STATE OF IDAHO)
County of KOOTENAI)ss

FILED 12/1/2021

AT 3:55 O'Clock P. M

CLERK OF DISTRICT COURT

Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

SNAP! MOBILE, INC.,

Plaintiff,

vs.

VERTICAL RAISE, LLC, an Idaho limited liability company, and PAUL LANDERS, individually,

Defendants.

Case No. **CV28-19-8796**

MEMORANDUM DECISION AND ORDER DENYING PLAINTIFF'S MOTION FOR ATTORNEY FEES AS COSTS

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

An eight-day jury trial was held in this case which resulted in a jury verdict on August 25, 2021, in favor of plaintiff against defendants which totaled $1 million dollars. That was comprised as follows: a finding that defendants were unjustly enriched in the amount of $550,000.00; defendants damaged plaintiff via unfair competition in the amount of $200,000.00; punitive damages were assessed against defendant Vertical Raise, LLC in the amount of $150,000.00; and against defendant Paul Landers in the amount of $100,000.00.

Following that verdict, on October 13, 2021, plaintiff filed Plaintiff's Verified Memorandum of Fees and Costs, requesting this Court approve costs as a matter of right in the amount of $31,734.87, discretionary costs in the amount of $231,000.03, and attorney fees in the amount of $1,369,372.40. Pl.'s Mem of Fees and Costs 3. This was accompanied by Plaintiff's Motion for Attorneys' Fees and Costs, Declaration of Elizabeth D. Sonnichsen in Support of Plaintiff's Motion for Attorney Fees and Costs, Declaration of

Jeff Bone in Support of Plaintiff's Motion for Attorney Fees and Costs, and Declaration of Keely E. Duke in Support of Plaintiff's Motion for Attorney Fees and Costs. On October 20, 2021, plaintiff filed Notice of Errata (Declaration of Keely E. Duke in Support of Plaintiff's Verified Memorandum of Attorneys Fees and Declaration of Jeff Bone in Support of Plaintiffs Verified Memorandum of Attorneys Fees). On October 27, 2021, defendants filed Defendants Vertical Raise, LLC's, and Paul Landers' Response to Plaintiff's Verified memorandum of Fees and Costs, a Declaration of Counsel [Nathan S. Ohler] in Support of Defendants' Response to Plaintiff's Verified memorandum of Fees and Costs and Response to Plaintiff's Motion for Additur or New Trial in the Alternative. On October 29, 2021, plaintiff filed Plaintiff's Amended Verified Memorandum of Fees and Costs, which increased costs as a matter of right by $1,439.40, and increased discretionary costs by $7,629.78. Attorney fees requested was unchanged between the two pleadings. This was supported by the Amended Declaration of Keely E. Duke in Support of Plaintiff's Motion for Attorney Fees and Costs. On November 10, 2021, plaintiff filed Plaintiff's Reply to Defendants' Response to Plaintiff's Verified Memorandum of Fees and Costs.

On November 17, 2021, this Court heard oral argument on Plaintiff's Verified Memorandum of Fees and Costs, which was filed on October 13, 2021. At the conclusion of that argument, this Court found plaintiff was the prevailing party (the day before, on November 16, 2021, this Court heard argument on Defendant's Verified Memorandum of Costs and Attorney Fees and found at the conclusion of that hearing that defendants were not the prevailing parties and, thus, not entitled to an award of attorney fees), granted costs as a matter of right as requested in the Plaintiff's Amended Memorandum of Fees and Costs, in the amount of $33,174.27, and granted discretionary costs as requested in the amount of $238,629.81, with the exclusion of lodging and

transportation costs. The Court asked counsel for plaintiff to make that discretionary cost subtraction and arrive at the total amount of allowed discretionary costs. This Court found that the amount of attorney fees sought by the various attorneys for the plaintiff were reasonable, given the factors of I.R.C.P. 54(e)(3), but took the matter of whether plaintiff was entitled to attorney fees under advisement.

II. STANDARD OF REVIEW.

Determination of the prevailing party is within the discretion of the trial court and is reviewed under the abuse of discretion standard. *Jorgensen v. Coppedge*, 148 Idaho 536, 538, 224 P.3d 1125, 1127 (2010).

