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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10 **SOUTHERN DIVISION**

11	WIRELESS WAREHOUSE, INC.)	Case No. SACV 09-1436-MLG
12	Plaintiff,)	
13)	MEMORANDUM OPINION AND ORDER
14	v.)	GRANTING DEFENDANT'S
15	BOOST MOBILE, LLC,)	MOTION FOR SUMMARY JUDGMENT
16	Defendant.)	

17
18 **I. Background**

19 **A. Procedural History**

20 On December 8, 2009, Plaintiff Wireless Warehouse, Inc. ("WWI")
21 filed a complaint against Defendant Boost Mobile, LLC ("Boost")
22 alleging causes of action for (1) false promise; (2) promissory
23 estoppel; (3) intentional interference with prospective economic
24 relations; and (4) unfair, deceptive or illegal acts or practices in
25 violation of California Business and Profession Code § 17000 et seq.
26 (Docket No. 1.) WWI is a wireless communications master dealer that
27 provides services to sub-dealers in the United States. (Compl. ¶6.)
28 Boost is a division of Sprint Mobile that offers pre-paid wireless

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2 phones and services without contracts or activation fees. (Compl. ¶7.)
3 Plaintiff's claims arise out of an alleged oral promise by Boost to
4 enter into a long-term business partner relationship with WWI. (Compl.
5 ¶9.)

6 On November 4, 2010, Defendant filed a motion for summary judgment
7 with supporting declarations, exhibits, and statement of uncontroverted
8 facts. On November 15, 2010, Plaintiff filed an opposition to the
9 motion with supporting documents. The Court heard oral argument on
10 December 2, 2010, and took the matter under submission. The matter is
11 now ready for decision.¹

12 **B. Factual Background²**

13 The relevant facts, stated in the light most favorable to
14 Plaintiff, are as follows:

15 Plaintiff and Defendant entered into a one-year written Prepaid
16 Wireless Product Agreement ("PPA") in 2005, which they renewed in March
17 2006, and again on March 7, 2007, with an effective date of April 1,
18 2007. (Pl.'s Opp. to Motion for Summ. J. at 2.) The PPA created a
19 distributor-supplier relationship between the parties and outlined the
20 terms by which Plaintiff WWI, the distributor, was to sell Boost's
21 products. (Id.)

22 Sometime in early 2007, Boost launched a new unlimited service
23

24 ¹ The parties consented to the exercise of jurisdiction by this
United States Magistrate Judge. 28 U.S.C. § 636(c).

25 ² The Court assumes the truth of these facts only for purposes of
26 determination of Defendant's motion for summary judgment. In fact, many
27 of the operative facts, including the making of the alleged oral
28 promise by Boost's representative to WWI, is contested by Defendant.
(See, e.g., Pennington Decl., Ex. C, Deposition of Job Trucker ("Tucker
Depo.") at 59:4-61:22; 76:25-77:7; 85:25-87:5; 93:6-94:3; 97:7-13,
98:10-24; 110:11-111:1.)

1 product called Unlimited by Boost ("UBB"). (Pl.'s Opp. at 3.) The C290
2 handsets were the first model phones offered under Boost's UBB program.
3 (Pennington Decl. in Supp. of Def.'s Mot. for Summ. J., Ex. C, Tucker
4 Depo. at 38:14-17.)

5 On March 21, 2007, prior to the effective date of the 2007 PPA,
6 Boost sent WWI an attachment to the PPA, which expressly covered the
7 CDMA UBB product line (the "CDMA Attachment"). The CDMA Attachment
8 revised the PPA by, inter alia, (1) establishing that distributors must
9 seek approval for each authorized location in which distributors wished
10 to offer CDMA products; (2) establishing a return policy for CDMA
11 products; (3) setting the gross add bonus for the CDMA handsets (C290)
12 of \$5 per new subscriber activation; and (4) listing the fee that
13 distributors may charge consumers to replenish CDMA UBB product
14 accounts. (Anderson Decl. in Supp. of Def.'s Mot. for Summ. J., Ex. B.)
15 The CDMA attachment was sent to Plaintiff through Fedex and was
16 received by Plaintiff on March 22, 2007. (Anderson Decl., Ex. B at 1;
17 Pennington Decl., Ex. D.)

18 On or about June 1, 2007, Boost invited Howard Kim, Plaintiff's
19 representative, to its main business office in Irvine, California for
20 the purpose of discussing the expansion of its market for UBB. (Pl.'s
21 Opp. at 3.) At Boost's invitation, Kim also attended a conference in
22 Irvine on June 12, 2007. (Id.) While Howard Kim was in California, Job
23 Tucker, the acting vice president of Boost, allegedly told Kim that
24 Boost would enter into a long-term business partner relationship with
25 WWI if WWI would have its sub-dealers across the nation sell Boost's
26 unlimited service, switching their focus from T-Mobile to Boost. (Id.)
27 Job Tucker also allegedly promised to pay Plaintiff \$1.00 for each
28 payment and a \$3.00 to \$20.00 commission per product ("spiff") if

1 Plaintiff would have its sub-dealers sign up as Boost's prepaid service
2 payment centers. (Id.) According to Kim, between June 2007 and February
3 2008, Boost set specific targets for its market expansion and
4 continuously encouraged WWI to provide more effort in expanding its
5 markets and establishing more payment centers. (Id. at 4.)

