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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF CALIFORNIA

7
8 THE CITRILITE COMPANY, Inc.,
9 Plaintiff,
10
11 v.
12 COTT BEVERAGES, Inc.,
13 Defendant.

1:07-cv-01075-OWW-JLT
MEMORANDUM DECISION AND ORDER
RE: DEFENDANT'S MOTIONS TO
STRIKE (Docs. 75, 76)

14
15 I. INTRODUCTION.

16 Plaintiff the Citrilite Company, Inc. ("Plaintiff") proceeds
17 with an action for damages against Defendant Cott Beverages, Inc.
18 ("Defendant").

19 Defendant filed motions to strike certain opinions of
20 Plaintiff's experts on December 6, 2010. (Docs. 75, 76).
21 Plaintiff filed opposition to Defendant's motions on December 27,
22 2010. (Docs. 78, 80). Defendant filed replies on January 3, 2011.
23 (Docs. 82, 83).

24 II. FACTUAL BACKGROUND.¹

25 From 1996 to 2003, Plaintiff produced and marketed Slim-Lite,
26 a zero calorie fruit-flavored drink. On December 28, 2003,

27 ¹ The following factual background is limited to issues relevant to Defendant's
28 motions to strike. An exhaustive factual history is set forth in the Memorandum
Decision re: Defendant's Motion for Summary Judgment. (Doc. 65).

1 Plaintiff entered into a written agreement entitled "Intellectual
2 Property License and Purchase Option Agreement" ("the Agreement")
3 with Defendant, a producer and distributor of various non-alcoholic
4 beverages.

5 Under the terms of the Agreement, Plaintiff granted Defendant
6 the exclusive right to use the Slim-Lite brand identity and all
7 associated intellectual property rights for purposes of the
8 manufacture, production, distribution, sale and marketing of
9 Slim-Lite. In exchange, Defendant agreed to make royalty payments
10 to Plaintiff based on a rate of fifty cents (\$0.50) per case of
11 product sold (i.e., fifty cents per 240 ounces of the product sold
12 by Cott), with a guaranteed minimum royalty of \$350,000 per year.

13 The Agreement required Defendant to spend a certain amount to
14 market Slim-Lite and to "otherwise use commercially reasonable
15 efforts to promote and sell" Slim-Lite "so as to maintain and
16 enhance the value of the goodwill" inhering in Slim-Lite and
17 "produce the maximum amount of" royalty under the Agreement.

18 Plaintiff contends that Defendant breached its obligation to use
19 commercially reasonable efforts to promote and sell Slim-lite.
20 *Inter alia*, Plaintiff contends that Defendant's reduction and
21 eventual elimination of in-store demos of Slim-Lite at Sam's Club
22 was commercially unreasonable and resulted in lost royalties and
23 damage to the value of Slim-Lite's goodwill.

24 The proper methodology for assessing the impact of Defendant's
25 reduction and elimination of in-store demos at Sam's Club is the
26 subject of a dispute between the parties' experts and is the issue
27 underlying Defendant's first "motion to strike" certain opinions
28 related to the effectiveness of in-store demos. (Doc. 75).

1 Defendant's second motion to strike assails the methodology used by
2 Plaintiff's damages expert to calculate future lost profits and
3 damage to Slim-Lite's goodwill. (Doc. 76).

4 **III. LEGAL STANDARD.**

5 Federal Rule of Civil Procedure 12(f) provides that a court
6 may strike from any pleading "an insufficient defense or any
7 redundant, immaterial, impertinent, or scandalous matter." Fed. R.
8 Civ. P. 12(f). For the purposes of a motion to strike, immaterial
9 matter is "that which has no essential or important relationship to
10 the claim for relief or the defenses being pleaded." *Fantasy, Inc.*
11 *v. Fogerty*, 984 F.2d 1524, 1528 (9th Cir. 1993), rev'd on other
12 grounds, 510 U.S. 517, 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994).
13 Scandalous matters are allegations that unnecessarily reflect on
14 "the moral character of an individual or states anything in
15 repulsive language that detracts from the dignity of the court."
16 *Consumer Solutions Reo, LLC v. Hillery*, 658 F. Supp. 2d 1002, 1021
17 (N.D. Cal 2009). Rule 12(f) is deigned to eliminate from
18 consideration issues that "can have no possible bearing on the
19 subject matter of the litigation." *Naton v. Bank of California*, 72
20 F.R.D. 550, 552 n.4 (N.D. Cal. 1976). In addition to Rule 12, a
21 district court's inherent authority to manage its docket authorizes
22 the court strike matters from the docket.

