PINE TREES, INC. ©

Memo

To: Daniel Martinez, Manager of Risk Management Department

From: Erica Marcus, Supervisor, Sales Department

Date: February 20, 2006

Re: Burger Ranch

As you may remember, PINE Trees, Inc. ("Pine") has recently entered into one of our largest contracts yet with Burger Ranch (Burger), whereby Pine is to supply and decorate a Christmas tree in each of Burger's one hundred and thirty-seven fast food restaurants in Gould each year in December. The first year of the contract was 2005.

You undoubtedly remember the December 2, 2005 disaster. On that day one of the Christmas trees that we had delivered and decorated in early December to one of Burger's restaurants in Canoga Hills, Gould caught on fire. The fire then severely damaged the restaurant's premises, including the kitchen and dining areas. Earlier today, I received an angry call from Marc Washington, the president of Burger, updating me on the recent calculations of losses from the disaster.

Our records indicate that the Christmas tree was delivered to Burger's Canoga Hills site on time and in good order on the morning of Friday, December 2nd, 2005. As the manager on site requested our delivery crew, they placed the tree inside the restaurant in an area next to the ordering counter. The crew then spent the next two hours, as they routinely do, decorating the tree to the satisfaction of the on site manager, Richard Simon. Mr. Simon then initialed the receipt provided to him by our delivery crew, acknowledging receipt and full satisfaction from the decorated tree. Mr. Simon then fully paid for the tree and the services with a company check.

The fire broke out inside the Canoga Hills restaurant just as the last employee was leaving at approximately 11:37 p.m. on December 2nd. Fortunately, there were no customers in the restaurant at that time as the store generally closes at 11:00 p.m. on weekdays. Mr. Washington indicated to me during the phone conversation that a report he received yesterday from the local fire department tentatively concluded that the fire originated from the Christmas tree. He went on to say that the report indicates that the lights on the tree required too much power for the one outlet they were plugged into, causing an electrical short. The spark from this instantly ignited the tree. The employee, who had been about to unplug the tree and turn off the lights in the restaurant, was so shocked that he instantly ran out of the restaurant. He then searched for a phone to call the fire department (in his haste he had left his cell phone inside). It took a few minutes to find a phone, giving the fire a chance to spread.

Mr. Washington also said that as a result of the fire, the restaurant has been completely shut down for the past three months and that he does not expect the restaurant to be open for at least another three months pending complete renovation of the damaged areas.

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Mr. Washington then demanded compensation for the losses that Burger's restaurant sustained as a result of the fire. He faxed to me a copy of the construction bid Burger's restaurant accepted to reconstruct the premises, which came out to $464,900. In addition to the reconstruction costs, he also demands compensation for the potential profits the restaurant could have generated during the downtime. I am attaching the documents I asked him to fax me, which include some of Burger's financial data regarding revenues and expenses during 2004 and 2005.

I told Mr. Washington that I sympathize with the lost profits sustained by the Canoga Hills Burger Ranch, but that according to the agreement we entered with Burger, Burger agreed to waive all claims against us for any consequential damages. After he quickly looked at the Purchase Order Acknowledgment, he said that while there was such a clause in the document, it was not part of the contract since Burger never agreed to it or signed it. I replied that I would look it over and get back to him soon.

Required

In addition to the financial data provided by Mr. Washington below, please read parts of the Gould Commercial Code and the cases attached in the legal library. Before Ms. Marcus replies to Mr. Washington, write an objective report to her (refer to the report guidelines on the Gateway web site). (Assume that the applicable precedent is from the fictional jurisdiction of the state of Gould).

In preparing your report you may wish to review business law concepts 1, 2 and 10 and statistics concepts 1, 2, 3 and 9.

PURCHASE ORDER

Number: 865

Burger Ranch, Inc.
1990 Century City Boulevard
San Sur, Gould 93400
(874) 788-7000

Date: September 20, 2005

SELLER: PINE Trees, Inc.
18500 First Blvd.
Canoga Hills, Gould 75356

SHIP TO: See Instructions below

Per our discussion from earlier today, Burger Ranch orders one hundred thirty seven (137) PINE Christmas Trees - Evergreen style.

The trees are to be delivered before December 12, 2005 to each of Burger Ranch's 137 restaurants (attached please find a list). Pine delivery crew shall decorate each tree on the site per sample shown by your sales representative, Ms. Westbrook.

