IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

CLIVE B. HILGERT, Plaintiffs, V. GEORGE S. MAY INTERNATIONAL COMPANY, Defendant.	§ § § § § § § § § §	CASE NO. 7:07-cv-00094

DEFENDANT'S SECOND SUPPLEMENTAL REPLY TO PLAINTIFF'S SECOND SUPPLEMENTAL RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR RECONSIDERATION

Defendant George S. May International Company ("May") files this second supplemental reply to plaintiff's second supplem ental response to May's motion for summ ary judgment and May's response to plaintiff's motion for reconsideration.

Because Hilgert's latest filings merely reiterate the same unmeritorious points that he has made in his previous filings, May expressly in corporates the following motions along with all previously filed evidence into this motion:

1. May's 12(b)(6) Motion To Dismiss;
2. May's Response To Hilgert's Motion For Reconsideration And Motion To Stay;
3. May's Motion For Summary Judgment;
4. May's Reply To Hilgert's Response To May's Motion For Summary Judgment; and
5. May's Response To Hilgert's Supplem ental Response T o May's Motion For Summary Judgment.

ARGUMENT AND AUTHORITIES

The terms of Hilgert's employment (and the conditions that must be satisfied in order to qualify for a commission) are explicitly set forth in an employment agreement that he signed on March 4, 2004 and a superceding agreement that he signed on January 15, 2006.[1] Hilgert's claim is premised on the fact that he *disagrees* with the bargain that he made when he entered into the employment agreement. His breach of contract claim fails because the undisputed evidence establishes that the clients for whom he claims he is owed a sales commission were either (1) below the minimum standards necessary to qualify for a commission or (2) expressed a desire to cancel (and did not pay for) the survey. Hilgert's Employment Agreement explicitly states that both of these conditions must be satisfied before he may qualify for a sales commission.[2] Nevertheless, Hilgert argues—despite the language of his Employment Agreement—that he should have been able to sell surveys to any businesses that he chose, regardless of whether they met the minimum standards, and that May should have paid him a commission anytime one of the businesses decided to purchase management services. As explained in May's multiple motions on file with the Court, no language in the contract supports Hilgert's theory.

Hilgert's Employment Agreement explicitly states that a commission is payable "**only** when the survey has been conducted and the survey fee collected from the client … ."[3] Yet Hilgert repeatedly claims that he should be entitled to a commission on his "sale" because the

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1 *See* May's Motion for Summary Judgment, Ex. A, Hilgert Dep., at 110-11; Ex B-3; B-4.

2 *See id*., Ex. B-3, ¶ 4; Ex. B-4, ¶ 4.

3 *See id*., Ex. B-3, ¶ 5; Ex. B-4, ¶ 5 (emphasis added).

survey analysts "did not show up" to perform the surveys. As explained in May's motion for summary judgment, Hilgert is incorrect to claim that the survey analysts simply did not show up to perform a survey; the undisputed facts are that the clients he cites canceled or failed to respond to requests to confirm the survey appointments.[4] May has fully addressed (with evidence) why the clients that Hilgert complains about did not receive a survey.[5] In those cases, it is true that the survey analyst did not show up, but for good reason—the client had expressed an unwillingness to have the survey performed.[6] Under the plain language of the contract, Hilgert is not entitled to a commission if the client does not receive and pay for a survey.[7]

Hilgert also repeatedly, yet incorrectly, asserts that he should be entitled to a commission on any sale—regardless of whether the client meets the minimum standards—anytime May ends up performing management services. As explained in May's motion for summary judgment, the employment agreement clearly states that sales representatives are not entitled to a commission if the client fails to meet the minimum standards.[8] The minimum standards are objective and undisputed.[9] To meet them, the client must have (1) an average of at least seven employees over the past 52 weeks, and (2) at least $500,000 in annual sales over the prior 12 months.[10] The Company discourages its special representatives from selling surveys to businesses that are below the minimum standards, because those businesses are not likely to purchase management

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4 *See id*., p. 18-23.

5 See *id*.

6 *See id*.

7 *See id*., Ex. B-3, ¶ 5; Ex. B-4, ¶ 5.

8 *See id*., p. 6-10, 13-22.

9 *See id*., Ex. A, Hilgert Dep., at 82-83, 172.Ex. A, Hilgert Dep., at 82-83, 172; Ex. B-5.

10 *See id*., Ex. A, Hilgert Dep., at 82-83, 172; Ex. B-5.

services.[11] If Hilgert's contention is correct, then he would be able to sell a survey to any client—thereby causing May to expend considerable resources associated with sending a survey analyst to client (i.e. airfare, hotel, compensation, etc), all so Hilgert could gamble that the client may ultimately end up purchasing management services. That scheme does not comport with May's business model because clients below the minimum standards are not likely to purchase management services.

In his motion for reconsideration, Hilgert repeats the same arguments that he asserted in his response to May's motion for summary judgment. As May explained in its motion for summary judgment, Hilgert's intentional infliction of emotional distress ("IIED") claim fails because he makes the fatal admission that his IIED claim is based on the same set of facts that gives rise to his breach of contract claim and his charge of discrimination.[12] *See Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814, 816 (Tex. 2005) (Plaintiff's IIED claim failed as a matter of law because it was based on the same set facts that gave rise to her sexual harassment and retaliation claims). His claim also fails because the conduct that he complains of—*i.e.*, that someone allegedly yelled at him and called him "lazy"[13]—is not extreme and outrageous conduct under Texas law. *See Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993) (Extreme and outrageous conduct is conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.").

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[11] *See id.*, Ex. B-3, ¶¶ 3-4; Ex. B-4, ¶¶ 3-4.

[12] *See id.*, Ex. A, Hilgert Dep., at 333.

[13] *See id.*, Ex. A, Hilgert Dep., at 326-27.

CONCLUSION

For the foregoing reasons, Defendant George S. May International Company respectfully prays that the Court grant its motion for summary judgment, order that Plaintiff Clive B. Hilgert take nothing by way of this suit, and for all other relief to which it is justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the fore going document was served upon the counsel of record listed below by the Southe rn District of Texas ECF m ethod or by certified mail, return receipt requested on the 27th day of June, 2008.

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