IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	CASE NO. BK 10-82436-TJM
	)	
PROFESSIONAL VETERINARY	)	CH. 11
PRODUCTS, LTD. and	)	
EXACT LOGISTICS, LLC,	)	
	)	
Debtor(s).	)	

ORDER

Hearing was held in Omaha, Nebraska, on March 12, 2012, regarding Fil. # 1044, Amended Fifth Omnibus Objection to Claim, filed by Debtor Professional Veterinary Products, Ltd., and Fil. # 1085, Resistance, filed by Apexx Equipment, Inc. Robert Diederich appeared for the debtors, and Conor Boyle and Clyde Saatz appeared for Apexx Equipment, Inc.

In 2007, prior to bankruptcy, Professional Veterinary Products, Ltd. (‘PVP”), and Conquest One, Inc., d/b/a Apexx Equipment, Inc. (“Apexx”), entered into a non-exclusive contract whereby Apexx was granted authority to sell veterinary capital equipment products as an agent for PVP. As a result of the success of such sales, the parties entered into a second agreement in 2009. Under the second agreement, Apexx was to handle all of the sales of veterinary capital equipment on behalf of PVP. The contract provided that if PVP was approached by a potential customer concerning the purchase of capital equipment, PVP would immediately refer the potential customer to Apexx who would close the sale and PVP would receive a portion of the sale proceeds pursuant to a schedule appended to the contract.

The contract, which began in early March of 2009, was for one year, renewable. It could be terminated by either party at the end of each year by giving the other party a 60-day written notice of the termination. In addition, and separate from the annual termination option, the contract provided that it could be terminated at any time by giving a 60-day written notice of intent to terminate.

After the contract was entered into, Apexx expended funds to lease additional warehouse space; build an infrastructure for the warehouse space; employ additional personnel to enable it to increase sales; pay for travel expenses for meeting with PVP management; pay expenses for a toll-free PVP phone line; attend industry shows; and pay for the training of PVP personnel. The total amount spent by Apexx from March 2009 to the end of February 2010 was $208,522.00 as itemized in paragraph 21 of Fil. # 1153, the affidavit of Drew Blackstone, the president of Apexx.

Sales of the equipment decreased in 2009 from the prior two years and Mr. Blackstone and others in his organization came to believe that PVP was not honoring the terms of the contract and was closing sales itself instead of sending sales leads to Apexx, to the detriment of Apexx. Attachments to Fil. # 1153 at Exhibit F, Exhibit G, and Exhibit H show that PVP did make one sale of equipment that Apexx was attempting to complete, did sell a used piece of equipment to an Apexx customer and requested that Apexx cancel its order with the customer, and did attempt to negotiate a contract of sale of equipment from another potential customer, but the sale fell through.

After Mr. Blackstone and others in his organization brought the issue of PVP sales and sales attempts to the attention of PVP officials, PVP gave written notice of its intent to terminate the contract within 60 days. The contract was terminated at the end of February 2010. Thereafter, Apexx attempted to get information from PVP about all of the sales PVP had made and to get PVP to pay Apexx the appropriate commission on such sales. In August of 2010, PVP filed a Chapter 11 bankruptcy case. It liquidated its business assets and has recently been litigating or settling objections to claims.

Apexx filed a claim which included the $208,522.00 in out-of-pocket expenses referred to above and included an estimation of lost commissions of $142,000.00 based upon the belief of its officers and employees that PVP had breached the contract and made significant sales which should have accrued to the benefit of Apexx. The total claim is $350,522.00.

PVP has objected to the claim and asserts it owes Apexx nothing.

The measure of damages for a breach of contract is intended to compensate the injured party for the harm it suffered and make the party whole.

> In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position the injured party would have occupied if the contract had been performed, that is, to make the injured party whole. One injured by a breach of contract is entitled to recover all its damages, including the gains prevented as well as the losses sustained, provided the damages are reasonably certain and such as might be expected to follow the breach. While damages need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural.

