

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE: *
* CASE NUMBER 01-44007
PHAR-MOR, INC., *et al.*, *
* CHAPTER 11
*
Debtors. * HONORABLE KAY WOODS
*

M E M O R A N D U M O P I N I O N

Phar-Mor, Inc., *et al.*, reinstated Debtors ("Phar-Mor"), filed its Fifth Omnibus Objection to Claims (the "Objection") on or about February 13, 2003 (Docket No. 1541). One of the claims included in that Objection was Claim No. 0000162 filed by Yaffe & Company ("Yaffe"). Phar-Mor asserted in the Objection that Yaffe's claim was overstated in that it was asserted in an amount greater than the amount on Phar-Mor's books and records. Phar-Mor seeks to reduce the amount of Yaffe's claim from its asserted amount of One Million One Hundred Fifty Thousand Dollars (\$1,150,000.00) to Ninety-Nine Thousand Seven Hundred Five and 57/100 Dollars (\$99,705.57).¹ Yaffe filed a Response to the Objection on March 18, 2003 (Docket No. 1674). Yaffe notes that it would not be unusual for Phar-Mor's books and records not to reflect the total amount of its claim since the claim arises from Phar-Mor's rejection of an executory contract by and between the parties in July 2002.

The agreement in question was dated March 23, 1994,

¹There does not appear to be any disagreement that Yaffe's claim is classified only as a general unsecured claim.

as amended (the "Agreement"), and provided for Yaffe to perform advertising agency services for Phar-Mor. Yaffe insists that its claim for rejection damages includes: (i) the pro-rata share of the fee it paid to extend the Agreement until December 31, 2003; (ii) the "monthly retainer" in the amount of Forty-Six Thousand Five Hundred Dollars (\$46,500.00) for the 17 months remaining on the Agreement; and (iii) unspecified lost profits.² At the Court's request, the parties provided briefs in support of the legal theories for their respective positions regarding the claim. This opinion deals with the Objection and the Response based on those legal theories.³

The Court will first consider the term of the Agreement. Yaffe consistently maintains that its damages are based on the remainder of the Agreement's term. Since the Agreement was rejected in July 2002 and it had been extended until December 31, 2003, Yaffe asserts that it is entitled to damages for 17 months. On examination, however, Yaffe's damage calculation constitute "double dipping." Yaffe and Phar-Mor both acknowledge that the Agreement was amended by Amendment to Advertising Agency Services

²Yaffe states that its profits averaged in excess of Eighty Thousand Dollars (\$80,000.00) per month for the life of the Agreement and, thus, estimates that its "lost profits" would be One Million Three Hundred Sixty Thousand Dollars (\$1,360,000.00) for the remaining 17 months of the Agreement. Yaffe also acknowledges that the Agreement limits incidental and consequential damages to One Million Dollars (\$1,000,000.00).

³Phar-Mor filed Memorandum of Phar-Mor, Inc., et al. in Support of Fifth Omnibus Objection to Claim - Yaffe & Company ("Phar-Mor's Memo") and Yaffe filed Yaffe & Company's Brief in Support of Claim for Executory Contract Rejection Damages ("Yaffe's Brief").

Agreement dated October 11, 2000 (the "October 11 Amendment") to include a provision for the extension of the Agreement through December 31, 2002 in consideration for the payment by Yaffe of One Hundred Thousand Dollars (\$100,000.00). Pursuant to the October 11 Amendment, Yaffe also had the option to extend the Agreement for additional one year periods by tendering the sum of Fifty Thousand Dollars (\$50,000.00) to Phar-Mor on or before June 30 of the penultimate year of the Agreement as extended. On or about June 28, 2001, Yaffe paid Phar-Mor Fifty Thousand Dollars (\$50,000.00) to extend the Agreement "for the calendar year 2003." Phar-Mor rejected the Agreement pursuant to § 362 of the Bankruptcy Code in July 2002. As a consequence, Yaffe is entitled to damages in the amount of Fifty Thousand Dollars (\$50,000.00) for the period January 1, 2003 through December 31, 2003 because Phar-Mor breached the provision for the extension of the Agreement for that period. This amount is the total damages to which Yaffe is entitled for the period subsequent to December 31, 2002.

Yaffe argues that it is entitled to Twenty Thousand Eight Hundred Thirty-Three Dollars (\$20,833.00), which constitutes 5/24th of the One Hundred Thousand Dollars (\$100,000.00) that it paid to extend the Agreement for the two year period January 1, 2000 through December 31, 2002. Yaffe bases this element of damages on its assertion that, in the event of early termination, the Agreement provided for a return of a pro-rata share of any fee paid to extend the Agreement. Phar-Mor doesn't strongly contest this argument.

In fact, Phar-Mor "acknowledges that a damage claim could exist for the return of the unearned portion of the Opportunity Fee received by it from Yaffe." (Phar-Mor's Memo at 4.) Phar-Mor argues, however, that because the proration language is included in the sixth amendment to the Agreement dated April 14, 1999, but is excluded from the seventh amendment, that "by implication [proration] may not have been within the contemplation of the parties." (Phar-Mor's Memo at 5.) This Court finds that the silence in the seventh amendment regarding proration of the fee paid to extend the agreement does not negate the parties' earlier agreement concerning such proration. Thus, Yaffe is entitled to damages in the amount of Twenty Thousand Eight Hundred Thirty-Three Dollars (\$20,833.00) for Phar-Mor's breach of the Agreement prior to the agreed extension of December 31, 2002.

