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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE DISTRICT OF ARIZONA
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8 In re Gorilla Companies LLC, et al.,

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10 Debtors.

11 Robb M. Corwin; Jillian C. Corwin; and 13
12 Holdings, LLC,

13 Appellants,

14 vs.

15 Gorilla Companies LLC,

16 Appellee.
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No. CV-10-01029-PHX-DGC

No. AP-09-00266-RJH

No. BK-09-02898-RJH

No. BK-09-02901-CGC

No. BK-09-02903-GBN

No. BK-09-02905-CGC

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19 Robb and Jillian Corwin and 13 Holdings, LLC appeal from the final judgment
20 entered by the bankruptcy court on March 22, 2010. The Court has jurisdiction under
21 28 U.S.C. 158(a)(1). The judgment will be affirmed in part and reversed in part.¹

22 **I. Background.**

23 13 Holdings is owned by Robb and Jillian Corwin. In June 2007, pursuant to an
24 Asset Purchase Agreement (“APA”), 13 Holdings sold the assets of several event
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26 ¹ The parties’ requests for oral argument are denied. Rule 8012 of the Federal
27 Rules of Bankruptcy Procedure permits the Court to forego oral argument if, as here, “the
28 facts and legal arguments are adequately presented” and “the decisional process would
not be significantly aided by oral argument.” See *In re Branford Partners, LLC*, 2010
WL 3521907, at *1 (C.D. Cal. Sept. 6, 2010) (finding the appeal appropriate for decision
without oral argument pursuant to Fed. R. Civ. P. 78 and Fed. R. Bank. P. 8012).

1 management companies to Gorilla Companies LLC in exchange for an immediate
2 \$14 million payment, Gorilla stock worth \$1 million, a \$1.5 million deferred note, and a
3 “seller note” that could pay an earnout of up to \$6 million depending on the company’s
4 performance from March 2007 through February 2008. *See* Appellants’ Excerpt of
5 Record Exhibit (“ER”) 10.

6 Robb Corwin served as CEO of Gorilla after the asset purchase until his
7 termination in mid-November 2008. On April 2, 2008, Gorilla paid the \$1.5 million
8 deferred note and made a \$1.4 million prepayment on the seller note. A dispute arose
9 later that year regarding the amount 13 Holdings should receive under the seller note.

10 Gorilla filed suit against the Corwins and 13 Holdings in state court. *See Gorilla*
11 *Cos. LLC v. Corwin*, No. CV2008-032847 (Ariz. Super. Ct. Dec. 23, 2008). The case
12 was removed to the bankruptcy court after Gorilla filed chapter 11 bankruptcy. *Gorilla*
13 *Cos. LLC v. Corwin*, No. AP-09-00266-RJH (Bankr. Ariz. Mar. 10, 2009). Robb Corwin
14 and 13 Holdings subsequently filed proofs of claim in the bankruptcy proceedings.
15 Those claims were heard on July 16 and 21, 2009. ER 13-14; Appellee’s Supplemental
16 Excerpt of Record Exhibits (“SER”) 207-08. A bench trial on the claims asserted by
17 Gorilla in its amended complaint (ER 64) was held on November 23 and 30, 2009
18 (ER 1-2). On March 22, 2010, the bankruptcy court entered final judgment in favor of
19 Gorilla on the claims against it and on its own claims for breach of contract, breach of the
20 covenant of good faith and fair dealing, negligent misrepresentation, fraud, and unjust
21 enrichment. ER 112; Doc. 1 at 17-21. Gorilla was awarded more than \$4.7 million in
22 damages (including prejudgment interest) and nearly \$1.8 million in attorneys’ fees. *Id.*
23 This appeal followed. Doc. 1 at 12-16.²

24 **II. Standard of Review.**

25 The bankruptcy court’s “findings of fact are reviewed under the clearly erroneous
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27 ² Citations to items in the Court’s docket will be to page numbers supplied by the
28 electronic docketing system at the top of each page, rather than to original page numbers
on the bottom of each page.

1 standard, and conclusions of law, de novo.” *In re Lazar*, 83 F.3d 306, 308 (9th Cir.
2 1996). The bankruptcy court’s award of attorneys’ fees and costs “should not be reversed
3 absent an abuse of discretion or an erroneous application of the law.” *Id.*

4 **III. Discussion.**

5 Appellants argue that Gorilla failed to show it reasonably relied on an actionable
6 misrepresentation, that it failed to disclose and establish lost profits, that no contractual
7 provision allows for repayment of the \$1.4 million earnout payment made in April 2008,
8 that the bankruptcy court erred in several respects in calculating amounts owed under the
9 seller note, and that it erred in awarding fees related to the administrative bankruptcy and
10 for Gorilla’s tort claims. Doc. 52. The Court will address each argument in turn.