Price: $150 per tree, all-inclusive, per quote from Jill Westbrook. Payable net upon delivery and decoration.

General Conditions

Seller warrants all goods are of merchantable quality and fit for the intended purpose. Seller warrants that all goods are free and clear of all liens and claims by third party and that Seller possesses all rights to sell said goods free and clear.

Authorized Signature: ____________________
Ruben Sanchez

PURCHASE ORDER ACKNOWLEDGMENT

PINE TREES, INC.
18500 First Blvd.
Canoga Hills, Gould 75356
(818) 995-6500

September 25, 2005

Buyer: Burger Ranch, Inc.
1990 Century City Boulevard
San Sur, Gould 93400
(874) 788-7000

Ship To: Per instructions

Contact: Ruben Sanchez

We have received your purchase order number 865 dated September 20, 2005.

-137 Christmas trees-Evergreen style;
-Decorations to be added upon delivery;
-unit price $150
-We will ship first unit to your store in Canoga Hills, Gould.
-Payable net upon delivery.

____
Alexa Rubin
Department of Procurement

CONDITIONS APPLICABLE TO ALL SALES:

Late charges at 10% per month for past due payments; minimum late charge $10. Shipment travel at the risk and cost of Buyer. Risk of loss passes to Buyer at the time of identification. Seller warrants that all goods are of merchantable quality and fit for the intended purpose. To the extent defect is identified in any tree delivered, Seller shall promptly deliver a replacement tree to Buyer. Buyer waives any claims for consequential damages arising out of this purchase order, including, but not limited to lost profits.

BURGER FINANCIAL DATA FROM THE PRIOR YEAR OF OPERATION*

Week of	Revenues	Expenses
6-Dec-04	$117,608	$103,486
13-Dec-04	$130,626	$100,847
20-Dec-04	$142,544	$95,141
27-Dec-04	$109,530	$101,565
3-Jan-05	$118,357	$98,824
10-Jan-05	$178,881	$90,483
17-Jan-05	$142,718	$92,769
24-Jan-05	$106,841	$92,622
31-Jan-05	$118,390	$95,791
7-Feb-05	$157,411	$110,939
14-Feb-05	$141,588	$97,157
21-Feb-05	$130,279	$94,435
28-Feb-05	$130,308	$96,570
7-Mar-05	$82,154	$96,090
14-Mar-05	$121,936	$95,148
21-Mar-05	$109,481	$99,906
28-Mar-05	$126,345	$101,377
4-Apr-05	$118,177	$105,286
11-Apr-05	$147,774	$95,687
18-Apr-05	$150,890	$106,496
25-Apr-05	$65,550	$109,601
2-May-05	$125,736	$95,021
9-May-05	$92,529	$98,867
16-May-05	$124,269	$105,696
23-May-05	$133,673	$107,730
30-May-05	$147,666	$102,658
6-Jun-05	$157,924	$98,009
13-Jun-05	$138,597	$101,630
20-Jun-05	$103,805	$98,603
27-Jun-05	$158,812	$96,155
4-Jul-05	$130,239	$98,434
11-Jul-05	$155,509	$98,609
18-Jul-05	$132,658	$102,447
25-Jul-05	$117,698	$88,180
1-Aug-05	$167,928	$91,917
8-Aug-05	$149,437	$105,257
15-Aug-05	$144,108	$95,297
22-Aug-05	$140,708	$103,184
29-Aug-05	$104,823	$99,952
5-Sep-05	$166,587	$95,080
12-Sep-05	$127,610	$99,863
19-Sep-05	$156,508	$104,368
26-Sep-05	$166,942	$105,109
3-Oct-05	$141,190	$99,911
10-Oct-05	$163,260	$94,528
17-Oct-05	$138,656	$100,983
24-Oct-05	$113,671	$99,337
31-Oct-05	$115,956	$106,309
7-Nov-05	$145,595	$102,676
14-Nov-05	$156,734	$97,765
21-Nov-05	$135,435	$107,218
28-Nov-05	$129,572	$110,404

* All figures are after tax

PINE TREES, INC. LIBRARY©

Library of Legal Information

1. AGUILAR MANUFACTURING, INC., Plaintiff and Appellant, v. RICHFIELD, INC., Defendant and Respondent
2. KIDS' WORLD INC., Plaintiff and appellant v. LABS ETC. INC., Defendant and respondent.
3. GOULD Commercial Code

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AGUILAR MANUFACTURING, INC., Plaintiff and Appellant, v. RICHFIELD, INC., Defendant and Respondent

Civ. No. 87546

Court of Appeal of Gould, Third Appellate District, Division Three

April 24, 1998 filed

PRIOR HISTORY:
Superior Court of San Dimes County, No. SD 9563466, Elizabeth Westbrook, Judge.

