

MARKET AMERICA, INC., Plaintiff, v. RAY ROSSI, et al., Defendants.  
UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF  
NORTH CAROLINA  
1 :97CV0089 1

April 15, 1999, Decided

April 15, 1999, Filed; April 16, 1999, Entered on Docket

DISPOSITION: Defendants' Motion for Summary Judgment granted in part and denied in part and Market America's Motion for Partial Summary Judgment granted in part and denied in part.

JUDGES: James A. Beaty, United States District Judge.

OPINIONBY: James A. Beaty

OPINION: MEMORANDUM OPINION

BEATY, District Judge.

## I. INTRODUCTION

This matter is before the Court on Defendants Ray Rossi ("Rossi"), Tandy Brown ("Brown"), Craig Melton ("Melton"), Phil Lane, Julia Lane, Sheri Frey Conners, and Mike Perrault's Motion for Summary Judgment and Plaintiff Market America, Inc.'s, Motion for Partial Summary Judgment... For the reasons stated herein, Defendants' motion is granted in part and denied in part, and Market America's motion is granted in part and denied in part.

## II. FACTUAL AND PROCEDURAL BACKGROUND

Market America is a network marketing company that distributes consumer products. Based in Greensboro, North Carolina, it contracts with individuals who serve as "independent distributors" of its products. In addition to selling Market America products to consumers, these independent distributors are encouraged by Market America to recruit other individuals to join with Market America as independent distributors themselves. If these other individuals--who often consist of friends, family, or acquaintance of an independent distributor--contract with Market America, then they become a part of the "downline" of the independent distributor who recruited them. Independent distributors receive sales commissions on products they sell to consumers and also receive sales commissions on products sold by those independent distributors in their downlines. Defendants are all Virginia residents who Market America asserts contracted with Market America to work as independent distributors.

Market America contends that each of the Defendants--individually or in their

business entity name--entered into an Independent Distributor Application and Agreement ..., as follows:

6. . . . The term of the Market America Distributor Agreement is one year...

21. I agree that the marketing plan, genealogy reports, Distributor list and official literature are proprietary information and are considered trade secrets of the company as construed ... I agree not to enter into competition with Market America by participating as an Independent Contractor, consultant, officer, shareholder, director, employee or participant of another company or direct sales program using a similar matrix marketing structure or handling similar products to that of Market America or involving a Distributor of Market America in such a program for a period of six months from my written resignation or termination as an Independent Distributor of Market America. . . .

Market America further alleges that certain Defendants entered into additional agreements with Market America. It avers that (1) all Defendants entered into a Professional Service Package Agreement, (2) Rossi, Brown, and Melton each entered into a Certified Trainer Agreement, and (3) Rossi and Brown each entered into an Advisory Council Agreement... These agreements, as presented to the Court, contain various noncompetition or confidentiality provisions.

Market America alleges that in January 1997 Rossi and Brown began discussing with representatives of International Heritage, Inc. the possibility of becoming independent distributors of that company. Although no longer in business, International Heritage at the time was a network marketing company based in Raleigh, North Carolina, which operated in a similar manner to Market America. Market America viewed International Heritage as a competitor to its business. It is alleged that Rossi and Brown became dissatisfied with their work with Market America and sought to distribute products for another entity.

On January 23, 1997, Rossi and Brown, accompanied by approximately 25 individuals, traveled by bus to Raleigh to meet with representatives of International Heritage. Market America contends that most of those accompanying Rossi and Brown were independent distributors of Market America and also members of Rossi's and Brown's downlines. Sometime after the bus trip, representatives of Market America expressed concern about Rossi's and Brown's involvement with International Heritage. On February 10, 1997, Rossi and Brown wrote a letter to Market America in an effort to ease Market America's concerns. In addition to raising questions about certain Market America procedures, Rossi and Brown wrote the following:

We [have been] questioned by [Market America] distributors about . . . other ventures and if they compared to the opportunity with Market America. We decided to investigate some of these in order to know the competition, if any, and

[to] be able to answer questions accurately. We understand that the grass is always greener on the other side until you get to the other side and realize the grass you just left was greener all the time. Sometimes you have to look to understand what you have and to appreciate the people around you.

Following the parties' actions in January and February, Defendants' involvement with International Heritage allegedly intensified. Subsequently, on August 7, 1997, Market America was provided with tape recordings of conversations made among certain Defendants. In Market America's view, these recordings constituted evidence that Defendants had violated certain provisions of their agreements with Market America. As a result, on August 8, 1997, Market America immediately suspended Defendants from operating as independent distributors and stopped payment on checks that had been previously issued to Rossi, Melton, and Phil Lane. The suspension letter cited Paragraph 21 and, among other things, accused Defendants of "engaging in a competitive direct sales company and soliciting and otherwise interfering with Market America's contractual relations with its' [sic] distributors." ... Market America also informed Defendants that, pursuant to the provisions of the Market America Career Manual, they could appeal their suspensions. In response, each of the Defendants wrote to Market America challenging the adverse action. The internal appeal procedures set forth in Market America's Career Manual, however, were not followed....

Instead, on August 15, 1997, Market America filed suit against Defendants in state court. n8 It also sought and received a state court temporary restraining order enjoining Defendants from, among other things, (1) soliciting customers or clients of Market America, (2) recruiting Market America distributors for International Heritage, (3) making disparaging or untrue statements about Market America, (4) participating in various business activities, and (5) competing with Market America. It also listed Defendants' individual addresses.

