UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CAMPMOR, INC., *Plaintiff,* - *vs.* - BRULANT, LLC, *Defendant*.	CIVIL ACTION NO. 09-CV-5465 (WHW)
BRULANT, LLC, *Counterclaim Plaintiff,* - *vs.* - CAMPMOR, INC., *Counterclaim Defendant*.	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION IN LIMINE CONCERNING THE LIMITATION OF LIABILITY CLAUSE AND TO PRECLUDE CAMPMOR FROM INTRODUCING EVIDENCE OF LOST PROFITS

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PRELIMINARY STATEMENT

Plaintiff Campmor, Inc. ("Campmor") submits this memorandum of law in opposition to the motion in limine by Brulant, LLC[1] ("Rosetta") seeking an order enforcing, as a matter of law, the limitation of liability clause in the MSA between the parties and, consequently, precluding Campmor from introducing evidence of lost profits at trial. The motion is not just meritless, it is vexatious, and should be denied.

Initially, Rosetta's motion should be rejected as improperly seeking to determine factual issues through a motion in limine. Secondly, the motion is another attempt by Rosetta to relitigate issues already decided by this Court, in particular the Court's ruling on Rosetta's summary judgment motion, which addressed this specific issue in Campmor's favor and is the law of the case. Rosetta's motion also fails on what if anything could be considered its remaining "merits" because Campmor will demonstrate at trial, upon competent evidence, that it is entitled to damages above the contractual amount as provided by Ohio law because Rosetta acted recklessly in all but destroying Brulant's online business.

STATEMENT OF FACTS

In March of 2011 Rosetta moved for summary judgment seeking, *inter alia*, an order (i) enforcing, as a matter of law, the limitation of liability clause in the MSA and (ii) dismissing Campmor's claim for lost profits. *See*, Point IV(B) of Rosetta's March 30, 2011 Memorandum of Law in Support of Defendant's Motion for Summary Judgment, attached to the January 7, 2013 Certification of Ronald D. Coleman ("Coleman Cert.") as Exhibit J. This Court denied

[1] As the Court recalls, Brulant, LLC is a wholly-owned subsidiary of Rosetta, LLC and is so described in the caption of this action. As the Court is also aware, Rosetta, LLC purchased Brulant, Inc. (the entity with which Campmor initially had a contract) in 2008 and all services performed in connection with Campmor's website after Rosetta's purchase of Brulant, Inc. were performed and payment was rendered by Campmor in Rosetta's name. For the sake of convenience, these entities are collectively referred to herein as "Rosetta."

Rosetta's motion as it related to the above two issues. *Campmor, Inc. v. Brulant, LLC*, 2011 WL 2745922 (D.N.J.) at *6-8. In reaching its decision, this Court determined there was sufficient evidence in the record for a jury to determine Rosetta acted recklessly in regard to the performance of its contractual obligations to Campmor and, therefore, the limitation of liability clause in the Master Services Agreement would not bar Campmor's claim for lost profits. *Id*. Those same facts, of course, comprise the record upon which Campmor is prepared to prosecute its claims in the trial scheduled to proceed before this Court beginning in May of 2013.

LEGAL ARGUMENT

STANDARD OF REVIEW

Motions in limine are meant to deal with discrete evidentiary issues related to trial, and are not an excuse to file eve-of-trial dispositive motions on disputed matters of substance. *Dunn ex rel. Albery v. State Farm Mutual Auto. Ins. Co.*, 264 F.R.D. 266, 274 (E.D. Mich. 2009). While a summary judgment motion is designed to eliminate trial of issues concerning which there are no genuine issues of fact, a motion in limine is a procedural device for narrowing evidentiary issues for trial so as to eliminate unnecessary trial interruption. *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1069 (3d Cir. 1990). *Accord, C & E Services, Inc. v. Ashland, Inc.*, 539 F.Supp.2d 316, 323 (D.D.C. 2008) ("a motion in limine should not be used to resolve factual disputes or weigh evidence").

A court may "exclude evidence *in limine* only when evidence is clearly inadmissible on all potential grounds [internal citation omitted]." *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F.Supp. 1398, 1400 (N.D. Ill. 1993). "Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context." *Id*.

I. ROSETTA'S MOTION IS AN IMPROPER PHANTOM SUMMARY JUDGMENT MOTION.

Rosetta's motion is an improper attempt to litigate substantive issues, much less ones that have already been decided by this Court,[2] under the guise of a motion in limine in complete defiance of the black-letter rule enunciated in *Bradley v. Pittsburgh Bd. of Educ*., 913 F.2d 1064, 1069 (3d Cir. 1990).

For this reason alone the motion should be denied.

