

Continental Indus. Group, Inc. v Ustuntas
2023 NY Slip Op 31720(U)
May 22, 2023
Supreme Court, New York County
Docket Number: Index No. 653215/2012
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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CONTINENTAL INDUSTRIES GROUP, INC.,

INDEX NO. 653215/2012

Plaintiff,

MOTION DATE

- v -

MOTION SEQ. NO. 012

HAKAN USTUNTAS, PLASMAR PLASTIK VE KIMYA
SAN. TIC. A.S., A/K/A PLASMAR PLASTIC, INC., and
MARCHEM INTERNATIONAL TRADING LLP,

**DECISION + ORDER ON
MOTION**

Defendants.

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 012) 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 642, 643, 644, 645, 646, 647

were read on this motion to/for

PRECLUDE

Upon the foregoing documents, it is

Defendants' motion to "preclude[e] Plaintiff's expert Gennaro John Fulvio . . . from testifying at trial, which is currently scheduled to start on June 20, 2023 . . ." (NYSCEF 640, Order to Show Cause [OSC]) is granted.¹

The background of this action is set forth in the court's December 31, 2020 decision on defendants' motion for summary judgment and will not be repeated here. (NYSCEF 555 Decision and Order [mot. seq. no. 009].) The remaining causes of action are the (3) for breach of fiduciary duty against Ustuntas; (5) for misappropriation of trade secrets; (6) for misappropriation of confidential and proprietary information; (9)

¹ Accordingly, the court does not reach defendants' request for alternative relief to schedule "a *Frye* and/or other admissibility hearing to determine the issue . . ." (NYSCEF 640, OSC.)

for unfair competition. (NYSCEF 1, Complaint.) The jury trial in this matter is scheduled for June 20 to 30, 2023.

Plaintiff Continental Industries Group Inc. offers the March 24, 2023 five-page “Expert Report of Gennaro J. Fulvio, CPA” in support of plaintiff’s damages of \$11,877,381 for suppliers and \$2,159,352 for customers. (NYSCEF 630, Fulvio Report.) The essence of the report appears on pages 2-3:

“The invoice detail appears to be extracted from a general ledger system, and appears to be perfectly reasonable and in order, as I would expect to see in the books and records of a business in the ordinary course. I also considered the downward trend in individual supplier and customer revenues. Absent some other explanation, which I have not yet seen, the downward trend can reasonably be attributed to a diversion of revenues. In our opinion, a conservative and accurate amount of damages based on the total diversion of revenues is in the amount of \$11,877,381 for suppliers, and \$2,159,352 for customers. For suppliers, this is calculated by using 2007 revenues (\$145,471,687) as a baseline, and taking the diminution in revenues for subsequent years to 2013. The product of this calculation is then reduced by an arbitrary 60% (a subjective amount intended to provide a conservative calculation). This reduced amount is then multiplied by 3% profit margin. For customers, this is calculated by using 2007 revenues (\$34,143,742) as a baseline, and taking the diminution in revenues for subsequent years to 2012. The product of this calculation is then reduced by an arbitrary 60% (a subjective amount intended to provide a conservative calculation). This reduced amount is then multiplied by 3% profit margin.”

(*Id.* at 2-3.²)

As a preliminary matter, Fulvio’s report is late and thus procedurally improper. Plaintiff filed the note of issue on November 27, 2018 claiming to be trial ready. (NYSCEF 389.) All discovery, including expert discovery was to be concluded by that date. On December 1, 2022, plaintiff served a CPLR 3101(d) disclosure identifying

² Exhibits shall be identified by number not letter(s). As we approach trial, this procedure is particularly important. The court implores the parties to read the court’s procedures and follow them.

Raymond Dragon as its damages expert. (NYSCEF 631, Petek Gunay Balatsas, Esq. aff ¶ 5.) Plaintiff's explanation for producing a report from Fulvio instead of Dragon is that defendants rushed plaintiff to provide a report. (NYSCEF 642, Michael T. Conway, Esq. aff ¶ 4.³) Had the report been prepared in 2018, when it was due, plaintiff would not have been rushing in 2023. However, defendants failed to timely object and waived their objection by continuing to demand the report until March 2023.

In addition to being woefully late, Fulvio does nothing more than repeat the initial damage calculation of Omer T. Karabey, plaintiff's principal from the SDNY action (14 CV 790 (AT)). (NYSCEF 635, Nov. 2016 Declaration of Omer Karabey; NYSCEF 636, March 2020 Declaration of Omer Karabey; NYSCEF 637, Declaration of Omer Karabey.) While Fulvio admits his methodology is "very simple" math (NYSCEF 630, Fulvio Report at 1) he fails to show the math and how he arrives at his results. Fulvio adopts 3% as the proper profit margin relying on Karabey, because Fulvio finds him credible. (*Id.* at §§ VI[a], VIII[b].) However, Fulvio fails to provide any analysis to explain why this is the correct profit margin. (NYSCEF 628, Pamela M. O'Neill April 21, 2023 aff [O'Neill aff] ¶ 24.) Fulvio presumes that "the damages caused by the diverted revenues was solely attributable to the actions of Defendants." (NYSCEF 630, Fulvio Report § III[e].) However, when Ustuntas left plaintiff's employ in 2008, there was a worldwide financial crisis. Fulvio fails to account for anything extraneous such as competition, companies going out of business or free-will: businesses or customers terminating relationships as they do. (NYSCEF 628, O'Neill aff ¶ 16.) He fails to explain his implicit assumption that plaintiff maintains the same level of business without

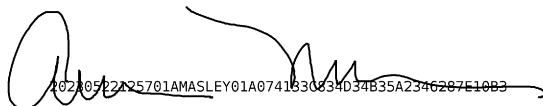
³ The court offers condolences to plaintiff's counsel.
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regard to world economic events. (*Supply & Bldg. Co. v Estee Lauder Intern., Inc.*, 57 Fed R Evid Serv 1309, *4 [SDNY Dec. 14, 2001].)

Fulvio's analysis is significantly flawed in that he calculates damages using the volume of goods transacted instead of revenue. (NYSCEF 628, O'Neill aff ¶ 21.) It is also contradicted by Karabay's damage calculation, which is admittedly based on more current information gained in discovery. (NYSCEF 636, Supplemental Declaration of Omer T. Karabey, March 26, 2020 as reported in *Continental Industries Group, Inc. v Altunkilic* (1:14 cv 790 [AT].) Fulvio admits that his 60% deduction is an "arbitrary" and "subjective amount intended to provide a conservative calculation." (NYSCEF 630, Fulvio Report § V.) Therefore, Fulvio is precluded from testifying at trial.

Accordingly, it is

ORDERED that defendants' motion to preclude Fulvio from testifying at trial is granted.



5/22/2023

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

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CASE DISPOSED

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NON-FINAL DISPOSITION

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GRANTED

☐

DENIED

☐

GRANTED IN PART

☐

OTHER

APPLICATION:

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SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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FIDUCIARY APPOINTMENT

☐

REFERENCE