm Bureau had no intent to pay the full service bonus commissions. Given this, it is clear that the District Court erred in holding that the doctrines of quasi estoppel, anticipatory repudiation, and futility should not apply. Under each doctrine, summary judgment should not have been entered in favor of Farm Bureau and Trumble's claim should have proceeded to the jury.

III. ARGUMENT RELATED TO FARM BUREAU'S CROSS APPEAL

The facts and issues involved with Farm Bureau's Cross Appeal deal with what transpired after Trumble's contract was terminated and are unrelated to the issues above. Accordingly, this section will be broken into six parts: (1) a brief review of the relevant facts, (2) clarification of the issue, (3) the applicable law, (4) why the District Court correctly entered summary judgment on Farm Bureau's Counterclaim, (5) a brief discussion of why Farm Bureau's arguments on appeal have no merit, and (6) a request for attorneys' fees on appeal.

A. UNDISPUTED FACTS RELEVANT TO FARM BUREAU'S COUNTERCLAIM.

In addition to the facts set forth in Section I.B.2, *infra*, the following facts are undisputed:

Trumble was bound by a ninety (90) day non-compete in his executed contract with Farm Bureau (the executed contract is not the Commission Contract). (R. p. 117). Trumble complied with his 90-day non-compete. (R. p. 641).

Farm Bureau gave Trumble a letter when he was terminated stating that "any customer lists, histories, or other similar information [Trumble may] **bring with** [him] when [his] employment terminates are trade secrets and will result in [Farm Bureau] having to file a lawsuit

to protect" itself. (R. p. 647) (emphasis added). As noted above, Trumble could not have "brought with" him any customer lists when he was terminated because Farm Bureau confiscated and deleted all of Trumble's files on his personal computer, including the 2014 List. (Part I.B.2, *infra*).

Shortly after his contract was terminated, Trumble began compiling a list of potential customers he would contact after 90 days elapsed. (R, p. 641, ¶ 6). The list that Trumble created, which was completed in August 2016, contained approximately 578[3] names and contains the alleged "confidential information" that Farm Bureau claims Trumble misappropriated (the "Subject List") (R. p. 518). It is important to remember that the Subject List is different than the 2014 List, which Farm Bureau confuses throughout its brief (this was more thoroughly discussed in Part I.B.2, *supra*).

Only 20 or 30 names on the Subject List are subject to Farm Bureau's Cross Appeal—in other words, 550 names on the Subject List cannot be considered a trade secret because they were generated from Trumble's personal knowledge and contacts on Trumble's phone. (R. p. 642).

The 20 or 30 names at issue came from Trumble's old commission statements and calendars. (R. p. 642).

Finally, the Subject List only contained names and addresses; no buying preferences or past policies or numbers were included on the Subject List. (R. pp. 642, 655).

[3] The number 578 is important because it is less than the estimated 1,200 plus names on the list that Farm Bureau deleted from Trumble's computer and the 939-plus insureds that Trumble serviced immediately prior to his termination. (R. pp. 641, 619).

B. CLARIFICATION OF THE ISSUE ON CROSS APPEAL.

At the District Court level, Farm Bureau argued that all of the names on the Subject List constituted a trade secret. (R. p. 679). The District Court quickly dismissed this argument, stating:

> [Farm Bureau] argue[s] that the client names and addresses on [the Subject List] are not generally known or readily ascertainable by proper means because [Trumble's] access to them arose from his contract to sell insurance on [Farm Bureau's] behalf. However, whether a party gained access to information during, or as the result of, an employment or work-related relationship with another party does not, without more, indicate that the information was obtained through improper means.
>
> To the extent that the information [used to form the Subject List] is the product of [Trumble's] "skills, training, and knowledge," including "maintaining good customer relationships, developing new clients, and serving current clients," [Trumble] is not barred from using it for his new employer's benefit.

(R. p. 885) (citing *Northwest Bec-Corp. v. Home Living Service*, 136 Idaho 835, 839, 41 P.3d 263, 267 (2002)).