An award of attorney's fees under I.C. § 12-121 is discretionary, but must be supported by findings supported by the record. *Wing v. Amalgamated Sugar Co.*, 106 Idaho 905, 910-11, 684 P.2d 307, 312-13 (Ct. App. 1984). In applying I.C. § 12-120(3), the interpretation of that statue is a question of law over which the appellate courts exercise free review. *BECO Const. Co. v. J-U-B Engineers, Inc.*, 145 Idaho 719, 726, 184 P.3d 844, 851 (2008).

In *Lunneborg v. My Fun Life*, 163 Idaho 856, 863-64, 421 P.3d 187, 194-95 (2018), the Idaho Supreme Court held that there is now a four-part test when determining whether the lower court abused its discretion, which requires the reviewing court to determine whether the lower court: "(1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason." This Court perceives the issue on prevailing party and fees and costs to be one committed to this Court's discretion, this Court feels it is acting within the outer boundaries of its discretion, is acting within the applicable legal standards, and has reached its decision by the exercise of reason.

III. ANALYSIS.

A. Prevailing Party Analysis: Plaintiff is the Prevailing Party.

As stated above, at the November 17, 2021, hearing, this Court found plaintiff to be the prevailing party in this litigation and on November 16, 2021, found defendants to not be the prevailing parties in this litigation (when this Court denied defendants' motion for costs and fees). Due to the length of both hearings, and both hearings continuing past 5:00 p.m., the Court's findings as to prevailing party were minimal. The Court will address that deficiency at this time.

Plaintiff has correctly noted:

> To determine a prevailing party, the court must consider "(1) the final judgment or result obtained [in relation] to the relief sought; (2) whether there were multiple claims or issues between the parties; and (3) the extent to which each of the parties prevailed on each of the claims or issues." *Choice Feed, Inc. v. Montierth*, 481 P.3d 78, 104 (Idaho 2021) (quoting *City of Middleton v. Coleman Homes LLC*, 163 Idaho 716, 723, 418 P.3d 1225, 1232 (2018)). "The prevailing party determination is based on the action as a whole" and is not a claim-by-claim examination. *City of Middleton*, 163 Idaho at 723.

Pl.'s Am. Mem. of Fees and Costs 5. Plaintiff then argues, completely accurately:

> Here, Snap! is clearly the prevailing party. Snap! prevailed on its summary judgment as to its claims of Tortious Interference with Contract and Misappropriation of Trade Secrets. Snap! also prevailed at trial on its third claim it tried to the jury; common law unfair competition. Further, Snap! received a $1 million verdict from the jury on its claims for tortious interference, common law unfair competition, and punitive damages. Snap!'s success on the issue <u>most central</u> to the dispute demonstrates that it is the prevailing party.
>
> As the Court is well aware, the primary issue in this litigation was whether Defendants tortiously interfered with Snap!'s contracts with Snap!'s Sales Representatives by having those Sales Representatives violate terms of their contract with Snap!. Snap! prevailed on that claim at summary judgment and the jury awarded $550,000 in damages as unjust enrichment damages forDefendants' tortious interference.
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> Second, Snap! also alleged that Defendants misappropriated trade secrets, which this Court found as a matter of law occurred. The jury elected to award the unjust enrichment damages to Snap! via the other two tried claims – tortious interference with contract and common law unfair competition. Nevertheless, Snap! prevailed on that claim with a ruling on

summary judgment that Defendants misappropriated Snap!'s trade secrets. Snap! prevailed on this issue.

Third, as to Snap!'s third and final claim tried, common law unfair competition, the jury found Defendants liable and awarded Snap! $200,000 in unjust enrichment damages for that claim.

Additionally, $250,000 of Snap!'s award from the jury was in the form of punitive damages against both Defendants ($100,000 against Landers and $150,000 against Vertical Raise), demonstrating that Vertical Raise's and Landers' conduct rose to a malicious, oppressive level, on a clear and convincing basis, to warrant an additional award to serve as deterrent and punishment—further proving that Snap! is the prevailing party in this matter. *See Choice Feed, Inc.*, 481 P.3d at 104 (holding that "it is within the scope of a trial court's discretion for it to consider an award of punitive damages as a factor in its prevailing party analysis.").

Snap! also defeated Defendants' counterclaims. As a result of Snap!'s successful Motion to Dismiss and Motions for Sanctions, Vertical Raise's and Landers' counterclaims were dismissed. *See* Judgment, dated March 13, 2021. As such, this Court entered Judgment dismissing with prejudice Vertical Raise's claims of Defamation, Tortious Interference with Prospective Business Advantage, and Violation of the Idaho Consumer Protection Act against Snap! March 13, 2021. This combination of affirmative relief granted on Snap!'s claims combined with a successful defense against Defendants' counterclaims shows that Snap! is the prevailing party in this litigation.

