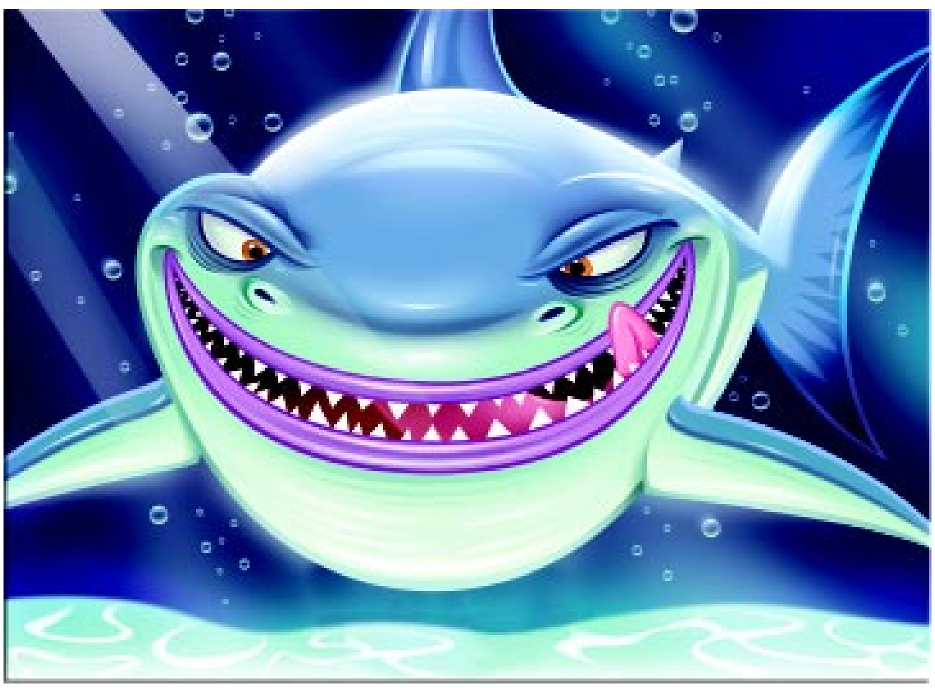
From The Jaws Of Defeat:

Snaring A Sweet Multi-Million-Dollar Settlement Instead Of Accepting Termination



MANA referral counsel Gerry Newman, Dan Beederman and Adam Glazer of Schoenberg, Fisher, Newman & Rosenberg, Ltd., Chicago, Illinois, report on an unlikely settlement recently scored by five sales reps facing termination when, in an increasingly common scenario, their long-time principal is acquired by a company with a direct sales force.

The market for the revolutionary sugar substitute products it had helped develop over the last five years was approaching maturity. After five years of intensive demand-creation work for the latest and greatest sweetener to reach the Midwest, the Michigan-based sales rep firm known as Mich-sugah was on the verge of reaping the benefits of its labor. Criss-crossing its six-state territory for the last half-decade on its own nickel in order to demonstrate the utility and safety of both the sweetener product itself and the manufacturing system used to bring it to market, while carefully cultivating the customer base, represented the full realization of Mich-sugah's potential.

Irv, Mich-sugah's president, was beaming. Making his rep firm's top priority the sales of this promising product line and its associated capital equipment at the expense of other product lines, family matters, and even health concerns, was all worth it to reach this point. The product had sailed through rigorous clinical trials, initial sales orders were strong, and projections for expanded and recurrent orders looked to be chart-busting. At last, Irv would see a substantial return on Mich-sugah's investment. These were sweet times indeed.

Things Get Sticky

It was then that the Mich-sugah reps began to hear rumors of imminent termination. Word on the street was that their principal was being acquired by an overseas company with an inside sales team. Termination?! Irv searched frantically for his contract. What rights did they have? Was termination really possible after devoting years to marketing the "Sweetener of the 21st Century"? Everyone knew its successful promotion would take at least five years.

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Did the blue or pink sweeteners reach restaurant tables overnight? Even if the manufacturer could terminate, Irv theorized, wouldn't some obligation to pay commissions survive?

Frustration quickly set in, before giving way to rage. Turns out Mich-sugah had no written contract. Irv had initially done this deal on a handshake, with honor, the way deals used to be done. Repeated promises from the manufacturer then followed that a "long-term" contract would be forthcoming. Relying on these assurances, Mich-sugah had hired additional staff, declined other projects, invested in the necessary equipment and training to handle the product development, and traveled extensively through its six states promoting the "healthy sugar." And here's our just dessert, thought Irv.