On appeal, Farm Bureau now argues that Trumble misappropriated trade secrets and tortiously interfered with Farm Bureau's prospective economic advantage based solely on the "approximately 20 or so" names on the 578-name Subject List that came from Trumble's old commission statements and calendars. Respondent's Brief, pp. 12, 39, 42. Accordingly, whether the commission statements and calendars are trade secrets is the sole issue involved in this appeal.

C. APPLICABLE LAW.

The Idaho Trade Secret Act, Idaho Code §§ 48-801, *et seq*. (the "ITSA"), defines "trade secret" as follows:

> (5) "Trade secret" means information, including a formula, pattern, compilation, program, computer program, device, method, technique, or process, that:
> (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
> (b) **Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.** Trade secrets as defined in this subsection are subject to disclosure by a public agency according to chapter 1, title 74, Idaho Code.

Idaho Code § 48-801(5) (emphasis added). In applying the above statute, this Court has also relied on the Restatements of Torts § 757, comment b, which sets forth the following six factors to determine whether information is a trade secret:

> (1) the extent to which the information is known outside [the plaintiffs] business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and his competitors; (5) the amount of effort or money expended by him in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Basic Am. V. Shatila, 133 Idaho 726, 735, 992 P.2d 175, 184 (1999). Restatements of Torts § 757, comment b, also makes clear that:

> The subject matter of a trade secret must be secret. Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret. Matters which are completed disclosed by the goods which one markets cannot be his secret. . . . Nevertheless, **a substantial element of secrecy must exist**, so that, except by the use of improper means, there would be difficulty in acquiring the information.

Restatement of the Law, Torts § 757, comment b (emphasis added).

It must additionally be noted that a "trade secret requires proof of 'independent economic value, actual or potential from not being generally known to the public or to other

persons who can obtain economic value from its disclosure or use.' To qualify as a trade secret, the information must be 'sufficiently valuable and secret to afford an actual or potential economic advantage over others.'" *Art of Living Found. v. Doe,* 2012 U.S. Dist. LEXIS 61582, *56-57 (N.D. Cal., May 1. 2012).

With respect to client lists, **"courts are reluctant to protect client lists to the extent they embody publicly available information."** *PMMR. Inc. v. Chaloner,* 2015 U.S. Dist. LEXIS 189222, *10 (C.D. Cal. Feb. 12, 2015) (emphasis added). However, "when a company expends significant effort creating its client list – even if it does so in partial reliance on publicly available information – and creates something more valuable than what is available publicly, its client list might be protectable as a trade secret." *Id.* at pp. *10-11 (emphasis added).

> [W]here the employer has expended time and effort identifying customers with particular needs or characteristics, courts will prohibit former employees from using this information to capture a share of the market. **Such lists are to be distinguished from mere identities and locations of customers where anyone could easily identify the entities as potential customers. As a general principle, the more difficult information is to obtain, and the more time and resources expended by an employer in gathering it, the more likely a court will find such information constitutes a trade secret.**

Morlife, Inc. v. Perry, 56 Cal. App. 4th 1514, 1521-22 (Ct. App. Cal. 1997).

Finally, it is not enough that the Subject List be a trade secret: Farm Bureau must also prove that Trumble "misappropriated" the Subject List, which is defined as:

> (2) "Misappropriation" means:
> (a) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

> (b) Disclosure or use of a trade secret of another without express or implied consent by a person who:
>
> (A) Used improper means to acquire knowledge of the trade secret: or
>
> (B) At the time of disclosure or use. knew or had reason to know that his knowledge of the trade secret was:
>
> (i) Derived from or through a person who had utilized improper means to acquire it:
>
> (ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
>
> (iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
>
> (C) Before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

Idaho Code § 48-801(2).

D. THE DISTRICT COURT CORRECTLY ENTERED SUMMARY JUDGMENT IN FAVOR OF TRUMBLE ON FARM BUREAU'S COUNTERCLAIM.

Before discussing the specifics of the District Court's decision, it must first be noted that there is simply no way the Subject List could be a trade secret under the ITSA for several reasons.

First, Farm Bureau did not even create the Subject List. The Subject List was created by Trumble after his contract was terminated. Since Trumble was the person who created the list (as opposed to Farm Bureau), ruling that the Subject List is a trade secret is akin to imposing a never ending, not bargained for non-compete in all employment-related relationships because the former servant will forever be prevented from using the personal knowledge he/she gained during the employment relationship. Besides being economically stifling, this would require well-established law to be overturned. *Northwest Bec-Corp.*, 136 Idaho at 840, 41 P.3d at 268.

