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Order on Georgia-Pacific's Motion and Memorandum to Exclude Damages (EZGreen Assoc. LLC)

John J. Goger
Fulton County Superior Court, Judge

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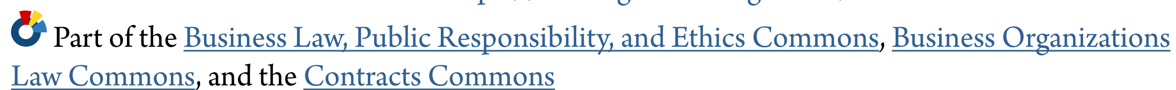
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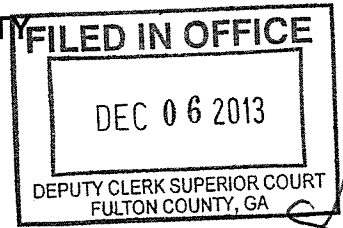
IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



EZGREEN ASSOCIATES, LLC,
Plaintiff,
v.

GEORGIA-PACIFIC CORPORATION,
GP CELLULOSE LLC (FORMERLY)
KOCH CELLULOSE, LLC), and
BLUEYELLOW LLC,
Defendants.

Civil Action File No.
2009-CV-168743

ORDER ON GEORGIA-PACIFIC'S MOTION AND MEMORANDUM TO EXCLUDE PLAINTIFF'S DAMAGES CALCULATIONS TO RECOVER "LOST ROYALTIES"

This matter is before the Court on Defendant Georgia-Pacific Corporation, GP Cellulose LLC (formerly Koch Cellulose, LLC) and BlueYellow, LLC's ("Defendants") Motion to Exclude Plaintiff's Damages Calculations to Recover Lost Royalties. Upon consideration of the briefs on the motion and the record of the case, this Court finds as follows:

On April 8, 2013, this Court issued an Order on Defendants' Motion to Exclude Plaintiff's Expert and Defendants' Motion for Summary Judgment on Plaintiff's Claim for Lost Royalty Damages ("April Order"). In the April Order, the Court ruled that Plaintiff was not permitted to rely on the opinion of an expert who based his damages analysis on "sales projections made before the product was manufactured or taken to market, untethered from any actual market activity," finding that Georgia law on lost profits damages required that such damages be proved with reasonable certainty. See, e.g., Johnson Cnty. Sch. Dist. v. Greater Savannah Lawn Care, 278 Ga. App. 110, 113 (2006).

On September 13, 2013, EZG supplemented its interrogatory responses to disclose its new damages theories, in light of the Court's April Order. Specifically, EZG identified three methods on which it intended to base its damages claim. First, EZG disclosed that it was planning to revisit one of the projections addressed in the Court's April Order that was found to be too speculative to support an expert's damages opinion. Next, EZG identifies a sales projection from 2005 based, in part, on sales of the product generated in a limited run of garden stores in Wisconsin. Finally, EZG puts forth a methodology based on product's actual sales record.

Defendants ask the Court to exclude Plaintiff's new damages methodologies on the basis that: 1)They are too speculative and uncertain; 2) They are the subject of a prior ruling; or 3) The calculations impermissibly include sales for which no wrongdoing on the part of Defendants has been alleged.

Under Georgia law, "[t]he general rule is that the expected profits of a commercial business are too uncertain, speculative, and remote to permit a recovery for their loss." MTW Inv. Co. v. Alcovy Properties, Inc., 228 Ga. App. 206, 207-208 (1997).

> The profits recoverable in such cases are limited to probable, as distinguished from possible benefits. Profits which are remote, or speculative, contingent or uncertain are not recoverable. The profits of a commercial business are dependent on so many hazards and chances, that unless the anticipated profits are capable of ascertainment, and the loss of them traceable directly to the defendant's wrongful act, they are too speculative to afford a basis for the computation of damages.

Id. Lost royalties are a subset of lost profit damages. Aronwitz v. Health-Chem Corp., 513 F.3d 1229, 1239 (11th Cir. 2008).

1. Method One

EZG seeks to evidence a damages figure of approximately $22 million by multiplying the average rate of royalties generated by total product sales by projections contained in Section 7.3(a) of the parties' Restated Engineered Seed System Agreement (the "Agreement").

For the reasons set forth in the April Order, the Court **GRANTS** Defendants' motion and orders that this damages method be excluded from trial.

