Samson Lift Tech., LLC v Jerr-Dan Corp.
2014 NY Slip Op 33479(U)
November 24, 2014
Supreme Court, New York County
Docket Number: 653586/2011
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

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SAMSON LIFT TECHNOLOGIES, LLC, Plaintiff, -against- JERR-DAN CORPORATION, A/K/A JERRDAN CORPORATION, and OSHKOSH CORPORATION, Defendants.	Index No. 653586/2011 DECISION AND ORDER Motion Sequence Nos. 006, 007 and 008

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MELVIN L. SCHWEITZER, J.

Samson Lift Technologies LLC (Samson) brings a breach of contract cause of action against defendant Jerr-Dan Corporation (Jerr-Dan). Samson brings fraud and promissory estoppel causes of action against defendant Oshkosh Corporation (Oshkosh). Samson moves for summary judgment. Jerr-Dan moves for partial summary judgment on the issue of damages. Oshkosh moves for summary judgment on both the fraud and promissory estoppel causes of action. All summary judgment motions are pursuant to CPLR 3212.

Background

The following material facts are not disputed, except as noted. Samson acquired the rights to U.S. Patent No. 5,915,912 by exercising an option to become the owner of the Patent on June 4, 2004. The product to be manufactured under this Patent was the Side-Loading Vehicle Retriever (SLVR), a tow truck capable of towing a car from the side quickly and efficiently. Samson did not have the capability to manufacture the SLVR or the necessary distribution network, so Samson sought a business partner to manufacture, market and sell the SLVR under the license agreement.

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Two logical candidates to enter into a license agreement with Samson were Jerr-Dan and Miller Industries (Miller), the two largest tow truck manufacturing companies in the United States. Samson exchanged documents with both parties. As of early 2004, both Miller and Jerr-Dan remained interested in entering into a SLVR license agreement with Samson. Ultimately, Jerr-Dan and Samson executed a license agreement on June 16, 2004 (Initial License Agreement).

Around this time Oshkosh purchased Jerr-Dan. Jerr-Dan contacted Samson, requesting that Tony Gelbart, President of Samson, travel to Wisconsin to meet with Oshkosh representatives to discuss the Initial License Agreement. Anticipating potential requests for changes to this Agreement, Gelbart was accompanied by his counsel, Jeffrey Wasserman. Gelbart and Wasserman met with Oshkosh and Jerr-Dan representatives, including Jeff Weller of Jerr-Dan and John Randjelovic, Don Verhoff, and Bryan Blankfield of Oshkosh on July 1, 2004.

The parties dispute the exact nature and content of discussions at this meeting. According to the deposition testimony of Gelbart, Randjelovic said Oshkosh would "help Jerr-Dan sell and market and distribute and manufacture the SLVR." According to Oshkosh, admissible evidence is clear that there were no additional promises made at this meeting. According to Samson, other promises were made. Regardless, Samson and Jerr-Dan executed an amended license agreement on July 22, 2004 (Amended License Agreement). Samson agreed to changes in sections 1.5, 5.1, and 5.2 in negotiating the Amended License Agreement.

Samson was unhappy with Jerr-Dan's production and alleges numerous breaches of the Amended License Agreement, most notably section 8.2. Based on Jerr-Dan's failure to meet its exclusivity target of 350 units by June 30, 2006, Samson provided notice that the license would convert to a non-exclusive license on August 22, 2006.

In October 2008, Jerr-Dan informed Samson it would no longer attempt to sell the SLVR. During its time attempting to sell the SLVR, Jerr-Dan sold one unit in compliance with the license agreement. Additional material facts are discussed below.

Discussion

To obtain summary judgment, the moving party must establish its cause of action "sufficiently to warrant a court's directing judgment in its favor as a matter of law." *Gilbert Frank Corp.* v *Fed. Ins. Co.*, 70 NY2d 966, 967 (1988). In order to defeat the motion, the defending party must produce admissible evidence to establish a factual issue requiring trial. *Id.* The motion must be scrutinized in a light most favorable to the opposing party. *Negri* v *Stop and Shop, Inc.*, 65 NY2d 625, 626 (1985).

Breach of Contract Claim: Samson Motion for Summary Judgment

Standards

"Under New York contract law, a plaintiff is entitled to summary judgment as to liability on a breach of contract claim if it establishes (1) the existence of a valid contract, (2) its own performance under the contract, and (3) defendant's breach of its obligations under the contract." *Lehman Bros. Holdings, Inc. v Resource Mtge. Banking, Ltd.*, 2013 NY Misc LEXIS 3843, *2-*3 (NY Sup Ct Aug 21, 2013) citing *Morgan Guar. Trust Co. v Bay View Franchise Mortgage Acceptance Co.*, No. 00-CIV-8613 (SAS), 2002 WL 818082, at *2 (SDNY April 30, 2002).

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Section 8.2

Samson asserts that Jerr-Dan's actions, established by uncontested facts, breached the Amended License Agreement and Samson is entitled to summary judgment. While other sections are alleged to have been breached, the summary judgment motion primarily focuses on section 8.2. 8.2 reads in part as follows:

> [Jerr-Dan] warrants to make reasonable commercial efforts to manufacture, advertise, sell and ship the Licensed Products, and shall continuously and diligently during the term of this Agreement procure and maintain facilities and trained personnel sufficient and adequate to accomplish the foregoing, all to the extent and in a manner no less thorough, diligent, and professional than the same accorded by [Jerr-Dan] for [Jerr-Dan's] other products.

Samson argues that this clause contains two distinct agreements: (1) to use "reasonable commercial efforts" to manufacture, advertise, sell and ship the SLVR, and (2) a "non-discrimination" agreement to treat the SLVR no worse than Jerr-Dan's other products. Jerr-Dan while acknowledging the sentence contains both a "reasonable commercial efforts" and "non-discrimination" element, urges a holistic reading. Jerr-Dan argues the clause imposes a single duty to use "reasonable commercial efforts" (in the same way it would use "reasonable commercial efforts" in regards to its other products).

