Multi-Million Dollar Pre-Trial Settlement Achieved for Wrongfully Terminated Commissioned Sales Representative Under Indiana Law

By Stephen P. Dunn, Esq.[1]

A naturally skilled product promoter based near Detroit, "Larry" served several different manufacturing company principals as a commissioned sales representative for more than twenty years. The commissions that Larry received on product sales he procured generally varied between two and five percent of net sales, and he generally earned around $100,000 - $200,000 per year. Larry had an undergraduate degree in finance from Michigan State University, an impressive rolodex of purchasing department contacts at most Original Equipment Manufacturer ("OEM") automotive companies operating in and near Detroit, as well as their tiered suppliers, and the quick wit and big smile that most successful salesmen frequently feature.

In 2009, as a result of the nationwide recession and related automotive downturn, Larry's principal laid him off of work. Married with three aspiring young daughters, Larry needed another principal, and fast. Larry learned of a small, start-up automotive supplier company located in Indiana ("Company"), and he arranged a meeting with its founder, "George." Larry and George hit it off immediately, and George wanted to engage Larry to sell George's automotive products to the Detroit OEMs. Problem was – as a start-up company with no sales, George couldn't afford to pay Larry. With few good options in a struggling economy, and with mouths to feed at home,

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Larry agreed to take a risk: he would market and promote George's products for a $5,000 monthly draw, but would also receive a sales commission of either 3% and 5% (depending on the price of the product sold to the customer) of all of George's sales to all of George's customers. If Larry sold well for George, he would earn well from George; if he did not sell, he would not earn.

In March of 2009, Larry and George entered into a written contract called the "Manufacturer Representative Agreement," which included Larry's 3% and 5% sales commissions, with a one-year duration. Drafted by George's lawyers, and signed by both Larry and George, the thirteen page, fully-integrated Manufacturer Representative Agreement (the "Agreement") actually contained only one sentence describing Larry's performance obligations: that he **"at his own expense, vigorously promote the sale of and stimulate demand for the wheel coatings of [Company] by direct marketing and by direct solicitation." The Agreement does not define or otherwise quantify the terms, "vigorously promote," "direct marketing," and "direct solicitation."** The Agreement also provided for the application of Indiana law, venue for disputes in Indiana, and the recovery of the prevailing party's attorney fees.

Larry hit the ground running, and, at his own expense, he vigorously promoted Company's products by direct marketing and by direct solicitation. He made thousands of phone calls, sent countless email messages, participated in dozens of meetings, and appeared at trade shows. His efforts produced tremendous results for George, as OEMs and their tiered suppliers submitted numerous requests for quotations and program award commitment letters. Larry even landed, for George's small Indiana start-up company, the major pick-up truck program for one of the Detroit Three OEMs – resulting in millions of dollars of new sales to George. To meet the rapid increase in demand, George invested more into the Company, obtained outside financing and additional investors, and poured the money into building new production lines.

When Larry's one-year Agreement expired in 2010, George and Larry entered into a new contract by the same name – this time with a three year duration. Larry's contractual performance obligations – that he "at his own expense, vigorously promote the sale of and stimulate demand for the wheel coatings of [Principal] by direct marketing and by direct solicitation" – remained exactly the same.

Larry, as agent, continued capably performing his duties for his principal, George. When Larry's three year Agreement expired in 2013, the parties agreed to a new contract by the same name – this time with a five year duration. Importantly, in the event of termination, the Agreement provided for Larry to receive post-termination sales commission payments based on a formula. Larry's contractually expressed performance obligations remained exactly the same. As Larry secured more business for Company, his sales commission payments increased as well. Larry, who had been earning around $100,000 per year from Company, earned around $200,000 in 2014 and nearly $900,000 in 2015. Larry's 2016 commissions were projected to exceed $100,000 *per month*.

Shortly after the parties signed Larry's 2013 Agreement, George sold about 60% of the Company to a Florida-based private equity firm ("PR Firm") whose founder had made hundreds of millions of dollars working for a well-known east coast hedge fund that had never operated in the unique automotive space. Before and after it closed on its purchase of the controlling interest in Company, PE Firm reviewed Company's financials – and specifically identified Larry's sales commission payments as problematic for Company. PE Firm resolved to terminate Larry.