-----Footnotes-----

n8 The case was properly removed to this Court on August 20, 1997.

-----End Footnotes-----

Also on August 15, 1997, Market America's President and Chief Executive Officer, James H. Ridinger, sent a letter to approximately 7,000 or 10% of Market America's independent distributors informing them that Defendants had been suspended. According to Market America, each distributor that received the letter was connected in some way to Defendants' downlines or resided in close proximity to Defendants. Some of these distributors were located and operated in North Carolina. Among other things, Ridinger wrote that despite repeated warnings and attempts to positively bring about harmony and even after we had considerable evidence of their breaches of contract and cross groups sponsoring

and other violations of the policies and procedures; we have received hard proof that their unscrupulous activities and plans to undermine the company and business continue, and in fact, have intensified. This group of individuals have [sic] been (directly or indirectly) recruiting Market America Distributors in a company which uses a binary matrix structure, International Heritage. . . . They persist in participating in this program and undermining the Market America business. . . .

this is not a letter or action just about the individuals listed in the lawsuit or this letter. Their action threatens the very foundation of what Market America is about. Their intentions are to undermine Market America and Distributors' businesses. We will pursue this with every legal remedy and with all of our resources. Their actions and threats against this company attack the very heart of what Market America is about and stands for. . .

Think about it. . . . What if these "undercover competitors who pose as Market America Distributors" can access our trade secrets, our lists, and go into ProPack and get Distributor lists to recruit them into competitive ventures? If nothing else, it is destructive and disruptive. How can we have open meetings . . . if these bandits can use the meeting list and go into our open meetings disguised as Market America Distributors only to proselytize the organization into something else and bad mouth the company and its leadership? And why should we arm anyone with our trade secrets in regard to our marketing plan, systems, lists, and products, only to help them compete with us and undermine everyone's business? . . .

In closing, let me remind everyone that we make it abundantly clear UP FRONT that there are requirements under [our] system and that we do not tolerate these . . . tactics. No one is forced to join or handcuffed. They know the deal up front and commit to it in writing by signing. It is repeated and reinforced at every level in the business, in training, and in subsequent agreements they sign to participate. They didn't have to join us. If they don't like it, they don't have to stay. They can get out. But they have to honor the no-compete for six months and they are not going to use their position in Market America to raid us. We are not letting the fox in the hen house. **WE WILL NOT LET THEIR GREED AND AVARICE UNDERMINE OR DESTROY [OUR] SYSTEM.**

A copy of the temporary restraining order issued by the state court against the Defendants was attached.

In addition to this mailing, Ridinger taped a recorded message which included language almost identical to that above and included it in Market America's monthly leadership audiotope for August 1997. Defendants contend that the Ridinger audiotope was accessible by approximately 5,000-8,000 distributors.

On September 29, 1997, the Lanes filed for personal bankruptcy. In their petition, they estimated the value of their counterclaims against Market America in the instant action as \$ 1 and estimated the value of Market America's claims as \$ 30,250...

On October 9, 14, and 20, 1997, United States Senior District Judge Richard C. Erwin held hearings on Market America's motion for a preliminary injunction. On October 9, Judge Erwin made the following statement with respect to the competition restriction contained in Paragraph 21 during an exchange with counsel for Market America:

*Judge Erwin:* As a matter of fact I am going to tell you up front, I am going to declare that portion of the, referred to as Paragraph 21, unenforceable in this case. Just that part of the contract described in Paragraph 21 as unenforceable. And I think you said this morning you weren't relying on the noncompete part of the contract.

In addition, on October 14, the following colloquy occurred between Judge Erwin and counsel for Market America with respect to the competition restriction contained in Paragraph 21:

*Counsel for Market America:* We believe that Your Honor is bound by the interpretation of the state with regard to this agreement, and this agreement has been considered no less than four times by the state courts, and in particular Paragraph [21], which is the paragraph we're talking about here, has been specifically found to be valid and binding by the state courts. And we believe Your Honor is bound by that.

*Judge Erwin:* To what extent?

*Counsel for Market America:* That Paragraph [21] . . . is valid and binding.

*Judge Erwin:* As far as geography?

*Counsel for Market America:* Period.

*Judge Erwin:* Counsel, I went over that, and I said that it was my opinion that this contract does not contain any restriction on geography. And by reason of that, the [United States Court of Appeals for the] Fourth Circuit has held that unless there is a restriction on the geography and the location of the parties involved, that it's moot.

On October 22, 1997, Judge Erwin issued a written opinion denying Market America's preliminary injunction motion. However, he made no reference to Paragraph 21 in his ruling.

On August 27, 1998, Market America filed an Amended Complaint asserting the following four causes of action: (1) breach of contract, (2) misappropriation and misuse of trade secrets and proprietary information, (3) unfair and deceptive trade practices, and (4) tortious interference with contract. On September 8, 1998, Defendants filed their Answer which, among other things, included the following eight amended counterclaims: (1) libel, (2) slander, (3) unfair and deceptive trade practices, (4) tortious interference with business relations, (5) restraint of trade, (6) money had and received, (7) breach of contract and misappropriation, and (8) breach of contract. On November 30, 1998, Market America and Defendants filed the respective motions now before the Court. To date, Market America has not conducted a review of Defendants' suspensions, despite Defendants' written responses to the suspensions which purport to request appeals. In addition, Defendants have not attempted to renew their 1997 contracts with Market America.