6 Plaintiff alleges that, between June 12, 2007 and February 28,
7 2008, in reliance on Boost's alleged oral promises, WWI undertook the
8 following actions: (1) set up new facilities across the nation to
9 handle Boost's new product; (2) hired eight additional salespersons
10 solely for the purpose of expanding the market for Boost; (3) sent its
11 representative to meet with its sub-dealers in order to convince them
12 to promote Boost's new product and to sign up as Boost payment centers;
13 (4) trained its sub-dealers to handle Boost's product and service; and
14 (5) moved to a larger facility with higher monthly mortgage payments
15 and did extensive remodeling on the building. (Id. at 5.)

16 Because Boost is a prepaid phone brand and does not send monthly
17 bills to customers, in order to collect payment from its customers,
18 Boost utilized several technology service providers ("TSP"). A company
19 named "VIA ONE" was the TSP which dealt with WWI's sub-dealers. In
20 order for WWI to collect the promised "spiff," WWI was required to ask
21 its sub-dealers to sign an application for direct deposit with VIA ONE
22 and to obtain Boost's approval for each retail store and Boost payment
23 center. Between June 2007 and February 2008, WWI obtained more than 700
24 applications from its sub-dealers, which were approved by Boost as its
25 retail and Boost payment centers. (Id. at 5-6.) Plaintiff claims that,
26 as a result of WWI's efforts and investments, its sub-dealers collected
27 14,000 payments and were adding approximately 3,000 new subscribers per
28 month by January 2008. (Id. at 8.)

1 Plaintiff alleges that, on or about February 14, 2008, Roger
2 Schlegel, who was then Boost's regional sales manager, informally
3 advised Howard Kim of the following: (1) Boost was going to terminate
4 its relationship with WWI and had never considered WWI a partner; (2)
5 Boost needed WWI to take WWI's sub-dealers' base for its market
6 expansion; and (3) all of the sub-dealers' accounts which belonged to
7 WWI would be transferred to companies run by Vincent Huang and Jack
8 Huston, who were close friends of Job Tucker. (Id. at 9.)

9 In March 2008, Boost terminated its business relationship with
10 Plaintiff and declined to renew the PPA, which by its own terms expired
11 on April 1, 2008. Plaintiff claims that, on or before April 1, 2008,
12 Boost sent notices to all of WWI's sub-dealers, notifying them that WWI
13 would no longer act as Boost's master dealer and that the sub-dealers
14 should switch to other master dealers to continue selling Boost's
15 products. (Id.) On March 25, 2008, WWI sent notices to each of its sub-
16 dealers, advising that it was no longer a master dealer for Boost
17 products and encouraging the sub-dealers to focus their marketing
18 efforts on T-Mobile's products.³

19 Plaintiff alleges that, as a result of Plaintiff's reliance on
20 Defendant's oral promise, Plaintiff sustained the following actual
21 damages: (1) \$168,645 in total salaries for eight additional
22 salespersons; (2) \$250,000 in remodeling costs for the new building;
23 and (3) \$237,000 in additional monthly mortgage payments and property
24 taxes. (Id. at 12-13.) Plaintiff also alleges that it sustained over
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26 ³ Plaintiff is currently involved in an unrelated arbitration
27 proceeding regarding more than \$700,000 of Boost and Sprint products
28 which Plaintiff ordered and took delivery of but allegedly never paid
for. (Forestner Decl. in Supp. of Def.'s Motion for Summ. J., Ex. A, ¶¶
2-3.)

1 \$1,675,766.59 in expectation damages. (Id. at 13.) Plaintiff further
2 alleges that, as a result of Boost's intentional interference with
3 WWI's business relationship with its sub-dealers, WWI lost T-Mobile
4 commissions, in the amount of \$1,948,229.58, for the year 2008. (Id.)
5

6 **II. Standard of Review**

7 Summary judgment is appropriate when, after reviewing the
8 discovery and disclosure materials on file and any affidavits, in the
9 light most favorable to the nonmoving party, the Court determines that
10 "there is no genuine issue as to any material fact, and that the movant
11 is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see
12 also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986);
13 *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004).
14 The moving party bears the initial burden of demonstrating the absence
15 of a genuine issue of material fact, at which time the burden shifts
16 to the nonmoving party to show the existence of a genuine issue.
17 *Celotex Corp. V. Catrett*, 477 U.S. 317, 322 (1986). The nonmoving party
18 "must come forward with 'specific facts showing that there is a genuine
19 issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio*
20 *Corp.*, 475 U.S. 574, 587 (1986)(quoting Fed. R. Civ. P. 56(e))(emphasis
21 omitted).
22

23 **III. Applicable Law**

24 As a preliminary matter, the parties dispute what law governs
25 Plaintiff's claims. Defendant contends that Virginia law applies based
26 upon the choice-of-law provision in the PPA, which provides as follows:
27 "Governing Law: This agreement is governed by the laws of the
28 Commonwealth of Virginia, regardless of conflicts of laws provisions."