DISPOSITION: The judgment is affirmed.

COUNSEL: Warren & Warren for Plaintiff and Appellant.

Gibson & Anderson for Defendant and Respondent.

OPINION BY: KAUFMAN

OPINION: This appeal presents for the first time in this state an occasion to interpret section 2207 of the Commercial Code (infra) as it operates to permit an offeree seller to accept an offer to purchase on terms not contained in the offer, which are yet binding on the offeror buyer, provided such terms do not represent a "material alteration" of the contract. Here the offeree seller's invoices contained a printed limitation of one year within which the buyer could commence an action "under this contract" after such action had accrued. On the facts before it, the trial court ruled that a suit brought by the buyer twenty-one months after all of its causes of action had accrued, including those for breach of warranty fraud and negligent misrepresentation, was barred by this one-year limitation provision which had become a term of the contract in the manner noted. In our view, the trial court properly ruled on the issues before it, and the judgment of dismissal will be affirmed.

Synopsis of the Trial Court Proceedings:

Aguilar Manufacturing, Inc., a Nebraska corporation (plaintiff) filed its initial complaint in the underlying action on March 30, 1979 for breach of warranty, fraud, and negligent misrepresentation. The suit was brought against Richfield Inc. a Gould corporation (defendant). The prayer asked for $ 2 million in general damages, for damages for loss of good will and reputation according to proof, for attorney's fees in the action, plus costs and other proper relief.

In defendant's answer to the complaint, it pleaded 16 affirmative defenses, one of which alleged ". . . that plaintiff failed to commence the within action within the one-year limitation period expressly agreed to by the parties in writing."

After the case was at issue, the parties stipulated in writing "that the question of whether, as a matter of law, plaintiff's claims are barred by the applicable statute of limitations on contractual limitations period may, and should, be determined in advance of impaneling a jury to determine the remaining factual issues in respect of the trial set for January 30, 1984. The reason for this stipulated order of proceeding is that if, as defendant contends but plaintiff disputes, the action is time-barred as a matter of law, defendant would be entitled to judgment without the need for further proceedings."

With reference to the agreed upon issue of fact, the pretrial conference order included recitations that:

"3. The procedure for all sales of emulsions purchased by plaintiff from [defendant], including all sales of Polyco 2151, was as follows: A representative of plaintiff would telephone [defendant's] facility and place an oral order for a quantity of emulsion at [defendant's] standard price for delivery at plaintiff's facilities in Colton. On several occasions plaintiff would also thereafter send to [defendant] a written purchase order identifying the product to be purchased, stating the quantity required and the place and means of shipment, the price per pound, the date and place of requested delivery.

"4. Plaintiff made at least seventeen purchases of Polyco 2151 between May 1976 and July 1977, inclusive.

"5. Plaintiff's oral and/or written offers to purchase Polyco 2151 did not limit acceptance to their terms.

"6. [Defendant's] sales documents in respect of the shipments of Polyco 2151 to plaintiff contained the following limitation of action provision, which constituted a proposal for addition to the contract: "'2. . . . Any action

by Buyer hereunder shall be commenced within one year after receipt of said products.'

"8. On each occasion that plaintiff ordered a shipment of Polyco 2151, [defendant] sent to plaintiff sales documents containing the limitation of action provision discussed in paragraph 6 at the same time or shortly after each shipment of Polyco 2151. Plaintiff received each of the foregoing sales documents in due course.

"9. Plaintiff at no time notified [defendant] of an objection to the one-year limitation of action provision contained in [defendant's] sales documents for the sale of Polyco 2151.

Discussion

Defendant's motion was brought and granted on the grounds that the one-year limitation periods in the sales documents were additional terms which became part of the contracts, pursuant to Gould's Commercial Code section 2207. Section 2207 provides in relevant part: "(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms. (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: (a) The offer expressly limits acceptance to the terms of the offer; (b) They materially alter it; or (c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received."