### III. STANDARD OF REVIEW

Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In making this determination, the Court views the evidence in the light most favorable to the non-moving party, according that party the benefit of all reasonable inferences... Judges are not "required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such character that it would warrant the jury in finding a verdict in favor of that party." ...

### IV. DISCUSSION

Before analyzing each cause of action in this case, the Court will discuss three initial issues raised by the parties.

#### A. The "Law of the Case" with Respect to Paragraph 21

Defendants contend that, for the purposes of ruling on the respective dispositive motions, this Court is bound by Judge Erwin's comments during the preliminary injunction hearings, to the extent that he declared the competition restriction contained in Paragraph 21 unenforceable. Based on his comments, Defendants assert that it is the "law of the case" that the competition restriction contained in Paragraph 21 is unenforceable. Market America argues that Judge Erwin's statements are "insufficient" to support such a contention. This Court agrees with Market America.

"The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter."

... As the Fourth Circuit has noted,

whether rulings by one district judge become binding as "law of the case" upon subsequent district judges is not a matter of rigid legal rule, but more a matter of proper judicial administration which can vary with the circumstances. It may sometimes be proper for a district judge to treat earlier rulings as binding, sometimes not.

When the initial ruling is one made in connection with a motion for a preliminary injunction, it is less likely to be considered the law of the case...

Here, although Judge Erwin unequivocally stated that Paragraph 21 is unenforceable as a matter of law, this Court declines to adopt this conclusion as the "law of the case." As the Supreme Court has noted, "a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." Since the question of Paragraph 21's operation and enforceability is central to this case, and in light of the decisions cited above, this Court will conduct an independent review of that provision of the Distributor Agreement.

#### B. The Lanes' Bankruptcy Filing

The second issue raised initially by the parties concerns the Lanes' bankruptcy filing on September 29, 1997. As noted previously, in that filing the Lanes asserted that the value of their counterclaims in this action was \$ 1. They also represented that their potential exposure from Market America's claims was \$ 30,250. In light of these representations, and since the Lanes were successful in obtaining bankruptcy relief, Market America contends that the Lanes should be estopped from recovering more than \$ 1 in this action. In response, the Lanes assert that the \$ 1 estimate set forth in their petition should not preclude recovery in this suit. This Court agrees with the Lanes.

In support of its contention, Market America cites cases holding that a bankruptcy court order can serve to preclude a subsequent claim. However, the document relied on by Market America in its argument is merely the Lanes' bankruptcy petition, a document which may be amended by the debtor at any time prior to the close of the bankruptcy case. In addition, the bankruptcy trustee of the Lanes' case has asserted in an affidavit that \$ 1 estimate does not preclude him from seeking amounts over-and-above \$ 1 that may actually result from the this litigation: "The . . . valuation of the Lanes' litigation claim in their . . . petition does not impose any limitation on the monies that I, as trustee, can collect from the Lanes for distribution to their creditors." In light of these facts, this Court finds that judicial estoppel is not appropriate in this instance and, therefore, the Lanes' representation about the valuation of their counterclaims in their bankruptcy petition does not limit the damages they may obtain with respect to

such counterclaims.

### C. Post-1997 Damages

Lastly, Market America asserts that, regardless of the outcome of Defendants' counterclaims, to the extent that Defendants seek damages based on provisions of their Distributor Agreements, they would not be able to recover for damages incurred after December 31, 1997. Market America contends that the Distributor Agreements expired on that day, and it notes that Defendants neither filed nor applied for a renewal. (Id.) Defendants primarily argue that post-1997 damages should be recoverable because the Distributor Agreements do not specifically grant Market America discretion to reject a timely and proper renewal application. In response to Market America's statement that Defendants have never sought renewal, Defendants contend that doing so would have been "futile and unnecessary." This Court finds Defendants' arguments unpersuasive.

Each Distributor Agreement expressly states that its term is one year. This necessarily means that, unless renewed, the contract ceases to be in force once the one-year term has expired, which, in this case, was December 31, 1997. Regardless of whether Market America had discretion to reject a proper renewal application--a question this Court declines to address--Defendants did not even attempt such a renewal. This Court is unpersuaded by Defendants' response--that to attempt a renewal would have been "futile and unnecessary"--since it is Defendants themselves who contend that Market America would have had no discretion to reject such an application. Accordingly, this Court finds that, to the extent that Defendants' counterclaims are based on their Distributor Agreements, any post-1997 damages would not be recoverable.

To summarize, with respect to the three initial issues raised by the parties, this Court finds that (1) Judge Erwin's comments during the preliminary injunction hearings did not create any "law of the case" precluding a subsequent independent review of Paragraph 21, (2) the Lanes' valuation of their counterclaims against Market America in their bankruptcy petition does not limit their possible recovery as to those counterclaims, and (3) to the extent that Defendants' counterclaims are based on their Distributor Agreements, any post-1997 damages would not be recoverable.

As noted earlier, Market America has asserted four claims and Defendants have set forth eight counterclaims. This Court will now analyze each cause of action in turn.