Samson's interpretation would require equal or better treatment of the SLVR. Jerr-Dan's interpretation would require equal or better commercial efforts in selling the SLVR. The distinction is not mere semantics. Consider Jerr-Dan omitting the SLVR from the dealer incentive program submitted to the court. If Samson's interpretation is correct, this undisputed omission violates the separate non-discrimination agreement. Jerr-Dan dealers were given an incentive to sell certain products, and were not given that same incentive for selling the SLVR. This is a form of inferior treatment as compared to other Jerr-Dan products. However, if

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Jerr-Dan's interpretation is correct, the decision to exclude the SLVR, despite being inferior treatment, may have been commercially reasonable. Other Jerr-Dan products were not included in the dealer incentive program, and the products covered by dealer incentive programs changed from time to time. There are other examples of undisputed facts which would violate a separate non-discrimination agreement but may be commercially reasonable (e.g. the SLVR was demonstrated far fewer times than the best-selling MPL product, which is differential treatment but, given the popularity of the MPL, not necessarily unreasonable).

The reading of section 8.2 advocated by Jerr-Dan is correct; section 8.2 imposes a duty to use reasonable commercial efforts, no worse than the efforts afforded Jerr-Dan's other products. Should the parties have wished to have imposed a strict non-discrimination agreement separate and additional to the "reasonable commercial efforts" provision, there were structures (e.g. separate articles, separate sections or even separate sentences) to do so. The final sub-clause of 8.2 solidifies Jerr-Dan's interpretation. By emphasizing that the non-discrimination language applies to "*all*" of the proceeding sentence, which includes the reasonable commercial efforts language, the parties clearly and unambiguously contracted a non-discrimination element into their reasonable commercial efforts promise. Therefore, to establish a breach of section 8.2 on summary judgment, Samson needs to prove Jerr-Dan, as a matter of law, did not undertake reasonable commercial efforts (or undertook these efforts in a manner worse than the reasonable commercial efforts accorded by Jerr-Dan for Jerr-Dan's other products). Samson argues that even under this interpretation, the treatment of the SLVR violated section 8.2 as a matter of law.

Samson argues that numerous undisputed facts prove discrimination that is commercially unreasonable as a matter of law. Until October 2007, there were no commissions budgeted for sales of the SLVR, despite the fact that commissions are typically budgeted as a part of

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Jerr-Dan's sales manager's compensation and commissions were offered for other trucks. The SLVR was not included as a "Covered Product." If the SLVR was a "Covered Product", there would have been a contractual duty for distributors to "diligently and aggressively sell and promote" the SLVR, and distributors would have been required to carry the SLVR in inventory. The dealer incentive program submitted to the court did not include the SLVR. Live demonstrations, important according to Jerr-Dan's Vice-President for Sales, were limited, and no mass demonstrations for distributors were hosted by Jerr-Dan like the demonstration of the 60-ton (HD) Rotator hosted by Jerr-Dan for approximately one hundred distributors. There was not a product specialist assigned to the SLVR from October 2006 to October 2007, and much of Jerr-Dan's sales staff could not operate the SLVR. The examples of training on the record are limited to Jerr-Dan training Samson's personnel, and the SLVR was not covered at Jerr-Dan University, a major training program. Personnel such as the Regional Manager of the Northeast (the primary target market) and the Vice-President for Sales were uninvolved in the marketing of the SLVR. Jerr-Dan documents reference an average price for the SLVR of $50,750, a price with a margin of 36.8%; a product introduced simultaneously had a zero margin. This high price, Samson posits, chilled sales. Pricing of the SLVR was listed as "TBD" in the 2006 and 2007 hard copy price books, not listed at all in the 2008 hard copy price books, and incorrect pricing was given to Samson for its SLVR sales in January 2007 (and not corrected until September 2007). With the price book a primary means to discover prices, as well as inaccurate pricing, Samson posits it was more complicated for distributors to determine an accurate price for the SLVR.

The SLVR also fell behind a promised manufacturing schedule. Jeff Weller did not deny making a promise testified to by Tony Gelbart and Ralph D'Angelo that an SLVR would be built

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by November 2004 for the American Towman Exhibition. This did not happen. The 60 ton Rotator Project was placed ahead of the SLVR in early 2006. No pre-production model of the SLVR was built until August 2006, and no production model was built until April 2007. The wheel-lift included on 90% of Jerr-Dan's products was not added to any SLVR until August 2006. All of the aforementioned facts in the previous two paragraphs are undisputed unless noted otherwise. Samson argues this requires judgment as a matter of law that the treatment of the SLVR was unreasonably inferior in terms of the commercial efforts undertaken by Jerr-Dan as compared to its other products.

Jerr-Dan offers facts which it claims are consistent with commercially reasonable efforts. The SLVR was introduced at the 2005 American Towman Exposition and prominently displayed at both the 2005 and 2006 American Towman Expositions. Jerr-Dan advertised the SLVR in trade publications both through favorable articles and full-page ads. Jerr-Dan created marketing materials, brochures, and (atypically) a DVD about the SLVR. After introduction and early marketing, Jerr-Dan relied on distributors to generate sales and arrange demonstrations. This is claimed by Jerr-Dan to be true of all Jerr-Dan products.

Jerr-Dan also offers the following undisputed facts which, Jerr-Dan claims, undermines Samson's facts supporting summary judgment. Many products were not on distributor schedules as "Covered Products", and these schedules merely listed products that dealers were required to keep in inventory. The dealer incentive program submitted to the court omitted 41 other Jerr-Dan products in addition to the SLVR. Paul Safelle earned a commission for SLVR demonstrations, regardless if the demonstration resulted in a sale, and Jeff Aiken testified he would have received a commission for SLVR sales after the time frame cited (October 2006-October 2007). Jerr-Dan typically performs demonstrations only when requested by independent dealers, thus the volume of demonstrations for particular products is usually out of Jerr-Dan's direct control. The only product specialist ever employed by Jerr-Dan dedicated to a single product was Aiken for the SLVR, and Jerr-Dan always had an employee capable of conducting a demonstration of the SLVR. "Jerr-Dan University" is an introductory training program and only offered product-specific training on the most basic and popular products. Testimony by Pat Smith and Avi Lazarus, Jerr-Dan distributors, states that the SLVR was treated no differently than other products and the ability to sell the SLVR was not impeded by Jerr-Dan. The regional sales manager of the Northeast did not receive commissions for certain other sales within his territory, and the sales that did result in commissions on any single product ranged from $30 to $150. There is no evidence that the Vice-President for Sales was directly involved with marketing any Jerr-Dan products, and Jerr-Dan typically does not sell products directly to end-users. SLVR sales other than the single sale in the geographic territory had a gross profit margin of 21.6%. In 2008 the price of the SLVR was available on Jerr-Dan's distributor website, which distributors by then had come to rely on. The pricing error discussed above did occur, but was corrected.

The promise made to introduce the SLVR at the 2004 American Towman Exhibition, according to Gelbart, was made in December 2003 (six months before the parties signed any agreement). D'Angelo testified Weller said the timeline for building a SLVR prototype for display would be "four to six months." D'Angelo testified that on June 10, 2004, Weller said the SLVR would "receive excellent exposure" and "create excitement" at the November 21 exhibition. The Initial License Agreement was entered into on July 16, 2004. Even if Weller's estimate was accurate (which it was not) Samson had reason to know that the SLVR not being prepared for the November 2004 American Towman Exhibition would be a possibility. Despite the pre-production model and production model not being available until August 2006 and April 2007, respectively, during this time Samson and Jerr-Dan both demonstrated and tried to sell the SLVR. There is no contractual requirement to have included a wheel-lift on the SLVR.

Jerr-Dan posits two cases stating that questions of reasonable commercial efforts are ill suited for summary judgment. *See Holland America Cruises, N.V. v Carver Fed. Sav. and Loan Ass'n*, 60 AD2d 545,545 (1st Dept 1977) ("whether defendant Carver acted in accordance with the reasonable commercial standards of the business of such defendant presents a question of fact which precludes summary judgment"); *Jones v Community Bank of Sullivan County*, 306 AD2d 679, 680-81 (3rd Dept 2003) ("Whether a bank acts in accordance with reasonable commercial standards generally presents a question of fact."). Although both cases were decided under Section 3-419[3] of the Uniform Commercial Code, this distinction alone does not render the proposition inapplicable here.

In *Bloor v Falstaff Brewing Corp.*, 601 F2d 609 (2d Cir. 1979) the court affirmed damages awarded by the lower court after a bench trial (not summary judgment) with respect to the violation of a "best efforts" clause. The "best efforts" clause there read as follows:

> "8. Certain Other Covenants of Buyer. (a) After the Closing Date the (Buyer) will use its best efforts to promote and maintain a high volume of sales under the Proprietary Rights." *Id.* at 610.

"Best efforts" and "reasonable efforts" clauses are used interchangeably in New York, so *Bloor's* analysis is illustrative here. *See Scott-Macon Secs., Inc. v Zoltek Cos.*, 2005 U.S. Dist. LEXIS 9034, *40 (SDNY May 11, 2005). Samson argues that under *Bloor's* reasoning the "reasonable efforts" clause required not just equal, but in fact preferable treatment. Samson's rationale for this preferential treatment is that, for its own products, Jerr-Dan is free to operate in a profit maximizing way. But with a "reasonable efforts" clause, there is an additional requirement to sell a high volume of SLVRs, even if taking the course to do so is not profit-maximizing for Jerr-Dan as a whole. *See Bloor*, 601 F2d at 614.

There are two problems with Samson's argument. First, in *Bloor* itself, treating a product subject to a "best efforts" agreement in an inferior way in a given circumstance to one of the defendant's own products was held to be commercially reasonable through a careful analysis of the facts and circumstances surrounding this decision. *Bloor*, 601 F2d at 614. Second, the "best-efforts" clause in *Bloor* did not have a non-discrimination clause like the last sub-clause in 8.2 (". . . all to the extent and in a manner no less thorough, diligent, and professional than the same accorded by [Jerr-Dan] for [Jerr-Dan's] other products."). The clause can be satisfied by equal as well as greater commercial efforts. It does not require preferential treatment or require Jerr-Dan's commercial efforts to be superior in respect to the commercial efforts used by Jerr-Dan for its other products.

The question of whether "reasonable commercial efforts" or "best efforts" have been undertaken is necessarily fact-intensive. As shown in *Bloor*, a lack of reasonable commercial efforts cannot be proven as a matter of law by mere undisputed inferior treatment of the SLVR in a given circumstance as compared to other products. Samson does provide evidence which could be interpreted as evidence that Jerr-Dan behaved unreasonably, including uncontested evidence that Jerr-Dan treated the SLVR in an inferior manner, in some respects, to its other products. But Jerr-Dan provides colorable evidence that they may have used reasonable commercial efforts greater or at the least no worse than the efforts used for their other products. The support and marketing Jerr-Dan provided for the SLVR were at times the same and at times superior to the support and marketing provided for other Jerr-Dan products. At other times the support and marketing provided to the SLVR was inferior. These treatments may have been commercially reasonable given a careful analysis of the circumstances. Similarly, treatments consistent with or even exceeding the treatment of other Jerr-Dan products may be found to have been commercially unreasonable, but this would again require a careful analysis of the circumstances. Neither these nor any other conclusions can be made as a matter of law based on the undisputed facts here.

Samson further argues the Amended License Agreement "contain[s] clear guidelines against which to measure such [commercially reasonable] efforts in order for such clause to be enforced." *Cruz v Fxdirectdealer, LLC*, 720 F3d 115, 124 (2d Cir. NY 2013). Among such guidelines posited by Samson are section 3.3 (terminating exclusive rights for "failing to employ those commercially reasonable and diligent efforts defined in paragraph 8.2 hereof") and the non-discrimination element of Section 8.2. A rigid "clear guidelines" standard of enforceability has not been accepted by the New York Court of Appeals. *See Van Valkenburgh, Nooger & Neville v Hayden Publ'g Co.*, 30 NY2d 34, 46 (1972). Clear guidelines can help a court in interpreting a contract, but may be a mere prerequisite for enforcement. *Cruz*, 720 F3d at 124 ("Some New York state courts have required "clear guidelines against which to measure" a party's efforts before they will enforce a "best efforts" clause."). It is unclear how "clear" the present "guidelines" are for determining what is commercially reasonable in this context. Using the missed exclusivity target as dispositive evidence of commercially unreasonable efforts begs the question. 8.2 allows the fact finder to weigh inferior treatment in helping to determine Jerr-Dan's commercial reasonableness, but allows inferior treatment as long as Jerr-Dan is not using inferior commercial efforts. The guidelines impact in this is insufficient to allow summary judgment as a matter of law.

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Finding a breach of 8.2 as a matter of law and a basis for summary judgment is at this juncture inappropriate.

Samson offers other bases for finding a breach of contract as a matter of law.

Failure to give Notice of Patent Filings

Samson argues Jerr-Dan breached section 5.1 by not notifying Samson of a provisional patent application in 2005 and a patent application in 2007. The relevant language in section 5.1 reads "[Jerr-Dan] will provide written notice to SAMSON of any Improvements conceived by [Jerr-Dan]. Such notice shall be provided to SAMSON, if [Jerr-Dan] files for U.S. patent protection for an Improvement." The plain language requires notice be provided of Improvements for which Jerr-Dan has filed a patent application. Jerr-Dan argues that section 5.1 requires notice of Improvements, not filings, and Samson failed to offer evidence that Jerr-Dan did not give notice of the Improvements that were the subjects of the patent applications. This argument is contradicted by the facts in the record. There is no dispute in the record that Jerr-Dan failed to give Samson the requisite notice of both Improvements and filings, and thereby violated section 5.1. Therefore, summary judgment for breach of contract based on section 5.1 is granted.

Samson also seeks summary judgment on section 5.5 of the agreement, which provides, in relevant part, "[t]he Parties will cooperate . . . with respect to prosecution of applications for patent protection for and regarding Improvements, regardless of which party developed the Improvements, including but not limited to, assisting with the preparation of the application. . . ." Jerr-Dan points out that Samson did not allege a violation of section 5.5 in its complaint. In reply, Samson requests leave to amend the pleadings to conform to evidence for a section 5.5

violation, and argues that Jerr-Dan had sufficient notice due to the previous inclusion of the facts related to their section 5.1 claim. *See Rodriguez v Panjo*, 81 AD3d 805, 806 (2d Dept 2011). "Leave to conform a pleading to the proof pursuant to CPLR 3025 (c) should be freely granted absent prejudice or surprise resulting from the delay," *Id.* Because Samson did not seek this relief in its moving papers, and raised it first in the reply, Jerr-Dan has not had an opportunity to submit papers in response. The court reserves on this issue, which shall remain sub judice, and gives Jerr-Dan two weeks, from receiving notice of entry of this decision, to file a sur-reply brief not exceeding five pages. The sur-reply shall be limited to the request for leave to amend under CPLR 3025 (c). Jerr-Dan shall also submit a courtesy copy of the sur-reply to Chambers at 26 Broadway, 10th Floor. There will be no further briefing on the issue.

Violation of the Territoriality Agreement

Jerr-Dan was licensed to sell the SLVR only in the United States. Samson was authorized to sell the SLVR in Europe. Jerr-Dan made an unauthorized sale of two SLVRs in the United Kingdom in early 2007. Samson did give retroactive permission for that sale and another sale of two units, but instructed Jerr-Dan not to make unauthorized sales again. Jerr-Dan did make an additional sale of two units. There were a total of six units sold in the United Kingdom. These facts are not disputed. Jerr-Dan did not comply with the territoriality agreement.

However, the breach supporting a breach of contract claim must be material. *See e.g. Morgan Guar. Trust Co. of New York v Bay View Franchise Mortgage Acceptance Co.*, No. 00 CIV. 8613 (SAS), 2002 WL 818082, at *4 (SDNY Apr 30, 2002) ("In addition, although section 8(a) refers to "any" breach of warranty, in order for a breach of warranty to trigger BVFMAC's section 8(a) repurchase obligation, it must be a material breach of the warranty in question.") Jerr-Dan offers Samson's retroactive approval of the sale and Samson accompanying Jerr-Dan to

Britain for dinner with an overseas buyer as evidence that its UK sales did not threaten the root of the Amended License Agreement. Jerr-Dan paid royalties on the unauthorized sales, and Samson did not articulate a compensable harm from this sale. A reasonable mind could conclude that this technical violation of the territoriality agreement did not threaten the essence of the agreement and therefore was not a material breach. Summary judgment on this ground is inappropriate.

Samson's motion for summary judgment on the breach of contract claim is denied as to section 8.2, granted, in part as to section 5.1, denied as to the territoriality agreement, and the court reserves decision as to section 5.5.

Breach of Contract Claim: Jerr-Dan Motion for Partial Summary Judgment

Jerr-Dan moves for partial summary judgment on the breach of contract claim, arguing Samson as a matter of law cannot prove damages. If there is an avenue for damages that could reasonably support a damages claim, partial summary judgment must be denied.

Background

Lost sales can be proven through expert testimony regarding general lost sales in the market. Samson attempts to offer such testimony through its expert Glenn Pomerantz. Pomerantz estimates in his primary damages calculation that, between 2005 and 2016, Jerr-Dan and Samson could have sold 3,256 SLVRs. The difference between this projection and actual (non-UK) sales (one unit) would lead to lost royalties of $24,265,851.

The projected sales used in Pomerantz's primary damages calculation originate in sections 3.3 and 3.4 of the Amended License Agreement. Section 3.3 begins "[i]n the right that [Jerr-Dan] does not, as the result of failing to employ those commercially reasonable and diligent efforts defined in paragraph 8.2 hereof, achieve Exclusivity Targets (as defined in Section 3.4) for any reporting period, SAMSON shall have the right . . . to convert the exclusive license granted under this Agreement to a nonexclusive license." Section 3.4 defines the Exclusivity Targets as 350 units for the first two years combined, and 350 units yearly for each year thereafter. Section 3.3 also stipulates "[t]he Parties acknowledge that the Exclusivity Targets originally agreed upon reflect realistic projections of market potential as of the time of the execution of this Agreement." The estimate was negotiated in an arms-length transaction between the parties. The Exclusivity Target represented about 2% of the size of the market, an estimate which Pomerantz considered reasonable. The Exclusivity Target was thus used as a basis for Pomerantz's primary lost profits analysis.

Pomerantz also performed an alternative damages calculation using Jerr-Dan's Annual New Product Development Plan for the SLVR. Projected sales in the first five years of production were 160, 200, 200, 208, and 216. The total lost sales were projected to be 2,119 units, leading to lost royalties of $14,262,248.

<u>*Standard*</u>

Summary judgment may be granted as to any cause of action "or part thereof," and if a motion for summary judgment is granted in part, the court may specify facts that are "not in dispute or are incontrovertible," rendering those facts "established for all purposes in the action." CPLR 3212 (e) and (g). Partial summary judgment is appropriate to eliminate claims for specified categories of damages. *Koch v Consolidated Edison Company of New York, Inc.*, 62 NY2d 548, 560 (1984).

In estimating lost profits, "the plaintiff must show a stable foundation for a reasonable estimate of damages[]" *Wathne Imports, Ltd. v PRL USA, Inc.*, 101 AD3d 83, 88 (1st Dept 2012), and the damages must naturally flow from the breach. *See Levine v Am. Fed. Group*, 180

AD2d 575, 577 (1st Dept 1992). Speculative testimony is inadequate to avoid summary judgment. *E.g. State v Slezak Petroleum Prods., Inc.*, 96 AD3d 1200, 1204-05 (3rd Dept 2012). Claims of lost profits involving new businesses or products (such as the SLVR) are subject to a heightened burden of proof, *Kenford Company, Inc. v County of Erie*, 67 NY2d 257, 261 (1986), but lost profits of such businesses can be recovered. There is also an element of causation, as the lost profits must be "directly traceable to the breach, not remote or the result of other intervening consequences." *Id.* "[D]amages for lost profits [] must be capable of proof with reasonable certainty[;] absolute certainty is not required." *Campbell v Rogers & Wells*, 218 AD2d 576, 580 (1st Dept 1995).

Discussion

Jerr-Dan posits that Pomerantz's primary damages calculation is wholly speculative. There is no evidence that the "ultimate evidence" supporting Pomerantz's primary calculation is not a sound sales forecast, and, without this evidence of sales, the negotiation of the Exclusivity Target can be separate from market realities in fact. Pomerantz testified he was unaware of any evidence that the Exclusivity Target represented a sales forecast besides the terms of the contract. Pomerantz analyzed other sources and data but not directly to support his damages estimate, instead using other information to estimate the size of the overall towing market. Arguing, however, that the Exclusivity Target "makes sense" because the Exclusivity Target equals approximately 2% of the market is not, without more, evidence of any probative value. *See e.g. Marsh v Smyth*, 12 AD3d 307, 312 (1st Dept 2004).

Jerr-Dan argues Pomerantz's report cannot prove causation of loss. Pomerantz's conclusion differs greatly from a market study performed by a third-party research firm, Wayne Blizman, which concluded the SLVR would sell 10-15 units per year (Blizman Report), and

Jerr-Dan argues this carefully researched report was disregarded. Causation, says Jerr-Dan, cannot be assumed, it must be proved that lost profits are "directly traceable" to the breach. *Kenford*, 67 NY2d at 261. This requirement is more stringent with lost profits from new products such as the SLVR. *Id.*

Pomerantz identifies 14 factors which caused or may have caused damages. Pomerantz did not estimate damages stemming from each individual factor; rather he aggregated the factors contributing to the damages. Pomerantz "evaluate[d] whether the above actions, if accurate, would have damaged Plaintiff and to what degree[.]" Pomerantz admits that the effect of some of the factors individually would be "relatively minor." Pomerantz does not attribute particular amounts of lost sales to a particular factor. If the jury were to find a breach of commercially reasonable efforts, regardless of which or how many of the 14 factors the jury found to be true, Pomerantz's calculation of lost royalties would be $24,265,851. Jerr-Dan argues this does not meet the requirements of causation.

The primary damages calculation by Pomerantz may sustain damages on a breach of contract, and thus summary judgment must be denied. The choice of the Exclusivity Target is consistent with standards in the accounting profession. The following excerpt from the American Institute of Certified Public Accountants Practice Guide nearly mirrors Pomerantz's analysis:

> In some instances, the lost profits calculation is made *in relation to a specific contract.* In that instance many of the elements of the calculation may be *set forth in the contract document*, i.e. *the number of units to be sold*, unit prices, etc. In this situation a model might be developed that calculates the *revenues anticipated under the terms of the contract*.

(Emphasis Added).

Pomerantz took the Exclusivity Targets, (defined by the parties as "realistic projections of market potential") and used them as a basis for revenues anticipated under the terms of the contract.

The Exclusivity Target was the "ultimate evidence" in Pomerantz's primary damages calculation. A reasonable fact-finder could conclude this was the correct choice, and that Pomerantz properly considered other evidence in coming to his conclusion. Contrary to the argument of Jerr-Dan, Pomerantz did not ignore the Blizman Report; rather he concluded "Jerr-Dan ignored the results of the [Blizman Report] and entered into the License Agreement with Samson with much higher unit sale expectations." Not accepting the projections of the Blizman Report could be found as well within the discretion afforded to Pomerantz in his valuation.

Jerr-Dan stresses that Pomerantz's approach of consideration causation in the aggregate cannot provide the causal bridge between breach and damages necessary to sustain a damages award. If a jury were to find Jerr-Dan did not use reasonable commercial efforts, (whether one of the 14 factors was found to be true or all 14 were found to be true) Pomerantz opines the damages would be the same. Pomerantz's report reflects his attempt to "evaluate whether the above actions, if accurate, would have damaged Plaintiff and to what degree."

All of the 14 factors analyzed by Pomerantz may or may not be breaches by Jerr-Dan of its contractual obligation to use "reasonable commercial efforts" in marketing the SLVR. In considering damages in the aggregate, Pomerantz testified that "whichever factors lead the jury to believe that best efforts or commercially reasonable efforts were not undertaken" would be the factors which caused the lost royalties. Jerr-Dan argues this is not sufficient causation of breaches to damages. But the damages caused by a lack of commercially reasonable efforts is precisely what Pomerantz analyzed. Pomerantz's reliance on the fact-finder's determination of "commercially reasonable efforts" was appropriate. His task was to estimate the damages caused by Jerr-Dan's failure to use commercial efforts, and to do so 14 factors potentially representative of a failure to use commercial efforts were considered. Pomerantz opines that if the sum of true factors is found to have breached commercially reasonable efforts, this would cause lost royalties of over $24 million. A reasonable fact-finder could conclude this satisfies the element of causation.

Because Pomerantz's primary damages calculation may support a damages claim by Samson, the motion for partial summary judgment must be denied. There is no need to consider the validity of Pomerantz's alternative damages calculation or the validity of evidence of specific lost sales at this time. Samson has an avenue for potential damages, which necessarily denies partial summary judgment on the issue of damages.

