

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

TOTAL CONTROL, INC.,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
DANAHER CORPORATION, et al.	:	NO. 02-668
Defendants,	:	

**MEMORANDUM AND ORDER**

**Anita B. Brody, J.**

August 18 , 2004

Plaintiff Total Control, Inc. (“Total Control”) promotes and sells products for the manufacturers it represents. Defendant is a group of interlocking corporations that plaintiff collectively refers to as Danaher Corporation (“Danaher”) that manufactures digital equipment and controls as well as other products. Total Control formerly represented some product lines for Danaher, but their relationship terminated on December 31, 2001.

On January 31, 2003, plaintiff filed a four count amended Complaint alleging violations of state law. On April 20, 2004, Defendant Danaher filed a motion for summary judgment.<sup>1</sup> After oral arguments and extensive briefing by the parties, on July 1, 2004, I granted Danaher’s motions for summary judgment only with respect to two discrete issues in Count I. I denied defendant’s motion for summary judgment with respect to the balance of the commissions

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<sup>1</sup>On April 28, 2004, plaintiff elected not to pursue Count II, a claim for Tortious Interference with Business Relations, and Count IV, a claim for Unjust Enrichment. Therefore, the summary judgment motion considered the remaining counts: Count I, a claim for Breach of Contract, and Count III, a claim for Violation of the Pennsylvania Commissioned Sales Representative Act.

claimed in Count I and with respect to Count III, the claim under the Pennsylvania Commissioned Sales Representative Act (“PCSRA”). On July 9, 2004, defendant moved for reconsideration of its summary judgment motion with respect to Count III, the claim brought under the PCSRA. I grant defendant’s motion for reconsideration.<sup>2</sup> For the reasons that follow, I also grant defendant’s motion for summary judgment with respect to the claim brought under the PCSRA.

### **I. Facts**

Danaher manufactures digital equipment and controls and other products. On June 30, 1986, Total Control entered into an Agency Agreement (“Agreement”) with Danaher.<sup>3</sup> By the terms of the Agreement, Danaher appointed Total Control as a sales agent of all Danaher name brand digital equipment and controls.

### **II. Discussion**

Total Control claims that Danaher is liable to Total Control for unpaid commissions and multiple damages under the PCSRA. Section 1473 of the PCSRA reads:

A principal shall pay a sales representative all commission due at the time of termination within 14 days after termination.  
Pa. Stat. Ann. 43 § 1473 (2004).

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<sup>2</sup> A motion for reconsideration is only appropriate where: (1) there has been an intervening change in controlling law; (2) new evidence is available; or (3) there is need to correct a clear error of law or prevent manifest injustice. *N. River Ins. Co. v. Cigna Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995) (citation omitted). I find that reconsideration is warranted to correct a clear error of law.

<sup>3</sup>While the Agreement was actually with an entity called “Dynapar,” Danaher explains that the proper defendants are Dynapar Corporation, an Illinois corporation, and Danaher Controls Corp., a North Carolina corporation, doing business as part of, in certain instances, Danaher Industrial Controls Group. This is not a contested issue.

Section 1474 of the PCSRA reads:

A principal shall pay a sales representative all commissions that become due after termination within 14 days of the date such commissions become due.

*Id.* § 1474.

If a principal is noncompliant with §§ 1473-74 of the PCSRA, § 1475 becomes relevant. Section 1475 reads:

(a) GENERAL.-- A principal who willfully fails to comply with the provisions of section 3 or 4 shall be liable to the sales representative in a civil action for:

(1) All commissions due the sales representative, plus exemplary damages in an amount not to exceed two times the commissions due the sales representative.

(2) The cost of the suit, including reasonable attorney fees.

*Id.* § 1475.

Section 1471 of the PCSRA defines “Principal” as:

Any person who does all of the following:

(1) Engages in the business of manufacturing, producing, importing or distributing a product for sale to customers who purchase such products for resale.

(2) Utilizes sales representatives to solicit orders for such product.

(3) Compensates sales representatives, in whole or in part, by commission.

*Id.* § 1471.

Section 1471 of the PCSRA defines “sales representative” as:

A person who contracts with a principal to solicit wholesale orders from retailers rather than consumers and who is compensated, in whole or in part, by commission. The term does not include one who places orders or purchases for his own account for resale or one who is an employee of a principal.