Second, the names on the Subject List derived from the commission statements were not "subject of efforts that are reasonable under the circumstances to maintain its secrecy." Redacted samples of the commission statements are located in Farm Bureau's Motion to augment the record at pages 18 to 26. Farm Bureau sent the commission statements to Trumble monthly to show Trumble's compensation. (R. Aug. p. 57). A review of the commission statements by themselves establishes that they are not a trade secret for the following reasons:

- Since Farm Bureau voluntarily sent the commission statements to Trumble, Farm Bureau took no efforts to maintain the secrecy of the commission statements.
- Farm Bureau's lack of efforts to maintain the secrecy of the commission statements is further established because the commission statements are not marked confidential and Farm Bureau did not request that they be returned after Trumble was terminated.
- Farm Bureau did not redact the commission statements when it sent them to Trumble, which Farm Bureau easily could have done if there was information contained thereon that Farm Bureau wanted to protect.

Farm Bureau cannot claim a trade secret in names that it took no efforts to protect and maintain the secrecy of.

Third, if one compares the commission statements (R. Aug. pp. 18-26) with the Subject List (R. p. 655), the Court will note that there are two crucial differences between the two documents: (1) the commission statements contain, among other things, policy numbers and premiums, which are not included on the Subject List, and (2) the Subject List contains addresses, which are not shown on the commission statements. These two differences are crucial because the only information Trumble could have gained from the commission statements is names, and names are not protected if they are "generally known or readily ascertainable in the

industry." *Sky Capital Group, LLC v. Rojas*, 2009 U.S. Dist. LEXIS 40970, *13 (Idaho D.C. May 14, 2009). Additionally, Trumble having to find addresses for the Subject List means that it was Trumble's efforts that created value, not Farm Bureau. What good is a list of names without addresses? The Subject List cannot be considered a trade secret when names are readily available through any number of means (phone book, trade associations/directories) and the other one-half of the information on the Subject List (addresses) resulted solely from Trumble's efforts.

Fourth, there is no independent economic value to be derived from the Subject List. The Subject List has no value to anyone—it is just names and addresses of people who may procure insurance. There are literally hundreds of thousands of people in this very state that procure insurance. The only difference between this list and a random list is that these people had contact with Trumble.

Finally, there is no misappropriation in this case. Misappropriation requires that Trumble acquired or disclosed the trade secret through improper means. Idaho Code § 48-801(2). Trumble was given the commission statements by Farm Bureau and created the Subject List himself. How could Trumble have misappropriated anything?

The District Court correctly incorporated each of the following points in its Order dismissing Farm Bureau's trade secret and tortious interference claims:

> Likewise, evidence that [Trumble] used his old commission statements to obtain some of the information on the list does not indicate that the information contained therein is a trade secret. The list simply contains names and addresses. **Although [Trumble] had access to his old commission statements, which included customer policy numbers, those**

numbers do not appear on the list, solicitation letter, or blank Information Release Forms. Further, the commission statements that [Farm Bureau] provided do not include any customer addresses. Although "approximately 107 names" on the list (out of 578 total) also appeared on [Trumble's] commission statements, **the evidence before the Court clearly shows that the commission statements could not have been the sole source of *any* entry on the list that includes both the customer's name and address (as would be required to mail them a letter).** Therefore, any successful solicitation arising from information on a commission statement had to incorporate other data sources as well.