Based on the above and the applicable case law, Snap! is clearly the prevailing party in this action.

Id. at 5-7. This Court finds not one bit of misstatement or overstatement in the above passage, and adopts such as its findings of fact.

Defendants argue, "Defendants deny that Plaintiff is the prevailing party for the reasons stated herein and in Defendants' Verified Memorandum of Costs and Attorney Fees, filed October 13, 2021." Defs. Resp. to Pl.'s Verified Memorandum of Costs and Fees 2. In the very next sentence, defendants tacitly admit the inevitable, writing: "To the extent Plaintiff is the prevailing party, its fees were not the product of [defendants'] bad faith, its requested discretionary costs were exceptional, and it is only entitled to those costs which are costs as a matter of right pursuant to Rule 54(d)(C)." *Id.* at 2-3. Later, defendants write:

Defendants concede that to the extent Plaintiff is the prevailing party, it is entitled

> to the court filing fees, service fees, some of the witness fees and witness travel expenses, some of the charges for reporting and transcribing depositions (excluding video-related charges), and $2,000 in expert witness fees as stated in Plaintiff's Fee Memorandum.

Id. at 5. At no point in Defendants Vertical Raise, LLC's and Paul Landers' Response to Plaintiff's Verified Memorandum of Fees and Costs do defendants make any argument or even any claim that plaintiff is not the prevailing party. As mentioned above, in that memorandum, defendants instead point this Court toward their "Defendants' Verified Memorandum of Costs and Attorney Fees, filed October 13, 2021." *Id.* at 2. In that document, defendants claim they are the prevailing parties as, "The Defendants prevailed on Courts II, III, V, VI, VII, VIII and IX." Defs.' Verified Mem. of Costs and Fees 7. Incredulously, defendants claim, "That Plaintiff prevailed on Count I (and Count IV, which did not result in any compensatory damages to Snap other than what it recovered under Count I), does not make it the prevailing party." *Id.* The only basis for this claim is that "the tortious interference claim was straightforward." *Id.* Whether the tortious interference claim was "straightforward" or not does nothing to controvert the fact that plaintiff prevailed on the tortious interference claim. Defendants' unsupported claim that they are the prevailing parties is unsupported by any evidence and the law. Defendants' unsupported claim that they are the prevailing parties is tough to stomach given a one-million dollar verdict by the jury. But, as plaintiffs correctly note, "'The prevailing party determination is based on the action as a whole' and is not a claim-by-claim examination. *City of Middleton*, 163 Idaho at 723." Pl.'s Am. Mem. of Fees and Costs 5. In response to defendants' ridiculous argument, plaintiff provides an accurate synopsis of the "action as a whole":

> Defendants argue that Snap! cannot recover its attorney fees under I.C. § 12-121 because it is not the prevailing party. In addition to the reasons articulated in Plaintiff's Amended Verified Memorandum of Fees

> and Costs and the Memorandum in Support of Snap! Mobile, Inc.'s Motion to Disallow Fees and Costs, each incorporated herein by reference, Snap! was clearly the prevailing party in this matter.
>
> Pre-trial, Snap! successfully defeated all of Defendants' counterclaims and Snap! was granted summary judgment as to its tortious interference with contract claim and misappropriation of trade secrets claim. At trial, Snap! obtained relief as to its central claims, with the jury finding that Defendants were unjustly enriched in the amount of $550,000 as to Snap!'s claim for tortious interference with contract and $200,000 as to Snap!'s claim for common law unfair competition. *See* Special Verdict Form, August 25, 2021. The jury also assessed punitive damages against Vertical Raise and Paul Landers, in the amounts of $150,000 and $100,000, respectively. *Id.* Because Snap! prevailed on the issues central to this litigation, it is appropriately considered the prevailing party. *See City of Middleton v. Coleman Homes LLC*, 163 Idaho 716, 723, 418 P.3d 1225, 1232 (2018) (holding that "[t]he prevailing party determination is based on the action as a whole and is not a claim-by-claim examination."). The assessment of punitive damages against both Defendants further reinforces Snap!'s position as the prevailing party. *See Choice Feed, Inc. v. Montierth*, 481 P.3d 78, 104 (Idaho 2021) (holding that it was "within the scope of a trial court's discretion to consider award of punitive damages as a factor in its prevailing party analysis.").