The trial court ruled that limiting the period contained in the sales documents was not a material alteration, and further that the one-year period of such limitation was not unreasonable.

Plaintiff does not dispute the applicability of section 2207, and concedes, as to subdivision (2) thereof, that its own offers to purchase did not limit acceptance to the terms of the offers, and that it did not object to the one-year limitation provisions. Plaintiff argues, however, that those provisions materially altered the contracts, and therefore did not become part of the contracts.

On the material alteration issue, comment 4 to section 2-207 provides in pertinent part: "Examples of typical clauses which would normally 'materially alter' the contract and so result in surprise or hardship if incorporated without express awareness by the other party are: a clause negating such standard warranties as that of merchantability or fitness for a particular purpose in circumstances in which either warranty normally attaches . . . [to] a clause requiring that complaints be made in a time materially shorter than customary or reasonable or to a provision which require arbitration, or otherwise contain terms limiting remedies." However, Comment 5 to section 2-207 provides in pertinent part: "Examples of clauses which involve no element of unreasonable surprise and which therefore are to be incorporated in the contract unless notice of objection is seasonably given are: . . . a clause fixing a reasonable time for complaints within customary limits."

On the issue of whether, between merchants, a one-year limitation period is normal, customary, or reasonable, there seem to be no Gould cases directly on point. However, the Gould Commercial Code section 2725, subdivision (1) provides that the parties to a sales contract may reduce the statutory four-year period of limitations to one year. A district court in New York has recently found that a one-year limitation provision is not an unreasonable or material alteration of a contract pursuant to Uniform Commercial Code section 2-207. (Aceros Industrials, S.A. de C.V. v. Florida Steel, supra, 528 F.Supp. 1156, 1158.)

In view of all the above, particularly comment 5 under the corresponding section of the Gould Commercial Code, we hold that the trial court correctly determined that the limitation periods here in question were not material alterations of the contracts, and further in view of section 2725, subdivision (1) of the Gould Commercial Code, that the one-year period was not unreasonable. As a consequence, the provisions are legally enforceable.

Plaintiff's attempts to distinguish Aceros, and to analogize defendant's one-year limitation provisions to provisions which require arbitration, disclaim warranties, or otherwise contain terms "limiting remedies" (Album Graphics, Inc. v. Beatrice Foods Co. (1980) are

without merit. The one-year limitation provisions here do not limit plaintiff's remedy, but limit the time within which it may pursue that remedy, and, moreover, do so in a way which is statutorily and judicially acceptable.

The judgment is affirmed.

KIDS' WORLD INC., Plaintiff and appellant v. LABS ETC. INC., Defendant and respondent.

EZ7868765

COURT OF APPEAL OF GOULD, FOURTH APPELLATE DISTRICT, DIVISION NINE

February 3, 2000, filed

PRIOR HISTORY: APPEAL from a judgment of the Superior Court of San Ramon County No. DE287345. Timothy L. Barr, Judge.

DISPOSITION: Affirmed.

COUNSEL: Law Offices of James A. Davidson, for Plaintiff and Appellant.
Maria Helfing for Defendant and Respondent

OPINION BY: MARCUS

OPINION:

I. FACTS

The material facts are undisputed. Two brothers, Howard and Lew Rudzkis, founded Kids' World in 1992. Kids' World is a retailer of toys, educational products, and computer training services for children. Kids' World operates a retail store in Beverly Rolls.

Defendant leased office space directly above the Kids' World store. On November 18, 1997, one of defendant's employees left water running in a sink overnight, causing a flood in plaintiff's store. The store remained closed due to flood damage for two weeks. When the store reopened, many of its shelves were empty. Further, computer classes, an important factor in the store's profitability, could not be resumed until January 1998. The store was not operating at its previous level until April 1998. Defendant, through its insurer, paid plaintiffs $200,000 for damage to the retail store.

Defendant presented evidence that Kids' World had no line of credit available to it during 1997 and 1998. Kids' World had never attracted any investors. At the time of the flood, Kids' World had five employees, only one of whom had a sales position.