11 **A. Fraud and Negligent Misrepresentation.**

12 Gorilla’s fraud and negligent misrepresentation claims are founded on estimated
13 EBITDA calculations Robb Corwin provided on February 22, 2008 (the “Corwin
14 calculations”), which suggested that he had earned the full \$6 million under the seller
15 note. ER 14. Gorilla claims that those calculations were false and caused it to make the
16 \$1.4 million prepayment on the seller note on April 2, 2008.³

17 An essential element of claims for fraud and negligent misrepresentation is actual,
18 justifiable reliance on the alleged misrepresentation. *Kuehn v. Stanley*, 91 P.3d 346, 350
19 (Ariz. Ct. App. 2004); *Walters v. First Fed. Sav. & Loan Ass’n of Phoenix*, 641 P.2d 235,
20 240 (Ariz. 1982). The only evidence the bankruptcy court cited in finding reliance on
21 the part of Gorilla is the prepayment itself. ER 2 at 597. But the bankruptcy court does
22 not explain what evidence shows this payment was made *in reliance* on the Corwin
23 calculations. As to whether any reliance on the part of Gorilla was justified, the
24 bankruptcy court stated only: “[Gorilla] was entitled to rely, did rely. The reliance was
25 reasonable and so forth.” *Id.* at 542. Appellants argue, correctly, that the bankruptcy
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27 ³ EBITDA stands for earnings before interest, taxes, depreciation and
28 amortization. ER 10 § 1.2.

1 court clearly erred in finding that Gorilla reasonably relied on the Corwin calculations.

2 When he emailed his calculations to Gorilla, Corwin made clear that they were
3 “estimated” calculations. ER 14. The accuracy of the numbers was immediately
4 questioned by Gorilla. ER 15. Managing Director Gunnar Bjorklund believed that the
5 company would have to “scrutinize” the Corwin calculations. ER 47. Gorilla associate
6 Gregg Osenkowski believed that “without monthly detail” there was “absolutely no way”
7 to reconcile his own projections for the earnout with the Corwin calculations. *Id.* He
8 specifically noted that certain numbers “look suspect.” ER 46. He concluded that
9 Gorilla needed to “dig in” to the monthly details, and went so far as to recommend that
10 the company hire a temporary CFO to review the books for the earnout calculation.
11 ER 46. Only one week later, and before having determined whether the projected earnout
12 amount was even “in the ballpark,” Bjorklund agreed in principle to make a prepayment
13 on seller note. ER 32. One week before actually making the \$1.4 million prepayment on
14 April 2, 2008, Gorilla was still working on the “confirmations of the EBITDA
15 calculations” provided by Corwin. ER 55. That task remained a work in progress as late
16 as September 2008, and Gorilla’s “final determination” on the earnout calculation was to
17 be turned over to Gorilla’s accountant for “review and finalization.” ER 15.

18 Gorilla largely fails to address this issue in its response brief. Doc. 70 at 10-12.
19 Gorilla does claim that Corwin never sought to clarify and correct his calculations, but
20 instead continued to assert that the numbers were accurate and showed he was entitled to
21 the full \$6 million earnout under the seller note. *Id.* at 11. But whatever Corwin’s
22 intentions were, Gorilla cites no evidence showing that it actually and justifiably relied on
23 representations by Corwin. *Id.* at 10-12. Any such justifiable reliance is belied by the
24 evidence recounted above.⁴

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26 ⁴ This is true for the negligent misrepresentation claim, and even more true for the
27 fraud claim. All elements of fraud, including justifiable reliance, must be established by
28 clear and convincing evidence. *Comerica Bank v. Mahmoodi*, 229 P.3d 1031, 1033-34
(Ariz. Ct. App. 2010). “Fraud may never be established by doubtful, vague, speculative,
or inconclusive evidence.” *Echols v. Beauty Built Homes, Inc.*, 647 P.2d 629, 631 (Ariz.

