IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

IN RE:	§	
	§	
COOKBOOK RESOURCES, L.L.C.,	§	Case No. 03-42649
	§	(Chapter 11)
Debtor.	§	

MEMORANDUM OPINION AND ORDER REGARDING CLAIM NO. 8[1]

This matter is before the Court on the Objection to Claim No. 8 filed by Cookbook Resources, Inc. (the "Debtor") and the response by Beverly Malone Harris (the "Claimant"). A hearing was held on April 14-15, 2004. At the conclusion of the hearing, the parties were invited to submit post-trial briefing. The Court subsequently took the matter under advisement.

I. JURISDICTION

This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §1334(b) and 28 U.S.C. §157(a). The Court has the authority to enter a final order in this contested matter since it constitutes a core proceeding as contemplated by 28 U.S.C. §157(b)(2)(A), (B), and (O).

II. FACTUAL BACKGROUND

A. The Bankruptcy Claim

The Debtor is in the business of printing, binding, marketing and warehousing books. On August 27, 2003, the Beverly Malone Harris (the

[1] This Memorandum Opinion is not designated for publication and shall not be considered as precedent, except under the respective doctrines of claim preclusion, issue preclusion, the law of the case, or other evidentiary doctrines applicable to the specific parties in this proceeding.

"Claimant") filed Claim No. 8 as a priority claim in the amount of $600,000. The basis of the claim is unpaid wages, salaries or commissions from September 16, 1999 to present. In support of the claim, the Claimant attached a pre-trial order from a pre-petition lawsuit pending in the United States District Court for the Western District of Louisiana. The Claimant also attached a letter dated September 16, 1999, which addressed sales commissions to be paid to the Claimant.

The Debtor objected to Claim No. 8 on the grounds that it asserted disputed and unliquidated claims against the Debtor. The Debtor denied any liability to the Claimant for any amount of the claim and objected to the failure of the Debtor to provide any substantiation for the claimed sales commissions.[2]

B. The Relationship between the Claimant, Sheryn Jones and Merikay Jones

At the hearing on the Debtor's objection to Claim No. 8, the Court heard testimony from three witnesses: Beverly Malone Harris, Sheryn Jones and Merikay Jones. (There is no relation between Sheryn and Merikay Jones.) For the sake of clarity, the Court will refer to Sheryn Jones as "Sheryn," Merikay Jones as "Merikay," and Beverly Malone Harris (who was previously known as Beverly Malone) as "Beverly" in this Memorandum Opinion.

Beverly met Sheryn in or around 1991 in connection with a book publishing company Beverly had started called Shadca. At that time, Sheryn

[2] The Debtor also objected that Claim No. 8 appeared to be duplicative of Claim Nos. 9 and 16. Claim Nos. 9 and 16 included several of the Claimant's co-plaintiffs in the Louisiana lawsuit. The claims of the co-claimants or co-plaintiffs were the subject of separate hearings before the Court.

worked for a company that helped to produce and print a book Shadca marketed and sold. Sheryn eventually went on to form the Debtor and brought Beverly into the Debtor's business.

Sheryn was the president of the Debtor, and the Debtor operated out of her residence in Highland Village, Texas. Beverly, who resides in Shreveport, Louisiana, operated as "Beverly Malone & Associates." At the hearing on the Debtor's objection to Beverly's claim, the parties stipulated that Beverly was a commissioned sales representative of the Debtor for some period of time.

Merikay had worked with Sheryn during the early 1980s. Merikay eventually became a production coordinator for the Debtor, where she was employed from the fall of 1996 through mid-summer of 2000. Merikay handled the "back end" of the Debtor's business, including billing and collections. She testified, credibly, that 90% of the Debtor's sales were generated by Beverly during the time Merikay worked for the Debtor.