1 (Anderson Decl. in Supp. of Def.'s Mot. for Summ. J., Ex. A, PPA at 19,
2 ¶ 31.) Plaintiff claims that California law applies because the claims
3 do not arise out of the PPA. (Pl.'s Opp. at 18-19.)

4 Federal courts apply the choice-of-law rules of the state in which
5 they sit. *Shannon-Vail Five, Inc. v. Bunch*, 270 F.3d 1207, 1210 (9th
6 Cir. 2001). California's approach to determining whether to enforce an
7 arm's-length contractual choice-of-law provision reflects a strong
8 policy in favor of enforcement of such provisions. *Nedlloyd Lines B.V.*
9 *v. Super. Ct.*, 3 Cal.4th 459, 464-65 (1992). In making a choice-of-law
10 determination, a court must examine: "(1) whether the chosen state has
11 a substantial relationship to the parties or their transaction, or (2)
12 whether there is any other reasonable basis for the parties' choice of
13 law." *Id.* at 466. If neither standard is met, the Court need not
14 enforce the parties' choice of law. *Id.* If either standard is met, the
15 chosen state's law applies unless it is "contrary to a *fundamental*
16 policy of California." *Id.* (emphasis in original).

17 Here, there was a substantial relationship between the contracting
18 parties and Virginia at the time of the PPA and the oral promise
19 because support services, replenishment operations, certain finance
20 operations, IT services, and legal services related to Boost were
21 provided from Virginia. (York Decl. in Supp. of Def.'s Mot. for Summ.
22 J. at 3.) In addition, because Boost products are distributed across
23 the country, in states with varying laws, Boost had a "reasonable
24 basis" for choosing Virginia law. (York Decl., ¶ 4.) See, e.g., *1-800-*
25 *Got Junk v. Super. Ct.*, 189 Cal.App.4th 500, 514 (2010). Nor does
26 Plaintiff contend that the choice-of-law clause is contrary to any of
27 California's policy interests.

28 Plaintiff argues that the choice-of-law provision in the PPA is

1 not applicable because its claims are outside the scope of the clause.
2 In making this argument, Plaintiff relies upon (1) an alleged long-term
3 partnership between Boost and an unrelated third-party to this action,
4 VIP Wireless, and (2) the arbitrator's order in the unrelated
5 arbitration proceeding that Boost be dismissed from the arbitration
6 relating to WWI's failure to pay for products it obtained under the
7 PPA.⁴ (Pl.'s Opp. at 18-19.) Neither of these arguments is persuasive.
8 As Defendant points out, there is no admissible evidence in this case
9 regarding any agreement between Boost and non-party VIP Wireless.
10 Further, the arbitrator's order dismissing Boost as a party to the
11 arbitration has no force or effect unless and until it is confirmed by
12 a court. *See Camping Constr. Co. v. Dist. Council of Iron Workers*, 915
13 F.2d 1333, 1347-48 (9th Cir. 1990) ("Arbitration awards are not
14 self-enforcing; and unless an award persuades the party contesting the
15 arbitrator's authority to comply voluntarily with its terms, it will
16 have no binding effect on either party until it is confirmed in
17 court."). Plaintiff makes no claim that an arbitration award has been
18 converted into a court order or judgment which is binding on this
19 Court.

20 Moreover, the *Nedlloyd* court held that a valid choice-of-law
21 clause, such as the one here, "encompasses all causes of action arising
22 from or related to that agreement, regardless of how they are
23 characterized, including tortious breaches of duties emanating from the
24 agreement or the legal relationships it creates." 3 Cal.4th at 470
25 (emphasis added); see also *Olinick v. BMG Entm't*, 138 Cal.App.4th 1286,
26

27 ⁴ Boost was apparently dismissed because it was not a proper party
28 to the arbitration proceeding. See Ex. E to Decl. of Mary Lee in Supp.
of Pl.'s Opp. to Motion for Summ. J.

1 1300 (2006) (choice-of-law clause applies to claims that are
2 "inextricably intertwined with the construction and enforcement" of the
3 contract). Given the broad application of choice-of-law provisions by
4 California courts, Plaintiff's claims are sufficiently related to the
5 PPA to fall under the scope of the PPA's choice-of-law provision. See
6 *PAE Government Services, Inc. v. MPRI, Inc.*, 514 F.3d 856, 860 (9th
7 Cir. 2007)(enforcing contractual choice-of-law provision and applying
8 Virginia rather than California law where alleged promises were made
9 "in connection with" the written agreement).

