IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

T3 ENTERPRISES, INC., an Idaho corporation; and THURSTON ENTERPRISES, INC., an Idaho corporation, Plaintiffs, vs. SAFEGUARD BUSINESS SYSTEMS, INC., a Delaware corporation; SAFEGUARD ACQUISITIONS, INC., a Delaware corporation; and DELUXE CORPORATION, a Minnesota corporation, Defendants.	Case No. CV-OC-2014-16400 MEMORANDUM DECISION AND ORDER ON SAFEGUARD'S MOTION FOR POST-JUDGMENT RELIEF

I. INTRODUCTION

This action arises from a distributorship relationship between Plaintiffs, Thurston Enterprises, Inc. ("Thurston") and T3 Enterprises, Inc. ("T3"), and Defendant, Safeguard Business Systems ("Safeguard"). A jury trial on Plaintiffs' claims was held between November 29 and December 21 of 2016. With regard to Thurston's claims against Safeguard, the jury found as follows:

- Thurston was damaged due to Safeguard's breach of the account protection provision of their distributorship agreement in the amount of $494,526. In addition, Thurston established its claim for punitive damages in connection with the breach;

- Thurston was damaged due to Safeguard's breach of the pricing schedule clause of their distributorship agreement in the amount of $156,628;

- Thurston was damaged due to Safeguard's breach of the implied covenant of good faith and fair dealing in the amount of $532,431, which represented the jury's determination of the diminution in value of the distributorship due to Safeguard's breaches of the distributorship agreement. In addition, Thurston established its claim for punitive damages in connection with the breach.

EC

- Thurston was damaged as a result of Safeguard's fraud in the inducement in the amount of $442,400. In addition, Thurston established its claim for punitive damages in connection with the fraud claim.

- Thurston was entitled to punitive damages in the amount of $4,750,000.

On January 27, 2017, Safeguard filed a timely motion for post-judgment relief under IRCP 50(b), 59(a) and 59(e) on grounds that the awards to Thurston are not supported by the evidence presented at trial and impermissible under Idaho law. Namely, Safeguard seeks the following relief:

- Eliminate the award for breach of the implied covenant of good faith and fair dealing on grounds that Thurston's diminution in value was not supported by the evidence;

- Reduce the award for breach of the account protection by $291,010, which represented future losses, on grounds that such amount was premised on speculative expert testimony;[1]

- The verdict for breach of the pricing schedule provision should be eliminated as legally and factually unfounded, as well as the corresponding award, which is excessive and unsupported;

- The verdict for fraud in the inducement should be dismissed since Thurston failed to establish an element of the claim and, further, the corresponding punitive damages claim fails for lack of proof of malice;

- The entire award for punitive damages should be dismissed due to lack of evidence that Safeguard had an "extremely harmful state of mind" towards Thurston.

In sum, Safeguard seeks to eliminate all of the damages assessed by the jury except for past losses for breach of the account protection provision in Thurston's distributorship. On each of the foregoing issues, Safeguard requests that the Court either: 1) direct entry of judgment under Rule 50(b)(2); 2) alter or amend the judgment under Rule 59(e); 3) vacate any portion of the judgment affected under Rule 59(a); 4) condition a remittitur under Rule 59(a), or; 5) order a new trial under Rule 59(a).

Oral argument was held on Safeguard's motion on February 21, 2017. The Court authorized additional briefing and took the motion under advisement on February 24, 2017.

---

[1] Alternatively, Safeguard argues that $49,141 of future losses attributed to infringing sales by DocuSource should be deducted since DocuSource ceased business in 2015.

II. STANDARDS

On a motion under Rule 50(b), the inquiry is whether there is substantial evidence in the record upon which the jury could properly find a verdict for the party against whom the judgment notwithstanding the verdict is sought. *Schwan's Sales Enterprises, Inc. v. Idaho Transp. Dep't,* 142 Idaho 826, 830, 136 P.3d 297, 301 (2006). The judge's task in answering this question is to review all the evidence and draw all the reasonable inferences therefrom in the light most favorable to the non-moving party. *Id.* The party seeking a judgment notwithstanding the verdict admits the truth of all the other side's evidence and every legitimate inference that can be drawn from it. *Id.* The judge is not an extra juror, though; there is no weighing of evidence or passing on the credibility of witnesses or making of independent findings on factual issues. *Id.* Instead, the judge must determine whether the evidence is substantial—that is, whether it is of sufficient quality and probative value that reasonable minds could arrive at the same conclusion as did the jury. *Id.*

Rule 59(a) authorizes a trial court to grant a new trial on several enumerated grounds, including: 1) excessive damages appearing to have been given under the influence of passion or prejudice (Rule 59(a)(1)(F)), or; 2) insufficiency of the evidence to justify the verdict or that it is against the law (Rule 59(a)(1)(G)). A trial court has wide discretion to grant or refuse to grant a new trial under IRCP 59(a), and its order will not be reversed unless "the trial court has manifestly abused the wide discretion vested in it." *Goodspeed v. Shippen*, 154 Idaho 866, 869, 303 P.3d 225, 228 (2013), cite omitted.

