UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

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J.P. Hering Distributing Company, Inc., Debtor
Bankruptcy Case No. 02-16113-11
Quality Beverages of Wisconsin, Inc., Debtor
Bankruptcy Case No. 02-16114-11

United States Bankruptcy Court
W.D. Wisconsin, Madison Division

March 27, 2003

J. David Krekeler, Krekeler Strother, S.C., Madison, WI and Terence R. Collins, Collins, Quillin & Knothe, La Crosse, WI for Debtor

Robert D. Martin, United States Bankruptcy Judge

MEMORANDUM DECISION

As explained in my remarks at the close of the trial in this proceeding, the 1997 contract between the Plaintiff, Western Wisconsin Water, Inc., d/b/a LaCrosse Premium Water ("Western"), and the Defendant, Quality Beverages of Wisconsin, Inc. ("Quality")[1], gave Western a "first right of refusal" to acquire (1) all of the accounts sold to Quality, meaning 420 accounts in LaCrosse and the surrounding area and 49 accounts in Prairie du Chien; and (2) all growth attributable to those accounts, for $207,250.00.[2] Quality's failure to offer to sell Western the accounts constituted a breach of the contract. Western is entitled to compensation for losses necessarily flowing from that breach. Those losses include anticipated profits from the resale of the accounts and from exclusive distributorship agreements into which Western would have entered. Western is also entitled to recover expenses incurred in mitigating its losses. Based on its total lost profits[3] ($112,514.96) and

[1]J.P. Hering Distributing Company, Inc., is also a debtor in this matter.

[2]The "first right of refusal" created an option intended in part to protect the areas of distribution from dilution and competition.

[3]This decision adopts the opinions of Catherine Durham, the Plaintiff's expert witness, set forth in Plaintiff's Exhibits 44 and 45, and this sum is based on calculations which are founded

net mitigation expenses[4] ($94,080.00), Western is entitled to damages in the amount of $206,594.96. Western is also entitled to judgment for $12,000.00 for the account payable from Quality.[5]

The contract provided Western a sort of option to purchase 552 accounts from Quality when Quality sold those accounts and others to Crystal Canyons in 2001. That number includes the accounts sold under the 1997 contract (469) and the proportionate increase in Quality's accounts attributable to those original accounts (83).

> The percentage of growth (17.6%) is calculated by subtracting the total number of accounts that Quality owned after the 1997 contract (669) from the total number of accounts that Quality owned in 2001 (787) and dividing that growth in accounts (118) by the number of accounts Quality owned in 1997 (669). Applying that percentage growth (17.6%) to the number of accounts sold in 1997 (469) reveals that the original accounts grew by 83 accounts, to 552 accounts in 2001.

After the breach, Western mitigated its damages by acquiring 400 of the 552 accounts subject to its option. As to those 400 accounts, Western is entitled to be reimbursed its costs of mitigation[6] ($94,080.00).

On the remaining 152 accounts that Western did not acquire, it is entitled to recover its lost profits. Western's lost profits ($112,514.96) consist of total profits lost from the resale of the accounts ($83,600.00) plus total profits lost from exclusive distributorship agreements ($85,983.36) minus the cost of repurchasing the accounts ($57,068.40).

> Western demonstrated that it could have resold the accounts for $550 each. Reselling 152 accounts for $550 each would have generated $83,600.00 in profit. Obviously, Western could have and might have resold the accounts it recovered in mitigation (the record is silent), so no loss was occasioned on this basis as to them.
>
> Western also demonstrated that it would have become the exclusive distributor to each account that it purchased from Quality, as it presumably did

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therein.

[4]See Plaintiff's Exhibit 44.

[5]The Defendant concedes that it owes the Plaintiff at least $12,000.00 for water that the Plaintiff delivered to the Defendant and there is no evidence to support a finding in a higher amount.

[6]See Plaintiff's Exhibit 44.

on the accounts reacquired in mitigation. Based on its theory that it was entitled to purchase 787 accounts from Quality, Western showed that it would have received $445,190.00 in profits from the exclusive distributorship agreements.[7] That represents a profit of $565.68 per account ($445,190.00 ÷ 787 accounts = $565.68 per account). For the 152 accounts used to measure Western's loss, there would have been a total profit of $85,983.36 from the exclusive distributorship agreements (152 accounts X $565.68 = $85,983.36).

Finally, there must be subtracted from the losses arising from the 152 accounts the cost of acquiring them under the option. That purchase price is the total cost of purchase ($207,250.00) divided by the total number of accounts available for purchase (552), or $375.45 per account, multiplied by 152 accounts. The purchase price for the 152 accounts is thus $57,068.40.

Upon the calculations set out herein and for the reasons stated on the record at the close of trial, which together constitute my findings of fact and conclusions of law in this proceeding, the Plaintiff is entitled to judgment against the Defendants in the amount of $218,594.96. It may be so ordered.

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[7]See Plaintiff's Exhibit 45, Revised Exhibit B-1. Ms. Durham calculated the total value of lost profits from the exclusive distributorship agreements at November 2, 2001, to be $445,190.00. To the extent that the present value of that number has changed, Wisconsin jury instructions on damages as to future profits explain that lost profit calculations need not be shown with "mathematical certainty."