UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

RICHARD SAUL WURMAN, Plaintiff, v. MARC HODOSH, Defendant.	)	C.A. No. 16-202 WES

MEMORANDUM AND ORDER

WILLIAM E. SMITH, Chief Judge.

I. Introduction

This dispute concerns the TEDMED conference, a spinoff of the well-known brand TED (Technology, Entertainment, Design). The TEDMED conferences specialized in medicine and healthcare. Plaintiff Richard Saul Wurman ("Plaintiff" or "Wurman"), an internationally recognized conference leader, who was instrumental to launching the TED platform, entered a contract with Defendant Marc Hodosh ("Defendant" or "Hodosh") to sell Hodosh TEDMED. Hodosh subsequently sold TEDMED to another, which in turn led to this dispute over the obligations contained in the Wurman-Hodosh contract and the proceeds of the subsequent sale.

Hodosh moves for summary judgment (see ECF No. 71) on Wurman's one-count, breach-of-contract complaint (see ECF No. 1). Hodosh also asserts a counterclaim for intentional interference with

contractual relations, as to which Wurman moves for summary judgment (ECF No. 63). Additionally, Wurman moves to strike certain paragraphs of Hodosh's Affidavit dated January 8, 2018, as well as certain exhibits in support of Hodosh's summary-judgment motion and opposition to Wurman's motion ("Motion To Strike") (ECF No. 77).

For the reasons that follow, the Court GRANTS both Motions for Summary Judgment and DENIES as moot Plaintiff's Motion To Strike.

II. Background

Wurman launched TEDMED in 1995. In 2001, he sold TED to Imagine Media but retained rights to continue to host and organize TEDMED conferences. To that end, Wurman organized four TEDMED conferences, in 1995, 2001, 2003, and 2004.

In April 2008, Wurman agreed to convey TEDMED to Hodosh. (Def.'s Statement of Undisputed Facts ("DSUF") ¶ 6, ECF No. 71-2.) The parties mostly disagree on what their agreement contemplated as to their post-sale relationship. For instance, Wurman suggests that he interviewed and selected Hodosh "to be his assistant" in relaunching TEDMED until Hodosh was ready to spearhead the conference alone. (Pl.'s Statement of Undisputed Facts ("PSUF") ¶ 17, ECF No. 63-2.) On the other hand, Hodosh says that Wurman approached him to "take over" TEDMED based on his reputation; and, rather than "assist[ing]" Wurman, Hodosh was

delegated "complete control" over TEDMED. (Def.'s Statement of Disputed Facts ("DSDF") ¶¶ 15, 17, 18, ECF No. 70-2.) Wurman maintains that he retained significant responsibility for TEDMED conferences after the sale to Hodosh, including preparing the schedule, selecting music, appearing on stage, and introducing presenters.[1] (PSUF ¶ 23.) Hodosh disagrees and suggests Wurman's role was entirely subject to Hodosh's pleasure and direction. (DSDF ¶ 23.)

Naturally, the parties also differ about Hodosh's obligations to Wurman with respect to conference-profit sharing. For instance, the parties disagree about whether Hodosh was required to annually host TEDMED conferences, or instead to simply host "at least one conference" before a certain date. (See DSDF ¶ 26.) It is Wurman's position that Hodosh agreed to pay him half of TEDMED's net profits for each conference for five years, unless Wurman earned $2 million in less than that time. (PSUF ¶ 21.)

Complicating matters, sometime between the 2010 TEDMED conference and November 23, 2010, Jay S. Walker, a wealthy entrepreneur and founder of Priceline, expressed to Wurman his interest in buying TEDMED; Wurman conveyed this news and referred

[1] Indeed, the TEDMED 2009 website showcased Wurman as TEDMED's founder, biographing his role as TED creator. (Pl.'s Statement of Undisputed Facts ("PSUF") ¶ 24, ECF No. 63-2.)

Walker to Hodosh. (DSUF ¶ 10; see Aff. of Marc Hodosh ¶ 16, ECF No. 72-2.) On December 1, 2010,[2] Wurman, Hodosh, and Walker met at Wurman's home to discuss Walker's interest in TEDMED. (DSUF ¶ 12.) Wurman informed Hodosh that he approved of a sale to Walker. (Id. ¶ 15.) On April 1, 2011, Hodosh closed on TEDMED's sale to Walker pursuant to an asset purchase agreement, in which Walker paid Hodosh $16 million up front, with an option for up to $9 million in future payments. (Id. ¶ 23.)