10 Accordingly, the Court will enforce the PPA's choice-of-law clause
11 and apply Virginia law to the dispute.

12 13 **IV. Discussion**

14 Two of Plaintiff's four claims are not actionable under Virginia
15 law. First, promissory estoppel is not a cognizable cause of action in
16 Virginia. See *Mangold v. Woods*, 278 Va. 196, 202-03 (2009) (expressly
17 refusing to create a cause of action for promissory estoppel); see also
18 *PAE Government Services*, 514 F.3d at 860 (affirming district court's
19 dismissal of promissory estoppel claim because Virginia law "doesn't
20 recognize promissory estoppel as a cause of action"). Second,
21 Plaintiff's cause of action for "unlawful, unfair, or fraudulent
22 business acts or practices," pursuant to California's Business and
23 Professions Code § 17000 et seq., is obviously not cognizable under
24 Virginia law. A valid choice-of-law provision selecting another state's
25 law is grounds to dismiss a claim under California's unfair competition
26 law. See, e.g., *Medimatch, Inc. v. Lucent Techs., Inc.*, 120 F.Supp.2d
27 842, 862 (N.D.Cal. 2000) (agreement that "construction, interpretation
28 and performance of this Agreement shall be governed by the local laws

1 of the State of New Jersey" required dismissal of California UCL
2 claims). Moreover, to state a statutory unfair competition claim under
3 Virginia law, a plaintiff must allege and prove "deception, by means
4 of which the goods of one dealer are palmed off as those of another."
5 *Monoflo Internat'l v. Sahm*, 726 F.Supp. 121, 127 (E.D.Va. 1989)
6 (quoting *Benjamin T. Crump Co. v. J.L. Lindsay, Inc.*, 130 Va. 144, 160
7 (1921)). Here, Plaintiff has not alleged that Boost improperly "palmed
8 off" any of WWI's goods or services as another's or another's goods or
9 services as WWI's.

10 The Court will now address Plaintiff's two remaining claims under
11 Virginia law:

12 **A. False Promise Claim**

13 Plaintiff contends that, at the time that Job Tucker made the
14 alleged oral promise to Plaintiff that Boost would "enter into a long-
15 term business partner relationship if Plaintiff would make its sub-
16 dealers across the nation sell Boost's unlimited service and UBB[,]
17 switching their service from T-mobile to Boost," he did not intend to
18 perform this promise. (Compl. ¶ 9.) Plaintiff further alleges that
19 Defendant intended that Plaintiff rely on the oral promise and that
20 Plaintiff reasonably relied on the promise to its detriment. (Compl.
21 ¶¶ 10, 11.)

22 In Virginia, to succeed on a claim for fraud, a party must show
23 "(1) a false representation (2) of a material fact, (3) made
24 intentionally and knowingly, (4) with intent to mislead, (5) reliance
25 by the party misled, and (5) resulting damage to the party misled."
26 *State Farm Mut. Auto. Ins. Co. v. Remley*, 270 Va. 209, 218 (2005). "In
27 Virginia, clear, cogent and convincing evidence is necessary to
28 establish an action for fraud and deceit." *Patrick v. Summers*, 235 Va.

1 452, 454 (1988)(citing *Carter v. Carter*, 223 Va. 505, 509 (1982)).
2 Clear and convincing evidence is such proof as will establish in the
3 trier of fact a firm belief or conviction concerning the allegations
4 which must be established. *Thompson v. Bacon*, 245 Va. 107, 111 (1993).
5 In addition to proving that a fraudulent material statement or omission
6 of fact was made by the defendant, the plaintiff must also prove by
7 clear and convincing evidence that plaintiff reasonably and justifiably
8 relied on the acts or statements of the defendant, to the plaintiff's
9 detriment. See *Piedmont Trust Bank v. Aetna Cas. & Sur. Co.*, 210 Va.
10 396, 400 (1969).

11 Defendant contends that it is entitled to summary judgment on
12 Plaintiff's false promise claim for the following reasons: (1)
13 Plaintiff cannot show that its reliance on the alleged promise was
14 reasonable and justifiable; (2) Plaintiff cannot establish that
15 Defendant intended to mislead Plaintiff at the time the oral promise
16 was made; and (3) Plaintiff has not produced admissible evidence of
17 damages resulting from its reliance on the oral promise. (Def.'s Mot.
18 for Summ. J. at 8-11.)

