IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT TENNESSEE

GIBSON BRANDS, INC., **Plaintiff,** **vs.** **CETON CORP.,** **Defendant.**	**CASE NO. 3:13-CR-1387** **CHEIF JUDGE HAYNES**

Introduction: This pleading is based on two alternative legal theories. One is that there is no binding contract between the parties, but rather the beginning of an agreement, with fundamental issues left open and never resolved. This implies that Gibson's first two causes of action, which presuppose a binding legal contract, should be dismissed. The other theory is that the incomplete "Agreement" signed by the parties and the "Statement of Work" attached to it constitute a binding contract, in which case (a) Ceton denies Gibson's allegations that Ceton breached the contract, and (b) Ceton alleges that Gibson itself breached the contract, excusing Ceton from further performance and entitling Ceton to recover damages.

This pleading uses the term "Agreement" to refer to the incomplete agreement, including the attached Statement of Work, signed by the parties on June 19-20, 2013.

CETON'S ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS

I. ANSWER

Ceton Corp. ("Ceton") answers the Complaint as set forth below. Each numbered paragraph of the Answer responds to the paragraph with the same number in the Complaint.

1. Admit the first sentence, except to the extent it implies that Gibson has technological expertise in consumer electronics; all technology associated with the home entertainment system comes from Ceton. Deny the second sentence and further allege that the idea for the home entertainment system came from Ceton, not Gibson. Admit the third sentence, except to the extent that it implies that the ideal for the home entertainment system came from Gibson.

2. With respect to the first sentence, Ceton acknowledges that the parties signed an "Agreement" on June 19-20, 2013. Whether the "Agreement" constitutes a contract in the legal sense is open to question, because critical terms were left open to be agreed upon later. If the "Agreement" is considered a contract, Gibson breached it, as explained further below.

The second and third sentences of section 2 of the Complaint are inaccurate and therefore denied, because:

--Ceton did not undertake to "help Gibson develop" the home entertainment system; rather, Ceton agreed to develop the system and Gibson to market it.

--The "Agreement" called for a number of products to be developed, rather than a single product, as alleged in the Complaint. One of the ways Gibson breached the "Agreement" was by declaring on October 24, 2013 that it would not market the products identified in the "Statement of Work" attached to the "Agreement." Instead, Gibson purported to substitute two

different products. Neither of these substitutes had the distinctive sound-reproduction capability that differentiated the home entertainment system originally contemplated by the parties from others on the market.

--The "Agreement" recognized that only some of the products could be ready for demonstration at the Consumer Electronics Show ("CES").

--The products in the "Statement of Work" that most closely resemble those Gibson described on October 24, 2013 were *not* ones that were expected to be ready for demonstration at CES.

--Developing the products described by Gibson on October 24, 2013 would have required additional work, not contemplated in the "Statement of Work" attached to the "Agreement," and there would not have been enough time to accomplish this before CES.

--According to the "Statement of Work," having certain products ready to be demonstrated at CES was a "goal" but not a contractual requirement.

--Gibson instructed Ceton to stop work on November13, 2013, depriving Ceton of the time needed to develop products for demonstration at CES.

--Gibson breached the "Agreement" on several occasions, the first time on September 19, 2013, thereby excusing Ceton from further performance.

Deny the fourth and fifth sentences of paragraph 2 of the Complaint.

3. Deny that the intellectual property Ceton developed over the seven and one-half years before the Gibson project ("Ceton's Pre-Existing Works") was "given" to Gibson. Rather, Ceton retained ownership of the Pre-Existing Works. Admit the rest.

4. Admit the first sentence, except that (a) Gibson's payments were made for the purpose of Ceton's receiving profits from products to be jointly developed and marketed, as well as in consideration for services and to cover costs, and (b) Gibson paid Ceton $950,000, not "more than $950,000."

With respect to the second sentence, Ceton admits that it expected the products to generate profits and that it would not have entered into the venture without such an expectation; however, Ceton denies that this expectation was a "realization," in the sense of something new, because it had always had this expectation. Ceton further alleges, on information and belief, that Gibson also expected the venture to be profitable. Ceton denies that the profits would derive from "Gibson's ideas," because the ideas came from Ceton.

Ceton denies that it is attempting to claim ownership of "the technology that Gibson conceived and funded"; rather, it claims ownership of its own Pre-Existing Works, as provided by the "Agreement."

Ceton denies the rest of the third sentence, as well as the fourth and fifth sentences of paragraph 4.

5. This paragraph describes what Gibson is asking for in this lawsuit. It does not contain any factual allegations to be admitted or denied.