Pl.'s Reply to Defs.' Resp. to Pl.'s Verified Mem. of Fees and Costs 6-7. Defendants' claim that they are the prevailing party and that plaintiff is not the prevailing party is entirely unsupported. Defendants essentially admit such. This Court finds plaintiff is the prevailing party in this litigation.

B. Attorney Fees Are Not Allowed Under I.C. § 12-121.

Even though plaintiff is the prevailing party in this litigation, this Court finds plaintiff is not allowed its attorney fees against defendants under I.C. § 12-121. Idaho Code § 12-121 itself does not require that for attorney fees to be awarded against a party, such party must have brought, pursued, or defended the case frivolously, unreasonably, or without foundation. However, case law is replete with that standard. Counsel for defendants argues the "one legitimate issue" defense against an award of attorney fees, arguing:

> Secondly, the Idaho Supreme Court has made clear that "[u]nder section 12-121, 'if there is at least one legitimate issue presented, attorney fees may not be awarded even though the losing party has asserted other

> factual or legal claims that are frivolous, unreasonable, or without foundation.'" *Sec. Inv'r Fund LLC v. Crumb*, 165 Idaho 280, 291, 443 P.3d 1036, 1046 (2019), *citing Michalk v. Michalk*, 148 Idaho 224, 235, 220 P.3d 580, 591 (2009); *see also Nampa & Meridian Irr. Dist. v. Washington Fed. Sav.*, 135 Idaho 518, 524-25, 20 P.3d 702, 708-709 (2001). Here, pursuant to the record in this matter and the examples that Defendants will present at oral argument, there can be no dispute that Defendants presented countless "legitimate issues" in defending themselves in this matter, much less the single "legitimate issue" required under the law.

Defs.' Resp. to Pl.'s Verified Mem. of Fees and Costs 6. However, plaintiff is correct in pointing out:

> [A] review of Idaho caselaw demonstrates that the Idaho Supreme Court has very clearly stated in recent years that "it is no longer enough for a non-prevailing party to have raised a single legitimate issue in order to be immunized from attorney fees under Idaho Code section 12-121." *Fitzpatrick Trustees of Fitzpatrick Revocable Tr. v. Kent Trustees of Alan & Sherry Kent Living Tr. Dated 11/07/2003*, 166 Idaho 365, 458 P.3d 943, 951 (2020). Instead, "[c]ourts take a holistic view to determine whether the standard under Idaho Code section 12-121 has been met." *Id.* This wholistic approach looks to the central arguments to the case to determine whether or not they were pursued in good faith or whether an award of fees under I.C. § 12-121 is appropriate. *See id.*
>
> Moreover, the most recent case cited by Defendants which relies on the one legitimate issue standard, *Frost v. Gilbert*, did no analysis of the argument or evaluation done at the district court level and did not address whether apportionment of fees at the district court level would be appropriate. 169 Idaho 250, 494 P.3d 798 (2021). In fact, the portion of the opinion addressing the legitimacy of the arguments presented to the district court states does not state that a single legitimate issue precluded an award of fees—the Court simply stated "Bruno presented legitimate issues to the district court in this case"—a finding that is equally compatible with all or most of the central issues of the case having been legitimately argued. *Id.*, 494 P.3d at 819.
>
> Finally, although as an unpublished opinion it is not authoritative or precedential, it is worth noting that the Idaho Court of Appeals has very clearly and recently stated that it considers the standard overturned. *See Lujan v. Hillbroom*, No. 48168, 2021 WL 3523472, at *4 (Idaho Ct. App. Aug. 11, 2021) ("[T]he district court did not rely on the portion of [*Budget Truck Sales, LLC v. Tilley*, 163 Idaho 841, 850, 419 P.3d 1139, 1148 (2018)] that has been overruled--there is no mention of the 'one legitimate issue' standard in the denial of Hillbroom's request for attorney fees.").