### D. Market America's Claim for Breach of Contract

Market America first alleges that Defendants breached their contracts with Market America "by entering into various agreements to serve as distributors for

competitors of Market America . . . , including but not limited to International Heritage . . . ." In addition, it alleges that Defendants breached their contracts "by recruiting other Market America distributors to become distributors for . . . Market America's competitors, including but not limited to International Heritage." With their motion, Defendants primarily contend that they are entitled to judgment as a matter of law because the only contractual provision that could support Market America's claim--the competition restriction contained in Paragraph 21--is unenforceable. Market America asserts that whether the competition restriction is enforceable should be a question for the jury and, even if it is deemed unenforceable by this Court, its breach of contract claim should nonetheless go forward because it rests on other clauses of Paragraph 21 and other agreements entered into between the parties. Specifically, Market America cites the trade secrets clause of Paragraph 21 and the provisions of the Professional Service Package, Certified Trainer, and Advisory Council Agreements, which were attached to the pleadings. In reply, Defendants argue the trade secrets clause does not prevent use of the information cited therein and that, to the extent they entered into other agreements, Market America cannot show any breach of those agreements' provisions.

Since Market America contends that its breach of contract claim rests on the contents of multiple agreements, this Court will analyze separately whether its claim may proceed under Paragraph 21 and under the relevant provisions of the Professional Service Package, Certified Trainer, and Advisory Council Agreements.

#### 1. Paragraph 21: the Competition Restriction and the Trade Secrets Clause

First, with respect to the competition restriction contained in Paragraph 21, Defendants' primary argument, as noted above, is that Market America's breach of contract claim fails because the competition restriction contained in Paragraph 21 is a covenant not to compete which lacks a geographic limitation and, therefore, is unenforceable. Defendants also contend that the competition restriction contained in Paragraph 21 never became operative because (1) they have never resigned nor been terminated and (2) they were not employees. (Id.) Market America asserts that the competition restriction contained in Paragraph 21 need not have a geographic limit because it is an "exclusive dealership agreement" and, even if it were considered a covenant not to compete, the lack of a geographic limitation does not necessarily render it unenforceable. Although this Court eventually concludes, in section IV.L. of this Memorandum Opinion, that the competition restriction contained in Paragraph 21 constitutes a restraint of trade, for the purposes of analyzing Market America's breach of contract claim this Court need not address its enforceability. Rather, even if it were enforceable, this Court finds that Market America has failed to proffer sufficient evidence that Defendants breached the provision.

On this issue, and as noted above, Defendants assert that the competition restriction of Paragraph 21 was never triggered because "Defendants neither resigned[] and [Market America] never terminated . . . Defendants in writing." Although Market America does not address this contention in the Argument section of its response, it nevertheless provides the following suggested reading of the restriction in its Statement of Facts: "The terms of Paragraph 21 apply only while a distributor is working with Market America and for the six months after he or she ceases working with Market America." This Court finds Market America's interpretation at odds with the plain meaning of the provision.

As noted previously, Paragraph 21 provides, in pertinent part: "I agree not to enter into competition with Market America . . . for a period of six months from my written resignation or termination as an Independent Distributor of Market America." The plain language of this provision indicates that it only becomes operative after the contracting party has resigned by writing or has been terminated in writing. Contrary to Market America's reading, the provision does not indicate that the restrictions apply "while the distributor is working" with Market America. In addition, the language does not indicate that the time period is triggered any time the contracting party "ceases working." Rather, only once there has been a written resignation or termination does the restriction begin to operate. [n11]

-----Footnotes-----

n11 While this interpretation may be counterintuitive, this Court is not at liberty to rewrite the terms of, nor insert words into, an unambiguous contract. See *Martin v. Martin*, 26 N.C. App. 506, 508, 216 S.E.2d 456, 457-58 (1975). Moreover, even if the restriction was somehow ambiguous, this Court must construe any ambiguity against the drafter, see *Silvers v. Horace Mann Insurance Company*, 324 N.C. 289, 295, 378 S.E.2d 21, 25 (1989), which, in this case, was Market America.

-----End Footnotes-----

Here, though Market America has set forth sufficient evidence indicating that Defendants were duly suspended from operating as independent distributors, it has failed to show either that Defendants resigned by writing or that Market America terminated them in writing. As such, according to the plain terms of Paragraph 21, Defendants were free to compete with Market America despite the fact that they were no longer permitted to sell for Market America. Moreover, as previously stated, Paragraph 21 contains no restriction on competition prior to written resignation, written termination, suspension, or any other formal cessation of the working relationship.

Second, with respect to the trade secrets clause contained in Paragraph 21,

Defendants argue that the provision does not proscribe any conduct and, therefore, cannot support Market America's breach of contract claim. Defendants make that argument in response to Market America's assertion that its breach of contract claim "include[s] . . . the provision of the . . . Distributor Agreement[s] forbidding the use of 'proprietary information' and 'trade secrets.'" Market America cites Paragraph 21 in support of that assertion. Here, too, this Court finds Market America's interpretation at odds with the plain meaning of the provision.

As noted previously, Paragraph 21 provides, in pertinent part: "I agree that the marketing plan, genealogy reports, Distributor list and official literature are proprietary information and are considered trade secrets of the company . . . ." The plain language of this provision indicates merely that Defendants "agree" that the information lists "are considered trade secrets." Contrary to Market America's reading, the provision does not restrict Defendants in any way with respect to such trade secrets. [n13]

-----Footnotes-----

n13 Again, even if the provision was somehow ambiguous, this Court must construe any ambiguity against the drafter. See *Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 295, 378 S.E.2d 21, 25 (1989).