6. Admit, except that Ceton denies Gibson is entitled to any damages.

7. Admit that venue and jurisdiction in Tennessee are proper. Deny allegations concerning Exhibit 1, because the terms of said "Agreement" are confidential.

8. Admit.

9. Admit.

10. Admit; provided, however, that (a) the "Agreement" provides that this exclusivity can be lost under certain circumstances, and (b) if the "Agreement" was a binding contract, Gibson's breach would deprive it of exclusive rights to the Deliverables.

11. Admit; provided, however, that (a) the "Agreement" provides that this exclusivity can be lost under certain circumstances, and (b) if the "Agreement" was a binding contract, Gibson's breach would deprive it of exclusive rights to the Deliverables. Ceton further alleges that under the "Agreement" Gibson cannot change the list of products to be developed without Ceton's written concurrence.

12. Admit, but only if the "Agreement" was a binding contract. Furthermore, if the "Agreement" was a binding contract, Gibson's breach would deprive it of exclusive rights to the Deliverables.

13. Admit, but only if the "Agreement" was a binding contract. Furthermore, (a) Gibson never asked for source code to be deposited in escrow or proposed any escrow agent to be agreed upon; therefore there was no escrow agent with which to deposit anything; and (b) the condition for release of source code from escrow (namely, a breach of the "Agreement" by Ceton that has not been cured) has not occurred.

14. Deny Gibson has paid all such invoices. Admit the second sentence, except that the correct amount is $950,000, not "more than $950,000."

15. Deny.

16. Deny that there is any escrow agent. Deny that Gibson has ever asked for source code to be deposited in escrow or proposed any escrow agent to be agreed upon.

17. Deny.

18. Deny.

19. Admit that the agreement is incomplete. Deny the rest. Ceton further alleges as follows: The November 14 email referred to in the Complaint, which was in fact sent on November 18, does not say what Gibson alleges it said. Ceton never refused to complete the project. The email was responding to Gibson's elimination of all the agreed products and its failure to participate in formulating an acceptable Business Plan and profits definition. In the email Ceton was attempting to salvage the parties' relationship by proposing a different economic arrangement, based on license fees rather than profits.

20. Deny that Gibson ever proposed a Business Plan. Ceton further alleges that (a) Gibson never proposed a definition of Net Profit, as the "Agreement" required it to do, and (b) by giving notice on December 12, Ceton was following the termination provisions of the "Agreement" in case the "Agreement" was considered to be a binding contract. Deny Ceton said it would not agree to "any" plan; rather, Ceton was communicating that it was unlikely to agree to a plan with the radical changes announced by Gibson on October 24. Deny the last sentence.

21. Admit.

22. This paragraph describes what Gibson is asking for in this lawsuit. It does not contain any factual allegations to be admitted or denied.

23. Deny.

24. This paragraph describes what Gibson is asking for in this lawsuit. It does not contain any factual allegations to be admitted or denied.

25. The first sentence describes what Gibson is asking for in this lawsuit and does not contain any factual allegations to be admitted or denied. With respect to the second sentence, Ceton has no knowledge about these particular estimates and therefore denies the allegation.

26. This paragraph describes what Gibson is asking for in this lawsuit. It does not contain any factual allegations to be admitted or denied.

27. This paragraph describes what Gibson is asking for in this lawsuit. It does not contain any factual allegations to be admitted or denied.

II. AFFIRMATIVE DEFENSES

1. Gibson is stopped from pursuing its claims.
2. Gibson has waived its claims.
3. If there were any damages, Gibson has failed to mitigate them.
4. Gibson's breach of contract claims are barred by the failure of a condition precedent.
5. Gibson has failed to state a claim on which relief can be granted.
6. Ceton has not had the opportunity to do discovery and reserves the right to amend its Answer and Affirmative Defenses as it obtains and analyzes additional information.

III. COUNTERCLAIMS

1. Ceton's responses and affirmative allegations set forth in the Answer and Affirmative Defenses are incorporated herein by reference.

2. During the latter part of 2012 and the first half of 2013, Gibson Brands, Inc. ("Gibson") and Ceton Corp ("Ceton") discussed a joint project for the development and sale of a home entertainment system comprised of various products, including technology that would give wireless speakers unique sound-reproduction capabilities.

3. Ceton had conceived of these home entertainment products before its conversations with Gibson and had already developed and demonstrated some of the components of the home entertainment system.