The Debtor's business involved what the parties referred to as "film deals" and "production deals." In a "production deal," the Debtor sold printed copies of a book to a customer at a substantial discount from the retail sales price. In a "film deal," the Debtor sold the customer a copy of a film of the book and received a payment for the use of the film. The purchaser of the film bore the cost and the financial risk of producing the book for sale.

C. The Four Ingredient Cookbook

Prior to entering into a formal agreement to become a commissioned sales

representative for Debtor, Sheryn participated in compiling a book called the *4 Ingredient Cookbook* from three smaller cookbooks. Sheryn marketed the *4 Ingredient Cookbook* to Steve Rosebrough, the vice president of purchasing for a company called Books Are Fun. Books Are Fun was a large producer of books, and Mr. Rosebrough was a personal friend of Sheryn. He eventually decided to order samples of the book and, later, to purchase copies.

In August 1999, Books Are Fun entered into a Memorandum of Agreement with the Debtor for an initial production of the *4 Ingredient Cookbook*. The Memorandum of Agreement was signed by Mr. Rosebrough for Books Are Fun, Sheryn for the Debtor, and Beverly, of Beverly Malone & Associates, for the Debtor. With regard to subsequent orders, Books Are Fun sent its requests for reorders to Beverly at her home in Louisiana. Beverly approved the requests and sent the approved reorder back to Books Are Fun as well as a copy to Sheryn at her office in Texas. The Debtor then sent the requested copies to Books Are Fun, and Books Are Fun paid the Debtor within ninety (90) days from receipt.

D. The September 16th Letter Agreement

A letter from Sheryn to Beverly dated September 16, 1999 is the heart of Claim No. 8. The letter began by stating that "[t]his will confirm our conversations concerning your representation of cookbooks." The letter expressed excitement at the relationship with Beverly and stated that her commission rate would be 10% the selling price of "the book." The letter also addressed the

treatment of books sold by Beverly for her own, personal business and printed by the Debtor as well as Beverly's travel expenses, among other things.

The letter specifically addressed the initial sale of 220,000 film copies of the *4 Ingredient Cookbook* to Books Are Fun, as follows:

> Reimbursement for "4 Ingredient Cookbook" sold to Books Are Fun will be split as follows. 220,000 books @ $1.00 = $220,000
> Less 10% royalty = (22,000)
> Total to be split = 198,000
> Total to be paid to Beverly = $99,000

See Claimant's Exh. No. 16.

Sheryn subsequently sent Beverly several letters regarding her commission rate and the terms of payment. In a letter to Beverly dated October 27, 1999, Sheryn that the Debtor would pay Beverly a 5% commission on the sale of the *4 Ingredient Cookbook* to Select Publications. (Select Publications was a new customer recruited by Beverly.) In a letter written the next day, Sheryn memorialized an agreement that Beverly would not receive commissions for test copies of books sent to Books Are Fun: "As agreed, commissions will not be paid until Books Are Fun places an order for books . . . ." *See* Debtor's Exhibit No. 534. Additionally, in a letter dated November 3, 2000, Sheryn notified Beverly that her commission rate for reorders of the *4 Ingredient Cookbook* by Books Are Fun would be 5% of sales after royalties.

E. The Relationship between the Claimant and the Debtor Prior to and After October 2000

Shortly after Beverly became a commissioned sales representative for the

Debtor in September 1999, Sheryn and Beverly had a disagreement relating to the negotiation of the pricing arrangement for Select Publications. On January 31, 2000, Sheryn wrote Beverly a letter in which she expressed a desire to "clear the air and move on." *See* Claimant's Exh. No. 31. Sheryn and Beverly continued to work together throughout most of 2000. However, on October 4, 2000, Sheryn sent Beverly a letter – referred to by the parties at the hearing on the Debtor's objection to Beverly's claim as a "termination" letter – stating that:

> This is to inform you that Books Are Fun is the only company where you are authorized to represent Cookbook Resources…If you plan to represent Cookbook Resources to Books Are Fun in the future, please send written confirmation of Steve's plans and dates. If I hear no reply within thirty days, I will assume you are no longer representing Cookbook Resources to Books Are Fun.

