

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

THE CITRI-LITE COMPANY, a )  
California corporation, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
COTT BEVERAGES, I NC., d/b/a )  
COTT BEVERAGES U.S.A., a Florida )  
corporation, and DOES 1 through )  
25, )  
 )  
Defendants. )

1:07-cv-1075 OWW SKO  
SCHEDULING CONFERENCE ORDER  
Discovery Cut-Off: 11/22/10  
Non-Dispositive Motion  
Filing Deadline: 12/6/10  
Non-Dispositive Motion  
Hearing Date: 1/7/11 9:00  
Ctrm. 8  
Dispositive Motion Filing  
Deadline: 12/17/10  
Dispositive Motion Hearing  
Date: 1/24/11 10:00 Ctrm.  
3  
Settlement Conference Date:  
11/17/10 11:00 Ctrm. 8  
Pre-Trial Conference Date:  
2/28/11 11:00 Ctrm. 3  
Trial Date: 4/12/11 9:00  
Ctrm. 3 (CT-7 days)

I. Date of Scheduling Conference.  
August 26, 2010.  
II. Appearances Of Counsel.  
Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball, LLP

1 by David J. Cooper, Esq., appeared on behalf of Plaintiff.

2 Scheper Kim & Harris LLP by David C. Scheper and Gregory A.  
3 Ellis, Esq., appeared on behalf of Defendant.

4 III. Summary of Pleadings.

5 1. Relief Sought: Monetary damages in an amount according  
6 to proof and to be determined according to proof. The Plaintiff  
7 has already provided Defendant with a range of damages, as well  
8 as the calculation and methodology of the same as part of its  
9 expert witness disclosures, and will be providing a supplemental  
10 report as to damages.

11 IV. Orders Re Amendments To Pleadings.

12 1. The parties do not anticipate amending the pleadings at  
13 this time.

14 V. Factual Summary.

15 A. Admitted Facts Which Are Deemed Proven Without Further  
16 Proceedings.

17 1. Cott is a Georgia corporation with its principal place  
18 of business in Tampa, Florida.

19 2. Cott produces and distributes non-alcoholic beverages,  
20 including carbonated soft drinks, sparkling and flavored mineral  
21 waters, energy drinks, juices, juice drinks, ready-to-drink teas,  
22 and other non-carbonated beverages.

23 3. Citri-Lite Corporation, Inc. ("Citri-Lite") is a  
24 California corporation with its principal place of business in  
25 Grass Valley, California.

26 4. Citri-Lite was incorporated in 1996 to produce and  
27 market "Slim-Lite," a non-carbonated, zero calorie, fruit  
28 flavored diet drink designed to help support weight loss.

1           5.     Between 1996 and 2002, Citri-Lite operated at a loss.

2           6.     On December 28, 2003, Citri-Lite and Cott entered into  
3 a licensing agreement (the "Agreement" or "Agmt."), which is  
4 governed by California law.

5           7.     From October 2003 to November 2007, Jason Nichol was  
6 Cott's Vice President for customer and business development and  
7 oversaw Cott's business with Wal-Mart and Sam's Club.

8           8.     Gil Woods was Cott's Senior Manager for Sales and  
9 Finance responsible for Wal-Mart and Sam's Club during the period  
10 in which the Agreement was in effect.

11          9.     Rob Scheiderer was Cott's Director of Sales from May  
12 2004 through January 2005. He was Director of Marketing and  
13 Category Management from January 2005 to March 2006.

14          10.    Charles Calise became a Marketing Manager at Cott in  
15 December 2003. He was responsible for control or branded  
16 beverages, including Slim-Lite.

17          11.    John Scandrett was Cott's Director of Marketing during  
18 the term of the Agreement and Charles Calise reported directly to  
19 him.

20          12.    Conall Dunne was Cott's Vice President of finance in  
21 2005.

22          13.    Doreen Gormley was Cott's Vice President of Marketing  
23 USA in 2005.

24          14.    During the time Cott marketed Slim-Lite, it worked with  
25 two Sam's Club buyers: Jim Dragovich and Becky Fields.