-----End Footnotes-----

Accordingly, to the extent that Market America's breach of contract claim relies on alleged violations of either the competition restriction or the trade secrets clause of Paragraph 21, Defendants' motion for summary judgment is granted. This Court has previously noted, however, that Market America asserts that its breach of contract claim does not rest entirely on Paragraph 21. Therefore, this Court will next analyze these other agreements separately below.

## 2. Provisions of the Professional Service Package, Certified Trainer, and Advisory Council Agreements

As discussed earlier, Market America also cites the Professional Service Package, Certified Trainer, and Advisory Council Agreements in support of its breach of contract claim. With respect to the Professional Service Package Agreements, Market America directs this Court's attention to the following sentence towards the top of the document:

I agree not to use the information or data provided through the professional service Package for any other purpose other than building my Market America Distributorship and will not use said information which I agree are considered trade secrets to enter into competition with Market America, Inc. or its Distributors.

With regard to the Certified Trainer Agreements, Market America identifies paragraphs 5, 25, and 26, which provide, in pertinent part:

5. The Trainer has a fiduciary responsibility to the Company under this agreement to accurately represent and to enforce the Company agreements, policies and procedures, rules and regulations, and programs with all Market America Distributors. . . .

25. . . . [Various] materials and information are made available to the Trainer in trust creating a fiduciary responsibility under law for the Trainer, their agents, representatives [sic] to protect the Company's interest in handling said information and materials. . . .

26. The Trainer shall not enter into competition by dealing directly with Company's suppliers or involving Company's participants or Distributors in any other venture for a period of one year from the termination of their Distributor Agreement and other contract [sic] with Company, without Company's prior consent. . . .

With respect to the Advisory Council Agreements, Market America cites paragraphs 2, 3, and 4. Paragraph 2 provides, in pertinent part, as follows: "Distributor agrees to keep all . . . Company trade secrets and proprietary information confidential and not to disclose it to any third party that could bring harm to Company or anyone entering into competition with Company." In addition, paragraph 2 also contains language essentially mirroring paragraphs 5 and 25 of the Certified Trainer Agreements cited above. Paragraph 3 is practically identical to paragraph 26 of the Certified Trainer Agreements cited above. Paragraph 4, entitled "Non-Circumvent," has two subparagraphs. Subparagraph A purports to limit a distributor's right to enter into transactions with "any supplier, vendor or consultant" of Market America. Subparagraph B provides, in pertinent part, as follows:

Distributor hereby agrees that for a period beginning upon execution of this Agreement and ending two years from the date of termination of this Agreement with Company, or two years from the date of conclusion of the last transaction between the parties, whichever date is later, neither Distributor, nor Distributor's employees, agents, consultants, corporations, divisions, subsidiaries or partnerships . . ., whether directly or indirectly, will enter into any transaction with any Company Distributor, inside or outside of their line of sponsorship, unless authorized under pre-existing contracts or agreements, without written consent of the Company. . . .

As noted previously, Market America avers that (1) all Defendants entered into a Professional Service Package Agreement, (2) Rossi, Brown, and Melton each

entered into a Certified Trainer Agreement, and (3) Rossi and Brown each entered into an Advisory Council Agreement. Defendants argue that, to the extent that they entered into such agreements, Market America cannot show any breach of the agreements' provisions. With the exception of paragraph 26 of the Certified Trainer Agreements, and paragraph 3 and subparagraph 4A of the Advisory Council Agreements, this Court finds that there exist genuine issues of material fact as to whether certain Defendants have breached provisions of their contracts with Market America.

Paragraph 26 of the Certified Trainer Agreements, as noted above, provides, in pertinent part: "The Trainer shall not enter into competition by dealing directly with Company's suppliers or involving Company's participants or Distributors in any other venture for a period of one year from the termination of their Distributor Agreement and other contract [sic] with Company, without Company's prior consent. . . ." The plain language of this provision indicates that it only covers a period after the Distributor Agreement and any other contracts have terminated. Here, though Market America has set forth sufficient evidence indicating that Defendants were duly suspended from operating as independent distributors, it has failed to set forth sufficient evidence from which a reasonable jury could conclude that Defendants competed with Market America during the one-year period following the termination of their Distributor Agreements and any other contracts that may have terminated. [n15] As such, according to the plain terms of paragraph 26 of the Certified Trainer Agreements, Defendants were free to compete with Market America despite the fact that they were no longer permitted to sell for Market America. Moreover, the provision contains no restriction on competition prior to the termination of the said contracts.

-----Footnotes-----

[n15] The Court notes that, at a minimum, this particular competition restriction could not have become operative prior to December 31, 1997, the date on which the Distributor Agreements at issue expired. As discussed previously, Defendants were merely suspended on August 8, 1997. Their Distributor Agreements remained in effect.

-----End Footnotes-----

Paragraph 3 of the Advisory Council Agreements, as noted previously, is practically identical to paragraph 26 of the Certified Trainer Agreements cited above. Therefore, for the reasons cited above, this Court finds that, to the extent that Market America's breach of contract claim relies on alleged violations of either paragraph 26 of the Certified Trainer Agreements or paragraph 3 of the Advisory Council Agreements, Defendants' motion for summary judgment is granted. This Court further finds, however, that Market America has set forth sufficient evidence to establish that genuine material issues of material fact exist

as to the other provisions cited above.