The standards governing the grounds enumerated under Rule 59(a) vary. For "excessive damages", the Court must carefully weigh the evidence and make the determination as to the amount of damages the Court views as fair and just, drawing upon its own experience. *Quick v. Crane*, 111 Idaho 759, 769, 727 P.2d 1187, 1197 (1986). "*[U]nless* it is apparent to the trial judge that there is a great disparity between the two damage awards and that disparity cannot be explained away as simply the product of two separate entities valuing the proof of the plaintiff's injuries in two equally fair ways", the trial judge "must" defer to the jury. *Id.*, emphasis in original. The disparity must "shock the conscience" of the Court such that it would be "unconscionable" to let the damage award stand. *Id.* at 770, 727 P.2d at 1198, citations omitted. If the Court finds the damage award excessive, the plaintiff is given the choice of either submitting to a new trial or of accepting the damage amount that the trial court considers

justified. *Quick v. Crane*, 111 Idaho 759, 770, 727 P.2d 1187, 1198 (1986). However, remittiturs are improper "if the verdict was the result of passion or prejudice to such an extent that such passion or prejudice may have infected the jury's decision on liability as well as damages." *Id.*

In assessing whether a new trial is warranted under Rule 59(a)(1)(G), the Court must weigh the evidence and determine (1) whether the verdict is against the Court's view of the clear weight of the evidence; and (2) whether a new trial would produce a different result. *Schwan's Sales Enterprises*, 142 Idaho at 833, 136 P.3d at 304. The Court is not required to view the evidence in a light most favorable to the verdict-winner. *Quick,* 111 Idaho at 768, 727 P.2d at 1196. "If having given full respect to the jury's findings, the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed, it is to be expected that he will grant a new trial." *Id.* That said, "respect for the collective wisdom of the jury and the function entrusted to it under our constitution suggests the trial judge should, in most cases, accept the jury's findings even though he may have doubts about some of their conclusions." *Id.* A remittitur is not available under Rule 59(a)(1)(G). *Id.* at 770, n. 2, 727 P.2d at 1198, n. 2.

III. ANALYSIS

A. Award for Breach of Good Faith and Fair Dealing

Safeguard first contends that the jury's award of $532,431 to Thurston for damages caused by Safeguard's breach of the implied covenant of good faith and fair dealing should be vacated on grounds that it is not supported by sufficient evidence, is excessive and is duplicative of damages awarded for breach of the account protection provision. If the Court reduces or vacates the award, Safeguard argues that a correlating reduction of punitive damages associated with the claim should also be made.

As damages for Safeguard's breach of the implied covenant, the jury awarded Thurston's loss of value proximately caused by Safeguard's breaches of the distributorship agreement. Evidence regarding the value of Thurston's business was presented to the jury primarily through the testimony of Thurston's expert witness, Robert Taylor, as well as through Roger Thurston and Safeguard's President, JJ Sorrenti. Specifically, Mr. Taylor testified that, based on Thurston's sales data from December 1, 2014 through November 30, 2015, the value or marketability of the business was $798,646. Tr. Trans. 1505:3-6. To arrive at this figure, Mr. Taylor applied a metric of "one times annual revenue" which, in fact, Safeguard itself uses to value Safeguard distributorships. *Id.* at 1485:13-16; 1504:21-24. Mr. Sorrenti confirmed

Safeguard's use of this metric. *Id.* at 2041:1-2042:18; Tr. Exh. 536. Mr. Thurston likewise testified to his experience purchasing and selling Safeguard distributorships and confirmed this was the metric he applied to value a business. *Id.* at 1755:17-1757:22.

Mr. Thurston also testified to his purchases of non-Safeguard distributorships which he valued using "1/3 annual revenue" or "one times gross profit" metric. *Id.* at 1759:14-1760:22.[2] He testified that this metric is the "industry standard." *Id.* He explained that the reason for the lower valuation calculation is that, in purchasing Safeguard distributorships, the purchaser has to buy out the seller's account protection rights, which non-Safeguard distributorships do not possess. *Id.* In other words, the account protection rights drive up the value. Again, Mr. Sorrenti, as well as Safeguard's Vice President of Franchise Development, Scott Sutton, confirmed that Safeguard places a lower value on non-Safeguard distributorships than on Safeguard distributorships. *Id.* at 323:18-325:4; 1582:1-1583:9. Finally, the jury heard testimony from Mr. Thurston that he valued his distributorship at "zero" given that Safeguard has refused to honor his account protection and because Safeguard facilitated IBF's transition to a Safeguard distributor in direct competition with Thurston. *Id.* at 1853:19-1854:11.

Prior to trial, this Court determined as a matter of law that Safeguard breached Thurston's account protection provision. The jury also determined that Safeguard breached the pricing schedule clause and the implied covenant of good faith and fair dealing. Evidently, the jury found that Safeguard's breaches effectively transformed Thurston into non-Safeguard distributor, as was argued by Thurston. Apparently adopting the valuation metric testified to by Thurston and Safeguard representatives with regard to independent distributors, the jury determined that the lost value of the business was $532,431, or 2/3 of its total value of $798,646.

Relying primarily on *Williams v. Bone*, Safeguard contends that without evidence of actual loss account protection as to specific accounts, the jury's decision was arbitrary and speculative. 74 Idaho 185, 259 P.2d 810 (1953). Further, Safeguard argues that the evidence established that the account protection violations only represented 1.9% of Thurston's total accounts[3] and, in fact, Thurston's sales have consistently increased since Safeguard purchased DocuSource and

---

[2] Safeguard contends that Thurston's testimony as to valuation metrics was inadmissible lay opinion which the jury should not have relied upon. However, Thurston's testimony was based on his own experience in purchasing both Safeguard and independent distributorships. Because it was based on personal knowledge and helpful to the jury, it was proper. IRE 701. Further, Safeguard did not object to Thurston's opinion and, therefore, waived the objection.

[3] Safeguard bases this percentage on Roger Thurston's testimony that Thurston had approximately 4000 customers.

IBF. Thus, Safeguard asserts the jury's determination that Thurston lost 2/3 of its value due to Safeguard's account protection violations was contrary to the evidence.