26          15.    Dragovich and Fields had discretion to modify the  
27 distribution of beverages under their respective categories.

28          16.    Both buyers also had discretion to cancel beverages in

1 their categories.

2 17. At the outset of the Agreement, Slim-Lite was being  
3 sold at approximately 248 Sam's Clubs.

4 18. In 2004, the first year of the Agreement, sales volume  
5 of Slim-Lite increased over its sales in 2003, before the  
6 Agreement.

7 19. In 2003, Citri-Lite spent \$705,566.26 on demos.

8 20. Sam's Club used its own employees to run in-store  
9 demos, and charged the supplier approximately \$150 per demo in  
10 each store.

11 21. Sam's Club charged the vendor the full retail price for  
12 the product actually used in the demo, thus requiring the vendor  
13 to buy back the product that would be sampled.

14 22. Cott conducted demos at Sam's throughout 2004 and from  
15 January, 2005 through April, 2005.

16 23. Cott expended over \$800,000 for Slim-Lite demos at  
17 Sam's Club in 2004.

18 24. On March 24, 2005, Cott notified Sam's Club it was  
19 cancelling all remaining Slim-Lite demos.

20 25. Sam's required a 30-60 day notice of cancellation, and  
21 the last demos were conducted on or about the end of April, 2005.

22 26. By September, 2004, Cott employees developed a plan to  
23 change the Slim-Lite packaging configuration to a 16.9 oz. bottle  
24 size, 24 bottles to a pack, and to introduce the packing changes  
25 by January or February, 2005. This packaging configuration was  
26 not implemented at Sam's Club during the term of the Agreement.

27 27. It generally took Cott 10-16 weeks to effect a change  
28 in bottle size, although it could be done quicker if it was at

1 the request of Wal-Mart or Sam's Club.

2 28. In early 2004, when Cott began distributing Slim-Lite,  
3 it was sold in approximately 800 Food Lion markets.

4 29. In March, 2005, due to poor performance and space,  
5 Slim-Lite was removed from 489 smaller Food Lion stores.

6 30. Peak distribution of Slim-Lite at Sam's Club occurred  
7 in December 2004, when the beverage was available in 528 stores.

8 31. Between December 2004 and March 2005, distribution at  
9 Sam's Club was cut to 463 stores.

10 32. At approximately the beginning of April 2005, Sam's  
11 Club cut the distribution of Slim-Lite from 463 stores to 89  
12 stores.

13 33. On March 30, 2005, Cott learned that Slim-Lite would be  
14 moved to Becky Fields, a new buyer at Sam's Club.

15 34. In October 2005, Cott notified Citri-Lite that it was  
16 exercising its right to terminate the Agreement effective  
17 December 31, 2005.

18 35. Cott first told Citri-Lite it was terminating the  
19 Agreement in a phone conversation on October 21, 2005, followed  
20 by a written notice on October 26, 2005.

21 36. In November 2005, Cott arranged for a meeting between  
22 Mr. Horrigan and Ms. Fields to discuss the proposed shrink wrap  
23 designs for a 24-pack of Slim-Lite.

24 37. Once the Agreement ended, Cott provided Citri-Lite with  
25 the design files it developed for the proposed 24-pack, 16.9  
26 ounce package.

27 38. Cott continued to produce Slim-Lite into 2006 from its  
28 remaining inventory of raw materials.

1           39. Cott continued to make production runs of Slim-Lite  
2 from its remaining inventory of raws under an arrangement whereby  
3 Cott charged Citri-Lite the cost of Cott's remaining inventory of  
4 Slim-Lite raw materials against outstanding royalties owed to  
5 Citri-Lite under the Agreement.

6           40. The parties entered into a final reconciliation of  
7 these services, resulting in a net payment to Cott of  
8 Approximately \$30,000.

9           41. Cott exercised its termination right under the  
10 Agreement.

11           B. Contested Facts.

12           1. All remaining facts are disputed.

13 VI. Legal Issues.

14           A. Uncontested.

15           1. Jurisdiction exists under 28 U.S.C. § 1332.