19 **1. Plaintiff Has Not Produced Any Evidence of Reasonable**
20 **and Justifiable Reliance**

21 Defendant argues that Plaintiff cannot establish reasonable
22 reliance upon the alleged oral promise because Plaintiff was aware that
23 there was a conflicting written agreement on point, that is, the PPA
24 and the CDMA Attachment. Defendant contends that, as a party to the
25 PPA, Plaintiff was aware that several of the express terms of the PPA
26 directly conflicted with the provisions of the alleged oral promise.
27 The alleged oral promise was that Boost would enter into a long-term
28 business partner relationship if Plaintiff would make its retailers

1 across the nation sell UBB, switching their service from T-Mobile to
2 Boost. In addition, Boost would give Plaintiff \$1.00 per each payment
3 and a \$3.00 to \$20.00 commission ("spiff") per product if Plaintiff
4 would make its retailers sign up as Boost's prepaid service centers.
5 (Pennington Decl., Ex. F, Pl.'s Response to Inter. No. 4.)

6 In contrast, several of the express terms of the PPA and CDMA
7 attachment to the PPA directly conflict with the terms of the oral
8 promise, including: (1) the terms and conditions of the PPA did not
9 "create an agency, franchise, dealership, employment, partnership,
10 landlord-tenant, or joint venture relationship;" (2) the PPA had a one-
11 year term that expired on April 1, 2008; (3) the PPA could not be
12 modified by oral representations; (4) the oral promise relating to the
13 amount of commission WWI would receive on UBB products was governed by
14 the CDMA attachment to the PPA, which expressly set the gross-add bonus
15 for each C290 UBB CDMA phone at \$5.00; (5) WWI's distributorship was
16 limited to a territory and was not nationwide; and (6) the PPA did not
17 require that retailers exclusively carry Boost products. (Anderson
18 Decl., Ex. A, PPA.) Therefore, Defendant contends that Plaintiff cannot
19 have reasonably relied upon the oral promise because it directly
20 contradicted the terms of the PPA.

21 Virginia courts have consistently held that reliance on alleged
22 verbal promises that contradict clearly written statements is
23 unreasonable. See, e.g., *Wynn v. Wachovia Bank, N.A.*, 2009 WL 2147629,
24 *6 (E.D. Va. 2009); *Bd. of Dirs. of Cardinal Place Condo. v. Carrhomes*
25 *P'ship.*, 58 Va. Cir. 602, 608 (2000) (holding that "a buyer's decision
26 to rely on [an oral misrepresentation as to the seller's identity] was
27 not reasonable, particularly in the face of a document that openly
28 indicates otherwise ..."); *Schryer v. VBR*, 25 Va. Cir. 464, 476 (1991)

1 (because "the terms of the contract were equally known to all
2 parties[,] ... plaintiff's reliance on any representations made by the
3 employer's agent was unreasonable").

4 Plaintiff has not produced any evidence showing the existence of
5 a genuine issue of material fact for trial. In its opposition,
6 Plaintiff merely states that, because Boost is not the "Supplier" under
7 the PPA, and therefore not a party to the PPA, the terms of the PPA are
8 entirely irrelevant to the dispute. (Pl.'s Opp. at 15.) This argument
9 is apparently based on the unexplained arbitration decision and has
10 already been rejected.

11 Plaintiff also argues that its reliance on the oral promise was
12 reasonable because VIP Wireless, a non-party to this action,
13 purportedly had a partnership with Boost and received benefits from
14 this partnership, which it "enjoyed for the past few years." (Id.)
15 Plaintiff offers no factual evidence to support its claim that its
16 reliance was reasonable given a business relationship between Boost and
17 a non-party. Further, the existence of any contractual relationship
18 between Boost and VIP Wireless cannot establish that WWI's reliance on
19 the oral promise was reasonable and justifiable because WWI has never
20 alleged that it relied upon any relationship between VIP Wireless and
21 Boost in its acceptance of the alleged oral promise.

22 In light of the explicit terms of the PPA and the CDMA attachment,
23 it was unreasonable as a matter of law for Plaintiff to rely on the
24 oral representations of Boost's representative, which directly
25 contradicted the terms of the PPA and the CDMA attachment. Plaintiff
26 has not provided any evidence to show that its reliance upon the
27 alleged oral promise was reasonable, and therefore Plaintiff cannot
28 maintain a claim for fraud.

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3 **2. Plaintiff Has Not Produced Any Evidence to Show That**
4 **Defendant Intended to Deceive Plaintiff**

5 Defendant also contends that it is entitled to summary judgment
6 on Plaintiff's false promise claim because Plaintiff has not produced
7 any admissible evidence to demonstrate that Job Tucker, as a
8 representative of Boost, had the "intent to deceive" WWI *at the time*
9 he made the alleged oral promise. Rather, Defendant argues, Plaintiff
10 has shown at most the nonperformance of an oral promise, which is
11 insufficient to demonstrate intent to mislead under Virginia law.
12 (Def.'s Mot. for Summ. J. at 10.)

