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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: C E Ramos **Justice** **PART** 53

Index Number : 603250/2005
WATHNE IMPORTS
vs.
PRL USA
SEQUENCE NUMBER : 025
OTHER RELIEFS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with accompanying memorandum decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 1/22/14

CHARLES E. RAMOS, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☐ DENIED ☑ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☑ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 53

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WATHNE IMPORTS, LTD.,

Plaintiff,

Index No. 603250/2005

-against-

PRL USA, INC., THE POLO/LAUREN COMPANY, L.P., POLO RALPH LAUREN CORPORATION, and RALPH LAUREN,

Defendants.

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Hon. CHARLES E. RAMOS, J.S.C.

Motion sequences 025 and 026 are consolidated for disposition. In motion sequence 025, the defendants PRL USA, Inc., the Polo/Lauren Company, L.P., Polo Ralph Lauren Corporation, and Ralph Lauren (the "Defendants") move to exclude the testimony of Berge Wathne concerning damages and for sanctions. In motion sequence 026, the Defendants move to exclude evidence regarding the plaintiff Wathne Imports, Ltd.'s ("Wathne") "Polo Ralph Lauren" claim.

Background

Wathne is a family business that has been a licensee of the defendants since 1984. On November 23, 1999, Wathne entered into an amended licensing agreement (the "Agreement") with the Polo Ralph Lauren Corporation ("Polo"), pursuant to which Wathne had the exclusive license through December 31, 2007 to manufacture and sell men's, women's and children's luggage and handbags bearing the trademarks "Polo by Ralph Lauren," "Ralph (Polo

Player Design) Lauren," "Ralph Lauren," "Polo Sport," "Lauren/Ralph Lauren," and "Polo Jeans Co," in the United States and Canada.

Pursuant to the Agreement, if Polo discontinued one of those trademarks, Polo was obliged to provide Wathne with a replacement trademark of "substantially equivalent market value." Wathne alleges that Polo discontinued the use of the "Polo Sport" and "Ralph Lauren" trademark and Wathne suffered damages, including lost profits.

After conducting extensive discovery in this action, Wathne filed the note of issue on April 21, 2011. The Defendants previously filed a motion for summary judgment seeking an order from this Court dismissing the complaint. In an order filed on April 2, 2008, this Court granted the motion and dismissed the complaint in its entirety except for the claims "arising out fo the discontinuation of the Polo Sport and Polo Jeans Co. Marks, and the scope of Wathne's waiver regarding children's backpacks" (*Wathne Imports, Ltd. v PRL USA, Inc.*, 2008 NY Slip Op 31123[U][Sup, Ct. NY County 2008]). The Appellate Division later modified this Court's decision and restored the claims related to the "Collection" line and children's backpacks.

Shortly after Wathne's current counsel entered the action, they purportedly discovered that prior counsel had not selected a witness to testify about Wathne's damages for its claim of breach

of contract related to the Ralph Lauren trademark.

After two efforts to offer a qualified witness failed, Wathne's counsel elected to offer the testimony of lay witness Berge Wathne ("Ms. Wathne"), Wathne's co-owner and chief executive, on the Ralph Lauren/Collection line damages.[1] Counsel indicated that Ms. Wathne's testimony would focus on the sales projections set forth in a business projection (the "5-Year Plan") agreed to in 1999 by Wathne and Polo as the Basis for renewing the Agreement. The Defendants objected to Ms. Wathne's testimony for this purpose.

Wathne then moved this Court for permission to present damages testimony at trial through Ms. Wathne. In its decision on that motion, this Court granted Wathne's motion, permitting Ms. Wathne to testify to Ralph Lauren Collection line damages, on the grounds that she, as owner and chief executive, was involved in the day-to-day activities of the company and testified that she was involved in the preparation of the 5-Year Plan. This Court's decision was also based on her representation that "the growth projections for the Ralph Lauren trademark 'are literally shown in the 5-Year Plan' and that she need only add an extension of those projections through 2007 and a deduction for the actual sales to calculate lost sales'" (Steiner Aff., Exhibit E at 11).

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[1]For a complete history of these efforts, refer to this Court's order and decision on motion sequence 024 filed on March 23, 2013.

After this Court issued its prior decision, counsel for the Defendants deposed Ms. Wathne regarding damages. The Defendants now move this Court to preclude Ms. Wathne from testifying as to damages at trial on the grounds that her deposition testimony reveals that she lacks the personal knowledge necessary to testify about damages. Alternatively, the Defendants seek an order permitting additional discovery because Ms. Wathne has raised new and unanticipated factual issues.

Discussion

The Defendants seek an order from this Court precluding Ms. Wathne from submitting trial testimony concerning Wathne's alleged damages. They allege that Ms. Wathne lacks the requisite personal knowledge to provide testimony concerning damages, as demonstrated by her reliance on her counsel and analysis and calculations performed by an expert to calculate damages. In opposition, Wathne asserts that Ms. Wathne's deposition testimony complies with this Court prior order and demonstrates that she is qualified to provide testimony about damages based on her personal knowledge of her company's historical performance and the industry.

In New York, a lay witness may only testify "only [] to facts and not to their opinions and conclusions drawn from the facts" (*In re Sara B*, 41 AD3d 170 [1st Dept 2007]). As noted in this Court's prior decision, courts have permitted the owner or

officer of a business to testify as to lost profits (Steiner Aff., Exhibit E at 8; *citing Lightning Lube v Witco Corp.*, 4 F3d 1153, 1174 [3rd Cir 1993][Court permitted the owner of a quick-lube business to offer lay opinion testimony on damages suffered by his business on the grounds that "in view of [his] experience in the quick-lube business, he was qualified to predict how well Lightning Lube could have been expected to do". However, in that case the court made a finding that the witness had experience that qualified him to predict profits.

In its prior motion requesting that Ms. Wathne be permitted to present damages testimony, Wathne represented to this Court that Ms. Wathne is capable of calculating her company's damages, that the calculations are based on the projections set forth in the 5-Year Plan, and that the calculations do not require expert analysis or opinion. Based on these representations, and because Ms. Wathne stated that she was involved in the day-to-day activities of the company, in negotiations and meetings with the Defendants, and "in all aspects of [Wathne's] operations, particularly those aspects relating to marketing, sales, growth projections, business plans and customer relations," this Court permitted Ms. Wathne to present damages testimony.

Now, based on her deposition testimony, the Defendants object to several specific items within her damages calculation. Wathne avers that, to arrive at her calculation of damages, Ms.

Wathne (1) began with the projections in the 5-Year Plan, (2) extended these projections for 2004-2007, using two alternative methodologies, (3) deducted Wathne's actual sales for this time period in order to determine "Lost Sales," and, finally, (4) applied a profit margin to determine "Lost Profits" (Opp Mem at 1-2).

However, contrary to counsel's representation, Ms. Wathne's testimony relies heavily on data and calculations provided to her by an expert, Glenn Newman ("Newman"). While much of the information provided is empirical data regarding sales, the calculation of Profit Margin and, to some extent, the calculation of "Lost Sales," is a subjective calculation requiring specialized knowledge. In fact, the 25% profit margin to which Ms. Wathne seeks to testify, came entirely from Newman's calculations. Ms. Wathne took his profit margin calculations for other lines and then averaged it.

Wathne relies on *Lightning Lube* for the proposition that Ms. Wathne is entitled to rely on the data and calculations provided by her expert to arrive at her damages figures. But, In *Lightning Lube*, the business owner relied on the reports of an accountant to make his damages calculations, and the Circuit Court held that it is "logical that in preparing a damages report the author may incorporate documents that were prepared by others, with still possessing the requisite personal knowledge or foundation to

render his lay opinion admissible under Federal Rule of Evidence 701" (4 F3d at 1175). The owner in *Lightning Lube* had demonstrated that he was capable of independently performing the calculation and testified that he personally participated in making that report. Conversely, Ms. Wathne's testimony demonstrates that she lacks personal knowledge of these calculations and would not be capable of making the subjective calculations independent of Newman's reports and counsel's guidance. As an example, when Ms. Wathne was asked why she deducted actual sales from net projected sales she replied "according to counsel it's the right thing to do."

Wathne's brief also admits that she "collaborated" with counsel for her testimony.

Equally troubling is her unwarranted change to projected gross sales for 2003-2003 (from the 5-Year Plan) from $500,000 to $1,000,000, because $500,000 "felt wrong." Only an expert witness could be expected to justify such a change.

This branch of the motion is granted. The Defendants have demonstrated that Ms. Wathne's offered testimony would merely be a conduit for the opinions of experts not subject to cross examination.

The Polo Ralph Lauren Claim

In motion sequence 026, the Defendants seek to preclude Wathne from presenting testimony regarding Wathne's "Polo Ralph

Lauren" claim at trial. The Defendants correctly argue that the doctrine of law of the case bars Wathne from presenting this claim at trial. This Court's prior order on the motion for summary judgment dismissed Wathne's claims in their entirety except for expressly enumerated exceptions, which did not include the claims arising from the "Polo Ralph Lauren" line. This portion of this Court's decision was later affirmed by the Appellate Division. Therefore, Wathne is barred from presenting evidence of these claims at trial.

Accordingly, but for the request for sanctions, the defendants' motions are granted in their entirely.

Settle order on notice.

Dated: January 22, 2014

J.S.C.

CHARLES E. RAMOS