16           2. Venue is proper under 28 U.S.C. § 1391.

17           3. In this diversity action, the parties agree that  
18 the substantive law of the State of California provides the rule  
19 of decision.

20           4. The Agreement obligated Cott, among other duties,  
21 to "use commercially reasonable efforts to promote and sell  
22 [Slim-Lite] so as to maintain and enhance the value of the  
23 goodwill residing in the Intellectual Property and to produce the  
24 maximum amount of Royalty" due to Citri-Lite under the Agreement.

25           5. The Agreement also contained an implied-in-law  
26 covenant of good faith and fair dealing which required, *inter*  
27 *alia*, that both parties to the Agreement act in good faith and  
28 with fairness toward the other concerning all matters relating to

1 the subject of the Agreement; that neither party take any action  
2 to destroy or injure the right of the other party from receiving  
3 the benefits of the Agreement; that each party give the other's  
4 interests as much consideration as it gave to its own interests;  
5 that both parties refrain from doing anything which would render  
6 performance of the Agreement impossible; and that both parties do  
7 everything that the Agreement presupposed that it will do to  
8 accomplish the Agreement's purpose.

9 B. Contested.

10 1. Plaintiff's Statement.

11 a. Citri-Lite performed all terms, covenants,  
12 and conditions on its part to be performed under the Agreement.

13 b. Beginning in approximately October 2004 and  
14 continuing through October 2005, Cott unilaterally breached  
15 Section 2.4 of the Agreement by failing, inter alia, "to use  
16 commercially reasonable efforts to promote and sell [Slim-Lite]  
17 so as to maintain and enhance the value of the goodwill residing  
18 in the Intellectual Property and to produce the maximum amount of  
19 Royalty" for Citri-Lite. Cott is liable for actual and  
20 consequential damages caused by its breaches of Section 2.4 of  
21 the Agreement in an amount to be proven at trial.

22 c. During the term of the Agreement, Cott acted  
23 unfairly and in bad faith, failed to give Citri-Lite's interests  
24 as much consideration as its own, destroyed Citri-Lite's right to  
25 receive the benefits of the Agreement, and failed to do  
26 everything the Agreement presupposed to accomplish its purpose.

27 d. Cott is liable for actual and consequential  
28 damages caused by its breaches of the implied covenant of good

1 faith and fair dealing in an amount to be proven at trial.  
2 Specifically, Cott management decided in a meeting of the Board  
3 of Directors in October 2004, to focus on private label beverages  
4 and to wind down licensed brands, such as Slim-Lite. However,  
5 having made this decision, Cott never informed the plaintiff that  
6 it would discontinue supporting the Slim-Lite brand but rather  
7 withheld that information from the plaintiff until it gave  
8 plaintiff notice of termination of the Agreement approximately  
9 one year later, after irreparable harm had already been done to  
10 the brand.

11 2. Defendant's Statement.

12 a. Cott performed all terms, covenants, and  
13 conditions on its part to be performed under the Agreement, and  
14 thus is not liable for breach of contract.

15 b. Cott did not violate the implied covenant of  
16 good faith and fair dealing because it acted to do everything the  
17 Agreement presupposed to accomplish its purpose, by *inter alia*:  
18 seeking increased distribution of the Slim-Lite beverage at  
19 multiple retailers; obtaining greatly increased distribution of  
20 Slim-Lite at Wal-Mart Superstores nationwide in early 2005; by  
21 fully engaging Citri-Lite in its efforts to regain distribution  
22 of Slim-Lite at Sam's Club stores in mid-to-late 2005; and by  
23 continuing to produce Slim-Lite even after the Agreement's  
24 expiration.

25 c. Any injury to Citri-Lite was not caused by  
26 Cott, but by independent distribution decisions made by third  
27 party retailers, primarily Sam's Club, which were unrelated to  
28 any conduct by Cott.

1                   d.    As noted in the Court's summary judgment  
2 ruling, Citri-Lite's recovery for lost profits, if any, is  
3 limited to the date of the Agreement's expiration. Citri-Lite  
4 has not and cannot establish any damages for loss of goodwill.