Williams, however, did not address damages to the marketability of a business, but rather a claim for loss of earnings that was only supported by bank statements showing gross business income rather than net income. *Id.* at 188, 259 P.2d at 811. Thus, the Court vacated the award as speculative. *Id.* at 189, 259 P.2d at 812. Much more applicable is the case of *Windsor Shirt Co. v. New Jersey Nat. Bank*, offered by Safeguard, which held that, unlike lost profit damages, damage for the destruction of a business as a going concern can be established simply by evidence of pre-breach value and the corresponding decline in business value following the breach. 793 F. Supp. 589, 588-89 (E.D. Pa. 1992), aff'd, 989 F.2d 490 (3d Cir. 1993). In *Windsor Shirt*, a company sued its bank for prematurely calling their loan agreement and demanding repayment of the $5.2 million loan. *Id.* at 593. At trial, the jury heard testimony that the company was worth between $4 million and $9 million prior to the alleged breach of the loan agreement and sold for only $2.00 after the breach.[4] The jury also heard from the company's witnesses that the percentage of decline in value attributable to the breach was 100%. *Id.* at 598. The jury ultimately awarded $3.5 million to the company. In moving for post-judgment relief, the bank argued that the jury's award was speculative since the company did not introduce specific figures which would have permitted the jury to calculate the decline attributable to the bank's breach, such as "general operations, profits or sales." *Id.* at 599. Applying New Jersey law, the Court rejected the argument, distinguishing damages for lost profits—which would require such proof—from damage to a business's "value as a going concern", to wit:

> In this case, the damage to Windsor had nothing to do with an employee or fiduciary causing Windsor to forego business opportunities over a period of time. In this case, the damages question had to do with the effect of the Bank's breach of the Loan Agreement on Windsor's value as a going concern. The value of a company as a going concern is related to its ability to operate as a limited liability corporation: To borrow money, to make contracts with suppliers and employees, to conceive of and carry out long and short term marketing and business strategies, and those other qualities that distinguish a corporation from merely a group of individuals who have legal title to some property. It is obvious that the sort of questions one must ask in order to determine whether a company's value as

[4] The jury also heard testimony of the post-breach decline of the company's stock. 793 F. Supp. at 595–96.

> a going concern was affected by another's act have little to do with the sort of evidence adduced in *Franklin Music.*[5]

Id. at 599–600.

With regard to going concern value, the court found that testimony of the pre-breach value of the company and the decline in value following the breach was sufficient, noting "[t]he jury had the figure of 100%, which it could accept, or reject, or modify, and it could apply that figure to whatever value of Windsor as of November 30, 1989 it chose to accept from the valuation opinions it heard."

Indeed, it is widely recognized that lost profit damages are distinct from lost value damages. *See, e.g., Foster-Miller, Inc. v. Babcock & Wilcox Canada*, 210 F.3d 1, 17 (1st Cir. 2000)("Clearly, lost profits and diminished corporate value are distinct concepts."); *Protectors Ins. Service, Inc. v. United States Fidelity & Guar. Co.,* 132 F.3d 612, 617–18 (10th Cir.1998). In fact, Idaho has recognized that lost profit damages are distinct from "impairment of goodwill" to a business in the context of a breach of covenant not to compete cases, and both can be recovered. *Vancil v. Anderson,* 71 Idaho 95, 104, 227 P.2d 74, 79 (1951); *Dunn v. Ward*, 105 Idaho 354, 356, 670 P.2d 59, 61 (Ct.App.1983).[6] Goodwill, which is an intangible asset, is a factor in determining the value of a business and can be established through "various methods", including comparable sales and what a willing buyer would pay a willing seller for the business. *Chandler v. Chandler*, 136 Idaho 246, 249, 32 P.3d 140, 143 (2001). Importantly, the value of goodwill must be determined on its own facts and circumstances and is within the discretion of the trier of fact. *Id.* As noted in one law review,

---

[5] In *Franklin Music*, which the bank relied upon in support of its argument, a retail music store for sued for lost earnings caused by breach of fiduciary duty and conspiracy. To establish damages, the store introduced evidence of lost earnings resulting from lost advertising rebates and the defendant's improper neglect of his duties, as well as evidence of the store's gross profit ratios, actual sales and losses, and sales growth before and during the period when the injury occurred. *Franklin Music Co. v. American Broadcasting Companies, Inc.,* 616 F.2d 528 (3d Cir.1980).

[6] That said, where loss of business value or good will is based on lost profits, the allow recovery of both would be to permit double recovery. *See, e.g., Anodco, Inc. v. Reynolds Metals Co.*, 743 F.2d 417, 423–24 (6th Cir. 1984) ("[w]here the loss of profits and loss of value are intertwined, as they are here, and the loss of value is based on loss of future profits, to allow both would be to permit a double recovery"); *C.A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049, 1053 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981) ("Both business goodwill and future profits are computed into the going concern value loss.) Here, however, there is no such duplication. Mr. Taylor specified that his valuation figure was based on sales Thurston was actually making, not sales IBF and DocuSource were making to Thurston's protected accounts. Thus, Mr. Taylor clarified that there was no duplication or "double counting" between his valuation of the business and his calculation of Thurston's future account protection damages. Tr. Trans. 1505:7-15.

> The vast majority of courts decline to adopt one methodology as the means by which professional goodwill's value must be proven. No rigid and unvarying rule for the determination of the value of goodwill has been laid down by prior case law and each case must be determined on its own facts and circumstances. Valuation of goodwill is a question of fact and while opinion evidence may be admitted, it is not conclusive. The 'national trend' has been to allow parties to argue for the most appropriate valuation method and to allow courts to base their findings on the evidence provided.

Helga White, *Professional Goodwill: Is It A Settled Question or Is There "Value" in Discussing It?,* 15 J. Am. Acad. Matrim. Law. 495, 516 (1998), quotes and cites omitted.