Paragraph 4 of the Advisory Council Agreements, as noted previously, contains two subparagraphs. As to subparagraph A, this Court finds that Market America has not proffered sufficient evidence from which a reasonable jury could find that Defendants entered into transactions with Market America's suppliers, vendors, or consultants.

Accordingly, to the extent that Market America's breach of contract claim relies on alleged violations of the excerpt identified in the Professional Service Agreements, paragraphs 5 or 25 of the Certified Trainer Agreements, paragraph 2 of the Advisory Council Agreements, or subparagraph 4B of the Advisory Council Agreements, Defendants' motion for summary judgment is denied.

#### G. Market America's Claim for Tortious Interference with Contract

With its fourth and final claim, Market America alleges that "Defendants, without justification, intentionally induced Market America distributors to breach their contracts with Market America." It also alleges that "at the time . . . Defendants contacted Market America's . . . distributors for the purposes of recruiting them to join International Heritage, they had knowledge of the valid contractual relationship between those distributors and Market America." (Id.) With their present motion, Defendants contend that Market America's claim for tortious interference with contract fails as a matter of law because the underlying contractual provision allegedly breached by these other distributors is the competition restriction contained in Paragraph 21, an unenforceable covenant not to compete.

In order to establish a cause of action for tortious interference with contract, a plaintiff must establish that (1) a valid contract existed between the plaintiff and a third party which confers a contractual right against that third party, (2) the defendant knew of such contract, (3) the defendant intentionally induced the third party not to perform pursuant to the contract, (4) in doing so the defendant acted without justification, and (5) the defendant's actions resulted in actual damage to the plaintiff.

Here, Market America argues that, as a result of Defendants' activities, "numerous Market America distributors were led to [International Heritage] in violation of their agreements with Market America." As Defendants note and as Market America fails to challenge, the only provision of the Distributor Agreement that these other distributors could have violated by joining International Heritage is the competition restriction contained in Paragraph 21. [n21] However, Market America has failed to set forth sufficient evidence that these other distributors failed to perform according to, or comply with, Paragraph 21. As explained in section IV.D. of this Memorandum Opinion, according to the plain language of

the competition restriction, Market America must prove that an independent distributor competed with Market America within six months after the independent distributor's written resignation or termination. Market America has failed to adequately proffer evidence that these other distributors resigned by writing or were terminated in writing. Therefore, Market America has set forth insufficient evidence in support of the second element of its claim cited above. Thus, this Court finds that Market America's tortious interference with contract claim fails as a matter of law. Accordingly, Defendants' motion for summary judgment as to this claim is granted.

H. Defendants' Counterclaim for Libel [n22]

-----Footnotes-----

n22 The Court notes that the parties have merged their arguments with respect to Defendants' libel and slander counterclaims. This Court further notes, however, that the analyses of the two claims are not identical. As such, this Court will address each counterclaim separately.

-----End Footnotes-----

Defendants' first counterclaim alleges that "Market America has made false and defamatory statements of and concerning . . . Defendants and has published them to third persons." Moreover, they allege that such publication damaged Defendants' reputations, caused Defendants pecuniary harm, was made with malice, and was done without justification. Although Defendants' Answer indicates that the "false and defamatory statements" were made "through [Market America's] President and Vice President," the summary judgment briefs reveal that this claim is based on the Ridinger letter which, as noted previously, was mailed on August 15, 1997, by Market America to approximately 7,000 or 10% of Market America's independent distributors informing them that Defendants had been suspended. Defendants argue that they are entitled to summary judgment because the letter constitutes libel per se. Market America contends that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law because it was privileged in issuing the letter and, in any case, name calling is not actionable. This Court need not now undertake a full examination of the parties' motions with respect to this counterclaim because this Court finds that there exist genuine issues of material fact related to the circumstances and events giving rise to the Ridinger letter. According, the parties' respective motions are denied.

I. Defendants' Counterclaim for Slander

Defendants' next counterclaim alleges that "Market America's President, Vice President and agents have uttered false, base and defamatory words concerning

each of Defendants to third persons, and the words have tended to prejudice each Defendant's reputation, trade, business and means of livelihood." Moreover, they allege that statements caused Defendants pecuniary harm, were made with malice, and were made without justification. Despite the fact that Defendants' Answer indicates that the alleged slander was uttered by "Market America's President, Vice President and agents," the summary judgment briefs reveal that this claim is based primarily on the Ridinger audiotope that was almost identical in content to the Ridinger letter and which was accessible by approximately 5,000-8,000 distributors. Defendants argue that they are entitled to summary judgment because the Ridinger audiotope constitutes slander per se. Similar to their arguments with respect to the libel claim, Market America contends that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law because it was privileged in publishing the Ridinger audiotope and, in any case, name calling is not actionable. Since the statements made on the Ridinger audiotope are practically identical to the contents of the Ridinger letter, this Court reaches the same conclusion as to Defendants' slander counterclaim as this Court did with respect to Defendants' libel counterclaim, to wit, that there exist genuine issues of material fact related to the circumstances and events giving rise to the Ridinger audiotapes. Therefore, for the reasons set forth in section IV.H. of this Memorandum Opinion, the parties' respective motions are denied.