See Claimant's Exh. No. 43.

Beverly testified, credibly, that she responded orally and in writing to the October 4th letter within a few days. A letter from Beverly to Sheryn dated October 9, 2004, was introduced into evidence.[3]

On October 4, 2000, without waiting for a response from Beverly, Sheryn sent a letter to Mr. Rosebrough at Books Are Fun. The letter stated: "Just as a matter of information, I have reassigned Beverly's accounts to someone else because her time has been so limited. I hope this in no way has a detrimental effect on our business …. We have two representatives who you know well who will be presenting our line to various markets." *See* Claimant's Exh. No. 44.

[3] The Debtor suggested at the hearing and in its post-trial brief that the fax number on the letter did not match Beverly's office fax number and, therefore, Beverly created the letter to support her claims. However, Sheryn's testimony that she did not receive the letter was not credible to this Court.

Sheryn knew Mr. Rosebrough liked Beverly, and he was not unhappy with her work. Beverly discovered that Sheryn had attempted to remove her from the Books Are Fun account when she called in response to the "termination" letter.

Also in October 2000, Sheryn retained an attorney and sent a "cease and desist" letter to Beverly and Marikay. *See* Claimant's Exhibit No. 31. The cease and desist letter was dated October 31, 2000. The letter stated that Sheryn had learned of recent business activities by Beverly and Marikay regarding the printing, publishing and promotion of a cookbook entitled *The Busy Woman's Cookbook*. Sheryn admitted at trial that the letter was a bluff and that there was no legal basis for seeking to prevent Beverly from selling books to other companies.

Beverly visited Sheryn's home on January 15, 2001. Sheryn was not there. In a letter dated January 16, 2001, Sheryn asked Beverly to make an appointment to see her in the future and told Beverly that she had filed a police report stating that Beverly had entered her home without her permission.

Despite the nature and tone of the correspondence from Sheryn, Beverly continued to work the Books Are Fun account and Sheryn continued to treat her as an agent for the Debtor through May 2001. *See* Claimant's Exh. 58. For example, on May 24, 2001, Beverly approved Purchase Order No. 01-13749 for the Debtor regarding an order by Books Are Fun for 50,000 film copies of the *4 Ingredient Cookbook*. *See* Debtor's Exh. No. 621. On July 24, 2001, the Debtor invoiced

Books Are Fun for the 50,000 film copies ordered in Purchase Order No. 01-13749. *See* Debtor's Exh. No. 624.

F. Payments Made to the Claimant

The payments made to Beverly are summarized in Claimant's Exhibit No. 2. This exhibit reflects that Beverly received numerous advances against her commissions, most in the amount of $3,000 each. *See* also Claimant's Exh. 25. Additionally, Sheryn wire-transferred the initial payment outlined in the September 16th letter, less advances and amounts for books ordered by Beverly, to Beverly on May 16, 2000. Using the same formula outlined in the September 16th letter, the Debtor issued a second check to Beverly for $55,275 on October 19, 2000, for the sale of additional film copies of the *4 Ingredient Cookbook* to Books Are Fun.

On October 7, 2000, the Debtor wrote a check to Beverly for $48.24. The invoice that Sheryn sent with the check contained handwritten notes showing that Sheryn had used a 5% commission rate to calculate the amount owed to Beverly. Beverly did not cash the check.

Beverly received and cashed a third payment of $3,579 in February 2001. This payment also was calculated based on a 5% commission rate for the sale of an unspecified book to Books Are Fun. Beverly testified, credibly, that she received the third payment without any explanation of how it was calculated.

In a letter dated June 12, 2001, a law firm retained by Beverly made demand upon Sheryn and the Debtor for the alleged failure to pay Beverly her outstanding commissions.