The valuation metric and figures presented to the jury here were appropriate given the facts and circumstances of the case—they are metrics used by Safeguard itself in valuing both its own and independent distributorships.[7] Indeed, Mr. Thurston, as the owner of Thurston Enterprises, is "a competent witness to its value, as he is presumed to be familiar with its value by reason of inquiries, comparisons, purchases and sales." *Schroeder v. Partin*, 151 Idaho 471, 477, 259 P.3d 617, 623 (2011). *See also*, *Mercury Marine Div. of Brunswick Corp. v. Boat Town U.S.A., Inc.,* 444 So. 2d 88 (Fla. Dist. Ct. App. 1984)(holding that owner of corporate franchise was competent to testify as to loss of business value suffered by franchisee due to franchisor's breach).

Based on the foregoing analysis, relief under IRCP 50(b) is not warranted. The jury was presented with evidence of the value or marketability of the business, the two metrics used by Safeguard and Mr. Thurston in valuing Safeguard distributors versus independent distributors, and heard testimony from Mr. Thurston that he valued his business at zero given Safeguard's breaches; namely, his lack of account protection and competition from IBF. This evidence is not speculative; rather, it is largely based on Safeguard's own practices and evidence of Thurston's sale and purchase history involving similar businesses. Drawing all inferences from this evidence in Thurston's favor, it was reasonable for the jury conclude that Safeguard's breaches effectively transformed Thurston into non-Safeguard distributor and, applying the valuation metric used for independent distributors, determine that, as a consequence of the breaches, Thurston was worth only 2/3 of its prior value.

---

[7] *See also*, *Schonfeld v. Hilliard*, 218 F.3d 164, 178 (2d Cir. 2000)(In determining the market value of an asset, a plaintiff can rely on prior income history, expert opinion, evidence of sales of comparable assets, the testimony of the business's owner, and evidence of recent sales or recent offers for the company.)

Nor is relief warranted under IRCP 59(a)(1)(F). Weighing the evidence discussed above, the Court is likewise convinced that Safeguard's actions seriously undermined the Thurston's value as a Safeguard distributor. While the Court is not altogether persuaded that Safeguard's breaches transformed Thurston into the equivalent of a non-Safeguard distributor, the disparity between its own valuation and that of the jury is certainly not enough to shock the conscience. Rather, the disparity is representative of a difference in two equally viable opinions. This Court respects and will not disturb the collective conscience of the jury in this circumstance. Trial by jury is a touchstone of American jurisprudence and its results should be respected when possible.

Finally, relief is not warranted under IRCP 59(a)(1)(G) because the jury's award was not against the clear weight of evidence. There was evidence that Thurston's value was $798,646 as of November 30, 2015. There was evidence that non-Safeguard distributorships are typically valued 2/3 less than Safeguard distributorships. There was evidence that Thurston considered his business to be valueless given his lack of account protection. Although there was also evidence that the account protection violations only affected a portion of his protected accounts, the jury was within its bounds to determine that the violations affected the overall marketability of the company since "exclusive" account protection and other contractual rights had been trammeled upon by Safeguard. In considering this evidence, this Court cannot conclude that the verdict was against the clear weight of the evidence, nor does it believe a new trial would produce a different result.

B. Award for Future Account Protection Losses.

Having determined as a matter of law that Safeguard breached the account protection provision of Thurston's distributorship agreement, the jury was asked to determine Thurston's damages. Thurston presented its damages through Mr. Taylor, who offered calculations of both past and future account violation damages. Because there was a question of fact as to whether source fees were to be deducted from the past account protection damages, Mr. Taylor offered figures with and without source fees deducted. The jury awarded a total of $494,526, although the verdict form did not require it to apportion between past and future damages, nor did it require the jury to indicate whether it had, in fact, deducted source fees. To the extent the award was for future account protection damages[8], Safeguard contends that relief is warranted under

[8] As Safeguard points out, if the jury accepted Mr. Taylor's calculations for past account protection damages, the minimum amount attributable to future damages would be $263,357 (assuming source fees were not deducted from

either IRCP 50(b) or IRCP 59(a) on grounds that Mr. Taylor's calculations were speculative and excessive.

1. Deduction of source fees

As an initial matter, Safeguard contends that source fees must be deducted from the past account protection damage award in order to determine how much of the jury's award was attributable to future account protection damages. Safeguard argues that the deduction is warranted as a matter of law because the evidence established that the distributorship agreement required the deduction[9] and that it was Safeguard's practice to deduct source fees prior to rotating commissions. Tr. Trans. 1547:25-1550:4. However, in ruling on the parties' motions in limine, this Court found the agreement was ambiguous as it applied to rotated commissions; specifically commissions earned by a Safeguard-run distributorship, which paid no source fees, on sales to Thurston's protected accounts.[10] In other words, was Thurston entitled to the commission earned by the Safeguard-run distributorship, in which case no source fees were deducted? Or was the rotated commission to be treated as if Thurston made the sale, in which case source fees would be deducted? The ambiguity was left to the jury to resolve. Consequently, Thurston presented damage figures both with and without the source fee deduction.

In this case, it is simply not clear from the damages awarded by the jury whether source fees were deducted from account protection damages. With regard to past account protection damages, Mr. Taylor testified that $231,169 represented Thurston's damages without a deduction, and $203,516 represented damages with a deduction. He further testified that Thurston's future account protection damage was $315,588. The jury's ultimate award of $494,526 does not illuminate how it treated source fees, and there is no reason for this Court to

---

past damages) and the maximum amount would be $291,010 (assuming source fees were deducted from past damages). Thus, Safeguard seeks a deduction in the award of between $263,351 and $291,010.