23 Defendant's motions are procedurally unorthodox. A Rule 12
24 motion is necessary directed to a pleading, which is defined by
25 Federal Rule of Civil Procedure 7. The pleadings have long been
26 settled, as the summary judgment phase of this case is complete.
27 It appears that Defendant's motions to strike are motions *in*
28 *limine*, evidentiary in nature, to exclude certain expert opinions

1 from admission at trial. Pursuant to Local Rule 281(b)(5), the
2 proper procedure for advancing motions *in limine* is to identify
3 disputed evidentiary issues in the pre-trial statement, E.D. Cal.
4 R. 281(b)(5)), whereafter a motion *in limine* schedule is set. The
5 pre-trial conference for this matter is set for February 28, 2011.
6 (Scheduling Conference Order, Doc. 71). Motions *in limine* will be
7 scheduled at that time.

8 **IV. DISCUSSION.**

9 **A. Opinions Related to the Effectiveness of In-Store Demos**

10 **1. John Carson's Opinions**

11 John Carson is a designated expert retained by Plaintiff to
12 provide opinions on the commercial reasonableness of Defendant's
13 efforts to promote Slim-Lite. Mr. Carson has over thirty-five
14 years experience in the beverage industry and has served as the
15 president and chief executive officer for companies involved in the
16 sales, marketing, and distribution of a variety of soft drinks and
17 adult beverages. Mr. Carson has been directly involved in selling
18 to major retailers and managing third party distributor
19 relationships.

20 In his initial rebuttal report ("Rebuttal Report"), Mr. Carson
21 criticizes analysis provided by Defendant's expert, Dr. Randolph E.
22 Bucklin. Dr. Bucklin performed a regression analysis which
23 purports to demonstrate that in-store demos of Slim-Lite at Sam's
24 Club were not profitable because the demos did not generate
25 sufficient sales to cover the costs of the demos. Mr. Carson
26 rejects Dr. Bucklin's "implicit conclusion" that the goal of demos
27 was to immediately generate a sufficient increase in Slim-Lite
28 sales to justify the expense of the demos. (Carson's Initial

1 Rebuttal Report, Doc. 76, Ex. C at 7). Mr. Carson opines that the
2 purpose of in-store demos "is not to generate an immediate sales
3 increase but rather to support initial sales levels and to provide
4 enough product trial and awareness to promote long-term sales
5 growth." (Id.). Mr. Carson contends Dr. Bucklin's analytical
6 framework is flawed because it focuses only on the immediate
7 effects of demos on sales in the short run and does not account for
8 the role demos play in promoting long-term sales growth. For
9 example, Mr. Carson argues that Dr. Bucklin's analysis does not
10 take into consideration the impact canceling all demos had on
11 Defendant's relationship with Sam's Club. According to Mr. Carson,
12 because demos demonstrate to a retailer a supplier's level of
13 commitment to promoting a product, a supplier's decision to cancel
14 all remaining demos adversely impacts the supplier's relationship
15 with the retailer, leading to repercussions for overall
16 distribution and volume with the retailer in the long-term.
17 (Carson's Initial Rebuttal Report, Doc. 76, Ex. C at 6, 9).

18 Mr. Carson's Rebuttal Report offers the following critique of
19 Dr. Bucklin's regression analysis:

20 [R]ather than analyzing whether the demos immediately
21 paid for themselves, as I understand Dr. Bucklin to have
22 done, *a better measure of the effectiveness of demos is*
23 *to analyze the cumulative impact of demos on the*
24 *cumulative sales of Slim-Lite.* In reviewing the demo
25 program practiced by Citri-Lite prior to December 2003,
26 I see that Citri-Lite utilized demos for this purpose,
27 which is demonstrated by the relatively gradual expansion
28 into 248 Sam's Club stores over a period of several years
and a steady increase in sales.