G. Claim No. 8

Through December 2001, Books Are Fun paid the Debtor the total amount of $774,086 for copies of the *4 Ingredient Cookbook*. Of this amount, $3,456 related to test copies ordered through September 1999, $169,462 to hard copies, and the remainder to film copies. Books Are Fun typically paid the Debtor approximately $4.00 per copy for hard copies of the *4 Ingredient Cookbook* and approximately $1.00 per copy for film copies.

The Debtor paid its sales agents commissions based on the payments received from its customers for book orders.[4] Beverly calculated her claim in this case using a 10% commission for all "production" or hard copy orders and a 50% commission for all "royalty" or film orders by Books Are Fun. Beverly testified that, taking into account the payments she received, the Debtor owed her $369,059.75 as of the Petition Date based on its sales to Books Are Fun, Select Publications and Ingram Book Company.

III. DISCUSSION

A proof of claim, if it is executed and filed in accordance with the Federal Rules of Bankruptcy Procedure, constitutes *prima facie* evidence of the validity

[4] If the Debtor produced more or less books or films than the actual order, or if books arrived damaged or destroyed, the customer increased or reduced its payment, as appropriate. *See* Claimant's Exh. No. 63 (showing "order quantity" and "actual receipt" for each order).

and amount of that claim. FED. R. BANKR. P. 3001(f); *Matter of Fidelity Holding Co.*, Ltd., 837 F.2d 696 (5th Cir. 1988). Rule 3001 generally sets forth the requirements for filing a proof of claim, and one of those requirements states that:

> when a claim . . . is based on a writing, the original or a duplicate shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.

FED. R. BANKR. P. 3001(c). Likewise, if a creditor claims a security interest in property of the debtor, Rule 3001(d) requires the creditor to accompany his proof of claim with evidence that the creditor perfected a security interest.

The burden of persuasion under the bankruptcy claims procedure always lies with the claimant, who must comply with Rule 3001 by alleging facts in the proof of claim that are sufficient to support the claim. If the claimant satisfies these requirements, the burden of going forward with the evidence then shifts to the objecting party to produce evidence at least equal in probative force to that offered by the proof of claim and which, if believed, would refute at least one of the allegations that is essential to the claim's legal sufficiency. If the objecting party meets this evidentiary requirement, then the burden of going forward with the evidence shifts back to the claimant to sustain its ultimate burden of persuasion to establish the validity and amount of the claim by a preponderance of the evidence. *See In re Consumers Realty & Dev. Co.*, 238 B.R. 418 (B.A.P. 8th Cir. 1999); *In re Alleghany Int'l, Inc.*, 954 F.2d 167, 173-74 (3d Cir. 1992).

A. Interpreting the Parties' Original Agreement

Claim No. 8 is based on the September 16th agreement between Sheryn and Beverly. Under Texas law, the four corners of the contract control, *J.M. Krupar Construction Co. v. Rosenberg*, 95 S.W.3d 332, 334 (Tex. App. – Houston [14th Dist.], 2002), unless the contract is deemed ambiguous, *Clear Lake City Water Authority v. Kirby Lake Dev.,, Ltd.*, 123 S.W.3d 735, 744 (Tex. App. – Houston [14th Dist], 2003, rev. den.). Similarly, under Louisiana law, the meaning and intent of the parties to a written instrument should be determined within the four corners of the document. *See* LA. CIV. CODE art. 2046. If the wording of a contract is clear, but the meaning is reasonably susceptible to more than one interpretation, the language in question is rendered legally ambiguous and extrinsic evidence may be considered. *See Doerr v. Mobil Corp*., 774 So.2d 119, 1124 (La. 2000) (discussing article 2046 of the Louisiana Civil Code); *Heritage Res., Inc. v. Nationsbank*, 939 S.W.2d 118, 121 (Tex.1996).