13 As a general rule, under Virginia law, "fraud must relate to a
14 present or a pre-existing fact, and cannot ordinarily be predicated on
15 unfulfilled promises or statements as to future events." *Patrick*, 235
16 Va. at 454 (citing *Soble v. Herman*, 175 Va. 489, 500 (1940)). The
17 reason underlying the general rule is that "a mere promise to perform
18 an act in the future is not, in a legal sense, a representation, and
19 a failure to perform it does not change its character." *Patrick*, 235
20 Va. at 454.

21 Fraud claims may, however, be "predicated on promises which are
22 made with a present intention not to perform them, or on promises made
23 without any intention to perform them." *Id.* at 454-455 (citing *Lloyd*
24 *v. Smith*, 150 Va. 132, 145 (1928)). The basis for the exception is that
25 "the state of the promisor's mind at the time he makes the promise is
26 a fact," so that, if he misrepresents his state of mind, "he
27 misrepresents a then existing fact." *Lloyd*, 150 Va. at 145-46. A
28 plaintiff nevertheless still bears the burden to present clear, cogent

1 and convincing evidence that the defendant "had the intent to defraud
2 at the time he made the promise." *Patrick*, 235 Va. at 456 (holding that
3 plaintiffs' evidence as to falsity of broker's promise to purchase home
4 failed to meet "the increased proof the law requires to establish
5 fraud").

6 In its opposition, Plaintiff contends that Job Tucker's
7 contemporaneous intention to mislead can be demonstrated through "Job
8 Tucker's own testimony as well as what Roger Schlegel advised Howard
9 Kim on February 14, 2008." (Pl.'s Opp. at 15.) Plaintiff fails to cite
10 to any evidence in the record to support this contention. From the
11 Court's own review of Job Tucker's deposition testimony, there is no
12 support for Plaintiff's claim that Mr. Tucker had the intent not to
13 perform the oral promise at the time he made it. Indeed, Mr. Tucker
14 repeatedly and emphatically denied that he ever made the alleged oral
15 promise at all, let alone made any statements from which one could
16 infer that he had the contemporaneous intent to deceive WWI.
17 (Pennington Decl. Ex. C, J. Tucker Depo. Tr. at 59:4-61:22; 76:25-77:7;
18 85:25-87:5; 93:6-94:3; 97:7-13, 98:10-24; 110:11-111:1.) In light of
19 this testimony, there is no evidence to support an intent to deceive
20 at the time the alleged oral promise was made.

21 Similarly, the deposition testimony of Roger Schlegel provides no
22 support for Plaintiff's contention. During his deposition, Mr. Schlegel
23 stated that at his meeting with Howard Kim on February 14, 2008, the
24 only reason that he gave for Boost's decision not to renew the PPA with
25 WWI was that Boost was exercising the convenience clause in the PPA.
26 (Lee Decl., Ex. C, R. Schlegel Depo. Tr. at 7:20-8:10; 12:1-12.) Mr.
27 Schlegel also denied that he told Howard Kim that Boost was terminating
28 its relationship with WWI because Boost wanted to take WWI's sub-

1 dealers. (Schlegel Depo. Tr. at 8:11-9:2.)

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3 Plaintiff has not demonstrated the existence of a genuine issue
4 of material fact regarding whether the alleged oral promise was false
5 at the time it was made. *See, e.g., Albanese v. WCI Communities, Inc.*,
6 530 F.Supp.2d 752, 772-73 (E.D.Va. 2007) (granting summary judgment on
7 fraud claim where plaintiff failed to produce any evidence to show that
8 the defendant knew that the alleged oral promises were false at the
9 time they were made).

10 **3. Plaintiff Has Not Produced Any Admissible Evidence of**
11 **Damages**

12 Defendant also contends that it is entitled to summary judgment
13 as a matter of law on Plaintiff's false promise claim because Plaintiff
14 has not produced any admissible evidence regarding its alleged damages.
15 Plaintiff alleges that it incurred damages in reliance on the alleged
16 oral promise by hiring new employees, setting up new facilities to
17 handle Boost's business, traveling to visit its sub-dealers to convince
18 them to switch to Boost products, training the sub-dealers regarding
19 UBB, and moving to a new facility with higher rents and a five-year
20 lease. (Compl. ¶ 11.) Defendant contends that each of Plaintiff's
21 claims for damages are fatally speculative and uncertain. (Def.'s Mot.
22 for Summ. J. at 18-19.)

23 Under Virginia law, a plaintiff has the "burden of proving with
24 reasonable certainty the amount of damages and the cause from which
25 they resulted; speculation and conjecture cannot form the basis of
26 recovery." *Carr v. Citizens Bank & Trust Co.*, 228 Va. 644, 652 (1985)
27 (citing *Hale v. Fawcett*, 214 Va. 583, 585 (1974); *Barnes v. Quarries,*
28 *Inc.*, 204 Va. 414, 418 (1963)). Damages based on uncertainties,

1 contingencies, or speculation cannot be recovered. *Barnes*, 204 Va. at
2 418. "A plaintiff is not required to prove the exact amount of his
3 damages; however, he is required to show sufficient facts and
4 circumstances to permit a jury to make a reasonable estimate of those
5 damages." *Murray v. Hadid*, 238 Va. 722, 731 (1989).