(Id.) (emphasis added). Mr. Carson's Rebuttal Report does not
explain what he means when he uses the term "cumulative sales."
Based on the criticisms Mr. Carson advances in the Rebuttal Report,

1 it appears that when Mr. Carson discusses "the cumulative impact of
2 demos on the cumulative sales," Mr. Carson is referring to
3 *cumulative long-term increase in sales* attributable to in-store
4 demos.

5 Defendant seeks an order striking the portion of Mr. Carson's
6 opinion italicized above. (Doc. 75 at 2). Defendant contends
7 that (1) use of cumulative demo activity to explain cumulative
8 sales figures is an unorthodox method that is unsupported in the
9 field of marketing research; and (2) Carson's proposed cumulative
10 analysis is unreliable because regression analysis of two sets of
11 cumulative data inherently creates the appearance of a
12 relationship, regardless of whether the data sets are related, as
13 both cumulative data sets necessarily grow over time. Defendant's
14 arguments are misdirected. Defendant's arguments apply to the
15 mathematical methodology underlying Thomas Neches' regression
16 analysis, not to Mr. Carson's criticism of the manner in which Dr.
17 Bucklin evaluated the utility of Sam's Club demos.

18 Mr. Carson does not purport to know *how* to construct a
19 mathematical model to assess the cumulative impact of demos on
20 cumulative long-term sales increases, he simply opines that such an
21 assessment is favorable to Dr. Bucklin's analysis and purports to
22 identify flaws in Dr. Bucklin's model. Nothing in Mr. Carson's
23 curriculum vitae suggests that Mr. Carson has sufficient education
24 or experience in mathematics to qualify him to fashion a
25 methodology for analyzing and comparing data sets through
26 regression analysis,² and it is clear that Mr. Carson's Rebuttal

27
28 ² Mr. Carson's curriculum vitae does not indicate what degrees he holds.

1 Report does not offer an alternative statistical model to Dr.
2 Bucklin's. The Rebuttal Report provides: "Thomas Neches is
3 submitting a critique of [Dr. Bucklin's regression analysis], and
4 therefore, I do not comment on the statistical soundness of that
5 analysis." (Rebuttal Report at 6). Nor does Mr. Carson express
6 the opinion in his Rebuttal Report that total cumulative weekly
7 sales of Slim-Lite should be included as the dependant variable in
8 a least-squares multivariate linear regression analysis; Thomas
9 Neches' concluded this was appropriate in his regression model
10 based on Mr. Carson's opinion regarding the long-term goals of demo
11 programs. The fact that Mr. Neches devised an allegedly unreliable
12 methodology based on Mr. Carson's opinion does not render Mr.
13 Carson's opinion unreliable.

14 Mr. Carson's experience qualifies him to offer his criticism
15 of Dr. Bucklin's general analytical framework, and Mr. Carson's
16 criticism may assist the fact finder in determining the weight that
17 it should afford Dr. Bucklin's regression analysis. Defendant's
18 motion to strike Mr. Carson's opinion is DENIED without prejudice
19 to Defendant's right to file a proper motion *in limine*.

20 **2. Thomas Neches' Regression Analysis**

21 Thomas Neches is a designated expert retained by Plaintiff to
22 determine Plaintiff's economic damages. Mr. Neches has thirty
23 years experience performing accounting, financial, economic, and
24 statistical analysis. Mr. Neches is a certified public accountant
25 and is certified in financial forensics, among other disciplines.
26 On October 22, 2010, Mr. Neches prepared an Updated Expert Report
27 ("Updated Report") in which he criticized Dr. Bucklin's statistical
28 analysis of the effectiveness of in-store demos at Sam's Club.

1 Among other criticisms levied in the Updated Report, Mr. Neches
2 asserts that Dr. Bucklin's analysis fails to account for the impact
3 of demos on long-term cumulative sales. Mr. Neches conducted a
4 least-squares multivariate linear regression analysis to estimate
5 the cumulative weekly number of Slim-Lite cases sold as a function
6 of three factors: the cumulative number of weekly Friday through
7 Sunday demos; the cumulative number of Monday through Thursday
8 demos; and the number of stores carrying Slim-Lite in the week.
9 Mr. Neches' analysis indicates that Friday through Sunday demos at
10 Sam's Club were cost-effective, but that Monday through Thursday
11 demos were not.

