MARKING THE TRAIL
NEGOTIATION

Confidential Information for Pako Inc.'s Attorney

Your client, Pako, Inc., is a manufacturer of industrial packaging equipment in St. Louis, Missouri. You have represented Pako on many small transactions and employment matters over the years.

Your client's VP of Sales, Lee Danker, recently called you about a potential claim being made by Syd Willette, a commission salesperson who recently left the company to move to Cincinnati. Syd had been with Pako for five years and was an excellent salesman, who developed good relationships with Pako's customers. Lee does not know why Syd moved; he assumes it was to be closer to family. He believes Syd said something about having a new job, but he doesn't know what industry it's in. (Even though Cincinnati is too far away to be covered by Pako's standard non-compete terms, he fears Syd could harm Pako's sales from there.)

Lee explained that Pako's salespeople received small salaries plus commissions calculated as 20% of net sales revenues and paid on a quarterly basis. Pako's standard commission sales agreement states that "salespeople who leave the company in good standing will be paid trailing commissions on six months' net sales, after offsets for returns and revocations."

Shortly after Syd gave notice of his departure, he arranged to meet with Lee about trailing commissions. According to Syd's records, confirmed by Lee, Syd had completed past quarter sales of $100,000 in net revenues. Thus, $20,000 was due on his quarterly check. (The quarter fell a few days after his departure.)

However, Syd also claimed that he should receive "trailing commissions" on all booked sales – including orders confirmed but not yet shipped or paid– totaling $250,000 over the next 6 months. Syd's 20% commission on these sales would be $50,000. Syd requested that Lee "cash them out" upon his departure.

Lee took the position that Pako's trailing commission policy applied only to sales booked and *net sales revenues collected* in the past six months that may not yet have been covered in a quarterly commission check. Going back six months instead of the (three month) quarter allowed for any necessary adjustments, returns, etc., from the previous quarter's check. Thus, Syd's commission pay out – looking backward at net revenues for the past quarter – would still be about $20,000.

As Lee explained, he refused to pay any of the additional $50,000 in commissions on orders booked, saying these "weren't really sales yet." Because Syd argued so vehemently, Lee refused to pay even the $20,000 on past revenues unless Syd signed something giving up all other claims. Syd refused, and stormed out.

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Lee then contacted you to get advice and see if you would negotiate a settlement of this dispute if Syd were to make a claim against Pako.

The truth is that to defend a lawsuit and litigate this case would be expensive and distracting for a long time. You estimate $5,000 in attorneys, fees for responding to initial filing and pleadings, and $20,000 in fees in the unlikely event that the case went to trial.

When pressed, Lee acknowledged some ambiguity about the meaning of "trailing commissions" in the industry. It has been quite a while since a Pako salesman left. About 5 years ago, the salesman that Syd replaced was paid "trailing commissions" on sales revenues that came in later. Lee maintains that was discretionary on his part. That salesman had been promoted to Marketing VP. Given that he would still be at the company, Lee didn't think it politic to cut off his commissions, even if he could.

When Syd left, Pako's receivables were high and cash on hand was low. Since he was leaving the company, Lee felt less incentive to pay him right away. Lee pushed the less generous interpretation of "trailing commissions." Lee thought he might be able to find witness to testify that "trailing commissions" can interpreted as only on revenues received.

Bottom line: Lee instructed you that he does not want to pay $70,000 in a lawsuit, plus attorney's fees. If Syd and his lawyer raise a claim, Lee wants you to negotiate a settlement. He'd like to get away with the $20,000 (or less), but he suspects Syd won't accept that. If you convince him that's what a court would say, Lee would grudgingly be willing to pay up to 20% on the full net revenues from Syd's sales AFTER the revenues come in, and AFTER deducting any cancellations or defaults.

You did have a conversation with Lee about the nature of these accounts – were defaults or cancellations really likely? The answer was no, not really. Most were reputable companies, in thriving businesses. But one never knows. Perhaps that would be worth a discount off the $50,000. (Lee also recognizes that he won't want Syd or Syd's lawyer poking into Pako's books over the next six months, questioning what were cancellation or replacement orders.)

Lee emphasized that Pako's books are heavily weighted toward receivables now and their line of credit is near the limit. Pako would not want to pay any more than the $20,000 right away; it would want at least three months, possibly six months to pay anything more than that.

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