1 Because justifiable reliance is an essential element of both fraud and negligent
2 misrepresentation, *Kuehn*, 91 P.3d at 350, *Walters*, 641 P.2d at 240, Gorilla’s failure to
3 present evidence of such reliance requires reversal of the bankruptcy court’s judgment on
4 both theories.⁵

5 **B. Lost Profits.**

6 The bankruptcy court awarded Gorilla \$1 million in lost profits based on Corwin’s
7 alleged fraud and self-help efforts in connection with the removal of more than \$260,000
8 from Gorilla Quick Cash ATM machines. Because the finding of fraud will be reversed,
9 the award of lost profits must be set aside to the extent it is based on Gorilla’s fraud
10 claim.

11 Appellants argue that Gorilla never disclosed its lost profit damages calculation
12 prior to trial. Doc. 52 at 20. Gorilla responds by asserting that it disclosed its intent to
13 seek “compensatory and consequential damages in an amount to be proven at trial,” but
14 does not assert that it ever disclosed a computation of its lost profit damages before trial.
15 Doc. 70 at 12-13. Gorilla’s disclosures on this issue clearly were inadequate. Rule 26 of
16 the Federal Rules of Procedure – which applies in bankruptcy court trials of adversary
17 proceedings, *see* Fed. R. Bank. P. 7026 – requires that parties disclose, before trial,
18 “a computation of each category of damages claimed by the disclosing party[.]” Fed. R.
19 Civ. P. 26(a)(1)(A)(iii) (emphasis added). These disclosures are not optional. Rule
20 26(a)(1) states that the party “must” make them “without awaiting a discovery request.”
21 *Id.* The Advisory Committee Note to Rule 26 describes this disclosure obligation as “the
22 functional equivalent of court-ordered interrogatories.” Fed. R. Civ. P. 26(a)(1), Adv.
23 Comm. Note (1993). Rule 37 adds teeth to this disclosure obligation by stating, in
24 unequivocal terms, that a party who fails to disclose the required information “is not
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1982) (citation omitted).

27 ⁵ Because the Court reverses on Appellant’s justifiable reliance argument, it need
28 not address the argument that Corwin’s EBITDA calculation was only an estimate that
would not give rise to a claim for fraud or negligent misrepresentation.

1 allowed to use that information . . . at trial, unless the failure was substantially justified or
2 is harmless.” Fed. R. Civ. P. 37(c)(1); *see* Fed. R. Bank. P. 7037.

3 Gorilla does not argue that its failure to disclose was substantially justified. Nor
4 can it be said that the nondisclosure was harmless. Disclosing a computation of damages
5 under Rule 26(a)(1) is necessary for the opposing party to produce responding evidence,
6 such as an expert opinion. Corwin never had an opportunity to prepare and present
7 evidence in opposition to Gorilla’s lost profits computation because that computation was
8 not disclosed as the rules require. And because the disclosure obligation is automatic –
9 the functional equivalent of court-order interrogatories – Gorilla’s actions cannot be
10 justified because Corwin failed to request the computation before trial or failed to move
11 in limine to preclude Gorilla from presenting evidence that Rule 37(c) already precluded.
12 The Court concludes that it was an abuse of discretion to permit Gorilla to present
13 evidence of damages that had never been disclosed as required by Rule 26(a)(1). *See*
14 *Hoffman v. Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1179-80 (9th Cir. 2008)
15 (affirming exclusion of damages evidence at trial because “[d]isclosure of damage
16 calculations was mandated under Rule 26(a)”); Fed. R. Civ. P. 37(c)(1).

17 Gorilla argues that Appellants did not object to Kramer’s testimony or otherwise
18 cross-examine him about lost profits. Doc. 70 at 15. But Kramer testified during the first
19 day of trial (ER 1 at 25-26), and it was not until the second day – after Appellants had
20 moved for a directed verdict – that counsel for Gorilla asserted that its damages included
21 lost profits (ER 2 at 472). Appellants promptly objected to that category of damages on
22 the ground that “[i]t was not disclosed to [them] at any point during this case, as required
23 under Rule 26(a)(1)(A)(iii).” ER 2 at 475. Appellants have not waived their objections
24 to the award of lost profit damages.

25 Moreover, Gorilla failed to meet its burden of establishing the amount of lost
26 profits. A plaintiff must “prove the amount of [its] damages ‘with reasonable certainty.’”
27 *Walter v. Simmons*, 818 P.2d 214, 221 (Ariz. Ct. App. 1991) (quoting *Gilmore v. Cohen*,

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1 386 P.2d 81, 82 (1963)). This “reasonable certainty” requirement applies with added
2 force where, as here, a loss of future profits is alleged. *Gilmore*, 386 P.2d at 36.