The parties have wildly differing views as to whether and how Hodosh's sale to Walker altered Hodosh's contract with Wurman. Wurman and Hodosh agreed to a Term Sheet, which, according to Hodosh, provided that: (1) Walker would acquire TEDMED; (2) Hodosh – not Wurman – would receive the sale proceeds; (3) Walker would assume the Wurman-Hodosh Agreement/Addendum; and (4) Wurman would continue his work toward and support of a Walker-owned TEDMED under a renegotiated contract. (DSUF ¶¶ 18-19.) Wurman, of course, suggests that Walker did not assume the Wurman-Hodosh agreement; instead, "the term sheet expressly contemplated that Walker would enter into agreements with Wurman that were acceptable to Wurman and for which he would agree that Hodosh's contractual obligations to Wurman were discharged." (Pl.'s Statement of Disputed Facts ¶

[2] On this same date, Wurman and Hodosh signed an Addendum to their original contract. (Def.'s Statement of Undisputed Facts ¶ 13, ECF No. 71-2; PSUF ¶ 32.)

19, ECF No. 76-3.) On March 26, 2011, days before Hodosh sealed the deal with Walker over TEDMED, Wurman emailed Hodosh and wrote, "I will not stand between you and your deal." (DSUF ¶¶ 21-22.) According to Hodosh, Wurman had still hoped to finalize an agreement with Walker for his own continued participation in TEDMED. (Id. ¶ 22.) To this end, on April 11, 2011 (after the Hodosh-Walker deal closed), Wurman met with Walker and Walker's associate, Jose Suarez, at Wurman's home. (Id. ¶ 25.) There, Walker and Suarez informed Wurman that they wanted to transform TEDMED into something vastly different and asked whether Wurman would join them. (PSUF ¶ 36.) There was no mention in this meeting of assigning the Wurman-Hodosh agreement nor any offer to perform in place of Hodosh. (Id. ¶ 39.) Also at that time, Walker and Suarez described to Wurman the payment terms of the TEDMED deal with Hodosh ($16 million up front with an option to secure $9 million over time). (Id. ¶ 37.)

Following their meeting, Walker sent Wurman a proposal for his involvement in TEDMED. (DSUF ¶ 26.) That same day, Wurman rejected Walker's proposal and severed all ties with TEDMED. (Id. ¶ 27.) Notably, before Walker or Hodosh could publicly announce TEDMED's sale, Wurman wrote the TEDMED community a fiery email (from a mailing list he had on his computer) that denounced TEDMED and severed all ties to the significantly altered TEDMED conference. (See PSUF ¶¶ 43-45; Def.'s Mot. for Summ. J. Ex. U,

ECF No. 71-4.) Wurman sued Walker to remove his name and likeness from all TEDMED promotional materials. (DSUF ¶ 32.) On October 9, 2012, Hodosh and TEDMED, LLC entered a final and complete mutual release and covenant not to sue. (PSUF ¶ 51.)

On May 5, 2016, Wurman filed his one-count, breach-of-contract claim in this Court. (See generally Compl., ECF No. 1.) In his Answer, Hodosh included a counterclaim for intentional interference with contractual relations. (Answer & Countercl., ECF No. 7.) Following a period of discovery, on November 30, 2017, Wurman moved for summary judgment on the counterclaim. Soon after, on January 8, 2018, Hodosh moved for summary judgment on Wurman's breach-of-contract claim. Wurman also moved to strike various affidavit paragraphs and exhibits filed by Hodosh. On February 27, 2018, the Court heard oral argument from the parties.

III. Legal Standard

"Summary judgment is appropriate where the record reflects no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Schiffmann v. United States, 811 F.3d 519, 524 (1st Cir. 2016) (citing Fed. R. Civ. P. 56(a)). "In conducting this tamisage, [the Court] read[s] the record in the light most hospitable to the nonmoving parties . . . and draw[s] all reasonable inferences in their favor." Id.

IV. Discussion

A. Motions for Summary Judgment

The Court need not take a deep dive into Wurman's and Hodosh's respective motions for summary judgment because each of the claims they are directed against suffers from the same (ultimately fatal) flaw: a failure to set forth a sufficient method to calculate damages.