5 VII. Consent to Magistrate Judge Jurisdiction.

6           1.    The parties have not consented to transfer the  
7 case to the Magistrate Judge for all purposes, including trial.

8 VIII.       Corporate Identification Statement.

9           1.    Any nongovernmental corporate party to any action in  
10 this court shall file a statement identifying all its parent  
11 corporations and listing any entity that owns 10% or more of the  
12 party's equity securities. A party shall file the statement with  
13 its initial pleading filed in this court and shall supplement the  
14 statement within a reasonable time of any change in the  
15 information.

16 IX.   Discovery Plan and Cut-Off Date.

17           1.    With the exception of the deposition of George  
18 Horrigan, to be completed in September 2010, all percipient  
19 witness depositions have been completed. Both parties have  
20 completed written discovery and do not anticipate any discovery  
21 motions. Expert witness depositions of the two expert witnesses  
22 designated by each party will be conducted in October 2010.

23           2.    The parties are ordered to complete all non-expert  
24 discovery on or before September 30, 2010.

25           3.    The parties are directed to disclose any rebuttal or  
26 supplemental expert disclosures on or before October 22, 2010.  
27 The parties will comply with the provisions of Federal Rule of  
28 Civil Procedure 26(a)(2) regarding their expert designations.

1 Local Rule 16-240(a) notwithstanding, the written designation of  
2 experts shall be made pursuant to F. R. Civ. P. Rule 26(a)(2),  
3 (A) and (B) and shall include all information required  
4 thereunder. Failure to designate experts in compliance with this  
5 order may result in the Court excluding the testimony or other  
6 evidence offered through such experts that are not disclosed  
7 pursuant to this order.

8 4. The parties are ordered to complete all discovery,  
9 including experts, on or before November 22, 2010.

10 5. The provisions of F. R. Civ. P. 26(b)(4) shall  
11 apply to all discovery relating to experts and their opinions.  
12 Experts may be fully prepared to be examined on all subjects and  
13 opinions included in the designation. Failure to comply will  
14 result in the imposition of sanctions.

15 X. Pre-Trial Motion Schedule.

16 1. All Non-Dispositive Pre-Trial Motions, including any  
17 discovery motions, will be filed on or before December 6, 2010,  
18 and heard on January 7, 2011, at 9:00 a.m. before Magistrate  
19 Judge Sheila K. Oberto in Courtroom 8.

20 2. In scheduling such motions, the Magistrate  
21 Judge may grant applications for an order shortening time  
22 pursuant to Local Rule 142(d). However, if counsel does not  
23 obtain an order shortening time, the notice of motion must comply  
24 with Local Rule 251.

25 3. All Dispositive Pre-Trial Motions are to be  
26 filed no later than December 17, 2010, and will be heard on  
27 January 24, 2011, at 10:00 a.m. before the Honorable Oliver W.  
28 Wanger, United States District Judge, in Courtroom 3, 7th Floor.

1 In scheduling such motions, counsel shall comply with Local Rule  
2 230.

3 XI. Pre-Trial Conference Date.

4 1. February 28, 2011, at 11:00 a.m. in Courtroom 3, 7th  
5 Floor, before the Honorable Oliver W. Wanger, United States  
6 District Judge.

7 2. The parties are ordered to file a Joint Pre-  
8 Trial Statement pursuant to Local Rule 281(a)(2).

9 3. Counsel's attention is directed to Rules 281  
10 and 282 of the Local Rules of Practice for the Eastern District  
11 of California, as to the obligations of counsel in preparing for  
12 the pre-trial conference. The Court will insist upon strict  
13 compliance with those rules.

14 XII. Motions - Hard Copy.

15 1. The parties shall submit one (1) courtesy paper copy to  
16 the Court of any motions filed. Exhibits shall be marked with  
17 protruding numbered or lettered tabs so that the Court can easily  
18 identify such exhibits.

19 XIII. Trial Date.

20 1. April 12, 2011, at the hour of 9:00 a.m. in Courtroom  
21 3, 7th Floor, before the Honorable Oliver W. Wanger, United  
22 States District Judge.