Confirmation soon trickled in from company insiders of the principal's pending acquisition by the European conglomerate, SweetTalkers, SE, which did indeed utilize a direct sales force. Termination notices to all reps were expected to issue shortly. For a moment, Irv's thoughts flashed to the children's softball games, spelling bees and concert recitals he had missed.

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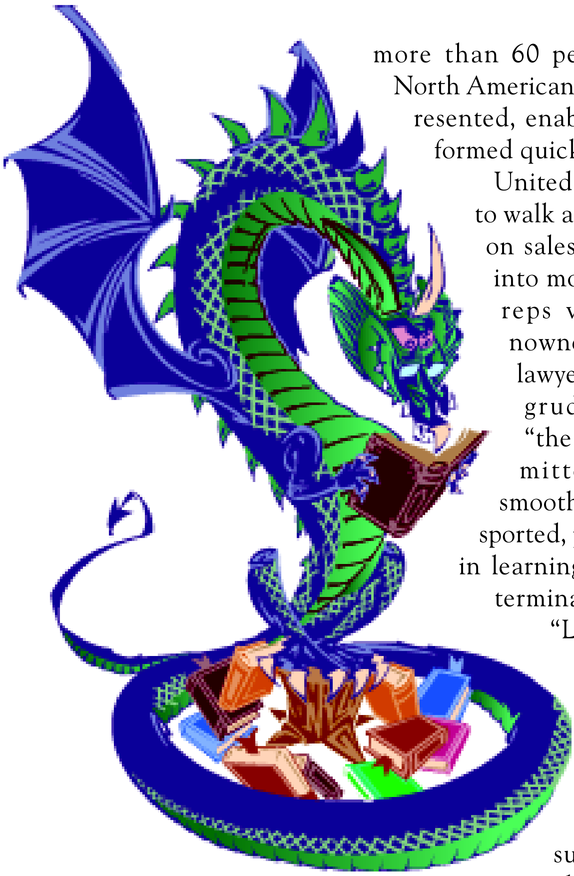
Did They Get You Too, My Sweet?

The irony in their name was starkly apparent. Had Irv really been sweet-talked right out of a written contract, and thus out of any right to commissions on sales Mich-sugah had procured? And if so, was he alone?

His first call was to Frank in Arizona, the rep who introduced the new sweetener to the Southwest. Then to Helen, who had done the same in New England. Attending all those sales meetings had at least helped Irv develop a rapport with his colleagues. Alas, each had a seat on the same leaky boat. Termination loomed after promised contracts never materialized. Soon, Hector from Orlando was on board too, and Jimmy out of San Jose made it five sweetener reps facing the same sour fate. Among these five reps,



more than 60 percent of the annual North American sales business was represented, enabling an alliance to be formed quickly.

United in their unwillingness to walk away from commissions on sales they had already put into motion, the new team of reps visited Rex, the renowned, fire-breathing rep lawyer whose opponents begrudgingly dubbed Rex "the Hex." With five committed clients, Rex, as smooth as the silk vest he still sported, proved most interested in learning about their pending termination by SweetTalkers.

"Let me see if I got this right," he begins, shaking his head. "You folks spent the last five years priming the nation for the next great sugar substitute, and you got nothing in writing?" Ol' Rex sounded to Irv a little too self-righteous the way he said "nothing." He was not surprised this prompted Helen to point out how certain promises to prepare contracts were made in e-mails. "Okay then," Rex continued, brightening up a bit. "What evidence do we have they recognized the five-year sales cycle associated with this product?"

Well, Irv knew that was a little trickier. It seems these repeated acknowledgments were all oral, but at least Hector and Frank recalled hearing the same thing. Irv wondered if this was sufficient for the Great Barrister. Rex the Hex rubbed his chin before posing his last question: "Would any of you have invested the time and resources you devoted to this product if they hadn't convinced you the relationship was long-term?" Upon eliciting a collective assurance that both principal and reps understood how the only upside potential came after several laborious years of developing the product and the territories, Rex agrees to start drafting.

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A Spoonful of Sugar Helps the Medicine Go Down

Acting as the group's facilitator, Irv takes the first read of the demand letter to SweetTalkers, what Rex described as "a shot across their bow." He is pleasantly surprised to see that breaching an oral contract can be made to sound as imprudent as breaching a written one. And this call for "an immediate and unequivocal assurance" of SweetTalkers' intent to keep the reps under contract for the next five years sure sounds good, but is it practical? For weeks, the members of the rep group have been gingerly opening their mail, expecting notices of termination. Rex's military jargon calls to mind the beleaguered Federation officers on that Star Trek episode who contemplated surrender to the Klingons when everyone knows Klingons don't take prisoners. "They don't use independent reps," Irv jots in the margin of Rex's missive.