Pl.'s Reply to Defs.' Resp. to Pl.'s Verified Mem. of Fees and Costs 7-8. This Court finds that the "one legitimate issue" is no longer a safe harbor for avoiding imposition of

attorney fees upon the losing party who has defended frivolously, unreasonably or without foundation. This Court finds the holistic (or wholistic) approach is what is required by Idaho's appellate courts. Against that backdrop, this Court finds plaintiff's claims accurate and compelling:

> Defendants do not refute Snap!'s numerous examples, supported by citation to the record, of Defendants' conduct that was frivolous, unreasonable, or without foundation. For example, Snap! has identified at least 55 instances where, during the trial of this matter, Defendants violated this Court's Orders regarding the Motions in Limine. See Declaration of Keely E. Duke in Support of Snap! Mobile Inc.'s Motion for Additur or New Trial in the Alternative, Ex. H. There is no legal authority for Defendants to ignore an Order of the Court and present argument or evidence that is directly contrary to the terms of that Order.
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> Defendants likewise frequently and continually violated this Court's Preliminary Injunction, with at least 103 violations identified by Snap! through the date of trial. *See* Plaintiff's Amended Memorandum of Fees and Costs, p. 17. Defendants' violations of the Preliminary Injunction concerned the very conduct that Snap! was seeking to prevent by initiating this litigation, required Snap! to expend significant fees to preserve its rights, and, like the violations of the Motions in Limine, are unsupported by law.
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> Defendants also demonstrated their bad-faith, frivolous approach to this litigation with their discovery tactics. Well after documents were due and only after having been compelled by the Court to produce them, Defendants provided documents in a data dump of over half a million items to their discovery vendor. This required Snap! and its counsel to comb through a vast quantity of irrelevant documents (including pornography, conspiracy theories, and racist, misogynistic, and homophobic content), clearly produced without any regard for relevance, in order to adequately identify responsive materials and prepare Snap!'s case for trial.

Id. at 8-9. This Court specifically finds that a violation of this Court's orders in limine are by definition frivolous, unreasonable, and without foundation. This Court finds that to be the case in each instance of each violation of its orders. This Court finds that given the high number of violations of this Court's orders (even over an eight-day trial), these repeated violations by defendants' attorneys were intentional, calculated, and defiant, and likely reportable conduct to the Idaho State Bar as a violation of the Idaho Rules of Professional Conduct. However, and this Court finds violations by defendants' attorneys

should not be attributed to defendants. There are sanctions which can address such conduct, such as I.R.C.P. 11 (though this is limited to signed pleading abuses and not trial conduct), mistrial under I.R.C.P. 48, and complaint to the Idaho State Bar Association. However, this Court finds an award of attorney fees under I.C. § 12-121 is not part of that list of available sanctions. Counsel for defendants defended this trial vigorously, too vigorously at times. However, that vigorous defense is actually what cuts against an award of attorney fees under I.C. § 12-121. This is because the operative words of the case law interpreting I.C. § 12-121 and the proscribed conduct of those words are "frivolous", "unreasonable", and "without foundation." While unethical and defiant conduct by counsel at trial could certainly be characterized as "unreasonable" in each of these fifty five instances, over the course of an eight-day trial, this Court cannot find such to be "unreasonable" as interpreted by case law under I.C. § 12-121. Under the holistic approach, this Court finds defendants' attorneys' overall conduct at trial was not consistently "unreasonable." More importantly, this Court cannot find defendants' overall defense of this litigation to be frivolous, unreasonable, or without foundation.

As mentioned above by this Court, a vigorous defense, even though at times "unreasonable" in this case, cuts against an award of attorney fees under I.C. § 12-121. An award of attorney fees was proper when the third-party defendant offered no defense, called no witnesses, presented no supported legal argument in favor of its position, and did not vigorously cross-examine any of the witnesses called by other parties in an attempt to support its defense. *Del Milam & Sons v. Bailey*, 107 Idaho 587, 691 P.2d 1202 (1984). There is obviously a great deal of discretion vested in the jury, and there is discretion vested in this Court in its decisions at trial and leading up to trial (and now post-trial). Any time a party or its attorneys are attempting to get a jury or a judge to exercise its discretion one way as opposed to another, it would be hard to make the case that such

attempts are frivolous, unreasonable, or without foundation. Defendants failed to prevail on many of their legal arguments, and defendants failed to limit damages to those claimed by their expert, but that does not make their attempts to do so frivolous, unreasonable, or without foundation.