In August 2015, PE Firm's leadership hired a new chief executive, "Sam." In October 2015, Sam created a PowerPoint presentation entitled, "Sales & Marketing Contractor Roles / Responsibilities," which articulated numerous purported "obligations" of Larry, such as creating

and submitting "bi-weekly sales forecast" documents, "acquisition status update" documents, and "customer information dossiers" – none of which were set forth in Larry's Agreement. Sam pressed Larry to confirm that Larry would perform all of the additional purported obligations in Sam's PowerPoint. Seeing the writing on the wall, Larry responded that he would perform all obligations required of him in the Agreement.

On December 15, 2015, Sam wrote Larry a formal letter demanding that Larry identify which of the purported obligations in Sam's PowerPoint that Larry refused to perform. Larry engaged the author of this article. I reviewed the Agreement, which provided for the application of Indiana law, and determined it to be a clear, express, unambiguous, fully-integrated contract with a five-year term that also provided for post-termination sales commission payments to Larry. Indeed, the Agreement was one of the clearest and strongest written commissioned sales representative contracts that I have ever reviewed. The Agreement did not provide for the possibility that the Company could force Larry to perform any additional performance obligations other than those expressly set forth in the Agreement. And, of course, courts enforce the terms of unambiguous contracts according to the four corners of the document. On behalf of Larry, I wrote to the Company expressing this position.

On January 15, 2016 at 12:04 am, the Company filed suit in the Northern District of Indiana against Larry personally and the entity through which Larry conducted business for the Company. Basically, the Company's suit alleged that somehow Larry had breached the Agreement by refusing to perform those extra-contractual purported duties contained in Sam's October 2015 PowerPoint presentation. That same day, the Company's attorneys sent me a letter terminating Larry, and also demanding that Larry honor the six-month non-compete term set forth in the Agreement.

Later that same day, before Company served Larry with its preemptive lawsuit, we filed our lawsuit in the same court on behalf of Larry's entity against the Company, alleging two counts: (1) Breach of Contract and (2) Violation of the Indiana Sales Representative Commission Act, IC §24-4-7-5 – which of course provides for the recovery of treble damages and attorney fees. Moreover, my research revealed the Indiana Supreme Court's pivotal decision in *Andrews v. Mor/Ryde Int'l, Inc.,* 10 N.E. 3d 502 (Ind. 2014), in which the Court held that Indiana's punitive damages cap does not apply to damages awarded under the Indiana Commissioned Sales Representative Act. In other words, the public policy of Indiana serves to support commissioned sales representatives like Larry and to deter principals from wrongfully terminating them. Indiana principals that terminate commissioned sales representatives are liable for both compensatory and exemplary damages – without restrictions – and attorney fees.

Eventually, the Court consolidated the two cases and realigned the parties according to their real interests – with Larry's entity as plaintiff and Company as defendant. We promptly moved for summary judgment as to Company's claim against Larry personally, because the Agreement was between Company and Larry's entity. Strangely, Company failed to timely respond to that motion, and it was granted. The case proceeded through discovery, and after we were forced to file several motions to compel, we eventually uncovered what one observer declared to be "more smoking gun emails in one case than I've ever seen." For example, in just one email, PE Firm's leadership stated:

> **I will tell you that I believe the contract in place with [Larry] is such a bad contract for the Company (gives one guy all major OEMs, Major Transplants, al Tier 1 and Tier 2 providers, and can't be cancelled except for cause) that I have recommended to [PE Firm owner] that rather than negotiate to something less terrible we need to try to get out of this contract… I think we need to fix it now rather than trying to get through the next 4 years (6 including contract tail) with a crappy agreement with [Larry].**

Understandably, the Company's lawyers wanted to mediate the case. We mediated in Detroit with a mediator of my selection at the Company's sole expense for an entire day, but the Company failed to make a serious offer. After I deposed the Company's Rule 30(b)(6) designees, including a member of PE Firm's leadership who drafted the email above referencing the "crappy agreement with [Larry]," the Company's lawyers reengaged with the mediator in a more serious manner. We resolved the case with the Company agreeing to make payments to Larry's entity of more than $2,600,000.

The outcome of commissioned sales representative disputes depends on the strength of the parties' agreement, and the plaintiff's attorney's persistence in discovery, and skill and tenacity generally. Larry received a large settlement because he had a great contract, and because, with unrelenting persistence, we pulled out of the Company, the PE Firm, and their respective attorneys incredibly helpful evidence that served as an indictment of the Company and its PE Firm leaders that they terminated Larry not because he breached the Agreement or failed to do anything required of him under it – but only to try to save money. The friendly language in the Indiana Sales Commission Representative Act didn't hurt, either.

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