Gary's Implement, Inc. v. Bridgeport Tractor Parts, Inc., 799 N.W.2d 249, 257 (Neb. 2011) (citations omitted).

> A party's "reliance interest" is a measure of damages in a contract action. Restatement (Second) of Contracts § 349 at 124 (1981). Reliance damages are defined as an alternative measure of damages under which "the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed." Id.

Anderson Excavating & Wrecking Co. v. Sanitary Improvement Dist. No. 177, 654 N.W.2d 376, 382. (Neb. 2002).

> In measuring damages for a breach of contract, any cost or other loss that is avoided by the injured party's not having to perform is deducted from the amount of damages incurred. Restatement (Second) of Contracts § 347(c) (1981). This court has also held:
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> > In considering the amount of damages in breach of contract cases, the trier of fact, in applying the general rule on damages, must also bear in mind that generally speaking the losses sustained

> by reason of the breach or the gains prevented are both actual and consequential damages. Of necessity this requires consideration of the concepts of mitigation on the part of the nondefaulting party and savings realized through the breach.
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> (Emphasis supplied.) Wells Fargo Alarm Serv. v. Nox-Crete Chem., 229 Neb. 43, 47, 424 N.W.2d 885, 889 (1988).

Ruble v. Reich, 611 N.W.2d 844, 852 (Neb. 2000).

The sole basis for the claim is the belief that PVP breached the contract by making sales of the capital equipment rather than referring potential customers to Apexx. The only evidence of such "breach" is the three instances discussed above concerning the sale of a repaired piece of used equipment; a note from an Apexx salesman that claims PVP made a sale rather than allowing Apexx to do so; and an email from an official of PVP to Apexx acknowledging that PVP was negotiating with a customer and requesting pricing information from Apexx. That note included a statement that it would be "a very nice opportunity for all of us if we can get the bid." (Exhibit G to Fil. #1153).

Vicky Winkler, the trustee of the PVP Liquidating Trust and the former president of PVP, states in her declaration that PVP did notify Apexx of a potential sale by a bidding arrangement and did request pricing information from Apexx. However, neither PVP nor Apexx got the bid and no sale occurred. Winkler Decl., ¶ 9 (Fil. #1225).

Ms. Winkler's declaration, at paragraph 10, explains the sale of the used equipment which had been damaged. It was not included in the inventory and was reconditioned and sold to a veterinarian customer of PVP Pharmaceuticals.

Although the evidence of a significant breach of the contract is very weak, technically, the sale of two pieces of capital equipment, no matter what the sale price, was not permitted pursuant to the terms of the contract and therefore could be considered a breach of the contract. Such a breach of the contract would give rise to a claim for damages. However, the claim that PVP's breach caused damages in the amount of $350,522.00 is not supported by the evidence.

The contract had a 60-day termination clause. PVP could have terminated the contract without cause at any time after the inception of the contract. There is nothing in the contract that binds either party to pay the other for any costs incurred in "ramping up" to enable the party to perform under the contract. There is nothing in the record to show that, prior to filing the claim, Apexx ever informed PVP that it had incurred the claimed expenses in reliance on its right to perform the contract on a long-term basis. Therefore, the "ramp up" costs incurred by Apexx were simply expenses incurred in the ordinary course of business to enable Apexx to perform under the contract, with the hope that sales would be such that it could recover the initial expenses plus much more in commission income.

The $142,000.00 estimated by Apexx as its loss of commission is not supported by any evidence. Apexx presented evidence that two sales were made. It appears that one of them was for $1,500.00 and there is no evidence of the sales price concerning the used and reconditioned equipment. The breach of the contract by PVP selling two pieces of equipment, caused, at most,

nominal damages for loss of commissions on the sales, the amount of which has not been shown.

IT IS ORDERED: The debtor's Amended Fifth Omnibus Objection to Claim (Fil. # 1044) is granted.

DATED: April 10, 2012

BY THE COURT:

/s/ Timothy J. Mahoney
United States Bankruptcy Judge

Notice given by the Court to:
* Robert Diederich
Conor Boyle
Clyde Saatz

* Movant is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.