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4 Gorilla CEO Brad Kramer testified that the company’s revenue for 2009 dropped
5 by more than \$10 million, that about half of this amount was due to the poor economy,
6 and that because the company’s gross profit percentage is close to 25%, the estimate of
7 lost profits attributable to the actions of Corwin is “[p]robably at a profit level of about a
8 million dollars.” ER 1 at 25-26. But Kramer presented no financial or other records to
9 support this estimate, nor did he claim that such evidence is unavailable. “[T]he plaintiff
10 in every case should supply some reasonable basis for computing the amount of damage
11 and must do so with such precision as, from the nature of his claim and the available
12 evidence, is possible.” *Gilmore*, 386 P.2d at 36. Kramer’s uncorroborated testimony is
13 too general and conclusory to establish the amount of lost profit damages with reasonable
14 certainty.

15 In summary, the bankruptcy court’s judgment must be reversed with respect to the
16 award of \$1 million in lost profits.

17 **C. Breach of Contract and Breach of the Implied Covenant.**

18 To prevail on a claim for breach of contract, the plaintiff must prove the existence
19 of a contract between the plaintiff and defendant, a breach of the contract by the
20 defendant, and resulting damage to the plaintiff. *See Coleman v. Watts*, 87 F. Supp. 2d
21 944, 955 (D. Ariz. 1998) (citing *Clark v. Compania Ganadera de Cananea, S.A.*, 387
22 P.2d 235, 237 (Ariz. 1963)). Gorilla’s breach of contract claim is based on Corwin’s
23 alleged misrepresentations leading to the \$1.4 million prepayment on the seller note,
24 alleged breaches of a non-competition agreement, a wrongful notice of default on the
25 seller note issued in January 2009, and alleged misstatements concerning the net income
26 of 13 Holdings at the time of the asset purchase. ER 64 at 2021-26. The bankruptcy
27 court entered judgment in favor of Gorilla on the breach of contract claim as it related to
28 the seller note. Doc. 1 at 19-20; ER 112 at 3479-80.

1 Appellants argue that judgment on the breach of contract claim must be reversed
2 because, among other things, neither 13 Holdings nor the Corwins promised,
3 contractually or otherwise, that the \$1.4 million prepayment on the seller note was
4 refundable. Docs. 52 at 22, 74 at 15. The Court agrees.

5 The bankruptcy court concluded that the \$1.4 million prepayment should be repaid
6 under alternative legal theories: fraud, breach of contract, and unjust enrichment. ER 2
7 at 541, 599; ER 112 at 3480-41. The right to a refund is implicit, the bankruptcy court
8 found, when a prepayment is made and it turns out that no payment was actually due.
9 ER 2 at 471, 541. But no contractual provision is cited in support of this repayment
10 theory. The Court agrees with the bankruptcy court that where the contract itself does not
11 explicitly require repayment of monies not due, the doctrine of unjust enrichment applies.
12 ER 2 at 541.

13 The judgment on the breach of contract claim, but not on the claim for unjust
14 enrichment, will be reversed. In addition, the bankruptcy court provided no basis for
15 entering judgment on the claim for breach of the implied covenant other than the reasons
16 supporting judgment on the fraud and breach of contract claims. Because judgment on
17 those claims will be reversed, the judgment on the breach of the implied covenant claim
18 must also be reversed. To be clear, while judgment on the claims for breach of contract
19 and breach of the implied covenant will be reversed, the alternative judgment on the
20 claim for unjust enrichment (Doc. 1 at 20; ER 112 at 3480) stands. As found correctly by
21 the bankruptcy court, Gorilla is entitled to repayment on an unjust enrichment theory
22 where an overpayment has been made and the contract itself does not require the
23 repayment. ER 2 at 541.

24 The bankruptcy court erred in allowing continual refinement of the EBITDA
25 calculation, Appellants contend, because the \$1.4 million prepayment on the seller not
26 was not contingent on a final EBITDA calculation, and the prepayment became final at
27 the latest on April 28, 2008. Docs. 52 at 22, 74 at 14. The seller note provides that
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1 Gorilla will furnish 13 Holdings “its calculation of the principle amount of this Seller
2 Note within 60 days following the Target Period,” which ended on February 29, 2008.
3 ER 10 at 1021. The Court agrees with the bankruptcy court that the seller note does not
4 require that “EBITDA should only be for amounts calculated as of April 30, [2008],
5 whether or not . . . a final calculation was presented by that date.” ER 2 at 595.
6 Continual refinement of the EBITDA calculation, therefore, was not improper,
7 particularly under the doctrine of unjust enrichment.