[9] With regard to sourced products, the distributorship agreement defined "commission" as "1) the amount billed to the end-user customer, as agreed to between the customer and the Distributor and communicated to Safeguard, less 2) the applicable processing charge as determined by the schedule then in effect, and less 3) sales tax, subject to applicable reversal provisions for Sourced or Brokerage orders." Tr. Exh. 8. The second element is the "source fee."

[10] The distributorship agreement as executed well before the BAM program took effect and, therefore, the situation of a Safeguard owned distributor making an infringing sale was not likely contemplated by the parties at that time. Further, the agreement does not specifically address "rotated" commissions.

attempt to guess. The jury was within its right to interpret the agreement and apply source fees accordingly.

2. Future Account Protection Damages

With regard to Safeguard's sufficiency of evidence argument, the standard for prospective losses must be established with reasonable certainty. *Hoffer v. Shappard*, 160 Idaho 868, 880, 380 P.3d 681, 693 (2016). "[C]ompensatory awards based on speculation and conjecture should not be allowed." *Id*, cite omitted. Again, the law does not require mathematical certainty; rather, the evidence must be based on more than just speculation." *Id.*

As with his valuation calculation, Mr. Taylor determined the present value of Thurston's future account protection damages by applying a one times annual revenue metric based on IBF and DocuSource's total sales to Thurston's protected accounts in 2015. Tr. Trans. 1589:11-25. For future IBF sales, the figure offered by Mr. Taylor was $241,869. For DocuSource, the figure was $73,719. *Id.* at 1503:22-1504:20. Mr. Taylor testified at length about the use of the metric, that it is an acceptable means in his profession of calculating such damages, and he pointed out that Safeguard itself utilizes the metric. *Id.* at 1468:25-1484:1.

Safeguard first argues that the metric utilized by Mr. Taylor was faulty because it compensated Thurston with rotated commissions from IBF and DocuSource for more than eight years into the future. *Id.* at 1579:9-24. However, Safeguard misinterprets Mr. Taylor's testimony. He testified that the metric was the equivalent of three times IBF and DocuSource's gross profit[11] on these accounts of 2015. Thus, it effectively compensated Thurston for IBF and DocuSource's commissions for three years into the future, not eight years. This is appropriate because account protection lasts three years under the distributorship agreement.[12]

Second, Safeguard argues the future damages calculation is speculative because it does not factor in customer attrition or the fact that the agreement could be terminated at any time by the parties. However, Mr. Taylor testified that customer attrition, as well as several other risk factors, such as a recession, are factored into the one times revenue multiple. Tr. Trans. 1474:19-1475:16; 1593:3-19. Further, Thurston's distributorship agreement only allows Safeguard to

[11] Mr. Taylor also testified that IBF and DocuSource's "gross profit" is the same as their "net profit", or commission amount, because they incur no additional incremental costs in making the profit. Tr. Trans. 1527:20-1532:4.

[12] However, in reality, account protection rights have a much greater duration because any sale of a Safeguard product by another to a protected account resets the three year clock anew. Thus, if IBF or DocuSource continue selling to Thurston's protected account, Thurston's rights to commissions might continue into perpetuity.

terminate under certain conditions. Tr. Exh. 8, ¶ 7(c). There was no evidence presented at trial that any of these conditions existed and, therefore, no evidentiary basis for Safeguard to rely on termination to limit Thurston's future damages.[13]

Finally, and in the alternative, Safeguard argues that future account protection damages attributable to DocuSource may not be awarded because the evidence established that DocuSource stopped selling in Idaho. Namely, Safeguard presented testimony from Amy Tiller-Shumway that her company, Inspired Results, purchased DocuSource in 2015 and it no longer has a presence in Idaho. Tr. Trans. 1991:6-1993:19. However, the jury was not asked to specify its apportionment of account protection damages between future and past and between those attributable to DocuSource and IBF. It is indeed possible that only a fraction of the future account protection damages attributable to DocuSource were awarded.[14] To the extent they were awarded, it was within the province of the jury to weigh Ms. Tiller-Shumway's credibility and either accept or reject her testimony.

For the forgoing reasons, post-judgment relief is not available under either IRCP 50(b) or IRCP 59(a). Mr. Taylor's estimation of future damages was supported by a reliable metric based on sound assumptions and his calculations were supported by the evidence. The jury's damage award was not excessive; indeed, it was below the maximum sought by Thurston for account protection damages, which was $546,757. The Court cannot say that its own valuation of account protection damages is significantly less than the jury's. Further, the award was not against the "clear weight of evidence." While the small portion of the award based on future DocuSource sales may be inconsistent with Ms. Tiller-Shumway's testimony, her testimony was only a portion of the evidence presented on account protection damages. Thus, this Court is not convinced that a new trial on future damages would produce a different result.

---

[13] Further, terminating Thurston's distributorship agreement to avoid paying account protection rights would likely trigger potential liability and recovery of the same damages for breach of the implied covenant of good faith and fair dealing.

[14] For example, assuming the jury awarded all of the future account protection damages attributable to IBF sales, which Mr. Taylor calculated to be $241,869, and the jury did not reduce source fees from the past account protection damages, the total award would be $473,038. This would mean the jury awarded only $21,288 based on DocuSource's future sales. Assuming the jury did reduce source fees and awarded the full amount of future IBF sales, the portion of future sales attributable to DocuSource would be $49,141.