Plaintiff's argument that defendants' actions of violating this Court's preliminary injunction 103 times is compelling, but similar to above, is misplaced. While violating this Court's orders in limine is essentially exclusively the province of defendants' attorneys, violating this Court's preliminary injunction is essentially exclusively the conduct of defendants themselves. As with the situation where unethical or deliberate behavior of counsel at trial may be sanctioned in other more appropriate ways than attorney fees, so too with violations by defendants of this Court's order on preliminary injunction. Violations of the preliminary injunction are subject to contempt proceedings, which occurred in this case. This Court allowed evidence of the violations of the preliminary injunction to be presented to the jury for a variety of reasons. Such is relevant to prove damages, including but not limited to punitive damages, which were assessed by the jury.

While this Court understands counsel for plaintiff's exasperation and frustration with defendants' attorneys throughout this litigation and with defendants' conduct prior to this lawsuit and throughout this litigation, this Court is unable to find that the conduct in question is capable of being sanctioned by attorney fees under I.C. § 12-121.

C. Attorney Fees Are Not Allowed Under I.C. § 12-120(3).

Attorney fees are allowed in favor of the prevailing party under I.C. § 12-120(3) when the civil action involves a "commercial transaction." A "commercial transaction" is then defined in that same subsection "to mean all transactions except transactions for personal or household purposes." What constitutes a "commercial transaction" has also been the source of many Idaho appellate court decisions over the years.

Plaintiff makes the following argument:

> It is true that this provision [I.C. § 12-120(3)] has previously been stated not to apply to tort-based claims. *See e.g. Bybee v. Isaac*, 145 Idaho 251, 260, 178 P.3d 616, 625 (2008); *Nw. Bec-Corp v. Home Living Serv.*, 136 Idaho 835, 842, 41 P.3d 263, 270 (2002). However, this is not an absolute prohibition. *See Blimka*, 143 Idaho at 728–29 ("From time to time the Court has denied fees under I.C. § 12–120(3) on the commercial transaction ground either because the claim sounded in tort or because no contract was involved. The commercial transaction ground in I.C. § 12–120(3) neither prohibits a fee award for a commercial transaction that involves tortious conduct, nor does it require that there be a contract.") (internal citations omitted); *See also Soignier v. Fletcher*, 151 Idaho 322, 326, 256 P.3d 730, 734 (2011) ("The categorical rule against awarding attorney fees under § 12–120(3) in tort actions no longer applies in Idaho.").
>
> The instant case presents a situation where attorneys' fees are proper even though the case involves tortious contact, because all of the claims not only "involve" a contract (*see Blimka*), but are founded on a commercial transaction – the contracts between Snap! and its Sales Representatives and the restrictive covenants contained therein.

Pl.'s Am. Mem. of Fees and Costs 22. Plaintiff then argues four points for that proposition. "First, Paul Landers had his sights set on taking Snap! Business Partners even before he started Vertical Raise." *Id.* "Second, to develop its business and target Snap!'s Business Partners, Vertical Raise then turned its sights on contracting with current and former Snap! Sales Representatives and eventually hired 42 Sales Representatives. See, Trial Exhibit 8A.2." *Id.* at 23. "Third, while knowing they wanted to target Snap! Business Partners and Snap! Sales Representatives to start Vertical Raise and get Vertical Raise up and running, Defendants admitted they knew about the restrictive covenants in place in the contracts . . . ." *Id.* at 24. "Fourth, Vertical Raise paid commissions to former Snap! Sales Representatives for violating the Snap! Sales Representative Agreement. Trial Exhibit 6, 37D." *Id.* at 26. Plaintiffs then conclude their argument as follows:

> Based on Defendants' business plan to tortiously interfere and

unfairly compete as the model for how Vertical Raise would start and grow its business, the gravamen of Snap!'s claims is a commercial transaction. Defendants' willful and improper encouragement and expectation that the Sales Representatives solicit their former Business Partners at Snap! in direct violation of their contract with Snap! is integral to and forms the basis of Snap!'s claims--without both Defendants' unlawful behavior and the Snap!'s Sales Representative Agreements containing the restrictive covenants, Snap! would not have been able to bring this lawsuit.

The Idaho cases examining tortious interference claims under Idaho Code § 12-120(3) did not arise under the unique circumstances that are present in this case. In *Bybee v. Isaac*, the Idaho Supreme Court stated that § 12-120(3) did not apply in the context of a tortious interference claim alleging a single instance of an employee being hired away by a competitor in violation of a non-competition provision. 145 Idaho 251, 178 P.3d 616 (2008). This is in contrast to Defendants' actions, which demonstrate Defendants based Vertical Raise's business model on mimicking Snap!, recruiting Snap!'s Sales Representatives, and encouraging and relying on those Representatives to breach their agreements with Snap! by soliciting and hopefully stealing Snap! Business Partners.