II. THE LAW OF THE CASE PRECLUDES ROSETTA'S MOTION.

"The law of the case doctrine 'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Farina v. Nokia, Inc*., 625 F.3d 97 (3rd Cir. 2010), *quoting*, *Arizona v. California*, 460 U.S. 605, 618 (1983). The law of the case doctrine applies where a court decides a motion for summary judgment on the merits and is later presented with the same issues. *In re Montagne*, 2010 WL 271347 at *5 (U.S.B.C. D. Vt. 2010).

As Rosetta is aware and the Court will recall, Rosetta's motion for summary judgment sought, *inter alia*, an order (i) enforcing, as a matter of law, the limitation of liability clause in the MSA and (ii) dismissing Campmor's claim for lost profits. *See*, Coleman Cert., Exhibit J. As Rosetta is also aware, this Court decided those issues as follows:

> **[T]he Court finds that there is evidence in the record from which a jury could find that Brulant was reckless.** According to the Supreme Court of Ohio, "[a]lthough a limitation-of-liability clause for damages caused by one's own negligence may be valid and enforceable, it is ineffective where the party to the contract seeking protection under the clause has failed to exercise any care whatsoever toward those whom he owes a duty of care. **Viewed in a light most favorable to the plaintiff, the internal Brulant**

[2] The Court's determination of these issues in deciding Rosetta's motion for summary judgment is discussed in detail in Point II below.

> **emails discussed earlier could show that Brulant "failed to exercise any care whatsoever" toward Campmor...A jury could find that such performance was reckless. The Court will not dismiss Campmor's lost profits claim based on the limitation of liability clause in the MSA.**
>
> *Campmor, Inc. v. Brulant, LLC*, 2011 WL 2745922 (D.N.J.) at *7 (emphasis added; internal citations omitted).

While Rosetta couches this second attempt to obtain this relief in terms of a slightly different theory, it cannot escape the frank reality that it is attempting to re-litigate an issue that has already been squarely decided by this Court. Absent a change in the law – not a new legal theory – or the discovery of new facts, the law of the case doctrine prohibits such practice. Moreover, while the law of the case doctrine is a matter of discretion, and notwithstanding that Rosetta has suggested no reason for the court to dispense with it here, its motion is, and has been found by the Court to be, at its core one concerning factual dispute that is properly determined at trial, not through a motion in limine. *See, C & E Services, Inc. v. Ashland, Inc.*, 539 F.Supp.2d 316, 323 (D.D.C. 2008). These two independent bases are more than adequate grounds for rejecting Rosetta's purported motion in limine, requiring no examination of the underlying arguments. In an abundance of caution, however, Campmor addresses those arguments below.

III. ROSETTA'S MOTION FAILS ON ITS MERITS.

Rosetta's motion would fail on its merits even if it were not a disguised motion for summary judgment and had not already been resolved by an earlier ruling. This is because Ohio law provides for recovery of lost profits where, as here, there is evidence of recklessness in a contract claim, and because under Ohio law Campmor's tort damages under its negligent misrepresentation theory are not limited by contractual limitations.

A. **Campmor is Entitled to Recovery of Lost Profits Because of Rosetta's Reckless Conduct in Connection with its Breach of Contract.**

A limitation of liability clause "is ineffective where the party to the contract seeking protection under the clause has failed to exercise any care whatsoever toward those to whom he owes a duty of care." *Richard A. Berjian, D.O. , Inc. v. Ohio Bell Tel. Co.*, 375 N.E.2d 410, 416 (Ohio 1978). Rosetta's argument that to demonstrate recklessness, Campmor must allege and prove that Rosetta did absolutely **nothing** [Rosetta Memorandum of Law dated December 5, 2012 ("Rosetta Memo of Law"), p. 11] is unsupported by any authority, and not surprisingly – it is absurd. The real standard, as admitted in Rosetta's own brief, is that a defendant "failed to **exercise any care** whatsoever" in the performance of its duties – a very different thing. [Rosetta Memo of Law, p. 8; emphasis added]. Applying that real standard, not Brulant's make-believe one, this Court has already decided that "the internal Brulant emails discussed earlier could show that Brulant 'failed to exercise any care whatsoever' toward Campmor" and that "there is evidence in the record from which a jury could find that Brulant was reckless." *Campmor, Inc.*, 2011 WL 2745922 at *7. These findings should be entirely determinative on the question, but, as set forth below, Campmor is eminently prepared to prove at trial that Rosetta failed in just that way.