6 Defendant argues that the damages claimed by Plaintiff fail under
7 this rule. Defendant contends that all of the evidence regarding
8 Plaintiff's damages is speculative because it is based primarily upon
9 Plaintiff's "guesstimates," rather than any actual evidentiary proof.
10 (Def.'s Mot. for Summ. J. at 18-19.) During his deposition, Howard Kim
11 repeatedly admitted that he arbitrarily fixed a monetary figure for the
12 various kinds of damages suffered by WWI, either to keep the
13 calculations "simple" or because any documentary evidence he had was
14 on his computer which had crashed and been discarded. *See, e.g.,*
15 *Pennington Decl., Ex. A, Howard Kim Depo. Tr. at 178:15-18; 178:20-*
16 *179:4; 181:16-18; 184:6-12; 185:23-186:3; 217:18-22; 223:15-17; Supp.*
17 *Pennington Decl., Ex. A, 11/17/10 Howard Kim Depo. Tr. at 119:25-120:9;*
18 *121:22-122:12; 122:12-123:2, 122:13-123:2; 129:9-130:4; 132:22-133:10.*

19 In its opposition, Plaintiff does not set forth any evidence
20 establishing a genuine issue of material fact sufficient to survive a
21 motion for summary judgment, but merely refers to the declaration of
22 Howard Kim, which in turn merely restates the amount of Plaintiff's
23 alleged monetary damages without providing any supporting evidence.
24 Thus, Plaintiff has failed to present evidence to establish a genuine
25 issue of material fact for the jury regarding its alleged damages.

26 In sum, Defendant is entitled to summary judgment as to
27 Plaintiff's false promise claim because no reasonable jury could find
28

1 that Plaintiff had proven fraud by "clear, cogent and convincing
2 evidence," as required under Virginia law. *See, e.g., Petra Intern.*
3 *Banking Corp. v. First American Bank of Virginia*, 758 F.Supp.1120, 1139
4 (E.D.Va. 1991) (granting summary judgment where plaintiff failed to set
5 forth any facts that a reasonable jury could find as "clear, cogent,
6 and convincing evidence" of fraud).

7 **B. Interference With Prospective Economic Advantage**

8 Plaintiff alleges that Defendant knew about the economic
9 relationship between Plaintiff and its 780 sub-dealers and that
10 Defendant intended to disrupt these relationships by sending notices
11 to all of WWI's sub-dealers informing them that WWI could no longer act
12 as Boost's master dealer and thereby causing all of WWI's sub-dealers
13 to terminate their contractual and/or business relationship with WWI.
14 Plaintiff further alleges that Boost then placed a close friend of its
15 executive officer in the position of master dealer who received \$1 per
16 payment and \$3 per product based upon all the transactions made by
17 Plaintiff's sub-dealers. (Compl. ¶¶ 12, 13, 21-24.) As a result of this
18 wrongful conduct by Defendant, Plaintiff alleges that the relationship
19 between WWI and its sub-dealers was disrupted and Plaintiff sustained
20 actual damages in excess of \$4 million. (Compl. ¶ 25.)

21 The elements of a cause of action for wrongful interference with
22 prospective business or economic advantage under Virginia law are as
23 follows: "(1) the existence of a business relationship or expectancy,
24 with a probability of future economic benefit to plaintiff; (2)
25 defendant's knowledge of the relationship or expectancy; (3) a
26 reasonable certainty that absent defendant's intentional misconduct,
27 plaintiff would have continued in the relationship or realized the
28 expectancy; and (4) damage to plaintiff." *Glass v. Glass*, 228 Va. 39,
51 (1984).

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3 In its opposition, Plaintiff states that it has shown that: "(1)
4 it maintained an economic relationship with 780 sub-dealers and from
5 them Plaintiff earned substantial income every month; (2) Boost had
6 knowledge of the relationships and approved each of them and the
7 applications for the payment locations; (3) Plaintiff was induced to
8 create these sub-dealers to become Boost payment centers; and (4) the
9 relationship between the sub-dealers and Plaintiff were disrupted by
10 wrongfully misappropriating these accounts to VIP Wireless and VHA
11 Wireless. As an independent wrong, Plaintiff alleged and has shown that
12 Defendant made a false promise without any intent to perform it."
13 (Pl.'s Opp. at 16-17.)