*Id.*

Under §1475 of the PCSRA, liability is only triggered if a “principal” fails to pay a “sales representative.” In other words, for Danaher to be liable under the statute, it must come within the statutory definition of a principal and Total Control must come within the statutory definition of a sales representative. These definitions are interdependent because under §1471 an entity is not a principal unless it “utilizes sales representatives” and “compensates sales representatives.” Therefore, whether Danaher is a principal, and therefore potentially liable under the PCSRA, turns on the determination of whether Total Control is a sales representative.

As noted above, §1471 of the PCSRA defines “Sales representative” as:

A person who contracts with a principal to solicit wholesale orders *from retailers rather than consumers* and who is compensated, in whole or in part, by commission. The term does not include one who places orders or purchases for his own account for resale or one who is an employee of a principal.

*Id.* (emphasis added).

While it is undisputed that Total Control contracts with Danaher to solicit wholesale orders, Danaher contends that Total Control does not sell to retailers.

The PCSRA does not define the term “retailer.” Defendant argues that Total Control does not qualify as a sales representative because the distributors and manufacturers to which it sells are not retailers under the statute. Plaintiff argues that distributors and manufacturers in this industry serve the same function as retailers and therefore trigger the PCSRA. According to the

plaintiff, “the outcome of this dispute does not turn on semantics, i.e. whether the word ‘retailer’ is used in a given industry.” (Mem. Law Opp’n Def’s. Mot. Recons. at 2.)

Plaintiff’s position is unsupportable. At least 28 states have a statute similar to the PCSRA. Of those 28 states, only two, Pennsylvania and Arizona,<sup>4</sup> use the word “retailer” in its definition of sales representative.<sup>5</sup> From this it is clear that the term “retailer” is not merely a matter of semantics but instead serves an important and intentional limitation on whom the Pennsylvania legislature intended to protect under PCSRA. Because it is a material term, and because it has not been statutorily defined, I must define the term according to traditional rules of statutory construction.

When statutory words or phrases at issue are undefined by the statute, the Court construes the words according to their plain meaning and common usage. *See* 1 Pa.C.S. § 1903(a). Judge J. Curtis Joyner in this district, interpreting the PCSRA, did just that and defined a retailer as:

“[a] person engaged in making sales to ultimate consumers. One whom [sic] sells personal or household goods for use or consumption.” *Black’s Law Dictionary* 1315-16 (6th ed. 1990); *see also id.* at 1315 (defining “retail,” v, as “to sell by small quantities, in broken lots or parcels, not in bulk, directly to consumer.”);

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<sup>4</sup>*See* Ariz. Rev. Stat. Ann. §44-1798 (2004).

<sup>5</sup>*See* Ala. Code § 8-24-1 (2004); Ark. Code Ann. § 4-70-301 (2003); Fla. Stat. Ann. § 686.201 (2003); Ga. Code Ann. § 10-1-700 (2002); 820 Ill. Comp. Stat. 120/1 (2004); Ind. Code Ann. § 24-4-7-4 (2004); Ky. Rev. Stat. Ann. § 371.370 (2004); La. Rev. Stat. Ann. § 51:441 (2004); Me. Rev. Stat. Ann. tit. 10, § 1341 (2003); Md. Code Ann., Labor and Employment § 3-601 (2003); Mass. Gen. Laws Ann. ch. 104, § 7 (2004); Mich. Comp. Laws Ann. § 600.2961 (2004); Minn. Stat. § 325.E.37 (2004); Miss. Code Ann. § 75-87-1 (2004); Mo. Ann. Stat. § 407.911 (2004); N.H. Rev. Stat. Ann. § 339-E:1 (2003); N.J. Stat. Ann. § 2A:61A-1 (2004); N.Y. Labor Law § 191-a (2004); N.C. Gen. Stat. § 66-190 (2004); Okla. Stat. tit. 15, § 676 (2004); Or. Rev. Stat. § 646.878 (2003); S.C. Code Ann. § 39-65-10 (2003); Tenn. Code Ann. § 47-50-114 (2004); Tex. Bus. Corp. Act Ann. § 35.81 (2004); Va. Code Ann. § 59.1-455 (2004); Wash. Rev. Code Ann. § 49.48.150 (2004); Wis. Stat. Ann. § 134.93 (2003).

*Webster's II New Riverside University Dictionary* 1003 (1994) (defining “retail,” n, as “the sale of goods in small quantities to consumers.”); Unfair Sales Act, 73 P.S. § 212(4) (defining “retail sale” as “any transfer for a valuable consideration . . . of title to merchandise to the purchaser for consumption or use other than resale or further processing or manufacturing”). As these definitions evince, the plain and ordinary meaning of a retailer is one who is selling some tangible good or product to an ultimate consumer.