Kids' World had started a Web site in the spring of 1995. Howard described the Web site as a "test" site; a way to learn about the internet and e-commerce; to experiment with Web designs and to "debug" the internet Web page. Howard stated the online business originally was not intended to be profitable. In fact, the online business generated less than $ 500 per year with the exception of one order for approximately $17,000. Between 1995 and 1997, Kids' World repeatedly revised its Web site.

Plaintiff presented evidence that by November 1997, when the flood occurred, the Rudzkis had developed a sophisticated Web site. As described by Lew, the new Web site "had one of the first online 'shopping carts' on the Web (this was the beginning of 'e-commerce'), a state of the art navigational system, and was a full functioning site." Plaintiff had incurred significant time and expense in drafting the programming code for and designing their "state of the art" Web site. They had hired a Web site design company and a development programmer. The new Kids' World Web site was "very similar" to the eToys site. The new Web site was scheduled to go online on Thanksgiving Day 1997, the start of the holiday shopping season and the most profitable time of year in the toy business.

In addition, prior to the flood, plaintiffs had signed a one-year contract with MindSpring, described as one of the "fastest growing" Internet service providers with "a relatively wealthy base of subscribers." Plaintiffs presented evidence of an agreement between MindSpring and Kids' World. Under the terms of the agreement, MindSpring's 200,000 subscribers would have direct, one-click access from its homepage to three toy Web sites--eToys, F.A.O. Schwartz, and Kids' World. According to Howard: "This was a key place to be because Kids' World would be highly visible to people who entered the site. Just as location has always been critical for a retail business, the same holds true for the internet." Further, Kids' World would not have been required to make any upfront payment to MindSpring. Instead, Kids' World would have paid commissions to MindSpring "based on a

percentage of sales made from the MindSpring placement."

At the time of the flood, Kids' World was also negotiating an arrangement with WeatherChannel.com to establish a link similar to the MindSpring link. WeatherChannel.com was then one of the "highest trafficked sites" on the Internet. Howard opined, "For Kids' World to have placement on the Weather Channel site would assuredly guarantee a very high number of visitors to the Kids' World [Web site]."

Kids' World also intended to market its Web site through contacts at magazines as well as radio and television stations. Kids' World was prepared to fill orders placed over the Internet. It had "drop shipment" agreements with numerous suppliers, i.e. the manufacturers agreed to ship products directly to Kids' World's customers. In addition, Kids' World was prepared to ship products directly from the retail store.

However, the flood caused extensive damage to the retail store. The Rudzkis were forced to devote their time to rebuilding and restocking the store. For a variety of reasons, they were unable to both rebuild the store and launch the Web site. Unable to launch their new Web site, plaintiffs withdrew their contract with MindSpring and did not follow through on the Weather Channel agreement.

Prior to the flood, plaintiffs were able to obtain revenue sharing agreements with Web site portals such as MindSpring without paying money up-front. According to Lew, this was because "the [Web site] portals had not yet recognized their value." In March 1998, the Kids' World retail store was reestablished and plaintiffs once again set their sights on e-commerce. By that time, however, revenue sharing Web portal arrangements were no longer available. Following the success of e-commerce retailers like eToys and Amazon, large amounts of cash up-front were demanded in return for access to Web site portals. The fees often exceeded $ 1 million. Plaintiffs were financially unable to proceed; the Web portal costs were "exorbitant." Without links on popular Web site portals, plaintiffs were unable to attract customers to the Kids' World Web site.

In March 1999, Richard X. Hanson, a forensic economist, prepared at plaintiffs' request a "preliminary analysis of losses suffered by [Kids' World] as a result of the flooding incident . . . ." It is apparent the analysis was prepared for settlement purposes. Dr. Hanson opined in pertinent part: "At the present time, eToys is far and away the industry leader. This is due to its early positioning that would have been identical to Kids' World. . . . eToys recently filed for an Initial Public Offering (IPO) expected to draw $ 115 million. This implies that the market predicts long-term annual profit in the $15 million per year range. This is a reasonable forecast for a firm with annual revenue currently at just under $30 million that is expected to double or triple every year for the next three to five years. Assuming that eToys and Kids' World would have been roughly equal competitors, the capital value of Kids' World could have been in excess of $50 million. This is therefore an estimate of the present value of lost profits to Kids' World from the possibility that the market will have grown sufficiently to foreclose effective market presentation." Dr. Hanson concluded if no settlement was reached between the parties to this action "by the time Toys 'R' Us or Mattel makes the expected entry into e-commerce," Kids' World's loss would probably be valued at $ 50 million. Dr. Hanson cautioned: "This latter estimate is preliminary, however. If the market continues to astound, market valuations may argue for even larger damages in the near future." Dr. Hanson relied on news articles as the source of his information about eToys.