14 Defendant contends that it is entitled to summary judgment on this
15 claim for the following reasons: (1) Plaintiff has not produced
16 evidence establishing the independent wrongfulness of Boost's alleged
17 conduct; (2) Plaintiff has not alleged or produced admissible evidence
18 of future economic benefit with its sub-dealers; (3) Plaintiff has not
19 produced admissible evidence of economic relationships with its 780
20 sub-dealers; (4) Plaintiff has not produced evidence of any disruption
21 actually caused by Boost; and (5) Plaintiff cannot produce admissible
22 evidence of damages caused by Boost's alleged wrongful interference.
23 (Def.'s Mot. for Summ. J. at 13-15.)⁵

24 **1. Plaintiff Has Produced No Evidence to Establish the**
25 **Independent Wrongfulness of Defendant's Conduct**

26 Under Virginia law, in a claim for interference with prospective
27 economic relationships, a plaintiff must allege that the interfering

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⁵ The Court will only discuss factors one, two and five above and does not reach the remaining factors.

1 party used "improper methods." *Masco Contractor Servs. E., Inc. v.*
2 *Beals*, 279 F.Supp.2d 699, 709 (E.D.Va. 2003) (citing *Commerce Funding*
3 *Corp. V. Worldwide Sec. Serv. Corp.*, 249 F.3d 204, 213 (4th Cir. 2001);
4 *Duggin v. Adams*, 234 Va. 221, 227 (1987)). Improper methods may include
5 the violation of a statute, trade standard, sharp dealing,
6 overreaching, or unfair competition. *Simbeck, Inc. v. Dodd-Sisk*
7 *Whitlock Corp.*, 44 Va. Cir. 54, 1997 WL 1070458, at *6 (Va.Cir.Ct.
8 1997) (citations omitted); see also *Commerce Funding Corp.*, 249 F.3d
9 at 214.

10 Plaintiff has not shown that there is a disputed material fact
11 sufficient to overcome a motion for summary judgment regarding
12 Defendant's alleged wrongful conduct. Defendant's act of refusing to
13 renew the PPA and informing WWI's sub-dealers that WWI was no longer
14 the master dealer for Boost products is not independently wrongful. In
15 fact, Plaintiff admitted that, under the terms of the PPA, Boost was
16 legally entitled not to renew its contract with WWI. (Pennington Decl.,
17 Ex. A, Kim Depo. Tr. at 88:2-6.) Thus, Plaintiff has failed to produce
18 any admissible evidence to show that Defendant used any "improper
19 methods" to interfere with WWI's relationship with its sub-dealers. In
20 addition, because Plaintiff's claim for false promise fails as a matter
21 of law, as discussed above, the alleged false promise also cannot form
22 the basis for a showing of an independent wrong.

23 **2. Plaintiff Has Not Alleged or Produced Any Admissible**
24 **Evidence of Future Economic Benefit With Its Sub-**
25 **dealers**

26 Defendant next contends that Plaintiff has not alleged or produced
27 any evidence sufficient to overcome a motion for summary judgment
28 regarding the probability that its relationship with its retailers
would result in future economic benefit but for Boost's conduct.

1 (Def.'s Mot. for Summ. J. at 14.) "Mere proof of a plaintiff's belief
2 and hope that a business relationship will continue is inadequate to
3 sustain a cause of action." *Commercial Business Systems, Inc. v.*
4 *Halifax Corp.*, 253 Va. 292, 301 (1997). Further, the proof must
5 establish a "probability" of future economic benefit to a plaintiff.
6 Proof of a "possibility" that such benefit will accrue is insufficient.
7 *Id.*

8 Here, Plaintiff has not produced any evidence of a "probability"
9 of future economic benefit with its sub-dealers absent the alleged
10 intentional interference by Defendant. (Pennington Decl., Ex. G, Pl.'s
11 Further Responses to Request for Production No. 55; Ex. E.) Indeed, as
12 Defendant points out, Plaintiff admitted that WWI's sub-dealers are
13 free to terminate their relationship with WWI at any time. (Def.'s Mot.
14 at 14; Kim Depo. Tr. at 137:10-13.) Thus, Plaintiff has failed to put
15 forth any genuine issue of material fact to establish the "probability"
16 of future economic benefit in its relationships with its sub-dealers.

17 **3. Plaintiff Has Not Produced Any Admissible Evidence of**
18 **Damages Caused by Defendant's Alleged Wrongful**
19 **Interference**

20 As discussed above, Plaintiff has not produced any admissible
21 evidence of damages sufficient to survive a motion for summary
22 judgment.

23 In sum, Defendant is entitled to summary judgment as to
24 Plaintiff's claim for intentional interference with prospective
25 economic advantage.

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1 **IV. Conclusion**

2 For the foregoing reasons, Defendant's motion for summary judgment
3 is GRANTED as to all of Plaintiff's claims. IT IS ORDERED that judgment
4 be entered dismissing the action with prejudice.

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6 Dated: January 11, 2011

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9 Marc L. Goldman
United States Magistrate Judge

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