…

In addition, there is no evidence that [Farm Bureau] took reasonable steps to protect the secrecy of the information [Trumble] used to create the list. . . . **Nothing on the commission statements indicates that the information contained therein is meant to be confidential.** There is no evidence that [Farm Bureau] ever asked [Trumble] if he had customer data in his phone or at home, or that they asked him to return it if he did. **Thus, regardless of what steps [Farm Bureau] took to protect some information, there is no evidence that the actual information at issue in this case was subject to any reasonable efforts to maintain its secrecy more than ninety days after an agent's termination.**

Accordingly, regardless of whether the identity of [Farm Bureau's] specific customers is "generally known or readily ascertainable," to the extent that [Trumble] was able to ascertain the information, there is no evidence that he did so using improper means. [Trumble] was not bound by any confidentiality agreements. **[Farm Bureau] provided [Trumble] with the information available on his commission statements, which did not indicate that the contents were intended to remain confidential. In addition, there is no evidence that [Farm Bureau] employed reasonable means to protect the information that [Trumble] used to create the list, regardless of what steps may have been taken to protect other information. Therefore, based on the undisputed evidence before the Court, the names and addresses of [Farm Bureau's] clients that appear on [Trumble's] solicitation list are not trade secrets as a matter of law.**

A misappropriation of trade secrets claim cannot succeed in the absence of a trade secret. Nonetheless, even assuming that [Farm Bureau's] clients' names and addresses were trade secrets, for the same reasons discussed above, there is no evidence in the record that [Trumble] committed misappropriation. Under

> Idaho Code section 48-801(2), misappropriation requires that the trade secret be "acquired by improper means" by the person using it or another, or that it was obtained "under circumstances giving rise to a duty to maintain secrecy or limit its use."
>
> **[Farm Bureau does] not allege, nor is there any evidence that, [Trumble] acquired the information on his list through theft, bribery, misrepresentation, or espionage. Therefore, any alleged improper means would necessarily have to arise from "a breach of a duty to maintain secrecy."** However, [Farm Bureau does] not dispute that [Trumble] abided by the ninety-day non-competition provision in the Career Agent's Contract. **In addition, nothing before the Court suggests that [Trumble] had any ongoing duty to keep any information he may have acquired through his work with [Farm Bureau] confidential, including the information that [Farm Bureau] printed on his commission statements.** Therefore, there is no issue of material fact in dispute regarding whether [Trumble] had a duty to maintain the secrecy of client names and addresses.

(R. pp. 886, 889-90) (emphasis added) (citations omitted). This opinion could (and should) be adopted by this Court in full and Farm Bureau's appeal should be denied.

E. FARM BUREAU'S ARGUMENTS ON APPEAL HAVE NO MERIT.

Farm Bureau makes very few arguments in support of its appeal. With respect to Farm Bureau's claim that Trumble breached the ITSA, Farm Bureau first argues that the "commission statements are a customer list that shows customer buying preferences and history of customer purchases." Respondent's Brief, p. 39. This argument, however, is irrelevant. Farm Bureau voluntarily provided the commission statements to Trumble. Farm Bureau did not request that they be returned. Simply because Trumble possessed the commission statements means nothing.

Farm Bureau next argues that Trumble "admitted that he obtained and used the commission statements to create the list while he was *under* his contract with Defendant Farm

Bureau." *Id.* In support of this argument, Farm Bureau cites to page 642 of the record, paragraph 7. A review of this citation shows that Farm Bureau is once again misrepresenting the record. Nowhere in paragraph 7 of page 642 of the record (or anywhere else) is there any fact supporting that Trumble created the Subject List while he was under contract with Farm Bureau. The record is clear: Trumble created the Subject List after his contract was terminated. (R. pp. 641-42).

Farm Bureau finally argues in support of its ITSA claim that the "District Court erroneously determined that Farm Bureau had not taken reasonable steps to protect its client lists [and] erroneously determined that [Trumble] had not misappropriated any trade secrets." Respondent's Brief, p. 40. Farm Bureau, however, offers no analysis as to why the District Court erred. Farm Bureau is simply grasping at straws without pointing to any holding or finding by the District Court that was in error. Trumble submits that Farm Bureau's lack of any analysis on how the District Court erred in finding that Trumble did not violate the ITSA establishes that Farm Bureau's appeal is frivolous.

Turning to Farm Bureau's tortious interference claim, it should first be noted that this claim "is based entirely on the allegations that [Trumble] violated the" Idaho Trade Secret Act. Respondent's Brief, pp. 41-45; (R. pp. 891-92). Therefore, if Trumble did not violate the Trade Secret Act, Trumble could not have tortiously interfered with Farm Bureau's economic advantage.