Two years after the flood, plaintiffs brought this action against defendants to recover profits lost not from the operation of the retail store, but because of the inability to launch the Web site at an optimal time. Plaintiffs alleged one cause of action for negligence. The trial court entered a judgment in favor of the defendant.

II. DISCUSSION

The Supreme Court set forth the law concerning lost profits as damages in Grupe v. Glick (1945) as follows: "Where the operation of an established business is prevented or interrupted, as by a tort or breach of contract or warranty, damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable for the reason that their occurrence and extent may be ascertained with reasonable certainty from the past volume of business and other provable data relevant to the probable future sales. On the other hand, where the operation of an

unestablished business is prevented or interrupted, damages for prospective profits that might otherwise have been made from its operation are not recoverable for the reason that their occurrence is uncertain, contingent and speculative. But although generally objectionable for the reason that their estimation is conjectural and speculative, anticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability. All of these cases recognize and apply the general principle that damages for the loss of prospective profits are recoverable where the evidence makes reasonably certain their occurrence and extent." (Italics added; accord, e.g., Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc. (2000) Resort Video, Ltd. v. Laser Video, Inc. (1995) Maggio, Inc. v. United Farm Workers (1991); Gerwin v. Southeastern Gould Assn. of Seventh Day Adventists (1971). In Natural Soda Prod. Co. v. City of L. A. (1943), the Supreme Court held: "The award of damages for loss of profits depends upon whether there is a satisfactory basis for estimating what the probable earnings would have been had there been no tort. A satisfactory basis for an existing basis may include reliance on specific economic or statistical models based on past financial records. If no such basis exists, as in cases where the establishment of a business is prevented, it may be necessary to deny such recovery. If, however, there has been operating experience sufficient to permit a reasonable estimate of probable income and expense, damages for loss of prospective profits are awarded." Contrary to plaintiff's assertion, the rule regarding proof of lost profits from a business applies in tort as well as contract cases. (Grupe v. Glick, supra, at pp. 692-693; Piscitelli v. Friedenberg (2001)) Uncertainty as to the amount of profits is not fatal to such a claim. (Continental Car-Na-Var Corp. v. Moseley (1944); Berge v. International Harvester Co. (1983); Fisher v. Hampton (1975); Engle v. City of Oroville (1965) As the Court of Appeal explained in S.C. Anderson, Inc. v. Bank of America (1994) "Lost anticipated profits cannot be recovered if it is uncertain whether any profit would have been derived at all from the proposed undertaking. But lost prospective net profits may be recovered if the evidence shows, with reasonable certainty, both their occurrence and extent. It is enough to demonstrate a reasonable probability that profits would have been earned except for the defendant's conduct." Moreover, the court held, a plaintiff is "not required to establish the amount of its damages with absolute precision, and [is] only obliged to demonstrate its loss with reasonable certainty." (Id. at pp. 536-537; accord, Natural Soda Prod. Co. v. City of L. A., supra, at p. 200 ["Since defendant made it impossible for plaintiff to realize any profits, it cannot complain if the probable profits are of necessity estimated"]; Sanchez-Corea v. Bank of America (1985); Rest.2d Torts, § 912, com. a.) The Restatement Second of Torts provides in this regard: "It is desirable . . . that there be definiteness of proof of the amount of damage as far as is reasonably possible. It is even more desirable . . . that an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered. Particularly is this true in situations . . . where the harm is of such a nature as necessarily to prevent anything approximating accuracy of proof, as when anticipated profits of a business have been prevented." (Rest.2d Torts, § 912, com. a.)

When the operation of an unestablished business is prevented, as here, prospective profits may be shown in various ways. The Restatement Second of Contracts, section 352, comment b, provides, "If the business is a new one or if it is a speculative one . . .,damages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like." Similarly, the Restatement Second of Torts, section 912, comment d states, "When the tortfeasor has prevented the beginning of a new business . . . all factors relevant to the likelihood of the success or lack of success of the business or transaction that are reasonably provable are to be considered, including general business conditions and the degree of success of similar enterprises."