In Rhode Island, both breach-of-contract and tortious-interference claims require - as a threshold element – sufficiently certain damages. See, e.g., Fogarty v. Palumbo, 163 A.3d 526, 541 (R.I. 2017); Greensleeves, Inc. v. Smiley, 68 A.3d 425, 434 (R.I. 2013). The Rhode Island Supreme Court has been unequivocal on this point. In Fogarty v. Palumbo, the court made clear that, to save a case from summary judgment, a claimant must advance a model or "a formula by which to compute . . . damages" to be presented to the jury. 163 A.3d at 538. Although true, as Plaintiff argues, "mathematical precision is not required," the Rhode Island Supreme Court has never "depart[ed] from [its] well-established principle that damages must be sufficiently certain . . . ." Id. at 537. That is, "the jury should be provided with some rational model of how the lost profits occurred and on what basis they have been computed." Id. (citing Abbey Medical/Abbey Rents, Inc. v. Mignacca, 471 A.2d 189, 195 (R.I. 1984)). In this context, it is key that a plaintiff does "not 'simply rest on the allegations and

denials in [his] pleadings,' but instead present[s] an expert witness who opine[s] that [he] suffered damages." Id. (quoting Brito v. Capone, 819 A.2d 663, 666 (R.I. 2003)). It is only "[w]hen there is substantial evidence in the record and reasonable inferences may be drawn from that evidence [that] mathematical certainty is not required." Id. at 538 (quoting Patel v. Bayliff, 121 S.W.3d 347, 356 (Tenn. Ct. App. 2003)). Neither Wurman's nor Hodosh's claim complies with these well-known and straightforward principles.

First, with respect to Wurman's breach-of-contract claim, Hodosh asserts that Wurman fails to prove entitlement to damages because, in asserting that Wurman is due one-half of the proceeds from TEDMED's sale to Walker, he conflates sale proceeds - not contemplated by the parties' agreement - with conference profits. (See Def.'s Mem. in Supp. Mot. for Summ. J. 17-18, ECF No. 71-1.) Hodosh submits that neither the contract nor the addendum entitles Wurman to a share of sale proceeds; instead, the contract unambiguously references conference profits. Although Wurman concedes that he was not due any portion of proceeds from TEDMED's sale, he argues, "Hodosh's sale made calculation of Wurman's profit in accordance with the contract impossible because TEDMED no longer was operated as required by the contract." (Pl.'s Mem. in Opp'n to Def.'s Mot. for Summ. J. ("Pl.'s Opp'n") 18, ECF No. 76.) Simply because calculating damages is difficult does not obviate

Hodosh's payment liability, Wurman argues. (Id.) And with this point, the Court agrees. But that's not enough.

Even accepting as true that Wurman was due a share of net profits from the TEDMED conference through 2015, and that he is guaranteed the benefit of the bargained for exchange, i.e., to be placed in as good of a position as he would have been had Hodosh performed, what Wurman offers to calculate damages is deficient. Wurman's damages proffer is pure speculation; indeed, Wurman has not even identified how damages should be calculated, relying instead on vague and conclusory observations: "Hodosh's sale price of $16 million is the primary, but certainly not the only, evidence on which a damages award can be based"; "[t]he purchase price Hodosh received represents roughly five years' future net profits of TEDMED, Inc.; he collapsed the future stream of net earnings into the liquidated sum $16 million." (Pl.'s Opp'n 19.) Despite Wurman recounting how much TEDMED profited in 2009 and 2010 and discussing how much Hodosh estimated TEDMED would make in 2011, there is no method or formula that the jury could use to calculate damages based on each TEDMED conference through 2015. Wurman has supplied no evidence to support the averment in his Complaint that "as a direct consequence of Hodosh's breach . . . Wurman has suffered financial loss in the amount of one-half of the sale proceeds received by Hodosh from sale of the TEDMED Conference . . . ." (See Compl. ¶ 31.)