Additionally, *Northwest* likewise involved a single instance of an employee being hired away by a competing company and involved tortious interference claims that were not based on the former employer's contract with the employee but rather the contracts and prospective contracts with the former employer's customers. 136 Idaho 835, 841, 41 P.3d 263, 269 (2002). Here, Vertical Raise and Paul Landers contracted with 42 Snap! Sales Representatives and knowingly encouraged them to violate the restrictive covenants contained in their employment agreements with Snap!.

Further, Idaho appellate courts have applied Idaho Code § 12-120(3) outside of strictly contractual claims on prior occasions where a claim arises "from some direct commercial dealings, negotiation or other interaction between the two litigants." *Erickson v. Flynn*, 138 Idaho 430, 437, 64 P.3d 959, 966 (Ct. App. 2002) (emphasis added). In *Erickson*, the Idaho Court of Appeals held that it would defeat the legislative purpose of Idaho Code § 12-120(3) not to allow recovery of attorney fees in the context of a quasi-contractual claim where the transaction had a commercial nature and was based on the same facts and circumstances as a parallel breach of contract claim. *Id.* Similar to the expansion of Idaho Code § 12-120(3) beyond strictly contractual claims in *Erikson*, this case warrants expansion of Idaho Code § 12-120(3) because the tortious interference with Snap!'s contracts has taken on a commercial character by forming the entire basis of Defendants' business model. Simply put, it would be difficult to bring a tortious interference claim more closely related to enforcement of a contractual provision and protection of contractual interests than Snap!'s claim here. As such, Snap! requests this Court apply Idaho Code § 12-120(3) to this matter and grant Snap!'s requests for attorneys' fees.

Id. at 26-28. This Court finds plaintiff's argument for an extension of current case law to

the present situation to be very persuasive. However, this Court is not inclined to make such an extension. The reason the Court cannot make that leap is because there simply is no "commercial transaction *between the parties*" as is required by *Drug Testing Compliance Grp., LLC*, 161 Idaho 93, 107, 383 P.3d 1263, 1277 (citing *Bryan Trucking Inc. v. Gier*, 160 Idaho 422, 426, 374 P.3d 585, 589 (2016) (italics added). While it is now beyond dispute that defendants Vertical Raise and Paul Landers encouraged Snap! sales representatives to break their restrictive covenants they each had in their individual contracts with Snap!, there was no contract between plaintiff Snap! and defendants Vertical Raise or Paul Landers, as is required by the italicized portion of *Drug Testing Compliance Grp., LLC.*

Defendants discuss *Drug Testing Compliance Grp., LLC* and its language requiring a "commercial transaction between the parties." Defs.' Resp. to Pl.'s Verified Mem. of Fees and Costs 12, n.7. Plaintiff makes the correct distinction that the contracts between the plaintiff and its customers in *Drug Testing Compliance Grp., LLC* were *void ab initio*, while in the present case the contracts between Snap! and its sales associates have been deemed valid by this Court. Pl.'s Reply to Defs.' Resp. to Pl.'s Verified Mem. of Fees and Costs 11-12. However, this Court finds that distinction to be without a difference. In response to defendants' arguments, plaintiffs claim:

> Defendants also ignore the holding in *Erickson v. Flynn*, which stated that "the claim must arise from some direct commercial dealings, negotiation *or other interaction* between the two litigants." 138 Idaho 430, 437, 64 P.3d 959, 966 (Ct. App. 2002) (emphasis added). Snap! has articulated throughout this litigation how Defendants perpetrated a pervasive scheme to contract with Snap! Sales Representatives and knowingly encourage them to violate the restrictive covenants contained in their employment agreements with Snap! to the point that it formed the basis of Vertical Raise's business model. This interference was so pervasive that it even took place while Representatives were still performing work for Snap! most notably in the case of Paul Croghan, then a soon-to-be partial owner of Vertical Raise who continued to work for Snap! for months

> while actively engaging with Vertical Raise. Defendants' interpretation of *Erickson* ignores the "other interaction" language by requiring a direct commercial *dealing* between Snap! and Vertical Raise.

