IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNIEK, INC.,

Plaintiff,

v.

DOLLAR GENERAL CORPORATION,

Defendant.

ORDER

06-C-311-C

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Several motions are before the court. First is defendant's motion to "Preclude Uniek, Inc. from Expanding Its Promissory Estoppel Claim to Include the 2005 Planogram," which will be granted. Throughout this case, it has been the court's understanding that plaintiff's promissory estoppel claim was limited to promises relating to the parties' relationship in 2006. To the extent there was any doubt, it was resolved by the parties' pretrial submissions, which all assumed the claim was so limited. Plaintiff's own proposed special verdict questions identifies the promissory estoppel claim as relating to 2006 only. At the final pretrial conference, plaintiff's counsel agreed to the court's proposed special verdict question limiting the promises at issue to those made "in or after December 2005."

In its response to defendant's motion, plaintiff concedes that its pretrial submissions

"focused on the promissory estoppel claim in December 2005 and after," Dkt. #212, at 13, but it notes that it submitted its pretrial submissions just before the summary judgment decision came out, which "change[d] the landscape of [the] case." Id. This argument is worse than disingenuous. As plaintiff well knows, the summary judgment opinion did not address the viability of a promissory estoppel claim for events occurring before December 2005 for one very simple reason: neither party suggested the existence of such a claim in their summary judgment materials. Thus, the summary judgment opinion changed nothing that would support plaintiff's current change in position.

Even if the opinion had changed the "landscape" as plaintiff suggests, this would not explain why, at the final pretrial conference (which occurred after the summary judgment opinion was issued), plaintiff presented its promissory estoppel claim as one limited to promises made in or after December 2005. I conclude that it is too late for plaintiff to change the entire structure of the trial and to double its length.

The second pending motion is plaintiff's motion for reconsideration of the court's decision to grant defendant's motion in limine to exclude evidence relating to Harbortown, the picture frame supplier that defendant chose over plaintiff in 2006. Nothing in plaintiff's motion shows that I erred in limiting the evidence relating to Harbortown. All of the information plaintiff seeks to introduce is irrelevant to its claim of promissory estoppel, the only claim remaining in the case. In a nutshell, plaintiff wishes to show that defendant

picked Harbortown over plaintiff because the girlfriend of defendant's new president of merchandising had a friendship with Harbortown's president. Although that bit of information may be more interesting to jurors than much of what they are likely to hear during this trial, it has nothing to do with promissory estoppel. Because plaintiff does not have to prove that defendant acted in bad faith, it makes no difference why defendant switched suppliers. Although plaintiff is correct that it is permitted to undermine the credibility of witnesses on cross-examination, plaintiff fails to explain how its proposed evidence would do that. Simply because plaintiff's evidence would make defendant look bad does not mean it shows that a particular witness is lying or that his or her testimony is otherwise unreliable. In any event, even if this evidence had any probative value, I would conclude that it was substantially outweighed by the unfair prejudice that it would likely cause.

The third motion is plaintiff's motion to exclude the deposition testimony of Jeff Cawiezell, which will be denied. Cawiezell was an employee of defendant during the events giving rise to this lawsuit. Although Cawiezell left defendant's employment several months ago, defendant believed that Cawiezell would still testify voluntarily. However, he has now informed defendant that he will not testify; he cannot be compelled by subpoena because he lives outside the Western District of Wisconsin and more than 100 miles from the courthouse. Fed. R. Civ. P. 45. In the absence of live testimony, defendant wants to use

Cawiezell's deposition testimony at trial, in accordance with Fed. R. Evid. 804(b)(1).

Plaintiff objects on the ground that the defendant's designation was two days late, but I cannot conclude that the delay was unreasonable under the circumstances. More important, plaintiff makes no showing that it would be unfairly prejudiced by the use of Cawiezell's deposition testimony.

Defendant has filed two other motions in limine relating to damages issues. As I told the parties at the final pretrial conference, I will take those issues up at the close of the liability phase.

ORDER

IT IS ORDERED that

1. Defendant Dollar General Corporation's motion to "Preclude Uniek, Inc. from Expanding Its Promissory Estoppel Claim to Include the 2005 Planogram" (Dkt. #197) is GRANTED.

2. Plaintiff Uniek, Inc.'s motion for reconsideration of the court's order limiting the evidence that may be introduced related to Harbortown (Dkt. #208) is DENIED.

3. Plaintiff's motion to preclude defendant from designating deposition testimony of Jeff Cawiezell for use at trial (Dkt. #210) is DENIED.

Entered this 10th day of July, 2007.

BY THE COURT:

Barbara B. Crabb

BARBARA B. CRABB
District Judge