*United Prods. Corp. v. Admiral Tool & Mfg. Co.*, 122 F. Supp. 2d 560, 564 (E.D. Pa. 2000).

While the *Admiral Tool* decision did not define the term “ultimate consumer,” a recent Pennsylvania Supreme Court decision did, albeit when interpreting a different statute. *See AMP, Inc. v. Commonwealth*, 852 A.2d 1161 (Pa. 2004). When interpreting the term “ultimate consumer,” the Pennsylvania Supreme Court reasoned:

When statutory words or phrases at issue are undefined by the statute, the Court construes the words according to their plain meaning and common usage. See 1 Pa.C.S. § 1903(a); *DeLellis v. Borough of Verona*, 541 Pa. 3, 10, 660 A.2d 25, 28 (1995). In this regard, in accordance with its plain meaning, “ultimate” refers to a point “beyond which it is impossible to go; farthest; most remote or distant” or “by which a process or series comes to an end; final; conclusive.” *Webster's New World College Dictionary* 1551 (4th ed. 1999). “Consumer” is “[a] person who buys goods or services for personal, family, or household use, with no intention of resale; a natural person who uses products for personal rather than business purposes.” *Black's Law Dictionary* 311 (7th ed. 1999); *see also Webster's New World College Dictionary* 313 (4th ed. 1999) (a “consumer” is “a person or thing that consumes; specif., a person who buys goods or services for personal needs and not for resale or to use in the production of other goods for resale”)(emphasis added); cf. *Paper Prods. Co. v. City of Pittsburgh*, 183 Pa. Super. 234, 246, 130 A.2d 219, 224 (1957) (“The essential distinction between a wholesaler and a retailer is that the person buying from a retailer is the ultimate user or consumer of the article or commodity and does not sell it again, whereas the one buying from a wholesaler buys only for the purpose of selling the article again.”) (*quoting Haynie v. Hogue Lumber & Supply Co. of Gulfport*, 96 F. Supp. 214, 216 (D.C. Miss. 1951)), *aff'd*, 391 Pa. 87, 94, 137 A.2d 253, 257 (1958).

*Id.* at 1167 n.4.

Ultimately, the AMP Court concluded that the phrase “ultimate consumer” refers to retail

customers and does not include manufacturers making use of component products. *AMP*, 852 A.2d 1161 (affirming lower court’s decision). While the statute in *AMP* involves state tax code and not the PCSRA, the Pennsylvania Supreme Court defined the term “ultimate consumer” in accordance with its plain meaning and common usage. In the instant case, the same term must be defined according to the same principals. Thus, the meaning of “ultimate consumer” in the instant case is informed by the definition the Pennsylvania Supreme Court gave to the term in *AMP*. Upon applying the reasoning of both *Admiral Tool* and *AMP*, to be covered as a sales representative under the PCSRA, Total Control must solicit wholesale orders from persons engaged in making sales to retail customers.

The only evidence plaintiff offers to establish that it is engaged in making sales to retail customers are conclusory statements from the President of Total Control. The President of Total Control declared “[i]n most instances, Total Control solicits wholesale orders from retailers, called ‘distributors’ in this industry, rather than making sales to end users or consumers.” (Schultz Decl. ¶ 3.) The President of Total Control also submitted, in the form of an exhibit, “a list of twenty-five distributors that purchased products from defendants...” and declared that “the distributors in turn sold defendant’s products to the end users of these products.” (Schultz Add’l Decl. ¶ 7-10.) Plaintiff has not identified the customers of these distributors. Defendant similarly does not offer any evidence relating to the customers of the distributors to which Total Control sells. The burden of proving facts that support its claim, however, falls on the plaintiff. The declarations and the list of names provided by plaintiff are not sufficient to show that Total Control sells goods to retailers who then sell to ultimate consumers. Because plaintiff has failed to establish a material element of his claim, I grant summary judgment for the defendant with

respect to this issue.

**ORDER**

**AND NOW**, this day of August, 2004, upon consideration of Defendant's motion for reconsideration (docket #114), Plaintiff's response (docket #115), Defendant's reply (docket #117), Plaintiff's sur-reply (docket #118), and defendant's sur-reply (docket #119), **IT IS ORDERED** that Defendant's motion for reconsideration is **GRANTED**. **IT IS FURTHER ORDERED** that Defendant's summary judgment motion (docket #s 89 and 90) is **GRANTED** in part consistent with this explanation.

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Anita B. Brody, J.

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