23 2. This is a non-jury trial.

24 3. Counsels' Estimate Of Trial Time:

25 a. 7 days.

26 4. Counsels' attention is directed to Local Rules  
27 of Practice for the Eastern District of California, Rule 285.

28 ///

1 XIV. Settlement Conference.

2 1. A Settlement Conference is scheduled for November 17,  
3 2010, at 11:00 a.m. in Courtroom 8 before the Honorable Sheila K.  
4 Oberto, United States Magistrate Judge.

5 2. Unless otherwise permitted in advance by the  
6 Court, the attorneys who will try the case shall appear at the  
7 Settlement Conference with the parties and the person or persons  
8 having full authority to negotiate and settle the case on any  
9 terms at the conference.

10 3. Permission for a party [not attorney] to attend  
11 by telephone may be granted upon request, by letter, with a copy  
12 to the other parties, if the party [not attorney] lives and works  
13 outside the Eastern District of California, and attendance in  
14 person would constitute a hardship. If telephone attendance is  
15 allowed, the party must be immediately available throughout the  
16 conference until excused regardless of time zone differences.  
17 Any other special arrangements desired in cases where settlement  
18 authority rests with a governing body, shall also be proposed in  
19 advance by letter copied to all other parties.

20 4. Confidential Settlement Conference Statement.  
21 At least five (5) days prior to the Settlement Conference the  
22 parties shall submit, directly to the Magistrate Judge's  
23 chambers, a confidential settlement conference statement. The  
24 statement should not be filed with the Clerk of the Court nor  
25 served on any other party. Each statement shall be clearly  
26 marked "confidential" with the date and time of the Settlement  
27 Conference indicated prominently thereon. Counsel are urged to  
28 request the return of their statements if settlement is not

1 achieved and if such a request is not made the Court will dispose  
2 of the statement.

3 5. The Confidential Settlement Conference

4 Statement shall include the following:

5 a. A brief statement of the facts of the  
6 case.

7 b. A brief statement of the claims and  
8 defenses, i.e., statutory or other grounds upon which the claims  
9 are founded; a forthright evaluation of the parties' likelihood  
10 of prevailing on the claims and defenses; and a description of  
11 the major issues in dispute.

12 c. A summary of the proceedings to date.

13 d. An estimate of the cost and time to be  
14 expended for further discovery, pre-trial and trial.

15 e. The relief sought.

16 f. The parties' position on settlement,  
17 including present demands and offers and a history of past  
18 settlement discussions, offers and demands.

19 XV. Request For Bifurcation, Appointment Of Special Master,  
20 Or Other Techniques To Shorten Trial.

21 1. None.

22 XVI. Related Matters Pending.

23 1. There are no related matters.

24 XVII. Compliance With Federal Procedure.

25 1. The Court requires compliance with the Federal  
26 Rules of Civil Procedure and the Local Rules of Practice for the  
27 Eastern District of California. To aid the court in the  
28 efficient administration of this case, all counsel are directed

1 to familiarize themselves with the Federal Rules of Civil  
2 Procedure and the Local Rules of Practice of the Eastern District  
3 of California, and keep abreast of any amendments thereto.

4 XVIII. Effect Of This Order.

5 1. The foregoing order represents the best  
6 estimate of the court and counsel as to the agenda most suitable  
7 to bring this case to resolution. The trial date reserved is  
8 specifically reserved for this case. If the parties determine at  
9 any time that the schedule outlined in this order cannot be met,  
10 counsel are ordered to notify the court immediately of that fact  
11 so that adjustments may be made, either by stipulation or by  
12 subsequent scheduling conference.

13 2. Stipulations extending the deadlines contained  
14 herein will not be considered unless they are accompanied by  
15 affidavits or declarations, and where appropriate attached  
16 exhibits, which establish good cause for granting the relief  
17 requested.

18 3. Failure to comply with this order may result in  
19 the imposition of sanctions.

20  
21 IT IS SO ORDERED.

22 Dated: August 27, 2010

/s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE