STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

VITEC SOLUTIONS, LLC,

Plaintiff,

MEMORANDUM DECISION

vs.

Index No. 8005/05

IKON OFFICE SOLUTIONS, INC.,

Defendant.

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES: **Amigone, Sanchez, Mattrey & Marshall, LLP**
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Attorneys for Plaintiff

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CURRAN, J.

The instant matter came before the Court upon cross motions by the parties for partial summary judgment. Upon due consideration, the Court denies Plaintiff's motion and grants the Defendant's motion in part.

A. Background and Procedural History

In early 2005, Empire Investment Holdings, LLC ("EIH") began negotiations to purchase a subsidiary of IKON involved in providing and servicing software and hardware systems in upstate New York ("the Business") (Alfonso Affid. ¶ 4; Exhibit I ["Alfonso EBT"] at 6, 9). David Alfonso, President of EIH, supervised the negotiations (Alfonso Affid. ¶ 5). The parties executed an Asset Sale and Assumption Agreement ("the Agreement") on March 31, 2005 and the sale closed on April 5, 2005 (*id*. ¶¶ 6-7 & Exhibit A [Agreement]). A new limited liability company, VITEC Solutions, LLC ("VITEC") was established to acquire and run the Business, and Mr. Alfonso became the chairman of the Board of Managers of VITEC (Alfonso Affid. ¶ 5; Alfonso Reply Affid. ¶ 17).

The aggregate purchase price for the Business was $900,000, plus an additional $50,000 for a Transition Services Agreement (Agreement § 4.1). Under section 4.1 of the Agreement, VITEC was required to pay $500,000 at closing in cash, and the amount of $400,000 was defined as the "Provisional Net Asset Value".[1] Section 4.2 sets forth a form of "true-up" provision:

> Within thirty (30) days after the Closing Date, Seller shall submit to Purchaser a final "**Closing Date Balance Sheet**" as of March 31, 2005 and calculation of the Net Asset Value as of March 31, 2005. Within sixty (60) days following the receipt of such "Final

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[1] Specifically, section 4.1 provides that "[t]he negative number of ($400,000) shall be referred to herein as the 'Provisional Net Asset Value.'" Section 4.2 (B) provides that, if the Final Net Asset Value "is less than the Provisional Net Asset Value (i.e. a higher negative number), then Seller shall, within five business days of the final determination of Net Asset Value, pay to Purchaser an amount equal to the difference" (Agreement § 4.2 [B]). If the Final Net Asset Value were deemed to be "greater than the provisional Net Asset Value (i.e. a lower negative number)", then the Purchaser had to pay the Seller the difference (*id*. § 4.2 [C]).

> Closing Date Balance Sheet" and calculation, Purchaser shall (i) notify Seller that it agrees with Seller's calculation of Net Asset Value, in which case such calculation shall be deemed the Final Net Asset Value, or (ii) provide Seller with a copy of Purchaser's calculation of Net Asset Value. In the event that Purchaser provides such a calculation of Net Asset Value, Seller will review such calculation and will notify Purchaser of any objection to Purchaser's calculation. If Seller has not given Purchaser notice of Seller's objection to Purchaser's calculation (such notice must contain a statement of the basis of Seller's objection), within 10 days of receipt of such calculation, then Purchaser's Net Asset Value Calculation shall be deemed the Final Net Asset Value. If Seller gives such notice of objection, then Seller and Purchaser will try in good faith to resolve any disputes and in the event that the parties cannot resolve such dispute, then each is free to file suit in a court of competent jurisdiction to enforce its rights hereunder.

(Agreement § 4.2 [A] [emphasis in original]).

Each party made certain representations and warranties in the Agreement which were deemed by the Agreement to have been material and to have been relied upon, notwithstanding any due diligence, and to survive the closing for a three-year period (Agreement ¶ 11).

On May 5, 2005, IKON sent VITEC a Net Asset Value spreadsheet with a positive value of $34,027 (Alfonso Affid., Exhibit B). In other words, IKON posited that VITEC owed it $434,027.

VITEC had engaged the services of an outside consulting company, TCM Jordan Consulting, Inc., to calculate its version of the Final Net Asset Value. By letter dated June 30, 2005, VITEC disputed items contained in the Closing Balance Sheet. Its letter stated in part:

> . . .Therefore, pursuant to Section 4.1 of the Purchase Agreement, $441,666.00 is due to IKON, which amount should be netted against the $2,187,336.00 owed to VITEC so that the net amount

> owed to VITEC is $1,745,670.00, pursuant to Section 4.2 (B) of the Purchase Agreement.

(Alfonso Affid., Exhibit C).[2] In other words, VITEC proposed that IKON should pay VITEC the net amount of $1,245,670 so that VITEC would acquire the Business from IKON.

VITEC detailed eight (8) separate categories of proposed adjustments to the Net Asset Value, the largest being "goodwill" impairment ($1,675,372); vacation accrual ($232,580); and additional allowances for bad debts ($215,123) (Alfonso Affid., Exhibit E).

By letter dated July 8, 2005, IKON responded and agreed to a credit of only $426.00 (Alfonso Affid., Exhibit D), rejecting certain categories of adjustments outright and agreeing to discuss certain other categories upon receipt of documentation. In response, VITEC replied on July 21, 2005, sending documentation to support its claims (Alfonso Affid., Exhibits E & F). When the parties could not resolve their dispute, VITEC brought suit.

In the Amended Verified complaint ("complaint"), VITEC asserts two causes of action against IKON, the first cause of action for breach of numerous provisions of the Agreement,[3] and the sixth cause of action apparently sounding in fraudulent inducement (McHale Affid., Exhibit A). The remaining causes of action were asserted against Synergy Global Solutions, Inc. and three individuals, none of whom remain parties to the action. IKON's answer to the complaint asserts affirmative defenses and two counterclaims. The first

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[2] This amount included the balance due on the Transition Services Agreement, which involved a monthly payment (Alfonso Affid., Exhibit C).

[3] VITEC alleges "without limitation" breach of sections 1.2. (E), (F), (G); 4.2, 5, 8(d), 14.1 (C), 14.2(F) and 18 (Complaint ¶ 58).

counterclaim asserts breach of contract for failure to pay the balance of the purchase price, and the second seeks damages for unjust enrichment.

B. Current Motions

VITEC moves for partial summary judgment under the first cause of action in regard to the post-closing adjustment of the purchase price on the grounds that there are no triable issues of fact and no merit to the defenses asserted in the answer to the amended complaint, warranting judgment in VITEC's favor as a matter of law. The motion does not address VITEC's "other breach of contract claims or its fraud claim . . . or damages arising therefrom, including, without limitation, lost customers and associated profits or diminished value of the 'Business'" (Alfonso Affid. ¶ 3).

IKON cross-moves for partial summary judgment on its first counterclaim, seeking the balance of the purchase price of $441,240 demanded in its July 2005 letter; and also seeks dismissal of both of VITEC's causes of actions against IKON.

C. Discussion

On a motion for summary judgment, the moving party bears the initial burden of establishing a prima facie showing of entitlement to judgment as a matter of law by tendering proof in admissible form sufficient to eliminate any material issue of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Unless the movant establishes its entitlement to judgment as matter of law, the burden does not shift to the opposing party and the motion must be denied (*see Loveless v Am. Ref-Fuel Co. of Niagara, LP*, 299 AD2d 819, 820 [4th Dept 2002]). The Court must view the evidence in the light most favorable to the non-moving party (*see Evans v Mendola*, 32 AD3d 1231, 1233 [4th Dept 2006]; *Esposito v Wright*, 28

AD3d 1142, 1143 [4th Dept 2006]). However, once the moving party establishes its entitlement to judgment through the tender of admissible evidence, the burden shifts to the non-moving party to raise a triable issue of fact (*see Gern v Basta*, 26 AD3d 807, 808 [4th Dept 2006], *lv denied* 6 NY3d 715 [2006]). With regard to defenses, the defendant has the burden of affirmatively demonstrating the merits of its defense and may not meet its burden merely by noting gaps in the plaintiff's proof (*see Edwards v Arlington Mall Assocs.*, 6 AD3d 1136, 1137 [4th Dept 2004]).[4]

(1) VITEC's Claim for Breach of Contract: Final Net Asset Value

VITEC lists several independent adjustments to IKON's proposed Closing Date Balance Sheet, upon each of which, individually, it deems it is entitled to judgment as a matter of law: additional allowances for bad debts, advances to employees, misallocated inventory, unrecorded payables, payroll taxes on commissions and bonuses accrued, prepaid expenses, accrued vacation, and accumulated depreciation,. VITEC seeks an order decreeing that the Final Net Asset Value is negative $477,937 (without prejudice to later proving that more is owed), and for judgment in the amount of $77,937.

VITEC submits the affidavit of its alleged accounting expert, Edward Jordan, a Canadian consultant who is president of TCM Jordan Consulting Inc. (Jordan Affid., Exhibit

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[4] Although the Agreement provides that it shall be construed in accordance with the laws of the State of Delaware (Agreement § 21 [E]), the parties have cited the law of New York and no Delaware law, and thus have waived that provision of the Agreement (*see generally Cargill, Inc. v Charles Kowsky Resources, Inc.,* 949 F2d 51, 55 [2d Cir 1991]; *HSBC Bank USA v Bond, Schoeneck & King, PLLC*, 2008 WL 4531639, *2 [4th Dept Oct. 10, 2008]).

A).[5] Mr. Jordan reviewed IKON's Closing Date Balance Sheet to determine whether IKON's calculation of Net Asset Value, as defined in the Agreement, was accurate (Jordan Affid. ¶ 3). The books and records for the Business had been kept separately from those of IKON's other businesses, which records were sold to VITEC (Jordan Affid. ¶ 6). The same person, Bill Harris, served as controller of the Business under IKON, and, for a short period, under VITEC (*id*. ¶ 7; Alfonso Affid. ¶ 19).

Together with Mr. Harris, Mr. Jordan identified adjustments to the Closing Date Balance Sheet submitted by IKON (Jordan Affid. ¶ 12). Under Mr. Jordan's supervision and control and with the assistance of Mr. Harris, a binder captioned "IKON Office Solutions Net Asset Proposed Adjustments" was prepared, which includes VITEC's Closing Date Balance Sheet, and a written explanation for the basis for each such adjustment ("The Summary") and "back-up documentation" (Jordan Affid. ¶ 13). A duplicate of that binder appears as Exhibit E (2 volumes) to the affidavit of David Alfonso.[6]

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[5] Mr. Jordan's resume, as submitted to the Court, does not detail his educational background. "To establish the reliability of an expert's opinion, the party offering that opinion must demonstrate that the expert possesses the requisite skill, training, education, knowledge, or experience to render the opinion" (*Hofmann v. Toys "R" Us--NY Ltd. Partnership,* 272 AD2d 296, 296 [2nd Dept 2000]). The Court has no basis for concluding that Mr. Jordan has any expertise in determining whether VITEC was entitled to adjustments on the net asset value. Nonetheless, IKON did not object to Mr. Jordan's expertise, so the issue is deemed to have been waived.

[6] With two limited exceptions, "[i]t is settled and unquestioned law that opinion evidence must be based on facts in the record or personally known to the witness" (*Hambsch v New York City Transit Auth*., 63 NY2d 723, 725-726 [1984] [internal citations and quotation marks omitted]). Neither Mr. Jordan nor Mr. Alfonso demonstrate personal knowledge of the facts in the binder, with the exception of Mr. Jordan's five-page list of adjustments. However, because IKON did not

IKON contends that its July 8, 2005 letter responding to VITEC's calculation of Net Asset Value by itself raises issues of fact concerning any adjustment VITEC seeks. That letter states in pertinent part:

> We unequivocally reject the unfounded requests and analysis set forth in Issues 2, 3c, 4, 5a, 5b, 6b and 8 of your letter, together with any suggestion of related payment obligations owing from IKON. Those assertions are wholly inconsistent with the express terms and conditions of the Agreement, the structure of the transaction, VITEC's exhaustive due diligence and the discussions and conduct of the parties both prior and subsequent to closing.

(Alfonso Affid., Exhibit D).

VITEC, in its reply papers, alleges that the only other evidence submitted by IKON to controvert VITEC's motion consists of the depositions of IKON's officers, attached to Mr. Alfonso's affidavit as exhibits (Oliverio Reply Affid.¶¶62-63 & Exhibit D; Alfonso Affid., Exhibits J, K and L).

The Court will rule on the proposed adjustments one by one.

(a) <u>Allowance for Bad Debts</u>

In Section 8 (F) of the Agreement, IKON represented and warranted that:

> All Accounts Receivable, including, without limitation, those that will be reflected on the Closing Date Balance Sheet, are valid and have arisen in the ordinary course of business, represent indebtedness incurred by the applicable account debtor in bona fide third party transactions, and are net of adequate reserves.

(Agreement¶ 8 [F]).

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object to the evidence, IKON is deemed to have waived any hearsay objections thereto (*see Dowling v Mosey*, 32 AD3d 1190 [4th Dept 2006]; *Rhoades v Niagara Mohawk Power Corp.,* 202 AD2d 762, 763 [3rd Dept 1994]).

VITEC asserts that IKON's reserves for bad debts were insufficient by the amount of $215,123, and therefore that the Closing Date Balance Sheet should be adjusted by that amount. Mr. Jordan's summary provides that IKON's accounts receivable reserve policy had a "problem" in that it did not "take into consideration invoices less than 150 days and the number of invoices that are reversed before they reached [sic] this stage" (Summary ¶ 2).

The Court determines that VITEC has failed to establish that it did not become aware of, and acquiescent to, this accounting policy during its period of due diligence. Nor has VITEC established that its expert's opinion is as a matter of law the only rational interpretation of the term "adequate reserves" (*see generally Matter of Westmoreland Coal Co. [Entech, Inc.]*, 100 NY2d 352, 358-359 [2003]; *Kocan v Ismach*, 196 AD2d 740 [1st Dept 1993]). Because VITEC has failed to meet its burden of establishing its entitlement to judgment as a matter of law, VITEC's motion is denied to the extent that it seeks such adjustments to the accounts receivable balance.

(b) Advances Due from Employees, Inventory, Unrecorded Payables, and Payroll Taxes on Commissions and Bonuses

For four of the categories under which VITEC seeks adjustments in its favor to the Net Asset Value, Mr. Jordan opines that such adjustments are necessary under generally accepted accounting principles (GAAP): employee advances[7], inventory[8], unrecorded

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[7] VITEC demonstrates that IKON listed as an asset $900 in advances to three employees of IKON, two of whom did not accept employment with VITEC, and for which there was no documentation available from IKON (Summary ¶ 1).

[8] VITEC contends that an unreconciled inventory balance does not qualify as an asset under GAAP; that certain sold inventory should not have appeared as an asset; that inventory credits from suppliers older than six months and intercompany receivables do not qualify as assets, and that demo equipment was

payables[9], and payroll taxes on commissions and bonuses[10] (Summary ¶¶ 1, 3, 6a, 7b). The Agreement, however, does not require an adherence to GAAP in the treatment of the Closing Date Balance Sheet, nor is there any evidence that the parties agreed about the proper application of GAAP (*see generally Matter of Westmoreland Coal Co. [Entech, Inc.]*, 100 NY2d 352, 358-359 [2003]; *McDonald v Fenzel*, 233 AD2d 219, 220 [1st Dept 1996]; *Kocan v Ismach*, 196 AD2d 740 [1st Dept 1993]). As stated by the Court of Appeals:

> In many instances, GAAP may provide more than one potentially applicable accounting methodology, and so the accounting professional may legitimately record a transaction in acceptable alternative ways. What is most important is that, when preparing financial statements intended to be used for comparative purposes, the methodology be consistently applied; i.e., the accountants follow the same permissible accounting conventions and use in each instance the same GAAP assumptions and estimates when computing the reported values

(*Matter of Westmoreland Coal Co.*, 100 NY2d at 358-359; *see McGraw-Hill Companies v School Specialty, Inc.*, 10 Misc 3d 1066 (A), 2006 WL 16305 [Sup Ct NY County 2006], *aff'd* 42 AD3d 360 [1st Dept 2007]).

VITEC has failed to establish what principles were applied to IKON's prior balance sheets, and whether those principles were consistent with the GAAP principles VITEC's expert applied here. Thus, VITEC has failed to establish the absence of material

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wrongly reported, mandating an adjustment of $19,844 (Summary ¶ 3).

9 VITEC argues that the initial Closing Balance Sheet did not include liabilities for $20,521 in expenses incurred prior to the Closing Date, for which, in most cases, invoices were received after the closing date (Summary ¶ 6a).

10 VITEC asserts that IKON failed to include as a liability on the Closing Balance Sheet "applicable payroll related taxes with regard to commissions and bonuses properly allocated to VITEC", in the amount of $12,518 (Summary ¶ 7b).

questions of fact concerning any proposed adjustments to these four categories, and VITEC's motion is denied to the extent that it seeks such adjustments.

(c) Prepaid Expenses

IKON's closing date balance sheet included a prepaid expense of $6,108.00 to Mayer Consulting that Mr. Jordan asserts was made on June 8, 2003 to cover a block of hours to service IKON customers. VITEC has failed to establish its entitlement to summary judgment in its favor on this category of assets, based only upon the allegation that the consultant's services were no longer required. Therefore, VITEC's motion is denied to the extent it seeks summary judgment with respect to prepaid expenses.

(d) Accrued Vacation

With respect to accrued vacation and other employee accruals, the Summary submitted by VITEC to IKON contains the following explanation:

> There was no accrued vacation amount included in the initial Closing Balance Sheet. Based on the information received from IKON post close on the hours owed to employees in earned but unused vacation, sick days and floating holidays, an accrual of $232,580 should have been included in the initial Closing Balance Sheet. This accrued vacation amount was determined by multiplying the actual vacation, sick and floating holiday hours accrued for each employee by the respective actual hourly wage, and then adding associated payroll taxes. GAAP clearly requires that all liabilities owing as of a balance sheet date be accrued as of the date. Consequently, the Closing Balance Sheet should include an additional $232,580 of liabilities

(Summary ¶ 6b; *see* Alfonso Affid.¶ 41 & n.1; Alfonso EBT at 147-148).

The parties' Agreement addresses the issue of which party was to be responsible for accrued vacation, at paragraph 12.1, which states in pertinent part:

> **After the date of Closing, Purchaser shall be solely responsible for payment of all** salary, **benefits, vacation (accrued and otherwise)** and employment costs and obligations relating to the Employees. All of the obligations of the Purchaser described in this Section shall be referred to herein as the "Employee Obligations." Failure by Purchaser to comply with the terms of this Section or to satisfy any Employee Obligation shall be deemed a material breach of this Agreement. **Seller shall remain responsible for any and all claims, liabilities or obligations of the Employees to the extent relating to periods prior to termination of such Employee's employment with Seller (including, without limitation, liabilities and obligations for wages and benefits for periods prior to the Closing Date)**, unless and to the extent attributable to a failure by Purchaser to comply with its obligations under this Agreement, including, but not limited to, The Employee Obligations.

(Agreement ¶ 12.1 [emphasis supplied]). With respect to accrued vacation and sick bank time, Mr. Alfonso states in his affidavit that "[t]hese liabilities . . . comprised a significant portion of the negative $400,000 Provisional Net Asset Value in the Agreement" (Alfonso Affid. ¶ 41 & n.1).

"[I]t is the responsibility of the court to interpret written instruments . . . [and the] problem of analysis of the instrument is to determine 'what is the intention of the parties as derived from the language employed'" (*Mallad Const. Corp. v. County Fed. Sav. & Loan Ass'n,* 32 NY2d 285, 291 [1973]). "A written contract will be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose. ... The meaning of a writing may be distorted where undue force is given to single words or phrases" (*Matter of Westmoreland Coal Co. v. Entech, Inc.*, 100 NY2d at 358 [internal quotation marks and citations omitted]).

In the Court's view, paragraph 12.1 of the Agreement renders VITEC, as purchaser, liable for accrued vacation for employees it hired as part of the "Employee Obligations", while IKON is liable for wages and benefits for periods prior to the closing date. VITEC fails to establish as a matter of law why the true-up provision of the Agreement should be interpreted to entitle it to an adjustment to the purchase price for accrued vacation time for which it expressly agreed to be responsible. Further, the Court determines that the Agreement is ambiguous with regard to which party must accrue the liability for the sick leave bank for employees hired by VITEC, and neither party has submitted any evidence on that point. Therefore, VITEC's motion for partial summary judgment is denied to the extent that it seeks such adjustments.

(e) Accumulated Depreciation for Computer Software and Hardware

VITEC argues that it is entitled as a matter of law to an adjustment of $3,944 due to the alleged failure of IKON to properly depreciate certain computer software and hardware, consistent with IKON's accounting policies. However, VITEC does not provide the Court with proof of those policies and, therefore, has failed to establish its entitlement to judgment as a matter of law with respect to that claimed adjustment.

Thus, for the reasons stated, the Court denies VITEC's motion for partial summary judgment in its entirety.

(2) IKON's Cross Motion for Partial Summary Judgment

(a) First Counterclaim

IKON cross-moves for summary judgment in its favor on its first counterclaim, alleging that VITEC breached the Agreement by failing to pay the remaining $441,666 of the purchase price (McHale Affid., Exhibit B ¶¶111-121). The motion is based upon an alleged admission by Daniel Dolan, VITEC's president, in a letter dated June 30, 2005, in which Mr. Dolan stated:

> . . .Therefore, pursuant to Section 4.1 of the Purchase Agreement, **$441,666.00 is due to IKON,** which amount should be netted against the **$2,187,336.00 owed to VITEC so that the net amount owed to VITEC is $1,745,670.00, pursuant to Section 4.2 (B) of the Purchase Agreement**

(Alfonso Affid., Exhibit C [emphasis supplied]). Alleging that it is undisputed that IKON performed under the Agreement by transferring all of the Business's assets to VITEC, and that VITEC has used and benefitted from those assets but failed to pay the balance it admits is owed, IKON asserts that it is entitled to summary judgment for the balance of the purchase price.

The Court disagrees. Initially, IKON failed to submit the affidavit of any individual with personal knowledge to support its motion for partial summary judgment, and thus IKON failed to meet its burden of submitting proof in admissible form that IKON has performed its obligations under the Agreement. Secondly, VITEC's "admission against interest" that a certain amount was "due" to IKON is no more than a statement of the requirements of section 4.2 of the Agreement: that there is a negative Provisional Net Asset Value of $441,666, which VITEC must pay absent viable adjustments to be made on a Final

Net Asset Value balance sheet. It also appears that VITEC's alleged admission was made in the broader context of VITEC's demand for net payment, and this context raises credibility issues which cannot be resolved on this motion (*see Brinson v Kulback's & Assoc., Inc.,* 296 AD2d 850, 852 [4th Dept 2000], *rearg denied* 747 NYS2d 852 [4th Dept 2002]). IKON's arguments are without merit, and its motion for partial summary judgment on the first counterclaim is denied.

(b) Lost Profits

IKON also asserts that it is entitled to summary judgment on VITEC's cause of action for breach of contract to the extent that it seeks lost profit damages. Specifically, IKON argues that VITEC's claimed loss of customers and the claimed "goodwill impairment" are not proper offsets to the amounts owed to IKON. Rather, IKON asserts, VITEC's alleged goodwill loss is nothing more than a poorly-disguised lost profit claim that cannot be sustained here (*see Awards.com v Kinko's Inc.*, 42 AD3d 178, 183 [1st Dept 2007], *appeal dismissed* 9 NY3d 1025 [2008], quoting *Kenford Co. v County of Erie*, 67 NY2d 257, 261 [1986]).

Despite having the burden of proof on its motion for summary judgment, IKON does not attempt to move against any particular allegation made by VITEC in its complaint as to IKON's breaches of warranties numbered 1.2. (E), (F), (G); 5; 8(d); 14.1 (F); and 18. Its argument appears to be directed to section 14.1 (C) (Complaint ¶ 58). That provision states:

> Seller [IKON] shall carry on the Business in the usual and ordinary course . . ., consistent with past practices, and shall use its commercially reasonable efforts to preserve its business and the goodwill of its advertisers, subscribers, customers, suppliers and others having business relations with the Business and to retain its business organization intact, including keeping available

> the services of the present employees, representatives and agents of the Business. . . .

(Agreement ¶14.1 [C]; *see* Summary ¶ 8).

The complaint alleges that IKON knew of substantial discontent among key employees at the Business prior to the closing, but actively concealed such discontent from VITEC. Specifically, the former owner of the Business, Paul Nellis, had two sons and a son-in law, Michael O'Connor, still working for IKON who sought to buy the Business in late 2004 and early 2005, making an offer of between $106,300.00 and $500,000.00 (Oliverio Reply Affid. Exhibit C; Oral Argument Tr at 52-53). VITEC alleges that this information was kept from it, as VITEC was barred from speaking to employees about future employment; but had VITEC known of the extent of the employee discontent and that a substantial number of employees were likely to refuse employment with it, VITEC would have refused to close the transaction without acceptance of employment by key employees (Amended Complaint ¶¶86-91; Oral Argument Tr at 22-23).

As stated by the Court of Appeals in *Kenford Co. v County of Erie* (67 NY2d 257, 261 [1989] [*Kenford I*]),

> Loss of future profits as damages for breach of contract have been permitted in New York under long-established and precise rules of law. First, it must be demonstrated with certainty that such damages have been caused by the breach and, second, the alleged loss must be capable of proof with reasonable certainty

(*id*).

On summary judgment, IKON is required to establish by proof in admissible form its entitlement to judgment as a matter of law, in order for the Court to dismiss the claim

for lost profit damages. IKON has failed to submit such proof. For example, it submits no admissible evidence to contradict VITEC's "Lost Customer" analysis, which IKON attaches to its attorney's affidavit. Apart from the attachments, the affidavit of IKON's attorney is without evidentiary weight, and IKON cannot obtain judgment merely by pointing to alleged gaps in its opponent's case (*see Edwards v Arlington Mall Assocs.*, 6 AD3d 1136, 1137 [4th Dept 2004]).

With respect to the argument that VITEC was a "start-up" business and therefore that lost profit damages are unavailable as a matter of law under *Kenford I,* VITEC responds that the Business had been running essentially as a stand-alone entity within IKON for eight years, and before that had run in essentially the same fashion under a different name for approximately fifteen years prior to IKON's purchase of it (Alfonso Affid., sworn to on June 9, 2008, ¶ ¶5-10). Thus, there is an issue of fact whether a lost profit claim would be too speculative for recovery on breach of contract.

Finally, IKON asserts that the Court may rule as a matter of law that the parties did not contemplate lost profit damages for a breach of contract, merely because VITEC's claimed lost profits exceed the purchase price for the Business. Although there is a certain logic to that claim, nonetheless IKON has failed to establish as a matter of law that absolutely no lost profit damages were contemplated, given the nature of the warranty upon which VITEC relies. Thus, IKON's motion is denied, without prejudice to renewal at trial, to the extent that it seeks dismissal of any lost profit claim based upon breach of contract.

(c) Summary Judgment with Respect to Cause of Action for Fraudulent Inducement

For the same reasons that the Court denies IKON's motion with respect to its first counterclaim, the motion is also denied with respect to the cause of action based upon fraudulent inducement. IKON alleges that this cause of action cannot stand because there is no proof of causation, i.e. no proof that any customers failed to work with VITEC because of any act by IKON or its employees. As noted, apart from the attachments, the affidavit of its attorney is without evidentiary weight, and IKON cannot obtain judgment merely by pointing to alleged gaps in its opponent's case (*see Edwards v Arlington Mall Assocs.*, 6 AD3d 1136, 1137 [4th Dept 2004]).

However, the Court agrees with IKON that lost profit damages are unavailable as a matter of law under Plaintiff's cause of action for fraudulent inducement. Under such a cause of action, "'the true measure of damage is indemnity for the actual pecuniary loss sustained as the direct result of the wrong' or what is know as the 'out-of-pocket' rule" (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996], quoting *Reno v Bull*, 226 NY 546, 553 [1919]; *see also Cayuga Harvester, Inc. v Allis-Chalmers Corp.*, 95 AD2d 5, 22 [4th Dept 1983]). "Under the out-of-pocket rule, there can be no recovery of profits which would have been realized in the absence of fraud" (*Lama Holding Co. v. Smith Barney Inc.*, 88 NY2d at 421).

Thus, the Court denies Plaintiff's motion for partial summary judgment in its entirety, and grants Defendant's cross motion for partial summary judgment only to the extent

that it seeks dismissal of any claim for lost profits under the sixth cause of action for fraudulent inducement, but otherwise denies the motion.

Plaintiff's counsel to submit order on notice to Defendant.

DATED: November 24, 2008

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HON. JOHN M. CURRAN, J.S.C.