8 The Court also finds that the bankruptcy court did not clearly err in finding that
9 the \$1.4 million payment Gorilla made to 13 Holdings on April 2, 2008, constituted, at
10 least in part, a prepayment under the seller note. While retaining Corwin as CEO may
11 have been the reason the payment was made earlier than required under the seller note,
12 the payment clearly was meant to satisfy part of the earnout amount due under the seller
13 note.

14 **D. The EBITDA Calculation.**

15 Appellants argue that the bankruptcy court made four errors in calculating
16 EBITDA: double counting a depreciation expense, reclassifying independent contractors
17 to employees, making adjustments inconsistent with judicial admissions made by Gorilla,
18 and writing-off an unpaid NFL invoice after the deadline for calculating EBITDA. Doc.
19 52 at 23. When these alleged errors are corrected, Appellants assert, EBITDA increases
20 from \$3,970,803 to \$4,779,372, resulting in Gorilla owing 13 Holdings over \$636,000.
21 *Id.* The Court will address each alleged error in turn.

22 **1. The Depreciation Expense.**

23 There is no dispute that Gorilla’s expert, Lynton Kotzin, erroneously deducted a
24 \$297,328 depreciation expense twice from EBITDA. Mr. Kotzin explained at trial that
25 this error was offset by another error he had made, and that the double-counting error
26 ultimately was immaterial because his overall EBITDA computation reconciled to within
27 \$10,000 of the starting EBITDA computation of Appellants’ expert witness, Stephen
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1 Clarke. ER 1 at 167-73. Appellants contend that by not accounting for Mr. Kotzin’s
2 double-counting of the depreciation expense, the bankruptcy court clearly erred in
3 deducting \$297,328 from EBITDA. Doc. 52 at 24.

4 But Appellants do not explain why the depreciation expense error is material to
5 the EBITDA calculation. The bankruptcy court noted that while Mr. Clarke repeatedly
6 stated that Kotzin had erred in deducting the depreciation expense twice from EBITDA,
7 “he never explained what difference it made.” ER 2 at 540. The bankruptcy court found
8 Mr. Clark not credible, particularly compared to Mr. Kotzin. *Id.* at 598. Given that
9 credibility determination, and the failure on the part of Mr. Clarke and Appellants to
10 explain why the depreciation expense error is material, the Court cannot say that the
11 bankruptcy court clearly erred.

12 **2. Reclassification of Independent Contractors.**

13 Section 1.2 of the APA allows for a deduction from EBITDA for the costs
14 associated with the reclassification of independent contractors to employees, but only for
15 the “period prior to closing[.]” ER 10 at 982, § 1.2(a)(1)(vi). Appellants argue that the
16 bankruptcy court erred in allowing a reclassification deduction from EBITDA in the total
17 amount of \$261,415, which consists of \$57,986 for the pre-closing period and \$203,429
18 for the post-closing period. The Court agrees with Appellants with respect to the post-
19 closing period.

20 The plain language of the APA limits the deduction for reclassifying employees to
21 the pre-closing period. Contrary to the finding by the bankruptcy court (ER 2 at 595), the
22 general language in Section 1.2 defining the meaning of EBITDA “with respect to any
23 particular period” (ER 2 at 981), does not trump the specific language in Section
24 1.2(a)(1)(vi) that costs associated with the reclassification of independent contractors to
25 employees may be deducted from EBITDA only for the “period prior to closing[.]”
26 ER 10 at 982. The final EBITDA computation should be adjusted to include the amount
27 deducted for post-closing reclassification costs, that is, \$203,429.
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1 The bankruptcy court did not err in finding that no audit was required in order to
2 make the adjustment to EBITDA for reclassification costs. ER 2 at 595. The relevant
3 provision, Section 4.7 of the APA, requires an audit “[u]nless otherwise determined by
4 [Gorilla’s] Board of Managers.” ER 10 at 999. Appellants do not dispute that no audit
5 was performed because, on advice of counsel, the Board decided only two days after the
6 closing date to reclassify all independent contractors to employees. *See* Doc. 70 at 22-23.
7 The lack of an audit, therefore, does not require that the \$57,986 in reclassification costs
8 for the pre-closing period be added back to the bankruptcy court’s EBITDA calculation.