The only argument that needs to be addressed with respect to Farm Bureau's tortious interference claim is the allegation that Trumble, by competing with Farm Bureau, is liable to

Farm Bureau for damages. For instance, Farm Bureau takes issue with Trumble "sending the Solicitation Letter to individuals who were *currently* insured by Farm Bureau." Respondent's Brief, p. 43 (emphasis in original). Is Farm Bureau really suggesting that Trumble simply competing is a tort? Farm Bureau clearly knows that a tortious interference claim is only viable if "the interference was wrongful by some measure beyond the fact of the interference itself." *Id.*, p. 41 (quoting *Cantwell v. City of Boise, et al.,* 146 Idaho 127, 138, 191 P.3d 205, 216 (2008)). Sending a letter to individuals who were insured by Farm Bureau is simply competition—there is no wrongful interference whatsoever. Had Farm Bureau not wanted Trumble to compete, Farm Bureau should not have terminated Trumble or simply reinstated the contract, which was all Trumble wanted.

The remainder of Farm Bureau's arguments on this issue simply restate its ITSA claim, which will not be addressed herein. However, it must finally be noted that Farm Bureau, once again, simply alleges that the District Court erred in dismissing the tortious interference claims without providing any meaningful analysis. *Id.*, p. 44. Like the ITSA claim, Farm Bureau's lack of meaningful analysis establishes that Farm Bureau's appeal is frivolous.

F. TRUMBLE IS ENTITLED TO ATTORNEYS' FEES AND COSTS ON FARM BUREAU'S CROSS-APPEAL.

As noted above, the District Court was correct in dismissing Farm Bureau's Counterclaim because the Subject List is not a trade secret and competition is not a tort. Given that Farm Bureau provides no meaningful analysis on its appeal (and what analysis is provided is generally based on misconstruing the record), Trumble submits that he is entitled to attorneys'

fees and costs under Idaho Code § 12-121.

Idaho Code § 12-121 provides that attorneys' fees may be awarded in a civil action "to the prevailing party or parties when the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation." Section 12-121 applies when a party brings an appeal frivolously, unreasonably or without foundation. *Woods v. Sanders*, 150 Idaho 53, 61 (2010). This Court has held that when a party "'fails to present a genuine allegation of factual or legal error on the part of the . . . judge,' an award of attorneys' fees under § 12-121 is appropriate." *Id.* (citation omitted). Here, Trumble should be awarded his attorneys' fees in responding to Farm Bureau's appeal because Farm Bureau does not present a genuine legal error on the part of the District Court and Farm Bureau's factual claims are misrepresentations of the record. The Court should also consider sanctions under Idaho Appellate Rule 11.2 against both Farm Bureau and its counsel for the clear misrepresentation of the record noted above, particularly in Section I.B.2.

IV. CONCLUSION

For the reasons discussed above, Trumble respectfully requests that this Court enter an Order providing that, with respect to Trumble's Appeal:

> (1) The District Court decision is overturned and that Trumble is immediately entitled to the service bonus commission plus interest either because (a) Farm Bureau terminated the Commission Contract or (b) the forfeiture provisions of the Commission Contract are unenforceable. In the event this Court orders that Trumble is immediately entitled to the bonus commissions, Trumble requests that this Court award Trumble his attorneys' fees on appeal and that this Court remand this case to determine whether Trumble is entitled to punitive damages; OR

(2) Remand this case to determine whether Trumble engaged in dishonest conduct, as alleged by Farm Bureau, with a directive that if Farm Bureau does not prove at trial that Trumble engaged in dishonest conduct then Trumble is entitled to the bonus commissions. In the event this Court remands this case to ascertain whether Farm Bureau can prove that Trumble engaged in dishonest conduct, then Trumble would request that this Court also find that Trumble was excused from complying with the one-year non-compete in the Commission Contract.

With respect to Farm Bureau's Cross Appeal, Trumble respectfully requests that the Cross Appeal be denied and that Trumble be awarded his attorneys' fees.

DATED this 7th day of February, 2019.

POINTS LAW, PLLC

By: /s/ Michelle R. Points
Michelle R. Points, of the firm
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing document was served upon the following attorney(s) this 7th day of February, as indicated below and addressed as follows:

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