C. Preferential Pricing

Thurston's claim for breach of the pricing schedule clause was based on Safeguard's practice of offering IBF and DocuSource significantly lower base prices on certain products than offered to Thurston. Section 1 of Thurston's distributorship agreement gave Thurston the right to "solicit the sale of [Safeguard Systems] in accordance with the price schedules published by Safeguard and on the terms and conditions set by Safeguard from time to time." Tr. Exh. 8. Thurston argued on summary judgment that this provision required that Safeguard offer uniform pricing to all its distributors. The Court disagreed, finding the provision to be ambiguous because the "terms and conditions" referenced therein were not before the Court. Thus, the provision was submitted to the jury to interpret and, to the extent it found that uniform pricing was required, it was to determine damages. The jury ultimately found that Safeguard breached the provision by not offering uniform pricing and awarded $156,628. Safeguard contends that the jury's interpretation of the provision was unsupported by the evidence and, further, that Mr. Taylor's testimony on damages was speculative and the award excessive.

1. Interpretation

With regard to Safeguard's first argument, it bears noting that in opposing Thurston's motion for summary judgment on the issue, Safeguard argued that "there is both 1) a factual dispute as to whether the Distributorship Agreement even contains a provision that requires [Safeguard] to offer the same 'price schedules'…to every distributor; and 2) that [Safeguard] breached any provision regarding price schedules."[15] The Court agreed with Safeguard and found the provision to be ambiguous as a matter of law. Therefore, it became an issue for the trier of fact to ascertain the meaning of the provision. *Knipe Land Co. v. Robertson*, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011). Indeed, the jury was appropriately instructed that the terms of the provision were in dispute and given the rules of contract interpretation so as to ascertain the parties' intent.

Analyzing the jury's interpretation of the pricing schedule provision under IRCP 50(b), the Court finds there was sufficient evidence presented which supporting the finding. The jury heard from Mr. Taylor that Safeguard offered IBF a base price on two products which was approximately 40% less than that offered to Thurston. Both Roger Thurston and Dawn Teply testified that they understood the preferential pricing clause to give them the right to the same base price schedules other distributors received. Tr. Trans. 1708:16-1709:7; 1769:10-1772:6.

[15] See, Safeguard's Memo in Opp. to Thurston's MSJ, p. 17 (Sept. 9, 2016).

Although the jury also heard from JJ Sorrenti that Safeguard does not have a uniform pricing policy and that discounts in base price are available to any distributor whose sales reach a certain point, the jury was free to disregard Mr. Sorrenti's testimony. In addition, it is possible that the jury could not ascertain the true intent of the parties and instead resolved the ambiguity against Safeguard, the drafter, as instructed. Drawing all the reasonable inferences from the parties' proffered evidence in the light most favorable to Thurston, the Court finds the jury's conclusion to be reasonable.

Applying the standard under IRCP 59(a)(1)(G), the Court cannot conclude—after weighing the foregoing evidence—that the jury's interpretation of the provision was against the clear weight of evidence. There was conflicting testimony about the meaning of the provision. Each party provided their own interpretation of the provision. The "weight" of the evidence fell to neither side. Consequently, relief is not warranted.

2. Award of Damages

Mr. Taylor provided the testimony on damages for breach of the pricing schedule provision. Namely, he analyzed the pricing on two product lines—laser checks and envelopes—offered by Safeguard to Thurston and IBF between May of 2015 and February of 2016 and observed that "on average", the base prices offered to IBF were 40% lower. Tr. Trans. 1462:12-1466:21; 1502:22-1503:13. To arrive at damages, Mr. Taylor tallied up all of the charges to Thurston on the two products between August of 2013 through February of 2016 and multiplied them by 40%. Using this approach, he calculated Thurston's "pricing advantage" damages to be either $188,255.50 or $219,883.39, if source fees charged to Thurston but not charged to IBF on the product sales were added. *Id.* The jury awarded $156,628.

Safeguard contends that Mr. Taylor's methodology contained "significant flaws" which render his opinion speculative and the jury's verdict excessive. First, Safeguard contends that Mr. Taylor's analysis failed to consider the effect of the "flex pricing" which allows a distributor offering a lower retail price on a product to receive a lower base price so as to prevent a significant loss in profit margin.[16] By comparing only the base prices on the products rather than looking at the corresponding retail price to determine the difference in profit margin, Safeguard contends that Mr. Taylor's method was incomplete and unreliable. However, Mr. Taylor's

[16]The only testimony regarding "flex pricing" was from Dawn Teply, who noted that it did not lower the base price proportionally to the reduction in retail price. Tr. Trans. 1716:7-1717:11.

approach *did* factor in retail price or, as he referred to it, "list price." He testified that he looked at "list price and the quantity to identify matching product being purchased by …Thurston Enterprises and IBF." Tr. Trans. 1463:13-15. Once matching product was identified, the base prices offered to IBF and Thurston on the product was compared. *Id.* at 1463:21-1464:24. Thus, Safeguard cannot establish that Mr. Taylor's methodology was unreliable or speculative on this ground.

Second, Safeguard argues Mr. Taylor improperly applied the 40% figure to all of Thurston's sales of the two product lines, including sales that did not match IBF sales for list price and quantity. Safeguard was able to cross-examine Mr. Taylor on this point at length. Mr. Taylor explained that, for non-matching sales, it was impossible to determine whether there was preferential pricing occurring. Thus, he made the assumption, based on the extent of matched sales versus non-matched sales, the preferential pricing was occurring as to both product lines as a whole. Tr. Trans. 1611:7-1615:4. This assumption—which Mr. Taylor made quite clear to the jury—was not speculative; rather, it was reasonably based on extensive data showing the widespread application of preferential pricing on the two products. The jury was free to accept or reject the assumption as it saw fit.

Third, Safeguard argues that Mr. Taylor improperly applied the 40%, which was based on data from May 1, 2015 forward, to Thurston's sales of the two products lines from August of 2013 forward. In cross-examination on this issue, Mr. Taylor explained that he applied the percentage to prior years because Safeguard demonstrated the ability to charge IBF 40% less than what it was charging Thurston. Tr. Trans. 1615:15-1616:18. This assumption does not make Mr. Taylor's improperly speculative. The jury was made well aware of Mr. Taylor's assumption and, based on the extensive data Mr. Taylor analyzed from May 1, 2015 forward, it could certainly infer that Safeguard had been giving the same favorable pricing prior to that date as well.