4. As discussions continued, the parties arrived at the following conception about what each would contribute to the project and what economic return each would receive: Ceton would design and develop the family of home entertainment products, including wireless speakers with unique capabilities. To accomplish this, Ceton would add new features and capabilities to designs, software, firmware, and other intellectual property that it had developed on its own, at great expense, over the previous seven and one-half years. Gibson would pay Ceton to develop these new features. The fees paid to Ceton were to cover actual development costs with no markup. Ceton's financial return would come from its share of the profits from the sale of the new products. Gibson would use its resources, connections, expertise, and brand to market the products on a large scale. The parties would split the profits, with 40% going to Ceton and 60% to Gibson.

5. Ceton would not have embarked on the venture without the prospect of receiving a share of the profits. Ceton's profit share would, in part, constitute remuneration for the use of the intellectual property it had developed over the previous seven and one-half years.

6. The amount of profits, and therefore Ceton's economic return, depended what products would be brought to market; the retailers through which they would be sold; the price, cost, and profit margin of each product; the anticipated sales volumes and gross profits for each product during different time periods; the net profits and Ceton's share of profits for different

periods; and a host of other factors. Information and expectations about such items are typically set forth in a document known as a "Business Plan."

7. Ceton's share of the profits would also depend on how profits were defined. While the parties had discussed the fact that Gibson would form a subsidiary to pursue the project and that Ceton would receive 40% of the profits *attributed to that subsidiary*, the subsidiary had not been formed as of mid-June 2013, nor had the parties identified what project revenues and expenses (and therefore profits) would be attributed to the subsidiary, as opposed to the mother company (Gibson Brands, Inc.) or other entities. Given that the Gibson subsidiary would be controlled by Gibson and that products could be sold under the Onkyo brand rather than the Gibson brand, it was critically important that these questions be answered by a mutually agreed Business Plan and definition of profits.

8. Gibson and Ceton signed the "Agreement" on June 19-20, 2013. It included, as an exhibit, a "Statement of Work" describing what specific products would be developed initially and the fees Gibson would pay Ceton to create them. However, at that time the parties had not agreed on a definition of profit or a Business Plan. The parties decided to proceed forward without these questions having been answered, believing that they could reach agreement on them in the near future.

9. The "Agreement" provided that Gibson would propose a Business Plan and a detailed definition of Net Profits and give it to Ceton within 90 days and that the parties would attempt to reach mutual agreement on them. The "Agreement" further provided that Gibson would work with Ceton "in good faith" to arrive at a satisfactory and acceptable Business Plan and profits definition that would be attached to the "Agreement" as an exhibit, "time being of the essence."

10. Under the law, "time being of the essence" means that deadlines are legally binding.

11. Under the "Agreement," the deadline for Gibson's furnishing the proposed Business Plan and details of the definition of "Net Profits" was September 19, 2013.

12. Gibson did not propose a detailed profits definition or Business Plan by September 19, 2013, nor has it done so since.

13. Meanwhile, Ceton was working on the project. It invoiced Gibson monthly, as agreed. The last invoice paid by Gibson covered work done through September 30, 2013.

14. Ceton continued to try to obtain a Business Plan and profits definition from Gibson, without success.

15. On October 24, 2013, there was a meeting between the top personnel of Gibson and Ceton as well as personnel from Onkyo, a company in which Gibson has a large financial interest. At this meeting Gibson announced it was scaling back the venture to a tiny fraction of its anticipated scope. It said that the project would only involve one or two products instead of the numerous home entertainment devices identified in the Statement of Work and in prior conversations between the parties. In addition, these substitute products to be developed were materially different from the products described in the Statement of Work.

16. Ceton found this extremely disturbing. Gibson was now saying that the parties would develop and sell just one or two relatively expensive products, suitable for a small "niche" market, instead of the broadly marketable products listed in the Statement of Work and other products previously discussed. This would likely eliminate the possibility of Ceton's earning a profit share commensurate with what it was contributing to the venture and could eliminate profits entirely.

17. On November 12, 2013, Ceton sent Gibson an email describing its concerns. Ceton will not attach a full copy of the email to this Answer, because it contains confidential information about specific products. The following quotations from the email reflect Ceton's general concerns:

> I want to point out again that Gibson is not just paying for services Ceton is currently providing, and Ceton is bringing more to the table than just these current services. Ceton's pre-existing technology, which is the foundation for the current work, is something it has developed over seven and a half years at great cost. Also, Ceton has attained substantial unique expertise directly applicable to the HomeCaster project from the years its engineers have spent developing other products. I mention this so that you will understand where I'm coming from when I say that Ceton would not have started down the road with Gibson were it not for the 40% of profits that Ceton is to receive under the Agreement.