In this case, the September 16th letter confirms Beverly's representation of the Debtor and sets forth the rate at which Beverly would be paid, among other things. The letter does not address or ambiguously addresses several of the issues now disputed by the parties, including (1) whether Beverly is entitled to the same commission rate for reorders as for initial orders, (2) whether Beverly is entitled to half the Debtor's profit from the sale of film copies of books to Books Are Fun, (3) whether Beverly is entitled to the commission rate in the original agreement or a reduced rate, and (4) whether Beverly is entitled to the commission rate in effect

at the time a customer places an order or at the time the order was filled by the Debtor. The Court's primary concern in interpreting the September 16th letter is to give effect to the parties' intent. *Instone Travel Tech Marine & Offshore v. Int'l Shipping Partners, Inc.*, 334 F.3d 423, 428 (5th Cir. 2003). In doing so, the Court is required to read all parts of the contract together to ascertain the agreement of the parties, while ensuring that each provision of the contract is given effect and none are rendered meaningless. *Id.*

B. Determining Beverly's Original Commission Rate for Books Are Fun

The September 16th letter agreement states that Beverly's commission rate would be "10% of the selling price of the book." In the next paragraph, the letter states more specifically describes the "reimbursement" Beverly would receive for film copies of the *4 Ingredient Cookbook* sold to Books are Fun. The letter does not state that this is a one-time "reimbursement" rate. The Court, therefore, concludes that the September 16th letter agreement is ambiguous with regard to whether Beverly is entitled to half of the Debtor's profit from all sales of film copies of the *4 Ingredient Cookbook* to Books Are Fun.

Sheryn's course of conduct suggests that she interpreted the September 16th letter agreement as requiring the Debtor to split its profits with Beverly. It would be reasonable for Beverly to infer, based on Sheryn's payment to her of half of the Debtor's profit for the second sale of film copies of the *4 Ingredient Cookbook* to Books Are Fun, that she was entitled to half of the Debtor's profit relating to such reorders. Sheryn's testimony that she mistakenly used the formula set out in the

September 16th letter agreement for the second sale to Books Are Fun, or that she made the $55,275 payment to Beverly as a goodwill gesture, was not credible.

C. Whether Beverly Accepted a Reduced Rate

As discussed *supra*, the September 16th letter agreement set forth a general commission rate of 10% for the sale of books. However, in a subsequent letter dated October 27, 1999, Sheryn offered to pay Beverly a 5% commission on a particular sale of the *4 Ingredient Cookbook* to Select Publications. Additionally, in a letter dated November 3, 2000, Sheryn stated that Beverly would be paid 5% of sales after royalties on all reorders of the *4 Ingredient Cookbook* by Books Are Fun – thereby modifying the original agreement to split the Debtor's profit on such reorders.

Beverly argues that the Court should not apply the reduced commission rates, because she never expressly agreed to the proposed reductions. However, Texas and Louisiana courts have long held that conduct may manifest assent to an agreement. *See, e.g*., *In re Halliburton Co*., *et al.*, 80 S.W.3d 566, 568-69 (Tex. 2002); *Illinois Cent. Gulf R. Co. v. Int'l Harvester Co*., 368 So.2d 1009, 1011-12 (La. 1979); LA. CIV. CODE art. 1942; LA. CIV. CODE. art 1927. There is no dispute that Beverly received unequivocal notice of changes to her commission rate regarding sales of the *4 Ingredient Cookbook*. *See Price Pfister, Inc. v. Moore & Kimmey, Inc*., 48 S.W.3d 341 (Tex. App. – Houston [14th Dist.] 2001, rev. den.) (commission rate not modified where notice of change to commission rate was ambiguous). Sheryn's course of dealing was unambiguous, and Beverly could not

have reasonably inferred that the original commission rate was still in force after receiving Beverly's letters. The Court, therefore, concludes that Beverly accepted the Debtor's alterations of her commission rate for orders submitted to the Debtor after her receipt of the letters.[5] *See In re Alamo Lumber Co.*, 23 S.W.3d 577 (Tex. App. – San Antonio 2000, rev. den.) (employees accepted arbitration policy by continuing to work after receiving copy of policy).