Our Courts of Appeal have held, consistent with the Restatement Second of Torts, that the experience of similar businesses is one way to prove prospective profits. (Resort Video, Ltd. v. Laser Video, Inc., supra, at p. 1699.

We turn to the case before us. Given Kids' World's state-of-the-art Web site, and its expected favorable one-click Web portal

placement on the fast-growing MindSpring site, and perhaps the "highly trafficked" Weather Channel Web site as well, it would have attracted a very high number of relatively wealthy potential customers to its online store. Kids' World was prepared to meet customers' online orders through drop-shipment agreements with manufacturers as well as direct shipments from its Beverly Hills retail store. Once the Rudzkis proved they could significantly attract customers and had a viable online business, the Kids' World Web site would have attracted significant venture capital, i.e., "funds invested in a new enterprise that has high risk and the potential for a high return." (Black's Law Dict. (7th ed. 1999) Westlaw, Blacks.) Further, given the timing of the venture, both in terms of the approaching holidays, and the emerging Internet business, coupled with the availability of Web portal placement without any up-front fees, Kids' World would have been in a position to be a financially successful leader in the e-commerce sale of toys. Finally, based on a comparison with eToys' status in 1999 and assuming Kids' World and eToys would have been roughly equal competitors, Kids' World's capital value money or assets invested, or available for investment, in the business (Black's Law Dict. (7th ed. 1999)) could have been in excess of $ 50 million.

As substantial as plaintiffs' evidence sounds on the surface, we conclude it does not suffice. The evidence is not sufficient to find with reasonable certainty lost net profits from the unlaunched Web site by a preponderance of the evidence. (Lugtu v. Gould Highway Patrol, supra, at p. 722; Aguilar v. Atlantic Richfield Co., supra, at p. 850.) This is because the evidence, while suggesting the Web site would have been viable, is not of a type necessary to demonstrate that a triable controversy exists as to a reasonable certainty that the unestablished business would have made a profit. Although plaintiffs had five years' experience as toy retailers, and had operated a Web site since 1995, they had not previously operated their Web site as a profit-producing venture. Plaintiffs' operation of the Kids' World Web site had in the past resulted in negligible revenues and therefore would not support an inference there was lost prospective profits. In addition, the online market for toys was not an established one. Further, the whole scenario presented by plaintiffs is rife with speculation. The following undisputed contingencies existed so as to bar the computation of potential lost profits: Kids' World would be competing with two other toy retailers on the MindSpring portal; it would be necessary for Kids' World to attract not only sufficient viewers from the MindSpring portal but customers who actually made purchases; the amount of purchases would have to be of sufficient quantity to make the site financially viable; venture capital in an unknown amount might have been available; and plaintiffs might have produced profits in some amount. Moreover, plaintiffs presented no evidence to the effect it was reasonably probable the venture would have been profitable, i.e., gains from online sales would have exceeded the costs of operating the Web site business.

Plaintiffs presented no evidence of a satisfactory basis for estimating what the probable earnings would have been. They failed to assert any method for determining lost profits. Plaintiffs presented no specific economic, statistical, or financial data, market survey, or analysis based on the business records or operating histories of similar enterprises. That the eToys venture was successful up to 1999, as set forth in Dr. Hanson's declaration, does not suffice in and of itself to establish the Plaintiffs' claim of lost profits. Dr. Hanson's comments about eToys' success were based on news articles and not on any actual data. Dr. Hanson's conclusion that plaintiffs' online business would have resulted in profits was based on an unanalyzed assumption the Kids' World Web site would have been a roughly equal competitor with eToys. Further, Dr. Hanson's conclusion about plaintiffs lost profits is based on his unexplained projected capital value of Kids' World without any analysis of its net worth.

Therefore, the trial court properly entered a judgment in favor of the defendant.

III. DISPOSITION

Judgment is affirmed. Defendant is to recover its costs on appeal from Plaintiff.

GOULD COMMERCIAL CODE

SECTION 2-207: Additional Terms in Acceptance or Confirmation

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different form those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

a. The offer expressly limits acceptance to the terms of the offer;
b. They materially alter it; or
c. Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

SECTION 2-104: Definitions

(1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

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