Ceton's email also said:

> The Agreement is incomplete. It leaves important issues unresolved. Both of us have started moving forward believing that these issues will be resolved, and I hope they will. But we're becoming concerned about some important things. There's a common thread to these things—if they're not resolved in a fair way, Ceton's prospects for profit will be greatly diminished or eliminated altogether.

18. Gibson did not take the email well. It responded on November 13, 2013, calling an immediate halt to the project. It instructed Ceton's top personnel to come to Nashville for a meeting. The fact that Ceton did not come when summoned increased Gibson's consternation.

19. In its efforts to find common ground, Ceton proposed an alternative economic structure on November 18 under which Gibson would retain all profits and Ceton would develop products and receive a licensing fee. This was not an ultimatum, as Gibson alleges, but part of an effort to engage Gibson in a meaningful dialogue.

20. Between October 24, 2013, when Gibson announced that it would only sell one or two "high-end," niche-market products, and December 13, 2013, when it filed this suit, Gibson never (a) proposed a detailed definition of profits, (b) proposed a Business Plan, or (c) sought to satisfy Ceton's concerns—namely, that Gibson's one or two-product approach does not have nearly the profit potential of the multi-product approach that had been the basis for the joint venture.

21. Meanwhile, on November 30, 2013, Ceton's invoice for work done through October 31 came due. Gibson did not pay it.

22. Unable to agree on a Business Plan and definition of profits and given Gibson's refusal to enter into a meaningful dialogue about how to resolve these issues, Ceton concluded that if the "Agreement" was a legally binding contract, it would have to terminate it.

23. The "Agreement" gives each party the right to terminate it upon the other's breach.

24. Ceton sent Gibson a notice of intent to terminate for cause on December 12, 2013. In doing so it followed the process set forth in the "Agreement," mindful of the possibility that the Agreement might be considered a legally binding contract.

25. Gibson filed this suit on December 13, 2013. Gibson had drafted the Complaint before Ceton gave notice of intent to terminate.

26. Gibson's conduct referred to in this Answer, Affirmative Defenses, and Counterclaims was not accidental or merely negligent. It was intentional.

A. Gibson's Breach of Contract.

If the "Agreement" is considered a binding legal contract, Gibson breached the contract in the following ways:

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27. Gibson anticipatorily breached the "Agreement" by unilaterally purporting to change the products that would be developed and marketed. The "Agreement" says that any change in the Statement of Work (which identifies products under development) requires the written concurrence of both parties.

28. Gibson breached or repudiated the "Agreement" by unilaterally instructing Ceton to stop work on November 13, 2013.

29. Gibson breached the "Agreement" by failing to provide a complete Business Plan (including a precise definition of Net Profits) by September 19, 2013.

30. Gibson breached the "Agreement" by failing to work with Ceton "in good faith" to arrive at a satisfactory and acceptable Business Plan (including a precise definition of Net Profits), as explicitly required by the "Agreement."

31. Gibson breached the "Agreement" by failing to pay Ceton's last invoice for work performed and by failing to reimburse certain expenses.

32. Gibson breached the "Agreement" by intentionally attempting to injure or lessen Ceton's public reputation by filing this lawsuit without prior notice and without any breach of the "Agreement" by Ceton.

33. Gibson breached the confidentiality provisions of the "Agreement" and the prior confidentiality agreement between the parties by attaching the "Agreement" and "Statement of Work" as an Exhibit to the Complaint. Furthermore, Gibson has declined to seal the Complaint or its Exhibit to remedy this breach, despite Ceton's request that it do so.

B. Fraud.

34. Gibson induced Ceton to sign the "Agreement" on June 19, 2013 and to work on the project both before and after that date by making material misrepresentations, (a) which Gibson made knowing they were false or utterly disregarding their truth or falsity, (b) which Gibson intended Ceton to rely upon, (c) which Ceton reasonably relied upon, and (d) which caused economic injury to Ceton, including, without limitation, the waste of its corporate resources in this venture with Gibson and the lost opportunity to earn profits from the technology it has developed over many years.

(a) Gibson's misrepresentations about profits to be paid to Ceton.

35. The products that Ceton would develop for the venture were based on pre-existing technology Ceton had developed over the previous seven and one-half years. This pre-existing technology made the project possible.