In the Final Pretrial Order [attached to the Coleman Cert. as Ex. O], Campmor has set forth, *inter alia*, the following facts, which it will prove at trial upon competent evidence:

- Rosetta insisted Campmor launch the 6.0 site despite known and significant problems in completing sales (p. 10, ¶ 26) – both the problems, and the decision to ignore them and proceed with the cutover to the new site, being amply documented in emails among Rosetta personnel;

- On March 24, 209, Rosetta stated in writing that all SCE, PPC and SEO work was in place for the 6.0 site, including Page Titles and 301 redirects (p. 10, ¶¶ 27, 28 and 29), which Campmor later discovered was false (p. 12, ¶ 40) – thus delaying Campmor's ability to remedy the situation, including by getting a third party to evaluate the situation or by timely replacing Rosetta altogether;
- Rosetta made material misrepresentations about the level of completion and functionality and SEO work Rosetta had performed (p. 13, ¶ 47) at other key points during the relationship, again preventing Campmor from accurately gauging Rosetta's progress and its competence or otherwise mitigating its eventual damages;
- Rosetta was contractually required to create, implement and regularly update an XML SiteMap for the 6.0 site (p. 11 ¶ 33), a fundamental component ("best practice") in any search engine optimization configuration for a retail website, which it simply never did (p. 11, ¶ 35);
- Rosetta launched Campmor's website on the wrong (and more expensive) WebSphere platform (p. 11, ¶¶ 36, 37), not the one Campmor believed it was licensing and which it had been advised was the appropriate one for its business – by Rosetta.

As mentioned above, there is myriad evidence in the record to support the above (and Campmor's other factual allegations), including evidence demonstrating Rosetta's recklessness. This evidence includes internal Rosetta emails (*see*, Coleman Cert., Ex. G), including:

- *Between Campmor guys, I am pretty embarrassed on the quality of the site that we created for them. DJ [Dan Jarashow] has very valid points and I suspect that his business will increase significantly when they are fixed."* [Ex. G, p. 1]
- *"I am shocked that we released anything of this nature. Work that we are having to do was either completely overlooked, not tested, or there was a thought of just throwing something out there and catching up afterwards. I*

haven't spent energy figuring out why we are at this point, just what to fix. If anything it makes me feel better on where we are with JAB [Jos. A Bank - another Brulant account]." [Ex. G, p. 1].

- *"[I]t is totally unacceptable for Rosetta to have a site that has this many quality issues…. I think you and I agree that its site and coding issues is the deep rooted problem here. I have spent quite some time on the site lately and the issues are clearly there and they are clearly issues that we have caused."* [Ex. G, p. 3].

- *"Organic traffic and conversions are down… We are having some issues with keywords that are no longer addressed on the site due to removal and non-replacement of some old pages… All of its 'kids/children's' terms seem to have tanked, due to lack of redirects from the old pages to the new. [Citing Dave Fazekas of Brulant]: 'Testing methodologies are weak…. Lots of ordering issues…. Major defects include shipping issues and credit cards.'* [Ex. G, pp. 5-6].

- *[F]rankly there are way more serious usability/site content issues that are preventing the organic conversions…. We got very far with the 5.6 version of this site, yet from the redirects, error page and URL standpoint we are almost back to square one for many of the pages on the site. This is due to decisions that were made during the launch process to de-prioritize SEO requests."* [Ex. G, p. 7].

At a bare minimum, the above emails – in which Rosetta staff use words such as "embarrassed," "shocked," "unacceptable," to describe their own work – and including phrases such as "Work that we are having to do was either completely overlooked, not tested, or there was a thought of just throwing something out there and catching up afterwards" and "the issues are clearly there and they are clearly issues that we have caused" – raise a question of fact as to whether Rosetta's breaches of contract were reckless. Indeed, it would appear that if the jury would so much as agree with Rosetta's own descriptions of its conduct recklessness would not even be a "question." And as demonstrated above, it is black-letter law that issues of fact must be resolved at trial, not through a motion in limine. The Court should reach the same conclusion it reached in deciding Rosetta's summary judgment motion: "If Brulant disputes Campmor's lost profit claims, it is free to challenge them at trial." *Campmor, Inc.*, 2011 WL

2745922 at *7.

B. Campmor's Negligent Misrepresentation Claims Allow for Recovery of Lost Profits.

Under Ohio law, a party that has suffered from a negligent misrepresentation "is entitled to recover those damages necessary to compensate that party for the pecuniary losses caused by the misrepresentation." *Atco Medical Products, Inc. v. Stringer*, 1998 WL 161340, at *4 (Ohio Ct. of Appeals, 9th Dist.). This includes recovery of lost profits. *See*, *id*. at *5.

Rosetta's motion simply does not address Campmor's negligent misrepresentation claim, wishing it away. But it is here, and part of the case going to trial. Therefore, even if Rosetta were entitled to an order precluding lost profits from being awarded to Campmor on its breach of contract claim, which, as demonstrated above, it is not, Campmor's claim for lost profits would be permitted to proceed to trial and could not be dismissed as an evidentiary matter because of the continuing viability of Campmor's negligent misrepresentation cause of action.

CONCLUSION

Based on the foregoing, Campmor respectfully requests that Rosetta's motion in limine be denied in its entirety and that costs and attorneys' fees be awarded to Campmor in responding to Rosetta's improper motions, along with such further relief as to this Court seems just.

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