#### J. Defendants' Counterclaim for Unfair and Deceptive Trade Practices

Defendants further allege that Market America's conduct constitutes a violation of the UTPA cited and discussed previously in section IV.F. of this Memorandum Opinion. Specifically, Defendants contend that Market America inequitably asserted its power in position. [Market America] stopped payment on Defendants' commission checks, ignored Defendants' appeals in violation of its own career manual, obtained an ex parte [temporary restraining order] prohibiting Defendants from communicating with their downlines, and sent a libelous letter to [members of] Defendants' downlines--all in an effort to enforce a void non-competition provision [Paragraph 21].

Based upon these allegations, Defendants have moved for summary judgment as to their UTPA claim. Market America, with its motion for partial summary judgment, contends that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law because "when reduced to its essentials, Defendants' unfair trade practices claim amounts to nothing more than a restatement of its breach of contract [counter] claims." In addition, Market America argues that "Defendants have failed to plead and . . . cannot . . . show an essential nexus with North Carolina" to sustain their claim. This Court disagrees.

At the outset, this Court notes that Market America's argument, that Defendants have failed to establish a sufficient connection to North Carolina to bring an unfair trade practices claim, is without merit.

Under North Carolina law, in order for [the UTPA] to apply, North Carolina must have a substantial relationship to the particular conduct giving rise to the unfair and deceptive trade practices claim. In a multi-state unfair trade practices case, the North Carolina Supreme Court would likely apply the most significant relationship test." The "most significant relationship" test is the most appropriate for a deceptive trade practice claim involving multi-state interests.

Deceptive trade practice causes of action vary among the states. Under the significant relationship test, [a] court considers where the relationship between the parties was created and where it was centered.

Jacobs v. Central Trans., Inc., 891 F. Supp. 1088, 1111 (E.D.N.C. 1995), rev'd in part on other grounds, 83 F.3d 415 (4th Cir. 1996) (citations omitted). Applying the test to the case at hand, this Court concludes that the alleged facts of this case bear a sufficient connection to North Carolina so as to allow for a cause of action pursuant to the UTPA. Market America is a North Carolina corporation headquartered in Greensboro. The Distributor Agreements were issued from North Carolina and, most notably, some of Market America's alleged unfair and deceptive conduct, to wit, the publication of the Ridinger letter and the Ridinger audiotape, occurred in North Carolina. Contrary to Market America's contentions, the evidence indicates a sufficient nexus for Defendants to bring their claim pursuant to North Carolina law. See *id.* at 1111 (relationship "substantial" when defendants were headquartered in North Carolina and much of the decisions of which plaintiffs complained were made in North Carolina). [n23]

-----Footnotes-----

n23 The Court notes that this result does not implicate the due process concerns raised by the Fourth Circuit in *New England Leather Company v. Feuer Leather Corporation*, 942 F.2d 253 (4th Cir. 1991). There, the court ruled that New York's--not North Carolina's--unfair trade practices law should apply. In making that conclusion, the Fourth Circuit noted that applying North Carolina law would have due process implications here because no North Carolina resident is involved in this litigation and because the elements of a deceptive trade practice claim vary among the states. Consequently, a party could lack notice that conduct committed in one state and not considered a deceptive trade practice there could be the basis for a treble damage award in North Carolina.

Here, such due process concerns are not implicated since the party alleged to have engaged in unfair trade practices--Market America--is based in North Carolina.

-----End Footnotes-----

As noted above, Market America also argues the Defendants' unfair trade practices counterclaim is barred because it is essentially the same as Defendants' breach of contract counterclaims. This Court disagrees. As this Court reasoned in section IV.F. of this Memorandum Opinion, if the alleged acts constitute substantial wrongdoing over-and-above a party's failure to adequately fulfill its contractual obligations, then an unfair trade practices claim in addition to the underlying breach of contract cause of action may be appropriate. Here, although some of Defendants' unfair trade practices allegations are also cited in support of their breach of contract counterclaims, Defendants' have proffered evidence that constitutes substantial aggravating circumstances over-and-above Market America's alleged failure to abide by the terms of its contracts. For example, Defendants have alleged that the Ridinger letter, which they contend constitutes libel per se, constitutes wrongdoing which can, as a matter of law, support a cause of action under the UTPA. *Ellis v. Northern Star Co.*, 326 N.C. 219, 226, 388 S.E.2d 127, 131 (1990) ("[A] libel per se of a type impeaching a party in its business activities is an unfair or deceptive act in or affecting commerce in violation of [the UTPA] . . ."). Thus, this Court finds that Defendants' counterclaim for unfair trade practices is appropriate and, therefore, Market America's motion for partial summary judgment is denied. However, Defendants' motion for summary judgment as to its unfair trade practices counterclaim is also denied to the extent that this Court has previously ruled that there are genuine issues of material fact which preclude entering judgment as a matter of law as to Defendants' libel counterclaim.

#### M. Defendants' Counterclaim for Money Had and Received

Defendants also allege that "Market America owes Defendants . . . for earned commissions withheld and/or subject to stop payment orders by Market America." With their motion for summary judgment, Defendants contend that they "are clearly entitled to be paid all commissions that accrued through Friday, August 8, 1997, the date of the[] suspension[s]." This Court agrees.

The Supreme Court of North Carolina has provided the following description of an action for money had and received:

An action for money had and received may be maintained as a general rule "whenever the defendant has money in his hands which belongs to the plaintiff, and which in equity and good conscience he ought to pay to the plaintiff. . . . The plaintiff is entitled to recover when it appears that the money in question belonged to the plaintiff and was secured by the defendant without the consent of the plaintiff, or if with his consent, without consideration." Recovery is allowed upon the equitable principle that a person should not be permitted to enrich himself unjustly at the expense of another. Therefore, the crucial question in an action of this kind is, to which party does the money, in equity and good conscience, belong? The right of recovery does not presuppose a wrong by the person who

received the money, and the presence of actual fraud is not essential to the right of recovery. The test is not whether the defendant acquired the money honestly and in good faith, but rather, has he the right to retain it.

Here, Market America has failed to cite any evidence that it was or is entitled to retain commissions earned by Defendants prior to the date of their suspension. In fact, Market America has not even addressed Defendants' motion as to this counterclaim in its summary judgment brief. This Court finds, therefore, that there are no genuine issues of material fact as to Defendants' money had and received counterclaim and, therefore, they are entitled to judgment as a matter of law with the actual amount of damages to be determined at trial. Accordingly, Defendants' motion for summary judgment as to this counterclaim is granted subject to a determination during trial of damages to be awarded, if any.

#### O. Defendants' Counterclaim for Breach of Contract

Lastly, Defendants allege that "after Defendants appealed their suspensions within the time set out in the Career Manual, Market America failed to comply with . . . the Career Manual, which required it to provide written notice of [Market America]'s decision regarding their appeals and allow a hearing if requested." They further allege that "Market America's failure to comply with . . . the Career Manual constitutes a breach of contract." With their motion for summary judgment, Defendants argue that, as to this claim, there are no genuine issues of material fact and that they are entitled to judgment as a matter of law. This Court agrees.

As noted above, to establish a breach of contract, the complaining party must prove that (1) a valid contract was made, (2) obligations were assumed under the contract, and (3) the opposing party failed to fulfill--or breached--those obligations. Here, Market America does not contest that the Distributor Agreements were valid and that they incorporated by reference the provisions of the Career Manual. Pursuant to the relevant terms of the Career Manual, it assumed an obligation to "review [an] appeal and decide on actions to be implemented" when an independent distributor files a written request within "15 business days from the postmarked certified [suspension] letter . . . ." Defendants have set forth sufficient evidence indicating that they filed such written requests in a timely fashion. Market America has neither challenged the validity of Defendants' written appeals, nor the fact that it assumed the obligations cited above. Most importantly, it has failed to rebut Defendants' allegation that they have never received a hearing. As such, Defendants' motion for summary judgment as to this counterclaim is granted subject to a determination during trial of damages to be awarded, if any.

#### V. CONCLUSION

For the foregoing reasons, this Court concludes that Defendants' Motion for Summary Judgment filed with respect to Market America's claim for breach of contract is

granted in part and denied in part. To the extent that Market America's claim for breach of contract relies on alleged violations of (1) the competition restriction or trade secrets clause contained in paragraph 21 of each Independent Distributor Application and Agreement ("Distributor Agreement"), (2) paragraph 26 of the Certified Trainer Agreements, or (3) paragraph 3 or subparagraph 4A of the Advisory Council Agreements, Defendants' Motion for Summary Judgment is granted and that portion of the claim is dismissed with prejudice. However, to the extent that Market America's claim for breach of contract relies on alleged violations of (1) the excerpt from the Professional Service Package Agreements cited by Market America in its summary judgment briefs and identified by this Court in the Memorandum Opinion to be filed forthwith, (2) paragraphs 5 or 25 of the Certified Trainer Agreements, or (3) paragraph 2 or subparagraph 4B of the Advisory Council Agreements, Defendants' Motion for Summary Judgment is denied.

This Court further concludes that Defendants' Motion for Summary Judgment filed with respect to Market America's claim for tortious interference with contract is granted and the claim is dismissed with prejudice.

This Court further concludes that both Defendants' Motion for Summary Judgment and Market America's Motion for Partial Summary Judgment filed with respect to Defendants' counterclaim for libel are denied.

This Court further concludes that both Defendants' Motion for Summary Judgment and Market America's Motion for Partial Summary Judgment filed with respect to Defendants' counterclaim for slander are denied.

This Court further concludes that both Defendants' Motion for Summary Judgment and Market America's Motion for Partial Summary Judgment filed with respect to Defendants' counterclaim for unfair and deceptive trade practices are denied.

This Court further concludes that Defendants' Motion for Summary Judgment filed with respect to Defendants' counterclaim for money had and received is granted subject to a determination during trial of damages to be awarded, if any. Accordingly, Market America's Motion for Partial Summary Judgment filed with respect to this counterclaim is denied.

This Court further concludes that Defendants' Motion for Summary Judgment filed with respect to Defendants' counterclaim for breach of contract (relating to Market America's appeal procedures) is granted subject to a determination during trial of damages to be awarded, if any. Accordingly, Market America's Motion for Partial Summary Judgment filed with respect to this counterclaim is denied.

An Order and Judgment in accordance with this Memorandum Opinion has been previously filed.

This the 15th day of April, 1999.

James A. Beaty

United States District Judge