The Debtor's contention that Beverly was not entitled to receive a commission until an order was actually filled and, therefore, that her rate should be determined at that time, is not supported by the law. The Debtor's argument confuses the earning of a commission with the conditions precedent to payment. *Cf: Marcus Millichap Inc. of San Francisco v. Munple Ltd. (In re Munple, Ltd.)*, 868 F.2d 1129 (9th Cir. 1989) (rejecting broker's argument that commission was not payable until the escrow closed on the grounds that the argument confused broker's performance obligations with conditions precedent to payment). Further, the Debtor's October 28th letter to Beverly discussed the payment of commissions *upon the placement of an order* by Books Are Fun. Thus, the Court finds and concludes that Beverly is entitled to the commission rate that was in effect at the time she submitted a customer's order or reorder to the Debtor.

D. Determining When the "Termination" Occurred

The September 16th letter does not address the manner in which the Debtor

[5] In her post-trial brief, the Claimant emphasized a Louisiana statute regarding the dissolution of contracts and the effect of partial performance. It appears to the Court, however, that the instant case involves the amendment and termination – not the dissolution – of an agreement.

might terminate Beverly's authority to represent it. Certain jurisdictions require reasonable notice prior to the termination of a contract of indefinite duration. *See, e.g., Citrini v. Goodwin*, 315 S.E.2d 354 (N.C. App. 1984) (action by agent against real estate broker for commissions). The parties have not cited the Court to any Texas or Louisiana cases containing such a requirement, nor has the Court's own research revealed any relevant authority. Further, it appears that both Texas and Louisiana law permitted either Beverly or Sheryn to terminate their agreement at will. *See, e.g.*, LA. CIV. CODE § 2727 (default rule is that employment contracts of indefinite duration are terminable at will); LA. CIV. CODE § 2024 (a contract of unspecified duration may be terminated at will); *Burton-Lingo Co. v. Armstrong*, 116 S.W.2d 791 (Tex. Civ. App. 1938, error ref'd).

In this case, however, the October 4th letter did not provide Beverly with actual notice that she would no longer be paid as a commissioned sales representative of the Debtor after November 4, 2000. The letter invited Beverly to respond within thirty days and, as discussed *supra*, Beverly did so. The letter of October 4th was not a clear statement of termination, and it did not, by its terms, extinguish Beverly's authority to represent the Debtor.

Nonetheless, it is clear from the record that the relationship between Sheryn and Beverly never recovered from their conflicts in October 2000. It also is clear from the record that Books Are Fun and other customers continued to place orders with Beverly after October 2000, the Debtor continued to fill orders submitted by Beverly through May 2001, and the Debtor made at least one payment to Beverly

in February 2001. The Court finds that the facts and circumstances of this case, including the tone and content of Sheryn's written correspondence during and after October 2000, Sheryn's attempt to commandeer the Books Are Fun account in October 2000, and Sheryn's failure to make any payments to Beverly after February 2001, operated to terminate Beverly's position as a commissioned sales representative of the Debtor effective June 1, 2001.

E. Determining Whether the Claimant Was the "Procuring Cause" for Post-Termination Orders

Books Are Fun paid for its February, April and May 2001 orders of the *4 Ingredient Cookbook* after June 1, 2001. The Debtor takes the position that Beverly is not entitled to any commissions for any orders filled after her "termination." In contrast, Beverly's calculation of claim against the Debtor includes orders of the *4 Ingredient Cookbook* submitted by Books Are Fun (without her assistance) after June 1, 2001.

The Court is aware that Beverly was instrumental in recruiting Books Are Fun as a customer of the Debtor. With regard to post-termination commissions, the terms of the parties' agreement ordinarily would govern. *See Eustis v. Moons*, 367 So.2d 1343 (La. Ct. App. 4th Cir. 1979), writ denied, 370 So.2d 577 (La. 1979); *American Nat. Ins. Co. v. Teague*, 239 S.W. 604 (Tex. Comm'n App. 1922). However, the September 16th letter agreement is silent on this issue -- nothing in the September 16th letter agreement suggests that Beverly is entitled to commissions on all sales to Books Are Fun in perpetuity.