In sum, the "flaws" articulated by Safeguard in Mr. Taylor's approach to preferential pricing damages did not render his opinion speculative. Rather, his calculations were based on a sound methodology and reasonable assumptions that the jury could accept or reject.[17] In considering the evidence as a whole, this Court does not find the jury's award excessive

[17] Evidently, the jury did reject Mr. Taylor's assumptions to a certain extent by awarding Thurston between $31,627 and $63,255 less that the amounts Mr. Taylor calculated.

compared to the Court's own analysis of damages or contrary to the weight of the evidence. Thus, post-judgment relief is not available under either IRCP 50(b) or IRCP 59(a).

D. Fraudulent Inducement and Associated Punitive Damages

Safeguard contends that the jury's award of $442,400 on Thurston's fraudulent inducement claim was not supported by sufficient evidence or, alternatively, against the clear weight of evidence. Specifically, Safeguard argues that Roger Thurston failed to establish that he was unaware that Dunlap was withholding sales data from him regarding the eight accounts at issue. To this end, Safeguard cites to selective testimony by Mr. Thurston which, according to Safeguard, establishes that Mr. Thurston chose to enter into the March 2014 agreement knowing he did not have IBF sales information on the accounts he was selling.

When read in context with the rest of his testimony, however, Safeguard's citations do not establish that Mr. Thurston knew that IBF was selling Safeguard products to his protected accounts or that he knew Safeguard was failing to disclose such sales. Rather, the citations simply establish that Mr. Thurston knew IBF had sold products to Thuston's protected accounts (i.e., had common customers) prior to becoming Safeguard distributors and was now interested in selling Safeguard products to the same accounts. Indeed, as Mr. Thurston testified, he expected to have received a rotation notice had IBF in fact sold Safeguard products to Thurston's protected accounts, yet he did not. Tr. Trans. 1824:24-1829:5. Consequently, he thought that either no such sales had been made or that the sales were trivial. *Id.* It was not until litigation commenced that Mr. Thurston learned that IBF had been making significant sales of Safeguard products to the protected accounts. *Id.*

From Mr. Thurston's testimony, taken together with Michael Dunlap's testimony about Safeguard's practice of issuing a ten day rotation notice every time a sale of a Safeguard product is made to a distributor's protected account[18], it was reasonable for the jury to infer that Mr. Thurston did not know that IBF made anything more than an insignificant sale of a Safeguard product to the eight protected accounts prior to the March 2014 agreement. Thus, relief is not warranted under IRCP 50(b). In addition, in weighing the evidence presented regarding Thurston's knowledge prior IBF sales of Safeguard products, it is evident that the jury's findings

[18] Tr. Trans. 896:20-897:4.

were in accord with the clear weight of evidence. Thus, relief is not warranted under IRCP 59(a)(1)(G) either.

E. Punitive Damages For Fraudulent Inducement

Safeguard next requests that the Court eliminate $1,327,200[19] in punitive damages for fraudulent inducement on grounds that there was no clear and convincing evidence presented that Dunlap acted with the requisite malice in failing to disclose the sales numbers. On this point, Safeguard relies on the case of *Duffin v. Idaho Crop Improvement Association* to assert that Dunlap's mere failure to disclose the IBF sales data cannot, in and of itself, support a claim for punitive damages. 126 Idaho 1002, 895 P.2d 1195 (1995).

As an initial matter, *Duffin* held that "[a]s a matter of law, the failure to disclose a subsequently discovered fact, absent a duty to do so, is not such conduct that would support an award of punitive damages under I.C. § 6–1604." *Id.* at 1014, 895 P.2d at 1207. Here, the evidence established that the fact, i.e., IBF sales of Safeguard products to Thurston's accounts, was not subsequently discovered but was known by Dunlap and not disclosed in the many communications with Roger Thurston leading up to the March, 2014 Agreement. Further, the jury determined Safeguard did have a duty to disclose.[20] Thus, *Duffin* is not persuasive.

Second, the jury was presented with more than simply Safeguard's failure to disclose. Punitive damages may be awarded upon a showing of "oppressive, fraudulent, malicious or outrageous conduct." I.C. § 6-1604. Clear and convincing evidence of deliberate concealment in order to deprive a seller of the benefit of a bargain satisfies this standard. *See, e.g., Griff, Inc. v. Curry Bean Co.,* 138 Idaho 315, 321, 63 P.3d 441, 447 (2003). The jury heard evidence that Dunlap deliberately concealed sales of Safeguard products made by IBF despite knowing full well that Safeguard was required to disclose them, at least by issuing rotation notices. 882:3-25; 1828: 24-1829:21. Further, it was not a single event; the concealment was on-going over a period of several months. *Id.* The only reasonable inference to be drawn from the evidence is that Safeguard concealed the information in order coerce or dupe Thurston—its own long-time distributor—to sell its protected accounts well below their market value. In other words,

---

[19] 3 x $442,400 = $1,327,200.

[20] In fact, this Court previously held on summary judgment that Safeguard had a duty to disclose to Thurston all infringing sales information on the nine accounts at issue while negotiating the Customer Transfer Agreement.

Safeguard's failure to disclose was a deliberate tactic in its overall attempt to deprive Thurston of the true value of its accounts.

