

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AGRIZAP, INC. : CIVIL ACTION  
 :  
 vs. :  
 :  
 WOODSTREAM CORP., et al. : NO. 04-3925

**MEMORANDUM**

**ROBERT F. KELLY, Sr. J.**

**NOVEMBER 20, 2006**

The Defendants have filed a motion to exclude the damage report and testimony of Wayne D. Lorch. At the time Defendants' motion was filed Plaintiff had claims for patent infringement as well as State law claims including breach of contract and fraudulent misrepresentation. Subsequent to the filing of the present motion this Court sustained summary judgment motions to all of Plaintiffs' State law claims with the exception of fraudulent misrepresentation.

It is clear to this Court that Plaintiffs' expert Wayne D. Lorch (Lorch) was engaged to render an opinion with respect to contract damages only. We come to this conclusion based upon the following:

Q. Okay. What were you engaged to do on or about August 17?

A. To provide an opinion as to the damages of Woodstream allegedly not honoring a licensing or distribution agreement with AgriZap to distribute its product.

Lorch Dep. p. 10.

Q. And isn't it true that your report purports to estimate a damages -- estimate damages for breach of contract?

A. Yes.

Lorch Dep. p. 62.

Q. Okay. Now, do you know what damages are allowable for patent infringement?

A. I'm somewhat familiar with it.

Q. You're somewhat. Were you when you made this report?

A. Yes.

Q. Okay. What damages are allowable?

A. Are you implying that this report has damages related to the patent infringement?

Q. I'm asking you. Does it?

A. No.

Q. Okay. It only relates to the breach of contract, right?

A. Correct.

Lorch Dep. pgs. 67 & 68.

A. My understanding of patent losses are that they have to be actual economic damages.

Q. Once a court enters an injunction, there are no future losses, are there?

A. If the injunction says don't sell them anymore, correct.

Q. Right. And that's why your report can't relate to patent damages, right, because it goes out to 2010?

A. It -- that would seem fair. That wasn't -- that was beyond the scope of my involvement in the case, but --

Q. Why did you decide to limit your report to contract damages?

A. Based on the information that was -- that we had at the time the report was drafted, I wasn't asked to do any other sort of damage assessment.

Q. Okay, so you weren't asked to do a damage assessment with respect to the alleged trade disparagement, were you?

A. Not for the purposes of this report.

Q. Nor the alleged fraudulent misrepresentations, right?

A. Same answer.

Q. Nor the alleged statutory unfair competition right?

A. Same answer.

Q. Okay. And you don't intend to, do you?

A. That's actually a question that would be more properly stated to Counsel, based on what the status of the discovery is currently.

Q. Okay. Do you know what the status of discovery is?

A. No, I do not.

Q. You haven't been asked to render opinions as to damages on patent infringement, trade disparagement, statutory unfair competition, or fraudulent misrepresentation, right?

A. Not at this time.

Q. Okay. So the answer is "yes," not at this time, correct?

A. Could you read back the question.

Q. I'll recite it.

You haven't been asked to opine with respect to damages on any cause of action other than breach of contract, right?

A. At this time, that's correct.

Lorch Dep. pgs. 70 to 72.

Since the granting of summary judgment on Plaintiffs' breach of contract claim, Lorch's expert testimony would not be relevant to any issue remaining in this case. Plaintiffs' counsel seems to argue that Lorch's testimony should be allowed as to the remaining claims. The problem is, in his deposition Mr. Lorch himself disavows any intent on his part to render an opinion on any claim other than breach of contract. The grant of Plaintiffs' counsel's argument puts the Court in the awkward position of qualifying Mr. Lorch as an expert in an area where he himself indicated he was not rendering an opinion.

For this reason Defendants' motion will be granted.

If Plaintiffs feel, that despite Mr. Lorch's deposition testimony, some parts of matters disclosed in Mr. Lorch's 26(a)(2)(B) Report dated September 15, 2005 are relevant to establish damages as to remaining claims they may file a motion to reconsider within ten (10) days. Any such motion shall set forth with specificity the parts of the report they feel can be used to prove specific items of damages.

We therefore enter the following Order.

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**ORDER**

**AND NOW**, this 20th day of November, 2006, upon consideration of the motion to exclude the damage report and testimony of Wayne D. Lorch (Doc. No. 59), the opposition of Plaintiff Agrizap, Inc. thereto, and all other matters of record, it is hereby **ORDERED** that the motion be and the same is hereby **GRANTED**.

BY THE COURT:

/s/ Robert F. Kelly  
ROBERT F. KELLY  
SENIOR JUDGE