Wurman has done nothing to connect what Plaintiff was guaranteed (net conference profits), with what Plaintiff stakes a claim to (sale proceeds). Not that this couldn't be done. In fact, in his deposition when asked if he believed he deserved fifty percent of sale proceeds from TEDMED, Wurman asserted he would "argue that with a financial expert." (Wurman Dep. 132:22-133:13, Ex. 13 to Def.'s Mot. for Summ. J., ECF No. 71-11.) But discovery has closed and alas no expert has been presented. It is clear then, in light of Fogarty, that Wurman's damages proffer comes up short. And for that reason, Hodosh is entitled summary judgment on Wurman's breach-of-contract claim.

In her 1990s hit "Ironic," Alanis Morissette sang, "Well, life has a funny way of sneaking up on you [w]hen you think everything's okay and everything's going right . . . ." Well, that is certainly true here. It is indeed "[a] little too ironic . . . I really do think,"[3] that Hodosh's counterclaim fails for the same reason as Wurman's.[4] In attacking Hodosh's damages claim,

[3] Alanis Morissette, Ironic (Warner Bros. Records Inc. 1996). But is what Morissette sings about really irony? The debate has raged for over twenty years. See Robinson Meyer, Alanis Morissette Recognizes It's Not Ironic, The Atlantic (May 9, 2016, 12:55 PM), https://www.theatlantic.com/notes/2016/05/alanis-morissette-recognizes-its-not-ironic/481875/.

[4] Indeed, beyond the parties implicitly arguing against themselves in their respective motions and oppositions on the question of damages, counsel for Hodosh appeared to address the

Wurman faults Hodosh because "[w]hether the earn-out payment targets of achieved Net Revenue and Adjusted EBITDA were achieved for any period requires calculations applying the contractual definitions of those terms to the TEDMED, LLC annual financial statements." (Mem. in Supp. of Pl.'s Mot. for Summ. J. 28, ECF No. 63-1.) Yet, Wurman argues, Hodosh never made those calculations or provided sufficient discovery to explain "how he contends calculations should have been made from them," and therefore, damages cannot be established. (Id. at 28-29.)

Hodosh stakes a claim to the earn-out payments in his agreement with Walker, which provides that his earn-out eligibility depended on specific, financial-performance metrics set forth in TEDMED, LLC's financial documents. However, Hodosh concedes that he can't prove damages under the earn-out because he has not retained an expert to testify on the issue, nor has he provided any financial statements displaying conference profits. (See Def.'s Mem. in Opp'n to Pl.'s Mot. for Summ. J. 23, ECF No. 72-1.) Instead, in conclusory fashion, Hodosh relies on his "personal knowledge" to suggest he "knew that the 2012 TEDMED conference did hit the [financial] target." (Id. at 23.) But Hodosh offers nothing by way of a method or formula to present to

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parties' flip-flopping head on when he stated at oral argument, "I'm an advocate[;] I'm not a judge; I might rule a certain way on both [motions]." Well, I am a judge, and I agree.

the jury how they might calculate his entitlement to earn-out payments. For that reason, under Fogarty, Wurman is entitled to summary judgment on Hodosh's counterclaim.

Finally, because Hodosh's claim for pecuniary damages fails, his non-economic-damages claim based on harm to reputation or emotional distress also fails. See, e.g., Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc., 315 P.3d 1143, 1153 (Wash. Ct. App. 2013) ("[I]n order for a business to recover damages for injury to its reputation, it must produce some evidence of quantifiable, economic harm."); Ratner v. Noble, 617 N.E.2d 649, 650 (Mass. App. Ct. 1993) ("[R]ecovery for emotional distress is not allowed unless the elements of the tort are made out: i.e., actual damage to an economic relationship or prospective relationship.").

B. Motion To Strike

Because the Court's analysis is not disturbed by Plaintiff's Motion To Strike, and, indeed, "little of the challenged evidence actually figures into the court's resolution of the pending summary-judgment motion[s]," Wilson v. Port City Air, Inc., No. 13-CV-129-LM, 2014 WL 2480082, at *1 (D.N.H. June 3, 2014), the motion is denied.

V. Conclusion

For the above-stated reasons, the Court GRANTS Defendant Hodosh's Motion for Summary Judgment (ECF No. 71) and Plaintiff Wurman's Motion for Summary Judgment (ECF No. 63). The Court

DENIES as moot Plaintiff's Motion To Strike (ECF No. 77). A little too ironic, I really do think.

IT IS SO ORDERED.

William E. Smith
Chief Judge
Date: May 17, 2018