Historically, a "procuring cause" doctrine has been applied in cases involving real estate transactions to determine a broker's entitlement to a commission. Ordinarily, a real estate broker earns a commission by procuring from a purchaser a valid contract of sale upon the principal's terms. *See Thornton v. Bean Contracting*, 592 F.2d 1287 (5th Cir. 1979), *mod. on other grounds*, 597 F.2d 62 (5th Cir. 1979); *Mott v. Phillips*, 372 So.2d 223 (La.App., 1979). In order to establish that a broker was the procuring cause of the sale, the broker must either prove that a contract or deed was entered into between the principal and the purchaser procured by the broker. *See, e.g., Elliott v. Brann*, 36 S.W.2d 1096 (Tex. Civ. App. 1931).

The "procuring cause" doctrine is not exclusive to real estate transactions, but has been applied to other types of transactions by courts in states other than Texas and Louisiana. *See Reed v. Kurdziel*, 89 N.W.2d 479 (Mich. 1958) (suit for sales commissions relating to the sale of "Mill Stars" for the defendant). As one oft-cited treatise explains, "[i]n the case of a salesperson working on a commission basis, it is reasonable to assume that the commission has been earned when he or she has procured the customer's orders…." 19 WILLISTON ON CONTRACTS § 54:50 (14th ed.). "The purpose of this rule is to protect a salesperson who is discharged prior to the culmination of a sale, but after he or she has done everything that is necessary to effect the sale." *Furth v. Inc. Publishing Corporation*, 823 F.2d 1178 (7th Cir. 1987) (explaining the "procuring cause" doctrine under Illinois law).

For example, in *Wood v. Hutchison Coal Co.*, 176 F.2d 682 (4th Cir. 1949), the Fourth Circuit held that where the agent does not participate in the negotiation of a given contract with a customer, he is not the procuring cause, even though he may have originally introduced the agent to the customer. The Court in *Wood* explained the issue as follows: "The question is whether the principal in a non-exclusive sales agency may compete with the agent so as to deprive him of commissions on sales which the principal makes without the agent's assistance to a customer to whom the agent has previously sold goods, on which he has been paid a commission." *Id*. at 683.

In this case, as in *Wood*, the parties' agreement did not contemplate that Beverly would be the sole agent for the Debtor or that Beverly would receive commissions for sales she did not make. The September 16th letter states that the Debtor "will invoice and collect from companies with approved orders written by Beverly" and, as discussed *supra*, sets forth Beverly's commission rate for approved orders. *See* Claimant's Exhibit No. 16. Thus, in order to be entitled to a commission or other payment for an order, the parties' agreement required Beverly to taken some action in order to show that she, in fact, sold books or film copies to the Debtor's customers.

Beverly satisfied this burden by testifying about and offering evidence of purchase orders she submitted to the Debtor through May 2001, which were subsequently filled by the Debtor. The purchase orders went from Books Are Fun to Beverly to the Debtor. Sheryn's testimony that she ignored Beverly's

correspondence was not credible and was not supported by the evidence. The Court, therefore, concludes that Beverly was the "procuring cause" for orders submitted prior to her "termination" and that she is entitled to a commission on orders submitted prior to June 1, 2001.

F. Applying the Modified Commission Rate

Beverly's exhibits contain several summaries of the components of her claim. Exhibit 6 contains a summary the orders from Select Publications and Ingram Book Company and asserts a total claim of $12,815.94. Exhibit 63 contains a summary of the orders from Books Are Fun and asserts a total claim of $504,722. Additionally, Exhibit 2 contains a summary of amounts paid to Beverly by the Debtor totaling $162,952.22.[6] Thus, it appears from the record that Beverly's total claim for all orders, less payments, is $354,585.72. (This figure is somewhat less the claim of $369,059.75 asserted by Beverly in her testimony.)