12 Defendant argues that Mr. Neches' regression analysis is
13 neither relevant nor admissible. In support of its position,
14 Defendant advances three contentions, each of which is essentially
15 a gloss on the central criticism Defendant raises: any two
16 cumulative data sets may appear to demonstrate a relationship and
17 thus regression analysis of such data sets is unreliable.
18 Defendant contends that (1) cumulative analysis of sales data has
19 not gained acceptance in the field of marketing research; (2)
20 statistical analysts warn against using cumulative analysis of data
21 sets; and (3) cumulative analysis can incorrectly imply a
22 relationship between almost any two sets of data.

23 Defendant's expert, Dr. Bucklin, states "using cumulative demo
24 activity to explain cumulative sales is an unorthodox approach...I
25 have never seen [Mr. Neche's] type of formulation used in the
26 analysis of marketing data." (Bucklin's Second Rebuttal Report,
27 Doc. 76-4, Ex. D at 4). Although Dr. Bucklin has not seen a
28 specific application of a least-squares multivariate linear

1 regression analysis in which cumulative sales was used as the
2 dependant variable, Dr. Bucklin does not dispute that regression
3 analysis of cumulative data sets is a generally accepted scientific
4 practice, albeit one that is subject to scrutiny in light of the
5 well-recognized pitfalls of such analysis. The econometrics text
6 Dr. Bucklin cites in his report provides:

7 It is important to be aware of trends in analyzing the
8 relationships between two variables that are changing
9 over time. One reason is that is it easy for
10 investigators to be fooled into believing that there is
11 a real relationship between two variables when in fact
12 the two variables are unrelated. For example, if both
13 variables are following an upward trend over time, it
14 will appear that the dependent variable is increasing
15 because the independent variable is increasing.

16 (Doc. 75, Motion to Strike at 7). Dr. Bucklin's own authority
17 indicates that regression analysis of cumulative data is an
18 accepted methodology, provided the results of such analysis are
19 placed in the context of natural trends inherent in the data sets;
20 at trial, or during a hearing on a motion *in limine*, Defendant can
21 elicit this context during cross-examination of Mr. Neches and
22 direct examination of Dr. Bucklin. Further, the econometrics text
23 cited by Dr. Bucklin, as well as his own statements, reveal that
24 the real danger underlying regression analysis of cumulative data
25 sets - implying a relationship between completely unrelated sets of
26 data- is not present here. Dr. Bucklin cannot argue in good faith
27 that there is no relationship between demos and sales, as even his
28 own analysis demonstrates the existence of a relationship:

 [T]he approach I have taken regressing current sales on
current and lagged demos is the appropriate way to
estimate the effect of demos on Slim-Lite sales. Note
that I find the effect to be positive and significant
when using my approach.

1 (Bucklin's Second Rebuttal Report, Doc. 76-4, Ex. D at 5).
2 Because, as even Dr. Bucklin concludes, there is *some* relationship
3 between cumulative demos and sales, it is axiomatic that cumulative
4 demos are related to cumulative sales. Whether or not Mr. Neches'
5 analysis overstates the relationship between cumulative demos and
6 cumulative sales relates to the credibility and weight of Mr.
7 Neches' analysis, not its admissibility. To the extent testimony
8 reveals that Mr. Neches' regression model is designed to magnify
9 the relationship between cumulative demos and cumulative sales by
10 building in a positive correlation arising out of the inherent
11 upward trend attendant to cumulative data sets, the fact finder can
12 draw appropriate inferences regarding Mr. Neches' credibility and
13 the value of his analysis.³

14 Dr. Bucklin's attempt to demonstrate the fallacy of Mr.
15 Neches' methodology by conducting a regression analysis of
16 cumulative data concerning rainfall figures in Seattle, Washington
17 and the Los Angeles Lakers' basketball scores during the 2008-2009
18 season is unavailing. Unlike the cumulative data sets included in
19 Mr. Neches' analysis, Lakers' scores and Seattle precipitation are
20 indisputably unrelated. Defendant's motion to strike Mr. Neches'
21 regression analysis is denied without prejudice to Defendant's
22 right to file a proper motion *in limine*.