2. Method Two

Next, EZG seeks to introduce projections contained in a presentation made in 2005 by Doug Seekins (an officer of BlueYellow, LLC) to the Koch Cellulose Board. Contained in the presentation, Defendants prepared an estimate of the product's potential sales activity in Lowe's based on performance figures generated in 2005 in a three-month "test" run in 14 Stein's locations (Stein's is a regional garden store in Wisconsin). The product sold on average 43 rolls per store for April-June period. Based on these numbers, Defendants then project a total sales volume for the Stein's experiment (91 rolls per store). From there, Defendants estimated, using a multiplier of 5 to reflect the market difference between Stein's and Lowe's, that a 600 store product roll-out in Lowe's in 2006 would generate 450 rolls per store, with an upside estimate of 750 rolls per store and a downside estimate of 143 per store. Plaintiff relies on these estimates to support a damages claim of at least $10.355 M in royalties over a 4-year period.

In fact, the product went to market in 600 Lowe's locations in Spring 2007 (following a limited run of 140 Lowe's stores in Fall 2006), and evidently failed to hit the benchmarks hoped for above. Plaintiff does not specifically point to any conduct on the part of Defendants that contributed to the product's poor performance, other than the overall frustration over the delay in getting the product into Lowe's, which Plaintiff attributes to Defendants' unreasonable refusal to agree to the original contract terms with Lowe's, and Defendants' decision to terminate production of the product in August 2007.

Defendants take issue with Plaintiff's reliance on the Lowe's projections contained in the 2005 projection, arguing that they are too speculative, unreliable and fail to account for market reality. The Court agrees. The Court finds troubling Plaintiff's continued effort to concoct damages theories that ignore the actual reality of the product's Fall 2006/Spring 2007 sales record at Lowe's, in favor of educated guesswork such as the instant projections.

Plaintiff's chief complaint is that Defendants caused delays in getting the product to market and then terminated the business too soon. As such, the logical basis of its damages claim is the royalties that would have been generated in the years the product was allegedly sidelined due to the conduct of Defendants. The best evidence of what the product would have done had it been introduced to Lowe's prior to Fall 2006 is what the product actually did when it was finally sold in Lowe's in Fall 2006/Spring 2007. At a minimum, this is what Georgia law requires to support a claim for lost profits. Kitchen v.

Hart, 307 Ga. App. 145, 152-153 (2010) ("[D]efinite, certain and reasonable data" is necessary to support a lost profits claim).

While Plaintiff generically alleges that the track record is "tainted," they have failed to explain why the actual sales figures are unreliable and should be disregarded altogether in favor of projections that ignore the product's actual performance. Accordingly, Defendants' Motion is **GRANTED** as to Method Two.

3. Method Three

Finally, Plaintiff seeks damages based on the actual track record of product sales to support a claim for $65,861.60. This theory looks to actual royalties received by EZG between the time the product went to market and was pulled from the market ($241,493.84), to find an average royalty rate of $5,488.49 per month.

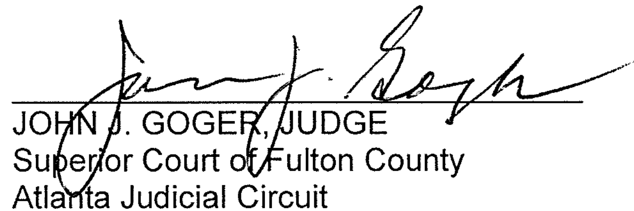
Assuming the product had entered Lowe's in 2004, and remained there until the contract was terminated on May 12, 2008, EZG calculates that total royalties would have been $307,355.44. Because Plaintiff already received $241,493.84, EZG would only recover $65,861 in additional royalties.

Defendants take issue with this theory because this figure includes total product sales—including sales from the international market for which EZG was responsible.

Georgia law requires that the party seeking lost profits deduct any expenses that would have been incurred had the lost profits been realized. Authentic Architectural Millworks, Inc. v. SCM Group USA, Inc., 262 Ga. App. 826, 831 (2003). Accordingly, the Court **GRANTS**, in part, Defendants' Motion as to Method Three. Plaintiff is required to account for any expenses it would have incurred in connection with the

portion of its damages claim that factors in international sales. However, as to Defendants' remaining objections regarding the inclusion of sales figures from markets not called into question in Plaintiff's allegations (such as the professional landscaping market, domestic golf course market, etc.), the Court defers ruling on these matters for now and will address during trial, if necessary.

SO ORDERED this 7 day of December, 2013.



JOHN J. GOGER, JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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