[*1] SCANNED ON 7/23/2014

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: CHARLES E. RAMOS PART 53

Justice

WATHNE IMPORTS

INDEX NO. 603250/05

MOTION DATE

- V -

PRL USA

MOTION SEQ. NO. 028

MOTION CAL. 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

decided in accordance with the accompanying memorandum decision.

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

DATED: 7/16/2014

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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WATHNE IMPORTS, LTD.,

Plaintiff,

-against-

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

Defendants.

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Index No. 603250/05

DECISION AND ORDER

Hon. Charles E. Ramos, J.S.C.:

Plaintiff Wathne Imports, Ltd has been a licensee of defendants PRL USA Inc., the Polo/Ralph Lauren Company L.P. and Polo Ralph Lauren Corporation (collectively, Polo). In 1999, Wathne and Polo entered into an amended license agreement under which Polo granted Wathne the exclusive license through December 31, 2007 to manufacture and sell handbags in the United States and Canada bearing the marks "Polo by Ralph Lauren," "Ralph (Polo Player Design) Lauren," "Ralph Lauren" (including "Collection" and "Blue Label"), "Polo Sport," "Lauren/Ralph Lauren" and "Polo Jeans Co." If Polo discontinued one of those trademarks, the agreement required it to provide Wathne with a replacement mark of "substantially equivalent market value." The amended license agreement also gave Wathne a non-exclusive right to sell the merchandise outside the U.S. and Canada with Polo's consent, which right Polo could terminate upon 180 days' written notice.

Wathne alleges that Polo breached the license agreement by, inter alia, discontinuing the use of the "Polo Sport" mark in 2001 without replacing it with a substantially equivalent mark.

Plaintiff now seeks to use its CEO, Berge Wathne, as its expert at trial on the question of alleged lost profits in the RALPH LAUREN Collection line of merchandise (Collection).

Initially, the plaintiff's designated damages expert was Glenn Newman, an experienced CPA who was a partner at ParenteBeard LLC and was accredited by the American Institute of Certified Public Accountants in certified financial forensics.

However, after providing an opinion on Collection damages, Mr. Newman withdrew his opinion, claiming that his opinion could not be proffered with reasonable professional certainty. Plaintiff now seeks to produce Ms. Wathne's testimony in lieu of Mr. Newman's. Initially, this Court granted leave to the Plaintiff to do so, but upon her examination before trial, it became apparent that Ms. Wathne was merely relying on Mr. Newman's analysis (which he considered to be unreliable!). Upon defendant's motion, this Court has barred Ms. Wathne from testifying as an expert.

A party may only recover damages for loss of future profits if it "demonstrates] with certainty that such damages have been caused by the breach . . . , the alleged loss must be capable of proof with reasonable certainty . . . not . . . merely

speculative, possible or imaginary . . . [and] the particular damages [must have been] fairly within the contemplation of the parties" (Kenford Co. v County of Erie, 67 NY2d 257, 261 [1986]). "New York law does not countenance damage awards based on [s]peculation or conjecture" (Wolff & Munier, Inc. v Whiting-Turner Contr. Co., 946 F2d 1003, 1010 [2d Cir 1991] [internal quotation marks omitted]).

The Court of Appeals in Ashland Mgt. v Janien (82 NY2d 395, 405-406 [1993]) explained that the evidence in Kenford Co. v County of Erie was insufficient to satisfy the applicable standard because the claim of lost profits for managing a stadium required the court to accept too many speculative assumptions, namely, that "the stadium had been completed, opened and operated successfully for 20 years, [and] that it also attracted professional sporting events, concerts and conventions fully supported by the public." In contrast, the evidence in Ashland was sufficient because it "rest[ed] on the parties' carefully studied professional judgments of what they believed were realistic estimates of future assets to be managed by the use of [a particular growth model]" (82 NY2d at 406).

Ms. Wathne's proffered testimony fails to satisfy any reasonable standard for this claim for lost profits, nor does it cure the unreliability found by Mr. Newman.

The Appellate Division has held in this case that Mr.

Newman's testimony regarding plaintiff's lost profits with regard to international sales would be permitted, but even he is unwilling to give the testimony that plaintiff now seeks to offer.

This issue has already been determined, re-argument was denied and an appeal has been taken. The present motion to enlarge the record is merely an attempt to circumvent that appeal.

This motion is denied.

Dated: July 16, 2014

J.S.C.

CHARLES E. RAMOS