Yaffe also contends that it is entitled to the "monthly retainer" of Forty-Six Thousand Five Hundred Dollars (\$46,500.00) for 17 months. As set forth above, Yaffe's total damage claim for calendar year 2003 is limited to Fifty Thousand Dollars (\$50,000.00). Thus, this Court will examine whether Yaffe is entitled to damages in the amount of Forty-Six Thousand Five Hundred Dollars (\$46,500.00) per month for August through December 2002 only. In the original Agreement, Phar-Mor agreed to pay Yaffe an "annual fee of seven hundred and sixty eight thousand dollars (\$768,000) in monthly installments of sixty four thousand dollars (\$64,000)." (Agreement, Section VII A.3. at 9.) Pursuant to a

letter from Yaffe to Phar-Mor dated April 18, 1996, effective May 1, 1996, the parties agreed to "[r]educe the monthly retainer from \$66,500 to \$46,500." (Yaffe's Brief, Ex. D.) In its brief, Yaffe also describes this measure of damages as "monthly retainer for services to be provided under the Agreement." (Yaffe's Brief at 5.) The parties agree that the Agreement was a requirements contract for Yaffe to provide all of Phar-Mor's advertising agency services. In consideration, Yaffe agreed not to provide the same kind of services to entities that competed with Phar-Mor.⁴ As consideration, Phar-Mor paid Yaffe a monthly "retainer fee" of Forty-Six Thousand Five Hundred Dollars (\$46,500.00) to hold itself out to provide services to Phar-Mor. Since Phar-Mor was not required to procure any specified amount of services from Yaffe on a monthly basis and since Yaffe was prohibited from representing competitors of Phar-Mor, the monthly "retainer fee" was, in essence, a fee paid by Phar-Mor so that Yaffe would be available to provide whatever services Phar-Mor requested while Yaffe refrained from providing such services to Phar-Mor's competitors. As a consequence, after Phar-Mor rejected the Agreement, Yaffe was free to represent other drug stores and did not have to hold itself ready to perform services for Phar-Mor. Accordingly, since Yaffe did not have to perform after Phar-Mor's breach, it is not entitled to the monthly retainer fee of Forty-Six

⁴The Agreement provided that Yaffe would "not represent a drug store, discount drug store or health and beauty aids chain or other client whose primary business is selling products that also constitute products within [Phar-Mor's] core merchandise" (Agreement, Section 2.H. at 6.)

Thousand Five Hundred Dollars (\$46,500.00) for the remaining term of the Agreement.

The Agreement is governed by Michigan law, which provides for expectation damages, including lost profits. *Jim-Bob, Inc. v. Mehling*, 178 Mich. App. 71, 98 (1989).

It is well settled that the appropriate measure of damages for breach of a contract, such as a lease, is that which would place the injured party in as good a position as it would have been in had the promised performance been rendered. Under this principle, lost profits, if they arise from the breach and are properly proved, are an appropriate element of damages.

The Agreement has a rather ambiguous section regarding damages in the event of termination (see Agreement, Section IX.B.). This provision provides that,

as a result of [Phar-Mor's] breach . . . or in the event [Phar-Mor] terminates this Agreement for any reason whatsoever, [Yaffe's] sole and exclusive remedy, in addition to those matters set forth in paragraph (a) above, . . . shall be limited to an action for damages sustained, but in no event shall such damages exceed [\$1,000,000]

(Agreement, Section IX. B.2.(b).) Yaffe's claim encompasses "lost profits" to the extent it can demonstrate that these are "damages sus-tained" by it, and as otherwise limited by the Agreement's limitation on damages. As noted in Yaffe's Brief, the amount of Yaffe's lost profits for the remainder of the Agreement (through December 31, 2002) are a factual matter that has not yet been addressed by the parties. This Court holds that, in addition to the

elements of damages set forth above, Yaffe is entitled to actual damages, including lost profits, if any, that Yaffe can demonstrate that it sustained for the period from the rejection of the Agreement until December 31, 2002.

In conclusion, Phar-Mor's Objection is sustained, in part, to the extent that Yaffe's Claim No. 0000162 is reduced and encompasses only the following items of damages:

1. Fifty Thousand Dollars (\$50,000.00) for breach of the provision extending the Agreement until December 31, 2003.
2. Twenty Thousand Eight Hundred Thirty-Three Dollars (\$20,833.00) for the pro-rata share of the fee paid to extend the Agreement until December 31, 2002.
3. An amount to be calculated and proven for the period from the rejection date (July 2002) until December 31, 2002 that constitutes the actual damages Yaffe sustained. This amount may include Yaffe's lost profits to the extent they can be demonstrated.

This matter is set for a further telephonic status conference on Monday, September 26, 2005, at 9:45 a.m.

IT IS SO ORDERED.

**HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Opinion was placed in the United States Mail this _____ day of August, 2005, addressed to:

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