In addition to the monies already paid to Beverly, the Court subtracts all test orders by Books Are Fun from the total claim amount. This reduction is based on the Debtor's October 28th letter to Beverly memorializing an agreement that Beverly would not be paid a commission for test orders. Of the commissions claimed for orders by Books Are Fun, **$749.70** related to test orders.

The Court also subtracts all amounts for orders submitted after June 1, 2001. Beverly's Exhibit 63 contains two orders from Books Are Fun after that

[6] This figure does not include $2,260.92 in legal fees charged to Beverly. The September 16th letter agreement did not address the payment of legal fees, and there was no evidence at the hearing on the Debtor's objection to Claim No. 8 that such fees are ordinarily charged to sales representatives.

date. The total amount of commissions claimed for these two orders is **$56,676.46.**

Select Publications made two large purchases from the Debtor, one of which was submitted the day after the October 27, 1999 letter from Sheryn to Beverly stating that the Debtor would pay her a 5% commission on the sale. There was no evidence that Beverly received this letter prior to receiving and processing the order from Select Publications. The Court therefore applies a 10% commission rate to that order. The Court also applies a 10% commission rate to the second large order, since the language in Sheryn's October 27th letter did not state that the 5% commission rate would apply to all orders by Select Publications. Thus, Beverly's claim based on the two orders by Select Publications is unchanged.

The Court also reduces the amount claimed by Beverly based on an amibiguity in the record. Beverly's summary of Exhibit 63 includes purchase order no. 00-10311 and lists the order quantity at 160,000. However, the purchase order itself is for 130,000 film copies of the *4 Ingredient Cookbook*. The parties may have subsequently revised the original purchase order, but the record is unclear on this point. The Court, therefore, subtracts the $13,500 commission claimed by Beverly for the 30,000 books not supported by the purchase order that was introduced into evidence.

Books Are Fun made several purchases from the Debtor after the November 3, 2000 letter from Sheryn to Beverly stating that Beverly's

commission rate for the *4 Ingredient Cookbook* would be 5% of sales after royalties were paid. The Court applies a 5% commission rate to orders submitted by Beverly for Books Are Fun for film copies or hard copies of the *4 Ingredient Cookbook* after that date. This affects three orders in February, April and May 2001 and reduces Beverly's claim for those orders by **$53,428**, from $60,107 to $6,679.

The Court applies a 10% commission rate to the purchase of *Kitchen Keepsakes* and *Cookbook 25 Years* by Books Are Fun, since the November 3rd letter reducing Beverly's rate was specific to sales of the *Four Ingredient Cookbook*. Using a 10% commission rate for the two orders by Books Are Fun of film copies the *Cookbook 25 Years* reduces Beverly's claim for these sales by **$42,380**, from $54,489 (which was half of the Debtor's profit) to $12,109. Using a 10% commission rate for the single order of film copies of Kitchen Keepsakes by Books Are Fun reduces Beverly's claim by **$38,880**, from $48,600 (which was half of the Debtor's profit) to $9,720.

IV. CONCLUSION

This dispute "is a clear reminder of the need to have a detailed, complete written contract governing the most important aspects of an employment relationship." *Furth*, 823 F.2d at 1181. The Court concludes, for all the foregoing reasons, that Beverly established an unsecured claim against the Debtor in the total amount of $148,972 by a preponderance of the evidence.

However, Beverly did not establish that any portion of her claim is entitled to priority under §507(a)(3). Accordingly, it is

ORDERED that Claim No. 8 shall be, and it is hereby, allowed as an unsecured claim against the Debtor in the amount of $148,972.

Signed on 9/30/2005

Brenda T. Rhoades MD

HONORABLE BRENDA T. RHOADES,
UNITED STATES BANKRUPTCY JUDGE