Also getting much play in this lawyer letter is some legal doctrine called the "procuring cause rule." This is a mouthful, but Irv sees how the rule loosely holds that, absent a contractual provision specifying how the rep gets paid, commissions on sales made by the principal, even if not personally concluded and completed by the rep, are due the rep if his efforts were the procuring cause of the sale. Rex invokes this doctrine to alert SweetTalkers that commissions will still be sought on sales procured by the reps, even if they are terminated. Irv finds himself nodding in agreement. Attaboy, Rex!

Perhaps most appealing is the accusation that SweetTalkers (and its predecessor) committed fraud. This sounds exactly right. In hindsight, it is clear the reps were encouraged to keep developing the market with well-timed promises of a long-term relationship. Only in reliance on these promises, and the mutual understanding that the real payoff for their commit-

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ment would come at the end of the five-year sales cycle, did Irv and the other members of the rep group make the business decisions to decline other lines and continue investing in the product. Didn't we have a right to rely on our "partners?" The Hex calls this "fraudulent inducement," and the entire rep group, whom Rex wisely keeps in the loop to ensure only one voice is heard, is in strong agreement.

The demand letter builds up a full head of steam by citing a laundry list of wrongful acts and their corresponding hard-hitting remedies, including the threat of "punitive damages" if suit is filed, and then abruptly shifts gears. Rex notes how the rep group helped the sweetener, still in its developmental infancy, generate nearly $20 million in national sales this last fiscal year. Millions more were earned in sales of the manufacturing equipment. That SweetTalkers is now poised to terminate those responsible for making its acquisition attractive in the first place is simply "counter intuitive." A deal is proposed.

To avoid facing a panoply of legal claims, including for breach of an oral contract, fraud, negligent misrepresentation, and under this common law procuring cause doctrine — not to mention for the violation of various state sales rep commission protection statutes — Rex's ultimatum requires SweetTalkers to sign the rep group members to their long-promised five-year contracts. During this time, the reps will continue to build sales, while also assisting with the transition of the sales function to their direct people. As Rex explains it, the decision to finally prepare such contracts should be easy for SweetTalkers because the alternative is to proceed with terminating the reps, whereby it still faces the prospect of paying commissions on all sales procured, but does so without obtaining their cooperation with the transition.

How Sweet it Is

The rep group confers and then works with Rex to unify and streamline their position before confronting SweetTalkers with their demands. The attention paid to the preservation of the group's unity pays off when SweetTalkers' initial response to the group's letter proves divisive, reaching out to its members individually, hoping to pick off one or two. In close contact with Rex, Irv works the phones to ensure this doesn't happen. Only after each rep rejects the separate entreaties of SweetTalkers is the conglomerate forced to confront the group as a whole and through counsel.

Evidently, the continental sensitivities of SweetTalkers were offended by the reps having the temerity to stand up for themselves and retain counsel. Reflexively, the order went out to expedite preparation of termination notices. American lawyers were consulted in the nick of time, however, and they assuaged some hurt feelings and convinced the Europeans to open a dialogue with their reps. While this proved fortuitous, Irv knew there was something about Rex that seemed to have a way of roiling domestic sensitivities as well.

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Armed with local lawyers, SweetTalkers' next proposed rep contracts that Rex called "as one-sided and grossly unreasonable" as he had seen in his 940 years at the bar. Or something like that. "No rep has ever signed something like this," he bellowed at the group, "and you won't be the first." Educating SweetTalkers that sales reps have rights, even if non-contractual, would obviously take some time.

Rex then plunges into an exchange of letters and phone calls with their lawyers that drags on for months. Slowly, a compromise emerges. Unwilling to start using independent reps to sell the new sweetener product, SweetTalkers does offer multi-year contracts to three of the five reps to promote its manufacturing system. All five reps get three more months to secure commissionable orders of the sweetener product, and all five receive a lump sum pay-ment of six or seven figures, representing the approximate cash value of two years worth of post-termination commissions. Significant to the reps who do not receive equipment sales contracts, they are not required to accept any non-compete terms, and can immediately accept competing lines while also accepting their post-termination revenue stream. Rex calls this "sweet revenge."

For Irv and the other members of the rep group, this was a matter of pride. The deal meant they had stood up for themselves in the face of an unfair termination, and fought to obtain fair compensation for work they had already performed. For the reps, this was sweet justice. ❐

Editor's Note: Due to a confidentiality agreement entered into by the actual parties in this matter, the authors have employed pseudonyms and utilized a different industry for this article.