23 ///

25 ³ Notably, although Mr. Neches' analysis revealed a statistically significant
26 positive relationship between cumulative Monday-Thursday demos and cumulative
27 sales, Mr. Neches' still concluded that such demos were not profitable and that
28 it was not commercially unreasonable for Defendant to cease Monday-Thursday
demos. Dr. Bucklin's regression analysis also reflects a distinction between the
effectiveness of Monday-Thursday demos and Friday-Sunday demos. (Bucklin's
Second Rebuttal Report, Doc. 76-4, Ex. D at 7).

1 **B. Motion to Strike Thomas Neches' Damages Calculations**

2 Plaintiff's damages expert, Mr. Neches, prepared an analysis
3 purporting to calculate lost expected profits and damage to
4 goodwill of Slim-Lite caused by Defendant's alleged breach. Mr.
5 Neches' analysis posits three alternative scenarios. Under Mr.
6 Neches' first scenario, Defendant would have continued selling Slim-
7 Lite under the terms of the Agreement through 2015. Under Mr.
8 Neches' second scenario, Defendant would have exercised its
9 purchase option in 2006 and then continued selling Slim-Lite
10 through 2015. Under Mr. Neches' third scenario, Defendant
11 terminates the Agreement in 2005, Plaintiff sells Slim-Lite through
12 2015, and then earns or sells the present value of future profits
13 after 2015.

14 **1. Lost Profits**

15 Defendant correctly contends that Mr. Neches' first two
16 scenarios for projecting lost profits are violative of California
17 law and the court's Memorandum Decision on Defendant's Motion for
18 Summary Judgement ("Memorandum Decision"). (Doc. 36). The
19 Memorandum decision provides, in pertinent part:

20 [Martin v. U-Haul Co. of Fresno, 204 Cal. App. 3d 396
21 (1988)] [] applies here and limits Citri-Lite's
22 recoverable damages. Cott properly terminated the
23 Agreement without cause by providing Citri-Lite, in
24 October 2005, a sixty-day advance written notice that it
25 was terminating the Agreement. (Doc. 40 at 52- 23, 64).

26 After that sixty-day notice period elapsed, the
27 Agreement terminated and Citri-Lite could not reasonably
28 expect further performance or royalty payments from the
Agreement beyond that point. At least one, if not more,
of Citri-Lite's damages theories, however, projects
Cott's sales of Slim-Lite and royalty payments to
Citri-Lite through 2015. These damages theories
presuppose more than full performance by Cott as limited
by the contract's express terms. To the extent Citri-Lite
seeks damages for lost royalty payments beyond the
termination of the Agreement, Plaintiff is barred from

1 recovering those damages. At oral argument on the motion,
2 Citri-Lite conceded the point, agreeing that Martin
precludes recovery of lost royalties beyond the term of
the Agreement.

3 (Doc. 65 at 45). Plaintiff tacitly concedes that Mr. Neches did
4 not review or follow the Memorandum Decision in preparing his
5 opinion on lost profits.

6 Plaintiff attempts to overcome the rule set forth in *Martin* by
7 arguing that (1) the court has broad discretion to admit expert
8 testimony; (2) the court should exercise its discretion to admit
9 Mr. Neches' analysis because Defendant's concealment of its breach
10 makes it difficult at this point in time to ascertain damages.
11 Plaintiff cites a slew of cases, none of which address the analysis
12 contained in the Memorandum Decision. Defendant's conclusory
13 allegation that Defendant's conduct makes it difficult to ascertain
14 damages at this point in time is insufficient to permit the court
15 to ignore its prior ruling, which now constitutes the law of the
16 case, and apposite California precedent which holds that lost
17 profit damages are limited to the term of the contract. *E.g.*
18 *Martin*, 204 Cal. App. 3d at 409.

