

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

KIERON SWEENEY, a Canadian resident, and  
0730985 B.C., LTD., a Canadian corporation,

Plaintiffs,

v

Case No. 15-145497-CB  
Hon. Wendy Potts

VISALUS, INC., a Nevada corporation,

Defendant.

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OPINION AND ORDER RE: DEFENDANT'S MOTION FOR SUMMARY DISPOSITION  
AND PLAINTIFFS' CROSS-MOTION FOR SUMMARY DISPOSITION

At a session of Court  
Held in Pontiac, Michigan

On

AUG 08 2016

This matter is before the Court on Defendant ViSalus, Inc.'s and Plaintiffs Kieron Sweeney and 0730985 BC, Ltd.'s cross-motions for summary disposition. The motions are brought under MCR 2.116(C)(8), which tests the legal sufficiency of the complaint, and (C)(10) which tests the factual support of the claims. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).

In the first amended complaint, Plaintiffs alleged breach of contract and unjust enrichment claims that arose out of a contractual relationship between Visalus and Sweeney or Sweeney's corporation. For purposes of background information, Visalus is a multi-level marketing company that sells health and weight loss products through a network of independent promoters.

Sweeney joined Visalus as an independent promoter in December 2010. At that time, he and Visalus entered into a contract that governed their relationship. In January 2013, Sweeney submitted a document to Visalus that he asserts was merely a name change changing his independent promoter account to that of his corporation, 0730985 BC, LTD. Sweeney asserts that the form he submitted was only a name change because he only signed the first page of the Agreement, and did not initial the second page of the Agreement.

Visalus, on the other hand, asserts that the submission of the paperwork was not merely a name change and that the corporation entered into a new independent promoter agreement with Visalus in 2013. The document that Sweeney submitted contained a clause stating that it was not considered complete unless Visalus received both the signed and dated application on page 1 and the initialed terms of agreement on page 2. The parties do not dispute that Sweeney failed to initial the Terms of Agreement on page 2. While Visalus argues that the corporation was bound by the 2013 policies and procedures, Plaintiffs argue the 2010 documents govern because the January 2013 submission was only a name change and the corporation did not enter into a new agreement.

On September 4, 2013, Visalus suspended and deactivated the corporation as an IP because Sweeney was allegedly pressuring members of his downline to invest in other ventures, conduct that Visalus considered unethical. Visalus' suspension froze the corporation's accounts, but the downline continued to generate sales. During the time that the corporation was suspended, the corporation's commissions were withheld. Visalus subsequently decided to reinstate the corporation as an IP. However, while Visalus was working on reinstating the corporation, Sweeney threatened legal action that Visalus determined to be further unethical conduct. Sweeney was subsequently notified that the corporation was being terminated as an IP.

Paragraph 5 of Sweeney's 2010 Agreement with Visalus states: "I may terminate this Agreement for any reason, at any time, by giving VISALUS prior written notice. VISALUS may terminate this Agreement in writing upon violation of policies and procedures or in the event I violate any part of this Agreement. In such event, no further commissions will be paid by VISALUS. To terminate this Agreement, I must mail or deliver personally to VISALUS, a signed, dated written notice of cancellation sent to ViSalus Sciences, 1607 East Big Beaver, Suite 110, Troy, Michigan 48083."

The 2010 Policies and Procedures also state: "[t]o become a new ID [Independent Distributor] as a corporation, partnership, trusts, or to change status, one must notify ViSalus in writing and a new Agreement must be turned into the corporate office. . . . If an active ID desires to change status from an individual to that of a partnership or corporation, this policy does not apply, providing there is no request for change of sponsoring/referring ID. A partnership or corporation may become an ID subject to review and approval by ViSalus. However, no individual may participate in more than one (1) position in any form." The only contract that exists between the corporation and Visalus is that which was executed on January 5, 2013. But, since Plaintiff asserts that the 2010 documents are still applicable, and Defendant's motion is viewed in a light most favorable to the non-moving party, the Court will evaluate the Defendant's motion pursuant to the 2010 documents. *Maiden*, 461 Mich at 120.

Defendant asserts summary disposition is appropriate because its termination of the corporation was not a breach of contract. Defendant further argues that its decision to terminate the Plaintiff corporation for unethical conduct is foreclosed from judicial review because Visalus reserved the right to determine what constitutes unethical conduct. Lastly, Defendant asserts that Plaintiffs' claim for unjust enrichment fails because an express agreement exists.

On the other hand, Plaintiffs assert that summary disposition is appropriate because Sweeney could not be terminated at will. Plaintiffs assert that the 2010 Terms and Conditions required cause for termination and assert that the new 2013 Terms and Conditions never became part of Sweeney's contract with Visalus because those terms were not sent to Sweeney. Plaintiffs also claim that Visalus did not have a basis to deny payment of commissions to Sweeney.

Visalus alleges that it could terminate Plaintiff for a violation of the policies; Section VI of the 2010 Policies and Procedures provides: "ViSalus conducts business in an ethical and credible manner, and expects all ID's to work ethically with their customers, with each other, and with the company. ViSalus permits no unethical activity and ViSalus will intervene when unethical behavior is evident. ViSalus reserves the right to use its best judgment in deciding whether certain ID activities are unethical and if determined so, are grounds for terminating or deactivating the ID position. If for any reason an ID violates any of the terms of the Agreement and/or these Policies and Procedures, ViSalus reserves the right to immediately deactivate or terminate the ID's position. Such action by ViSalus will terminate any and all rights of the ID and any further payments of any kind and is effective at the time of said violation."

When deciding a (C)(10) motion, the Court considers admissible evidence submitted by the parties in the light most favorable to the nonmoving party to determine if there is a genuine issue of material fact for trial. *Id.* The parties' relationship is governed by a contract. The construction and interpretation of a contract is a question of law. *Bandit Industries, Inc v Hobbs International, Inc*, 463 Mich 504, 511 (2001). "In interpreting a contract, our obligation is to determine the intent of the contracting parties. *Sobczak v Kotwicki*, 347 Mich. 242, 249; 79 N.W.2d 471 (1956). If the language of the contract is unambiguous, we construe and enforce the

contract as written. *Farm Bureau Mut Ins Co of Michigan v Nikkel*, 460 Mich. 558, 570; 596 N.W.2d 915 (1999). Thus, an unambiguous contractual provision is reflective of the parties' intent as a matter of law. Once discerned, the intent of the parties will be enforced unless it is contrary to public policy." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375 (2003).

Visalus claims that its termination of Plaintiffs was proper because it deemed Sweeney and his corporation's conduct unethical. The Court finds that the parties' contract permitted and reserved the right for Visalus to determine whether ID activities are unethical and grounds for terminating or deactivating a position. The contract also provided that if Visalus deactivates or terminates the ID's position, then the rights of the ID and any further payments of any kind will also terminate effective at the time of the violation. Sweeney claims that Visalus' labeling of his behavior as unethical does not insulate Visalus from judicial review.

In *Thomas v John Deere Corp*, 205 Mich App 91; 517 NW2d 265 (1994), the Court held that where an employer reserves sole authority to determine whether just cause exists and then subsequently determines that good and just cause for terminating the employment exist, the determination is insulated from judicial review. Similarly, the 2010 policies and procedures state that unethical practices are cause for terminating or deactivating the ID's position. Visalus reserved the right to use its best judgment to determine what constitutes unethical behavior. In the instant matter, Visalus determined that Plaintiff's behavior was unethical and then terminated Plaintiff as an ID. This course of action is protected by *Thomas, supra*.

Sweeney argues that he is entitled to receive ongoing commissions because he was not given notice that he was terminated. However, the 2010 policies and procedures state, at Section VI, that "[u]pon receipt of a credible complaint, ViSalus may immediately terminate the ID

implicated in the abuse. Deactivating an ID results in the immediate termination of the position, access to all reports, the forfeiture of any unpaid and/or future monies, and the prohibition against any future ID position.” Since Visalus terminated Plaintiff for unethical behavior, Plaintiff is not entitled to further payments of any kind pursuant to the applicable policies and procedures.

Finally, Plaintiffs allege that they were not provided with written notice of the termination as required by the parties’ agreement. In Exhibit H attached to Defendant’s motion for summary disposition, Sweeney, in an email chain, at least twice acknowledges being terminated after being accused of violating Visalus’ policies and procedures. Sweeney has not alleged any harm as a result of the alleged failure of Defendant to provide Plaintiff with a formal written notification. In fact, Sweeney acknowledged being terminated. Thus, the Court finds that the absence of a formal written notice is immaterial because Sweeney had already acknowledged, in writing, that his corporation was being terminated.

Defendant asserts that Plaintiffs’ claim for unjust enrichment fails because the parties had an express agreement. A claim for quantum meruit or unjust enrichment asks the Court to recognize an implied contract. *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). The Court will not imply a contract where an express contract exists. *Id.* The parties had an express agreement covering the subject matter in Count II of Plaintiff’s first amended complaint, so the Court will not imply a contract. *Id.*

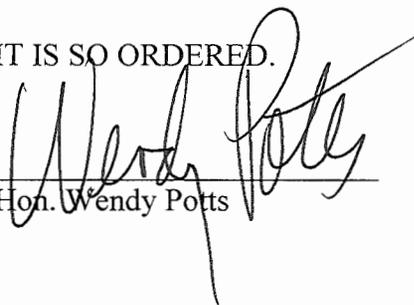
Plaintiffs also assert the procuring cause doctrine as stated in *Reed v Kurdziel*, 352 Mich 287, 294-295; 89 NW2d 479 (1958) is applicable to the instant case and supports their arguments in favor of an unjust enrichment claim. Plaintiffs argue that the doctrine applies when a contract governs the payment of sales commissions but is silent regarding the payment of post-

termination commissions. The instant contract is not silent regarding post termination commissions, and it expressly provides that deactivating an ID results in the immediate termination of the position, access to all reports, the forfeiture of any unpaid and/or future monies, and the prohibition against any future ID position. Thus, Plaintiffs' argument regarding the procuring cause doctrine is without merit. Considering only the pleadings, and accepting all well-pled factual allegations as true, the Court concludes that Plaintiffs' claim for unjust enrichment is so clearly unenforceable as a matter of law that no factual development could justify recovery.

For all of the reasons stated above, the Court grants Defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10) and dismisses Plaintiffs' complaint in its entirety. Since Plaintiffs' complaint is dismissed in its entirety, their motion for summary disposition is moot. This order resolves the last pending claim and closes the case.

Dated: **AUG 08 2016**

IT IS SO ORDERED.



Hon. Wendy Potts