Fraud and Promissory Estoppel Claims: Summary Judgment Motions by Samson and Oshkosh

Samson has two causes of action against Oshkosh: (1) a cause of action for fraud alleging Oshkosh made false representations in order to induce Samson to amend the Initial License Agreement in favor of the Amended License Agreement; and (2) a cause of action for promissory estoppel, alleging that Oshkosh made material misrepresentations, to which Samson relied upon to its detriment when it agreed to amend the Initial License Agreement. Both Samson and Oshkosh filed motions for summary judgment.

Background

Samson and Jerr-Dan had a license agreement as of June 2004. On July 1, 2004, Tony Gelbart met with Oshkosh and Jerr-Dan executives, where there was at least one promise made regarding Oshkosh's role in manufacture, marketing, and sales of the SLVR. Having this promise or promises, Samson entered into a new license agreement, giving up ownership rights in patent Improvements (defined term) for the SLVR.

Standards

The elements of a fraudulent inducement claim in New York are "[1] a misrepresentation or a material omission of fact which was false and known to be false by defendant, [2] made for the purpose of inducing the other party to rely upon it, [3] justifiable reliance of the other party on the misrepresentation or material omission, and [4] injury." *Lama Holding Co. v. Smith Barney Inc.*, 88 NY2d 413, 421 (1996) (internal citations omitted).

To establish a cause of action for promissory estoppel, a plaintiff must prove a "(1) clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise is made, and (3) an injury sustained in reliance on the promise." *Sabre Int'l Sec., Ltd v Vulcan Capital Mgmt., Inc.*, 95 AD3d 434, 439 (1st Dept 2012).

Discussion

Jerr-Dan argues that in his deposition, Gelbart identifies a single promise made to him by Oshkosh representatives. John Randjelovic, President of the Fire and Emergency Segment of Oshkosh at the time, promised Gelbart "[Oshkosh] would use [its] abilities to help Jerr-Dan sell and market and distribute and manufacture the SLVR." Gelbart stated there were no other specific promises made by Randjelovic that he could recall. The other Oshkosh representatives made other general statements related to the benefits of Oshkosh acquiring Jerr-Dan.

Samson produced an Affidavit by Gelbart, which stated "Oshkosh promised assistance to Samson in many forms… [which] cannot be accurately or fairly characterized as merely one promise." In the affidavit Gelbart asserted Oshkosh representatives promised they would

(1) help with marketing the SLVR, (2) assist with sales of the SLVR through Jerr-Dan's distributor network, (3) use Oshkosh's widespread contacts to help with sales, including to government entities, because of long-standing, ongoing, significant relationships Oshkosh and its divisions had established over years of selling garbage trucks, fire trucks, emergency vehicles (including ambulances), mobile command units, and others, (4) use Oshkosh's contacts with the United States military and civilian facilities such as airports to market and sell the SLVR, (5) use Oshkosh's massive buying power to lower manufacturing costs, and (6) cross-market the SLVR through Oshkosh's other divisions.

Gelbart continues that Randjelovic described the ways that Oshkosh would help sell the SLVR, would use its government contacts for marketing and selling the SLVR, and use Oshkosh's buying power in support of the SLVR.

The promises in the Gelbart Affidavit are more detailed and specific than promises held as too vague to induce reliance as a matter of law. *See Rogowsky v McGarry*, 55 AD3d 815, 816-17 (2d Dept 2008) (promise by defendant to honor a decedent's wish to convey property to the plaintiff's promise was vague and could not have reasonably induced reliance); *Dabriel Inc. v First Paradise Theaters Corp.*, 99 AD3d 517, 522 (1st Dept 2012) (vague promise to negotiate rent); *Pullman Group, LLC v Prudential Ins. Co.*, 288 AD2d 2, 4 (1st Dept 2001) (claim "not supported by the allegation of a clear and unambiguous promise"). The trier of fact could conclude Samson reasonably relied on the promises in the Gelbart Affidavit.

Oshkosh argues Gelbart's Affidavit should be ignored because it is contradictory to the deposition, citing *Harty v Lenci*, 294 AD2d 296, 298 (1st Dept 2002); *Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 (1st Dept 2002); *Red Zone, LLC v Cadwalader, Wickersham &Taft, LLP*, -- N.Y.S. --, 2013 WL 8695917, *7 (NY Sup Ct New York Cnty 2013) (slip op.).

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Consistent with the case law, the Affidavit should be ignored only if it is flatly contradictory. The promises in the Gelbart Affidavit, far from being flatly contradictory, add color and detail to the promises and discussion regarding Oshkosh's role in SLVR sales. The promises in Gelbart's Affidavit will not be ignored.

Assistance Provided by Oshkosh

Oshkosh argues the following are 'just some of the ways Oshkosh provided help." Jerr-Dan Engineers met with Oshkosh representatives seeking assistance on implementation of a high-tech "multiplex wiring system." Jerr-Dan had no experience with multiplex wiring, while Oshkosh used multiplex wiring almost exclusively on their defense trucks. Jerr-Dan worked with Oshkosh and its vendors to develop and implement a multiplex wiring system for the SLVR.

Karen Seylar, Jerr-Dan's Vice President of Marketing until 2008, directly reported to Kristen Skyba, Oshkosh's Vice President of Marketing. According to Seylar, Skyba prepared the marketing plan for the SLVR, and, pursuant to Skyba's authorization, a sales training kit including at least a marketing DVD and brochure was created for the SLVR.

Oshkosh also facilitated contacts with interested buyers. William Surace and Tom Del Grasso of the New York Department of Sanitation saw a DVD of the SLVR while visiting the Oshkosh factory, and Oshkosh later made contact with the Department of Sanitation, providing insight into the bidding process. Mike Smith, an independent contractor working on behalf of Oshkosh, helped facilitate marketing of the SLVR to the General Services Administration (GSA). Smith set up a demonstration of the SLVR for two GSA engineers, and provided advice into GSA contacts and their bidding process.

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Samson argues, as they must to sustain their motion for summary judgment, that the examples of help from Oshkosh cannot satisfy the detailed promises in the Gelbart Affidavit. The "high-tech" multiplex wiring was a standard request for most municipal truck bids as early as 2004. By helping with the implementation of multiplex wiring, Oshkosh merely assisted with the development of Jerr-Dan's new products, which was done routinely post-acquisition.

Samson argues Seylar (Jerr-Dan) did indeed report to Skyba (Oshkosh), but this was not unique for the SLVR, and thus was not any help from Oshkosh. Numerous Jerr-Dan personnel were unaware of Skyba's authorship of the marketing plan, or even the plan's existence.

Samson argues it was standard for Jerr-Dan to deliver a video with each truck, and thus the DVD is not new or special for the SLVR. The New York Department of Sanitation contact facilitated by Oshkosh is described by Samson as "assistance through happenstance" and an "ordinary courtesy". The video shown in the factory has not been identified. Mike Smith was an independent contractor, and thus Samson argues his efforts provide no basis for the claim that Oshkosh complied with its promises. The examples posited by Oshkosh are limited to assistance to Samson, only one of Jerr-Dan's approximately 75 distributors. There is also, argues Samson, no evidence of active cross-marketing.

Samson's attempts to minimize Oshkosh's proffered evidence do not make the evidence insufficient as a matter of law. Multiplex wiring or videos being standard for other Jerr-Dan trucks is irrelevant; nothing in the promises requires that Oshkosh's efforts be "new" or "special". The "chance viewing" of what potentially was a larger video presentation is not accompanied by a citation to evidence, and the so-called "chance viewing" was just a part of the contact between Samson and New York Department of Sanitation facilitated by Oshkosh. After the video viewing, Oshkosh put the Department of Sanitation in contact with Jerr-Dan, gave

Samson information about the Department of Sanitation's purchasing history, provided information on the opportune time to place a bid, and stayed in touch with Department of Sanitation representatives regarding the SLVR through an employee of Oshkosh's subsidiary.

It is irrelevant that Mike Smith was a government contractor; nothing in the promise required employees of Oshkosh to provide the promised assistance. Smith was working on behalf of Oshkosh. Oshkosh promised assistance to Jerr-Dan, not any of Jerr-Dan's individual distributors, so lack of evidence of Oshkosh helping other distributors is not persuasive.

There is undisputed evidence Oshkosh provided help to Jerr-Dan in selling and marketing the SLVR. Did the help provided by Oshkosh satisfy the specific promises articulated by Gelbart in the Gelbart Affidavit? The reasonable fact finder could find indeed that Oshkosh satisfied the specific promises in the Gelbart Affidavit. If so, there was no misrepresentation, as Oshkosh performed the promised conduct. Unable to prove misrepresentation as a matter of law, Samson's motions for summary judgment must be denied.

Damages

Samson must prove damages to sustain its promissory estoppel and fraud causes of action. *Braddock v Braddock*, 60 AD3d 84, 95 (1st Dept 2009); *Sabre Int'l Sec., Ltd. v Vulcan Capital Mgmt.*, 95 AD 3d 434, 439 (1st Dept 2012); *Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 (1st Dept 2006).

Samson's theory of damages derives from the opinion of its expert, John Kwon. Kwon's theory is that Jerr-Dan conceived of three 'Improvements' which, under the Initial License Agreement, Samson would have owned and patented. Improvements are defined similarly in both License Agreements (Initial License Agreement: "any modifications, improvements and/or developments to a product or method described or claimed in the SAMSON Patent Rights by

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either party." Amended License Agreement: "any modifications, improvements and/or developments to a product made by either party which, but for this Agreement, would infringe a claim in the SAMSON Patent rights."

Samson clearly lost ownership of Improvements conceived by Jerr-Dan with the amendment of the Initial License Agreement. 5.1 of the Initial License Agreement, in relevant part, reads "*All Improvements* made or conceived *by any Party* to this Agreement, separately or jointly with the other Party, shall be the *property of SAMSON*[.]" (emphasis added). 5.1 of the Amended License Agreement, in relevant part, reads "Improvements (as defined in section 1.5) *conceived by the LICENSEE* shall be the *property of the LICENSEE* [.]" (emphasis added). While 5.2 gives ownership of Improvements conceived by Samson to Samson, Samson clearly lost ownership rights of Improvements conceived by Jerr-Dan. The damages question is what the value of this loss is, if any.

John Kwon, Samson's expert, argues that Samson, but for the amendment to the License Agreement, would have owned and patented three Improvements. A patent on these Improvements would, according to Kwon, allow it and another manufacturer/exclusive licensee to corner the SLVR market and earn substantial royalties. There are two key assumptions inherent in this theory. (1) By amending the agreement, Samson lost value based on the exclusive right to Improvements, and (2) that the Improvements are patentable. These two assumptions are derived from the deposition of Kwon, who said "if the indication to me was that these improvements were not patentable and that in essence someone would have the rights on a royalty-, you know, free basis into perpetuity, then you know, then it would be difficult for me to offer any kind of opinion." Oshkosh argues that while only one assumption must be false to merit summary judgment, here both key assumptions are false as a matter of law. In turn, Samson argues there are triable issues of fact on each assumption, both assumptions must be false to challenge Kwon's testimony, and even if Kwon's opinion is invalid, other considerations preclude summary judgment.

Based on Kwon's clear statement, he would only have difficulty assessing value if the license was un-patentable and Jerr-Dan possessed a license in perpetuity under the Initial License Agreement. Oshkosh argues if either the Initial License Agreement granted a perpetual license *or* the Improvements are un-patentable, there are no damages as a matter of law. In his deposition, Kwon was asked to assume, even if Samson had a patent, that there was a perpetual license to the Improvements. And how would that affect Kwon's opinion? Kwon said in this hypothetical, a perpetual license "would have a negative impact to the value I would attribute to the patent improvements." When asked about the significance of the negative impact, Kwon replied "[w]ithout doing the analysis, it would be difficult to quantify right now, but I would, you know, I would fathom that it would be fairly significant."

After explaining his assumption of patentability of the Improvements, Kwon says that if the Improvements were not patentable, this would have an "impact on my conclusion" of "a lower value."

Oshkosh argues that this "fairly significant" impact of a perpetual license renders "Kwon's valuation opinion invalid." Similarly, Oshkosh argues "In the absence of patentable improvements, then, Kwon's entire damages analysis is indisputably incorrect, and thus has no probative value." Oshkosh's argument exaggerates Kwon's statements. A "significant" "negative impact", or "lower value" does not render the opinion worthless by its own admission. On the other hand, if the Initial License Agreement granted a perpetual license to Jerr-Dan *and* the Improvements were un-patentable, therefore making it "difficult for [Kwon] to offer any kind of opinion," the opinion fells itself by the sword of its author. But Kwon's opinion is only weightless if the Initial License Agreement granted a perpetual license and the improvements are un-patentable.

Is there factual evidence that the Improvements are patentable?

Oshkosh argues that the Improvements conceived by Jerr-Dan as a matter of law are un-patentable. The only evidence in the record supporting these three Improvements being patentable is Kwon's testimony. However, Kwon expressly disavows offering an expert opinion on the patentability of Improvements, and relies solely on conversation with Samson's patent counsel, Boswell, as the basis for his own assumption of patentability. Boswell's alleged statements are inadmissible hearsay. On the other hand there is evidence the Improvements were not patentable. Patent applications on the three Improvements discussed by Kwon were rejected, and Oshkosh expert Peter McDermott proffered that the rejection was proper and the Improvements were never patentable. The only admissible evidence shows the Improvements are not patentable.

Samson argues McDermott's argument was flawed. McDermott assumed the three Improvements discussed were the *only* Improvements, rather than *examples*. McDermott did not review the patent applications personally. Samson also argues that Oshkosh and Jerr-Dan applied for a patent on these Improvements, and the application was rejected due to Oshkosh and Jerr-Dan not disclosing prior art of the Samson Patent (Oshkosh disputes this, claiming they were disclosed through a published European patent application substantively identical to the Samson patent). Samson further argues that because the failed application is now prior art, no party could ever patent these improvements, but this is not due to inherent un-patentability of the

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Improvements. The patentability of the Improvements at the time of their conception is a question for the fact finder.

In this instance, there is no admissible evidence of patentability of the Improvements. The three Improvements in the words of Kwon himself, were the only Improvements on which his opinion was based. The only admissible evidence of patentability is offered not by Kwon directly, but via the inadmissible hearsay of an admitted third party. There is no evidence of the improvements being patentable.

Was Jerr-Dan granted a perpetual license under the ILA?

Article 5.1 of the ILA begins as follows: "All Improvements made or conceived by any Party to this Agreement, separately or jointly with the other Party, shall be the property of SAMSON, and SAMSON shall grant and hereby grants to LICENSEE an exclusive, *irrevocable, royalty-free license* to make, have made, use, sell, or offer for sale such Improvements *in perpetuity* in the Territory with respect to the Licensed products, provided that such license shall be exclusive so long as the license for the SAMSON Patent Rights granted under this Agreement remain exclusive." (emphasis added). Oshkosh argues this clearly grants a perpetual license to Jerr-Dan under the Initial License Agreement. Only the exclusivity of Jerr-Dan's license to the Improvements can be lost.

Samson argues the crux of its position are damages caused by Samson losing ownership of the patents, rather than damages caused by license (by the clear language of the Amended License Agreement, ownership of the patents created by Jerr-Dan are lost). This does not contest the perpetual license granted to Jerr-Dan via the Initial License Agreement. The clear language of the Initial License Agreement granted a perpetual license to Jerr-Dan. There is no evidence to dispute that the Improvements were un-patentable or to dispute that the Initial

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License Agreement granted a perpetual license to Jerr-Dan. The Kwon report, according to Kwon himself, therefore cannot support a damages claim.

Are there other considerations which create triable issues of fact?

Samson argues that the loss of ownership of the Improvements can be a basis for damages, even if the Improvements are un-patentable and subject to a perpetual license. Samson points to evidence establishing the potential for value in ownership of the Improvements. Scott Weingust, the Oshkosh Damages Expert, allegedly admits the Jerr-Dan Improvements at issue here have (1) "nominal incremental value." Samson argues further that (2) Weingust admits, while his valuation did not find value for ownership of the Improvements, alternative methods of valuing the Improvements "perhaps" could give them value. Samson also argues (3) Weingust, in suggesting that using a 15 unit rather than a 350 unit sales estimation for damages would be more appropriate, thus concedes the existence of damages and only contests the quantity of damages. For these reasons, says Samson, regardless of the validity of the Kwon report, summary judgment must be rejected, as the ownership lost by Samson clearly has value of some amount, to be determined by the trier of fact.

Oshkosh replies to Samson's arguments as follows. (1) Accepting the mere possibility of Improvements having 'nominal, incremental value' is not the same as confirming value was lost when ownership was lost, and thus damages. Even if there is value, there is no evidence which can possibly establish this value and neither Kwon nor Weingust try. (2) Weingust does not opine as to alternate valuation methods because he has no knowledge of these methods, and explicitly admits as much. Weingust declining to opine on topics of which he has no knowledge is not evidence of damages, but prudent expert testimony. (3) Weingust's criticism of Kwon's sales projection usage was one of many criticisms of Kwon's work. Weingust did not state that a manufacturer could have sold 15 units.

None of the statements by Weingust identified by Samson indirectly admits the existence of damages. There remains no evidence on the record that ownership alone of the Improvements in this context, with a perpetual license to Jerr-Dan and un-patentability, has any value.

Kwon's opinions are based on two assumptions- patentability of the Improvements and the absence of Jerr-Dan's royalty-free perpetual license to use the Improvements. Both assumptions are wrong as a matter of law, leaving Kwon's valuation meaningless by his own admission. Thus, Samson cannot demonstrate damages stemming from changes to the Initial License Agreement. Nothing in Weingust's opinions alters that result. Samson cannot prove damages to Oshkosh, a necessary element in both fraud and promissory estoppel claims. Oshkosh's motion must be granted in full.

Conclusion

Accordingly, it is

ORDERED that plaintiff Samson's motion for summary judgment pursuant to CPLR 3212 for breach of contract against defendant Jerr-Dan Corporation is denied as to section 8.2, is granted, in part as to section 5.1, is denied as to the territoriality agreement, and the court reserves decision as to section 5.5; and it is further

ORDERED that defendant Jerr-Dan's motion for partial summary judgment pursuant to CPLR 3212 on the issue of damages against plaintiff Samson is denied; and it is further

ORDERED that defendant Oshkosh's motion for summary judgment pursuant to CPLR 3212 against plaintiff Samson on both Samson's fraud and promissory estoppel causes of action against defendant Oshkosh is granted.

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Dated: November 24, 2014

ENTER:

J.S.C.