19 Although it is not a clearly articulated argument raised in
20 Plaintiff's opposition, Plaintiff also suggests that Defendant's
21 breach in 2004 (i.e. Defendant's commercially unreasonable handling
22 of Slim-Lite) caused Defendant to later terminate the agreement and
23 thus Defendant's termination of the agreement was itself a harm
24 caused by Defendant's commercially unreasonable conduct.
25 Plaintiff's purported exception would swallow the *Martin* rule, as
26 an aggrieved party could avoid the rule simply by asserting that
27 some antecedent breach of a contract obligation, such as a breach
28

1 of the covenant of good faith and fair dealing, caused their
2 adversary to exercise a termination option.

3 All three of Mr. Neches' scenarios regarding lost profits are
4 inadmissible to ascertain lost profit damages, as all three
5 incorporate projections of lost profits inuring after the contract
6 term in violation of the *Martin* and the Memorandum Decision.

7 **2. Lost Goodwill**

8 **a. Mr. Neches' Damages Scenarios and Goodwill Calculation**

9 Plaintiff argues that even if it is limited to lost profits
10 realized during the contract term, Mr. Neches lost profits
11 projections are relevant to the issue of damage to Slim-Lite's
12 goodwill, as damage to goodwill is calculated by comparing the
13 present value of expected future sales and profits with the actual
14 present value of expected sales and profits at the time the parties
15 agreement terminated. (Updated Neches Report, Doc 76-1, Ex. A at
16 4). Assuming Plaintiff's argument is correct, Mr. Neches' lost
17 profit projections are only relevant to the issue of damage to
18 Slim-Lite's goodwill to the extent such projections are sound.
19 Because Mr. Neches' first two scenarios are based on the unfounded
20 assumption that Defendant would have continued to sell Slim-Lite
21 past the contract term, they are not relevant to determining damage
22 to Slim-Lite's goodwill. As stated in the Memorandum Decision:
23 "[t]o the extent the goodwill damages Citri-Lite seeks are premised
24 on Cott's performance beyond the termination of Agreement,
25 Citri-Lite is barred from recovering those damages." (Doc. 65 at
26 46).

27 Unlike his first two scenarios, Mr. Neches' third lost profit
28 scenario does not assume continued sales by Defendant of Slim-Lite

1 through 2015. Rather, Mr. Neches' third scenario assumes that
2 Plaintiff would have continued to sell Slim-Lite (goodwill
3 untarnished) itself from 2005 to 2015. Evaluating the value of
4 Slim-Lite's goodwill based on projected profits Plaintiff could
5 have received selling Slim-Lite itself from 2005 through 2015 had
6 Defendant not damaged Slim-Lite's goodwill appears reasonable.
7 Conceptually, the lost profit projections provided in Mr. Neches'
8 third scenario are relevant to ascertaining damage to Slim-Lite's
9 goodwill, but only to the extent that such projections are sound.
10 The substantive merits of Mr. Neches' analysis can be explored *in*
11 *limine*.

12 **b. Mr. Neches' Goodwill Calculation**

13 Defendant complains that Mr. Neches' goodwill calculation is
14 flawed because it does not follow the legally-recognized formula
15 for calculating goodwill. Specifically, Mr. Neches failed to
16 subtract the value of Plaintiff's net-assets at the time of breach.
17 (Doc. 76, Motion to Strike at 9). Plaintiff responds that Mr.
18 Neches did not subtract net-assets because Plaintiff had "few
19 tangible assets" and thus Slim-Lite's goodwill accounted for
20 "virtually the entire value of the company." (Doc. 80, Opposition
21 at 21). Plaintiff also disputes the notion that there is only one
22 legally acceptable formula for calculating goodwill.

23 Mr. Neches' own statement in his Updated Rebuttal Report
24 states that net assets should be subtracted from expected profits
25 in calculating goodwill. Mr. Neches should have endeavored to
26 value Plaintiff's "few tangible assets" at the time of breach.
27 There may be a valid explanation for Mr. Neches' decision, but none
28 is provided. A more thorough inquiry is required before Mr.

1 Neches' goodwill valuation is excluded in whole or in part.
2 Defendant's arguments are best addressed in the context of a motion
3 *in limine*.

4 **ORDER**

5 For the reasons stated, Defendant's Motions to Strike are
6 DENIED, without prejudice to the filing of motions *in limine* in
7 accordance with applicable local rules and the Federal Rules of
8 Evidence.

9 IT IS SO ORDERED.

10 **Dated: January 25, 2011**

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE