

Campbell Sales Grp., Inc. v. Niroflex by Jiufeng Furniture, LLC, 2023 NCBC Order 38.

STATE OF NORTH CAROLINA
COUNTY OF BRUNSWICK

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
19 CVS 865

CAMPBELL SALES GROUP,
INC. d/b/a LEATHER ITALIA,
USA,

Plaintiff,

v.

NIROFLEX BY JUIFENG
FURNITURE, LLC; HIGH POINT
MARKETING GROUP, INC.;
GENFINE FURNITURE
INDUSTRY, LTD. a/k/a
HUIZHOU JIUFENG SCIENCE
TECHNOLOGY INDUSTRIAL
CO. LTD.; MICHAEL
ELKHATIB; and JOHN THOMAS
MOODY a/k/a QUING CHUN
MU,

Defendants.

**ORDER ON DEFENDANTS'
MOTIONS IN LIMINE**

THIS MATTER comes before the Court on Defendants' Motion in Limine to Prevent Leather Italia from Presenting Evidence of or Claiming Entitlement to Lost Profits Damages ("First Motion in Limine," ECF No. 193), and Defendants' Motion in Limine to Prevent Leather Italia from Presenting Evidence of or Entitlement to Loss of Reputation Damages ("Second Motion in Limine," ECF No. 196) (collectively, the "Motions in Limine" or "Motions"). **THE COURT**, having considered the Motions, briefs, exhibits, affidavits, depositions, arguments of counsel, and all other appropriate matters of record, **CONCLUDES** that the Motions should be **GRANTED**.

FACTUAL AND PROCEDURAL BACKGROUND

1. The factual and procedural background of this action is discussed in detail in this Court's Order and Opinion on Motions for Summary Judgment and Renewed Motion to Dissolve Preliminary Injunction. *Campbell Sales Grp., Inc. v. Niroflex by Jiufeng Furniture, LLC*, 2022 NCBC LEXIS 148 (N.C. Super. Ct. Dec. 5, 2022). Facts that are pertinent to the Motions in Limine are referenced herein in the Court's analysis of the Motions.

2. In its 5 December 2022 Order and Opinion, the Court granted summary judgment in favor of Defendants on the following claims asserted by Campbell Sales Group, Inc. d/b/a Leather Italia, USA ("Leather Italia") in its Amended Complaint: breach of contract, misappropriation of trade secrets, unjust enrichment, breach of confidence, and piercing of the corporate veil. (ECF No. 168, at p. 49.) However, the Court denied summary judgment on Leather Italia's remaining claims for conversion, unfair and deceptive trade practices ("UDTP"), and civil conspiracy. (ECF No. 168, at p. 49.)

3. This matter is set for a jury trial beginning on 21 August 2023.

4. On 10 July 2023, Defendants filed the Motions in Limine that are presently before the Court. (ECF Nos. 193, 196.)

5. The Motions in Limine came before the Court for a hearing at the pretrial conference on 4 August 2023. Accordingly, the Motions are now ripe for decision.

ANALYSIS

6. “A motion in limine seeks pretrial determination of the admissibility of evidence proposed to be introduced at trial[.]” *Hamilton v. Thomasville Med. Assocs.*, 187 N.C. App. 789, 792 (2007) (cleaned up). The Court’s ruling on motions in limine is interlocutory and “subject to modification during the course of the trial.” *Id.* (cleaned up). “The decision to either grant or deny a motion in limine is within the sound discretion of the trial court.” *State v. Fritsch*, 351 N.C. 373, 383 (2000).

7. The purpose of motions in limine is “ ‘to avoid injection into trial of matters which are irrelevant, inadmissible and prejudicial[.]’ ” *State v. Fearing*, 315 N.C. 167, 168 (1985) (quoting Black’s Law Dictionary 914 (5th ed. 1979)).

8. Defendants’ Motions in Limine are directed toward the damages recoverable in the event Leather Italia prevails at trial on its claim for UDTP. In a nutshell, Leather Italia contends in this claim that Defendant Genfine Furniture Industry, Ltd. a/k/a Huizhou Jiufeng Science Technology Industrial Co. Ltd. (“Genfine”) made various misrepresentations to Leather Italia—most significantly, that Genfine falsely led Leather Italia to believe that it was the exclusive United States distributor for certain models of furniture manufactured by Genfine when, in reality, Genfine was selling those same models to an affiliated entity, Niroflex by Jiufeng Furniture, LLC (“Niroflex”). Leather Italia further contends that Genfine and Niroflex conspired to keep their relationship a secret from Leather Italia. As discussed in more detail below, Leather Italia’s claim for lost profits is based on the

termination of its business relationship with Genfine and the accompanying adverse effects on its business.

9. Defendants' First Motion seeks to prevent Leather Italia from presenting evidence of, or claiming entitlement to, lost profits damages based on their contention that the alleged lost profits Leather Italia suffered were not proximately caused by Defendants' conduct and are too speculative. Defendants classify the lost profits Leather Italia is seeking into three categories.¹

- 1) Profits Leather Italia believes it would have made on the sale of Genfine products to existing Leather Italia customers;
- 2) Profits Leather Italia believes it would have made on the sale of products not manufactured by Genfine but sold to existing customers who also bought Genfine products; and
- 3) Profits Leather Italia believes it would have made on sales of Genfine products to new customers.

10. In their Second Motion, Defendants seek to prevent Leather Italia from presenting evidence of, or claiming entitlement to, loss of reputation damages based on Defendants' assertion that Leather Italia has not provided a "basis for calculating such damages, or even an estimate of those damages."

11. A party seeking damages "must show that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty." *Castle McCulloch, Inc. v. Freedman*, 169 N.C. App. 497, 501 (2005). "North Carolina courts have long held that damages for lost profits will not be awarded based upon hypothetical or speculative forecasts of losses."

¹ Leather Italia does not dispute this characterization.

Iron Steamer, Ltd. v. Trinity Rest., Inc., 110 N.C. App. 843, 847 (1993). In order for a claimant to be permitted to seek lost profits, they must be “the natural and probable result of the wrong[.]” *Champs Convenience Stores Inc. v. United Chemical Co.*, 329 N.C. 446, 462 (1991) (cleaned up); *see also Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 545 (1987) (cleaned up).

12. Evidence supporting a lost profits claim must be carefully analyzed to determine whether such profits have been established “with reasonable certainty.” *Id.* at 847-48 (cleaned up). However, “[a]bsolute certainty . . . is not required.” *Mosley & Mosley Builders, Inc. v. Landin, Ltd.*, 87 N.C. App. 438, 446 (1987) (cleaned up).

13. As a general proposition, it is clear that under North Carolina law lost profits may be recovered in connection with a UDTP claim. *See, e.g., Media Network, Inc. v. Long Haymes Carr, Inc.*, 197 N.C. App. 433, 448 (2009). Where lost profits are sought in connection with a claim for UDTP, a court must evaluate the quality of evidence of lost profits on an individual case-by-case basis in order to determine whether the damages have been proven with reasonable certainty. *Id.* The burden of proving damages to a reasonable certainty is on the party seeking them. *Brown v. Moore*, 286 N.C. 664 (1975).

14. The Court notes that Leather Italia does not have an expert witness in this case. However, the absence of expert testimony is not, by itself, fatal to Leather Italia’s lost profits argument. The North Carolina Court of Appeals has held that expert witness testimony is not required in order for a claimant to recover lost profits damages at trial. *See, e.g., Byrd’s Lawn & Landscaping, Inc. v. Smith*, 142 N.C. App.

371, 378 (2001) (holding that lay witness was permitted under N.C. R. Evid. 701 to offer opinion on lost profits issue based on his knowledge of plaintiff's revenues and profits made on gross sales). However, "[w]hether the evidence is such as to carry the case to the jury is always for the court to determine." *Ward v. Smith*, 223 N.C. 141, 142 (1943). "To justify submission of an issue it must not only arise on the pleadings, but must be supported by competent evidence." *Electro Lift, Inc. v. Miller Equip. Co.*, 4 N.C. App. 203, 208–09 (1969) (citing *Gunter v. Winders*, 256 N.C. 263 (1962)).

15. In lieu of expert testimony on the issue of lost profits, Leather Italia has offered deposition testimony from its employees—namely, its Chief Financial Officer, Gary Cebula, along with accompanying spreadsheets prepared by Cebula that purport to contain his calculations. During discovery, Cebula offered an opinion that as a result of the termination of its relationship with Genfine in 2019, Leather Italia lost between \$2,341,420 and \$4,590,854 in 2019. Cebula further opined that Leather Italia's loss in profits would have continued for at least seven years afterward, resulting in a total loss of between \$16,389,940 and \$32,135,977.

16. The Court has carefully reviewed the testimony of Cebula along with all other relevant evidence in the record relating to the issue of lost profits. The Court concludes that Leather Italia's claimed entitlement to lost profits fails for several reasons.

17. First, and most basically, Leather Italia is operating from a fundamentally flawed premise. Its entire lost profits argument is based on the fact that since 2019 it has no longer been able to offer its customers Genfine furniture

models, thereby causing a significant reduction in its sales to current customers and difficulty in attracting new customers. But, as explained in detail in the Court’s 5 December 2022 Order and Opinion, Leather Italia *chose* to discontinue its relationship with Genfine following a confrontation between Michael Campbell, Leather Italia’s Chief Executive Officer, and Defendant John Thomas Moody, the majority owner and general manager of Genfine, in 2019. Indeed, the record reflects a number of communications between Moody and Campbell in which Moody sought to preserve the two companies’ business relationship—efforts that went ignored by Campbell.

18. It is simply illogical to argue that Leather Italia should be entitled to recover lost profits based on its inability to sell Genfine furniture when it was *Leather Italia* who stopped buying such furniture from Genfine. Thus, there is a disconnect between Leather Italia’s theory of *liability* (which is based on Genfine’s alleged deception as to Leather Italia’s exclusivity regarding the sale of Genfine furniture models in the United States) and its theory of *lost profits* (which is based on its lost sales resulting simply from the fact that Leather Italia is no longer selling Genfine furniture). *See Vitaform, Inc. v. Aeroflow, Inc.*, 2023 NCBC LEXIS 38, at **8 (N.C. Super. Ct. Mar. 10, 2023) (noting that “[a]s a general matter, an expert should be excluded when the expert’s damages calculations do not match the theories of liability presented.”).²

² Although the Court’s analysis in *Vitaform* concerned the admissibility of an expert witness’s testimony, the underlying principles apply equally here, where a party seeks to offer lay opinion testimony in support of a lost profits claim. Such opinion testimony and supporting calculations must be consistent with the applicable theory of liability asserted.

19. Not surprisingly, neither Leather Italia's brief nor the Court's own research has disclosed any case from a North Carolina court allowing a lost profits claim on analogous facts.

20. Perhaps Leather Italia could have offered sufficient evidence to support a lost profits claim at trial premised on the net profits it lost out on based on Genfine's alleged deception concerning Leather Italia's status as Genfine's exclusive United States distributor (i.e., based on the difference between the profits it actually made and the profits it would have made if it had, in fact, been Genfine's exclusive distributor). Such a theory of lost profits might have been proper so as to place Leather Italia in the position it would have been in had Genfine honored its alleged promise of exclusivity.

21. However, that is not the theory of lost profits Leather Italia chose to pursue. Leather Italia is not arguing that it is entitled to recover the net profits it *would have* received as Genfine's exclusive distributor based on evidence as to sales of Genfine models that were instead made by Niroflex (or any of Leather Italia's other competitors). Moreover, it is too late in the game for Leather Italia to change course now.

22. As this Court stated in *Vitaform*, "the question is not whether Plaintiff *could* offer evidence of its damages, but whether Plaintiff *did so* when asked during discovery. . . . Plaintiff had approximately eighteen months between the filing of its complaint and the close of discovery to provide to Defendants any other evidence of

Plaintiff's damages. Plaintiff failed to do so, and accordingly should not be permitted to introduce new theories or evidence of damages at the eleventh hour." *Id.* at **14.

23. Furthermore, the Court finds that key portions of Cebula's testimony on this subject are impermissibly speculative, that he failed to properly take into account Leather Italia's sales of furniture obtained from manufacturers other than Genfine, and that he failed to reduce his profits calculations by costs Leather Italia avoided by virtue of the discontinuance of its relationship with Genfine.³

24. This Court has stated the following regarding the recovery of lost profits:

Lost profits "may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses," *Drews*, 296 S.C. at 214, 371 S.E.2d at 536 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 352, at 146 (1981)), but must be diminished by the costs which would have been incurred in earning such profits. *Id.* at 210, 371 S.E.2d at 534 (citing RESTATEMENT (SECOND) OF CONTRACTS § 331, Comment B (1932); *Mali v. Odom*, 295 S.C. 78, 367 S.E.2d 166 (Ct.App.1988)). In *Drews*, the court held, as a matter of law, that proof of damages was insufficient to submit to a jury because the complaining party only put forth evidence of gross profits without any figures for operating expenses averted or a standard for establishing net profits. 296 S.C. at 214, 371 S.E.2d at 536.

Allen Smith Inv. Props., LLC v. Barbary Properties, LLC, No. 09 CVS 20255, 2013 WL 57048, at *7 (N.C. Super. Jan. 3, 2013).

25. Consider the following portion of Cebula's deposition testimony regarding his lost profits calculations:

Q. This does not factor in any other risks, such as changes in the political scene or tariff issues? This is just literally a projection based on 2018 and 2019 sales data?

³ At the 4 August hearing, counsel for Leather Italia conceded that Cebula had failed to reduce his estimated lost profits by saved costs such as commissions and overhead that were avoided by not purchasing Genfine models.

A. (By Mr. Cebula) That's correct.

Q. Okay. I think you answered this question, but I just want to be clear. This does not factor in any sales that Leather Italia would have made from new manufacturers to replace sales that you projected were lost; correct?

A. (By Mr. Cebula) That's correct, yes.

Q. But you would -- you would admit that there were replacement sales?

A. (By Mr. Cebula) Admit there were replacement sales? Yes, we -- yes, we did manufacture products -- similar products to the Genfine products, and we did sell them in 2019, yes.

Q. And you plan to sell them going forward?

A. (By Mr. Cebula) Correct.

(Leather Italia Rule 30(b)(6) Dep. 178:5-24.)

Q. Okay. You haven't reduced any of these numbers by the sales that you've made from the new manufacturers?

A. (By Mr. Cebula) That's correct.

Q. Okay.

A. (By Mr. Cebula) That's correct.

Q. All right. So---

A. (By Mr. Cebula) So just to -- to Column B, so in the -- excuse me -- the first column -- correct -- when I'm looking at the 3.1 million, that would be assuming that we lost a hundred -- we would have potentially lost 100 percent of all that business.

Q. Of all the non-Genfine business?

A. (By Mr. Cebula) Correct. That's that assumption there, and that's an assumption, right. I mean, and it's probably not a reasonable assumption, because you're not going to lose 100 percent of customers, but what I -- what I did in the column to the right is, I looked at 100

percent of sales to those customers from 2018 to 2019 and quantified that we did lose -- we had a reduction, so whether you call it a loss or a reduction of \$887,000 in revenues from those same \$14 million -- the same customers that made up that \$14 million, we lost 887,000 in margin in 2019 that, you know, you say it was -- is that attributable to Genfine, or is that attributable to other factors? Who knows.

(Leather Italia Rule 30(b)(6) Dep. 162:12–163:15). This example from Cebula’s testimony illustrates the speculative nature of his assumptions as well as his failure to take into account factors highly relevant to lost profit calculations.

26. Cebula also projected lost profits accruing for the next seven years. However, given that (1) the business relationship between Leather Italia and Genfine only lasted for approximately two years; and (2) no contract existed between the parties committing Genfine to continue selling furniture to Leather Italia going forward, this aspect of Cebula’s testimony is also unduly speculative. *See Olivetti*, 319 N.C. at 549 (“The [trial] judge’s conclusion from this evidence that Ozment would have made any sales for Ames over the next three years, much less that he would have made more than \$800,000 worth of sales, was manifestly unsupported and the result of speculation.”).

27. Leather Italia’s evidence of reputational harm fares no better. As an initial matter, it has failed to cite any North Carolina case in which reputational damages have been awarded in the context of a business dispute. Moreover, even assuming that such damages are potentially recoverable (and assuming that expert testimony is not necessary to establish them), Leather Italia’s supporting evidence is, once again, deficient. In essence, Leather Italia is arguing that its reputation with its customers suffered once it became known that Niroflex was undercutting Leather

Italia's prices on Genfine models, making it appear that Leather Italia had previously been overcharging those customers for these same—or comparable—Genfine models.

28. In his deposition, however, Cebula candidly admitted that he was unable to quantify any such reputational harm.

Q. You don't have a number for reputation losses?

A. (By Mr. Cebula) I don't know how you -- I don't know how you would measure reputational losses. I really don't.

Q. You don't have a number for trust losses?

A. (By Mr. Cebula) We do not.

(Leather Italia Rule 30(b)(6) Dep. 175:16–22.)

29. As this testimony aptly demonstrates, a jury would have no basis for awarding reputational damages based on Leather Italia's evidence.

30. In sum, the Court **CONCLUDES** that Leather Italia's claim for lost profits and reputational injury is both logically unsound and unduly speculative such that Defendants' Motions in Limine should be **GRANTED**. *See, e.g., McNamara v. Wilmington Mall Realty Corp.*, 121 N.C. App. 400, 412 (1996) (“[W]e hold that plaintiff failed to meet his burden of proving lost profits with reasonable certainty.”); *Iron Steamer*, 110 N.C. App. 843, 849 (1993) (“[W]e find no factual basis upon which a jury could calculate lost profits with a ‘reasonable certainty.’ Mr. Cantor’s estimation of lost profits is based on assumptions that are purely speculative in nature.”); *Kerry Bodenhamer Farms, LLC v. Nature’s Pearl Corp.*, 2018 NCBC LEXIS 239, *20–21 (excluding calculation of lost profits based on “unsupported and speculative assumptions”).

CONCLUSION

THEREFORE, IT IS ORDERED that Defendants' Motions in Limine are **GRANTED** and that Leather Italia is precluded from presenting evidence of, or claiming entitlement to, lost profits damages or loss of reputation damages.

SO ORDERED, this the 11th day of August, 2023.

/s/ Mark A. Davis

Mark A. Davis
Special Superior Court Judge
for Complex Business Cases