9 **3. Judicial Admissions.**

10 Contrary to Appellants’ assertion, the bankruptcy court did not err in finding
11 “no basis for an argument that any [EBITDA] calculations presented prior to [the] trial
12 are judicial admissions by Gorilla.” ER 2 at 593. It is not clear from the record that
13 Gorilla was playing “fast and loose with the facts” (*id.* at 594), and calculations made in
14 the context of seeking preliminary relief do not warrant application of the judicial
15 admission doctrine.

16 **4. The NFL Invoice.**

17 Gorilla breached a contract with the NFL requiring it to provide security personnel
18 for Super Bowl XLII played in Glendale, Arizona in February 2008. When Gorilla failed
19 to provide sufficient personnel, the NFL hired replacement personnel at a cost of
20 approximately \$177,000 and deducted this amount from the total amount owed to Gorilla
21 under the parties’ contract. Gorilla ultimately determined that it was not in the
22 company’s best interest to pursue the portion of the invoice not paid by the NFL, in part
23 because the NFL had a strong case for hiring replacement personnel, the NFL was an
24 important client, and the costs associated with arbitrating a questionable claim were not
25 insubstantial. The bankruptcy court did not err in concluding that this determination was
26 “a management decision, a business judgment and not something for an accountant to
27 decide[.]” ER 2 at 538. The decision to exclude the \$177,000 invoice amount from the
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1 EBITDA calculation was proper.

2 **5. EBITDA Calculation Summary.**

3 With respect to the EBITDA calculation, the bankruptcy court's judgment is
4 affirmed with respect to the \$297,328 depreciation expense, the \$177,000 NFL invoice,
5 and the \$57,986 for employee reclassification for the pre-closing period. The bankruptcy
6 court erred in deducting from EBITDA \$203,429 for employee reclassification for the
7 post-closing period. The final judgment will be reversed in this respect and the case
8 remanded for a new EBITDA calculation consistent with this order. It is not clear to the
9 Court what the correct final EBITDA calculation should be in light of the adjustments to
10 EBITDA required by this order. Nor is it clear, given affirmance of the unjust
11 enrichment claim, how this order affects the portion of the judgment awarding
12 \$1,412,212 as overpayment on the seller note and requiring return the \$268,840 in Gorilla
13 Quick Cash funds. Doc. 1 at 20; ER 112 at 3480. The bankruptcy court, on remand,
14 shall determine a new final EBITDA calculation in light of the rulings set forth in this
15 order and shall amend the judgment accordingly.

16 **E. The Award of Attorneys' Fees.**

17 The bankruptcy court awarded Gorilla attorneys' fees in the total amount of
18 \$1,742,034.15. ER 109. This amount included Gorilla's administrative bankruptcy fees.
19 Those fees should be awarded to Gorilla, the bankruptcy court reasoned, because Gorilla
20 prevailed on its breach of contract claim and the administrative bankruptcy fees were
21 "related to" the APA. *Id.* at 3460. The bankruptcy court also noted that Gorilla's
22 bankruptcy was effectively brought against Corwin and was triggered by, and
23 substantially intertwined with, the contract dispute.

24 As explained more fully above, the Court finds that the bankruptcy court erred in
25 finding in favor of Gorilla on the breach of contract claim. In light of this ruling, the
26 Court finds that the award of attorneys' fees must be vacated. On remand, the
27 bankruptcy court may determine whether fees should be awarded to either side.
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IT IS ORDERED:

1. The judgment entered by the bankruptcy court on March 22, 2010 (Doc. 1 at 17-21; ER 112) is **affirmed in part** and **reversed in part**. The judgment is reversed with respect to (1) Gorilla’s claims for fraud, negligent misrepresentation, breach of contract, and breach of the implied covenant of good faith and fair dealing, (2) the awards of \$1 million in lost profits and \$1,742,034.15 in attorneys’ fees, costs, and related non-taxable expenses (plus applicable interest), and (3) the \$203,429 deduction from the EBITDA calculation for employee reclassification for the post-closing period. The judgment is affirmed on Gorilla’s claim for unjust enrichment and, with respect to the EBITDA calculation, the \$297,328 depreciation expense, the \$177,000 NFL invoice, and the \$57,986 for employee reclassification for the pre-closing period.

2. The case is remanded to the bankruptcy court for further proceedings consistent with this order.

Dated this 11th day of March, 2011.



David G. Campbell
United States District Judge