Accepting all the evidence adverse to Safeguard as true, and drawing all inferences in favor of Thurston, the jury could find that Dunlap's conduct, on behalf of Safeguard, was fraudulent and oppressive. Therefore, substantial, competent evidence supports the jury's punitive damage award. Even weighing the evidence without drawing inferences in Thurston's favor, this Court cannot conclude that the jury's finding was against its clear weight or otherwise the product of passion and prejudice. Consequently, the jury's award will not be disturbed under either IRCP 50(b) or IRCP 59(a).

F. Punitive Damages For Breach of Contract

Safeguard's final argument is that the evidence did not establish that Safeguard acted with an "extremely harmful state of mind" in breaching Thurston's distributorship agreement. It contends, rather, that the evidence showed that the BAM program was undertaken for a legitimate business purpose and negotiations with Thurston to address account protection were conducted in good faith. Safeguard relies in particular on the fact that Thurston's commissions have steadily increased since IBF and DocuSource were purchased under the BAM program, thereby establishing the program did not have the deleterious effect Thurston sought to prove.

While Idaho courts are generally reluctant to allow punitive damages for breach of contract, there is no "blanket prohibition" against it. *Myers v. Workmen's Auto Ins. Co.*, 140 Idaho 495, 502–03, 95 P.3d 977, 984–85 (2004). So long as the plaintiff is able to establish the requisite intersection of a "bad act and a bad state of mind," punitive damages are appropriate. *Id.* Conduct "which is unreasonable and irrational in the business context" and which shows "a lack of professional regard for the consequences of the breach of the contractual agreement" is grounds for punitive damages. *Cuddy Mountain Concrete Inc. v. Citadel Const., Inc.*, 121 Idaho 220, 229, 824 P.2d 151, 160 (Ct. App. 1992). Said another way, a party may breach a contract for a legitimate business purpose, but it cannot avoid the consequences of breach through concealment and oppression. Some of the factors relevant to the analysis of whether punitive damages are warranted in a breach of contract action include:

> (1) the presence of expert testimony; (2) whether the unreasonable conduct actually caused harm to the plaintiff; (3) whether there is a special relationship between the parties ...; (4) proof of a continuing course of oppressive conduct; and (5) proof of the actor's knowledge of the likely consequences of the conduct.

Id. at 229-30, 824 P.2d at 160-61.

Thurston presented compelling evidence as to all of these factors. Safeguard had a contractual obligation under Thurston's distributorship agreement to pay commissions on certain sales of Safeguard products by other distributors to Thurston's protected accounts. Tr. Exh. 8. Safeguard knew from its due diligence that DocuSource and IBF shared a large number of customers with Thurston and that Safeguard's acquisition of the companies under the BAM program would lead infringing sales of Safeguard products to Thurston's protected accounts. Tr. Trans. 301:12-303:12; 395:23-396:16; 469:16-470:5; 562:14-572:2: 857:14-861:23. Rather than honor Thurston's account protection rights through its typical practice of rotating commissions, Safeguard set an arbitrary account mitigation budget and sent Dunlap to "negotiate" with Thurston. Safeguard expected that Dunlap would "underspend" or compel Thurston to capitulate to giving up his protected accounts for an amount less than the set budget. *Id.* at 368:1-371:7; 377:21-380:10; 395:23-396:16; 531:6-533:10; 872:20-874:12.

When attempting to negotiate with Thurston, the jury heard that Dunlap, over a period of several months, consistently misrepresented and/or concealed the extent of account protection violations, despite receiving DocuSource and IBF's monthly reports showing infringing sales. Tr. Trans. 863:16-864:17; 944:5-947:13; 1130:23-1131:10; 1827:13-1829:21. After Thurston refused to capitulate, Safeguard did not attempt to prevent DocuSource and IBF from making the infringing sales and did not rotate the commissions on such sales to Thurston as it was contractually obligated to do, thereby compelling him to file suit. 873:3-874:12. Mr. Taylor established that Safeguard failed to rotate to Thurston commissions totaling $231,169 (or $203,516 with a source fee deduction) on sales made by DocuSource and IBF.

From this evidence, it was reasonable for the jury to conclude that Safeguard sought to avoid the consequences of its breach of Thurston's contractual rights through concealment and deception. Safeguard may have pursued the BAM program for its own legitimate economic interests, but the weight of the evidence did not support its theory of innocence. Further, the fact that Thurston's business continued to grow following the BAM transactions is irrelevant to whether Safeguard performed a bad act with a bad state of mind. It does not detract from the fact that Thurston suffered ascertainable damage in the form of unrotated commissions. This Court previously held, in permitting the amendment allowing claims for punitive damages, that "[a] party may breach a contract if it determines doing so is in its own economic interest, if it is

prepared to accept responsibility for the breach. It may not—without exposing itself to punitive damages—avoid the consequences of the breach by means of concealment, oppression, intimidation, or despotism." The jury found that this is precisely what Safeguard did, and there is clear and convincing evidence supporting that finding. Thus, relief under IRCP 50(b) or IRCP 59(a)(G) is not warranted.

IV. ORDER

For the foregoing reasons, this Court hereby **DENIED** Safeguard's Motion for Post-Judgment Relief.

IT IS SO ORDERED.

Dated this 24th day of March, 2017.

Steven J. Hippler
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 24 day of March, 2017, I emailed (served) a true and correct copy of the within instrument to:

James M. Mulcahy
Douglas Luther
Attorney at Law
jmulcahyllp@mulcahyllp.com
dluther@mulcahyllp.com

C. Clayton Gill
Attorney at Law
ccg@moffatt.com

Dane Bolinger
Attorney at Law
dbolinger@hawleytroxell.com

Paul R. Genender
Jason E. Wright
Attorney at Law
paul.genender@weil.com
jason.wright@weil.com

CHRISTOPHER D. RICH
Clerk of the District Court

By: E. Child
Deputy Court Clerk