Id. at 12 (italics in original). This Court finds the language in *Erickson* italicized by plaintiff above, "*or other interaction* between the two litigants," cannot be read so broadly as to obviate the need for a "commercial transaction *between the parties*" as required by *Drug Testing Compliance Grp., LLC* and *Bryan Trucking Inc.* This Court has read Erickson multiple times with this seemingly disparate language in mind. This Court finds the Idaho Court of Appeals' use of the words "or other interaction" does not mean there is no longer a need for a "commercial transaction between the parties."

The Idaho Court of Appeals quote in *Erickson* must be viewed in context within that decision, and also within the context of the decisions used by the Idaho Court of Appeals in providing that context. That portion of *Erickson* reads:

> *Great Plains* and *Hausam* suggest that for the commercial transaction clause of § 12-120(3) to apply, at a minimum, the claim must arise from some direct commercial dealings, negotiation or other interaction between the two litigants. *Great Plains* further suggests that this interaction need not result in the creation of a contract. It is our conclusion that Erickson's unjust enrichment and quantum meruit claims in the present case present the type of noncontractual commercial transaction contemplated by the Supreme Court in Great Plains to which § 12-120(3) will apply.

138 Idaho at 437, 64 P.3d at 966. Erickson and Flynn were both coin collectors. 138 Idaho at 433, 64 P.3d at 962. Flynn published a book which contained photographs of some of Erickson's coins. *Id.* In exchange for use of his coins, Erickson claimed Flynn agreed to attribute and give credit to Erickson within Flynn's book. *Id.* The Court found no contract had arisen but allowed the alternate theories of quantum meruit and unjust enrichment to proceed. *Id.* That was the "other interaction between the two litigants." 138 Idaho at 437, 64 P.3d at 966. There was "interaction" between the parties,

agreement to have the coins photographed and the purported agreement to be mentioned in the book. In the present case, there has never been "interaction" between the parties, there has only been competition between the parties. Vertical Raise and Landers encouraged Snap!'s sales representatives to violate the agreement they had with Snap! But at no time was their interaction between the two. In *Hausam*, as discussed in *Erickson*, the defendant's son had negotiated and signed a loan agreement to borrow money for the defendant's business. *Id.* Although the defendant's son had no authority to obtain a loan on defendant's behalf, the defendant was liable to the lender for unjust enrichment because the defendant had received the loan proceeds. *Id.* "We then concluded that the lender could not recover attorney fees under § 12-120(3) as the prevailing party on the unjust enrichment claim because the only "commercial transaction" that had occurred was between the plaintiff and the defendant's son, to which the defendant was not a party." *Id.* citing *Hausaum v. Schnabl,* 126 Idaho 569, 575, 887 P.2d 1076, 1082. In *Great Plains*, as discussed in *Erickson*, the plaintiff pipeline company had a contract with the general contractor to build a natural gas pipeline. *Id.* The general contractor went bankrupt and the subcontractors sued the pipeline company for unjust enrichment. *Id.* The pipeline company prevailed and sought attorney fees under I.C. § 12-120(3). *Id.* While "the gravamen of that claim was a commercial transaction", the Idaho Supreme Court "nevertheless denied the pipeline company's request for attorney fees because: 'The only commercial transaction took place between the respective subcontractor and [the general contractor], and [the general contractor] and [the pipeline company.] At no point were [the pipeline company] and the subcontractors involved in a transaction.'" *Id.* The Idaho Court of Appeals noted that the Idaho Supreme Court did not require a contract between the parties in order for I.C. § 12-120(3) be applied, but

there had to be a "commercial transaction", which "may extend beyond situations where a contract was formed." 138 Idaho at 436, 64 P.3d at 965. The Idaho Court of Appeals wrote, "*Great Plains* also seems to suggest that the commercial transaction clause authorizes an award of attorney fees where the theory of recovery is unjust enrichment, the 'transaction' is commercial in nature, and the parties 'transacted' directly with each other." 138 Idaho at 436-37, 64 P.3d at 965-66. This Court notes there must be some transaction between the parties in order for I.C. § 12-120(3) to apply, and that transaction requirement is missing in the present case.

While this Court finds plaintiff has made very cogent arguments for extension or expansion of current case law pertaining to I.C. § 12-120(3), this Court is unable to make such expansion given the facts of this case.

IT IS HEREBY ORDERED that plaintiff's request for attorney fees against defendants as set forth in the Plaintiff's Verified Memorandum of Fees and Costs and in the Plaintiff's Amended Verified Memorandum of Fees and Costs must be and is DENIED.

Entered this 1st day of December, 2021.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 1st day of December, 2021, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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