36. The fees Gibson proposed to pay for product development did not and were not intended to compensate Ceton for the value of its pre-existing technology or the expense of having created it. This is evident from the Statement of Work, which states that the fees were for "estimated actual development costs with no markup." Accordingly, during its negotiations with Gibson, Ceton made clear that it would have to receive some other form of remuneration in addition to the product development fees.

37. Gibson proposed that Ceton receive a share of profits from the sale of the products developed for the venture.

38. On April 29, 2013 and again on May 25, 2013, Gibson provided Ceton with sales forecasts implying that the profits, and therefore Ceton's compensation, would be substantial.

39. The agreement signed by the parties on June19-20, 2013 provided that Ceton would receive 40% of the "Net Profits" of the subsidiary Gibson would form to market the products. The agreement did not specify what revenues or costs would be treated as belonging to the project or which ones would be allocated to the subsidiary for the purpose of computing Net Profits. Among other things, it did not say whether revenues from wireless speakers developed by Ceton and sold under the Onkyo name would be attributed to the Gibson subsidiary.

40. There are different possible ways to attribute revenues and costs to the project and to the subsidiary. Some methods might lead to significant profits, while others might lead to no profits or a loss.

41. Recognizing that the definition of profits was still an open issue, the "Agreement" required Gibson to furnish the specifics of the Net Profit definition, as part of its Business Plan, on before September 19, 2013.

42. Gibson did not do so.

43. Gibson never intended to define Net Profits in such a way that Ceton would receive any compensation in the form of profits.

44. Gibson's representations that Ceton would receive compensation in the form of profits and that it (Gibson) would provide a suitable definition of Net Profits were false. Gibson knew the representations were false or utterly disregarded whether or not they were true.

45. Gibson intended Ceton to rely on these representations, in order to induce Ceton to develop products for this venture.

46. Ceton justifiably relied on Gibson's representations.

47. Gibson chose not to present the specifics of its definition of Net Profit because to do so would have revealed its intention that Ceton receive no compensation in the form of profits.

48. At meetings during October 23-25, 2013, Gibson's CEO and Chairman and other Gibson personnel indicated that Gibson considered Ceton merely a provider of product development services in exchange for fees, rather than a co-venturer. This reflected Gibson's view that Ceton would not share in profits in any material way.

49. If Gibson had been honest about this intention from the beginning, Ceton would not have embarked on this venture. It has suffered economic injury as a result of Gibson's misrepresentations, including, without limitation, the waste of corporate resources in this venture with Gibson and the lost opportunity to earn profits from the technology it has developed over the years.

(b) Gibson's misrepresentations about its intent to furnish a Business Plan.

50. During their discussions prior to the signing of the "Agreement," Gibson represented to Ceton that it would prepare a Business Plan for their venture.

51. These representations were made orally by Gibson's CEO and Chairman and other Gibson personnel to Ceton's president and other Ceton representatives.

52. The representations were also made in emails and attachments. These attachments contained drafts of some of the components of a Business Plan, leading Ceton to believe that Gibson would continue to work on developing the Plan.

53. The Business Plan would have included information about which products would be brought to market; the retailers through which they would be sold; the price, cost, and profit margin of each product; the anticipated sales volumes and gross profits for each product during

different time periods; the net profits and Ceton's share of profits for different periods; and a host of other information.

54. The "Agreement" required that the Business Plan be acceptable to Ceton. The purpose of this requirement was to allow the parties to reach agreement on open issues that had not yet been settled on June 19-20, 2013, when the "Agreement" was signed. These open issues included exactly what products would be produced and how profits would be defined for the purposes of determining Ceton's share of "Net Profits."

55. Gibson did not provide a Business Plan by September 19, 2013, as required by the "Agreement."

56. On November 4, 2013, Gibson's Chairman and CEO told several Ceton representatives that it was impossible for Gibson to produce a Business Plan until after the development of products was substantially complete. However, Gibson knew when it signed the "Agreement" that the development of products would not be substantially complete by September 19, 2013, the date by which it had promised to furnish the Business Plan.

57. On December 12, 2013, Gibson's CEO and Chairman told Ceton representatives that "if you had wanted a Business Plan you should have gotten one before we signed the agreement," or words to that effect.

58. At the time it signed the agreement on June 20, 2013 and thereafter, Gibson did not intend to provide a Business Plan with sufficient information to allow Ceton to determine whether the open issues could be resolved to its satisfaction. Nonetheless, Gibson represented that it would do so, knowing that the representation was false or utterly disregarding whether or

not it was true. It intended Ceton to rely on this representation, in order to induce Ceton to develop products for this venture. Ceton justifiably relied on Gibson's representations.

59. Ceton would not have embarked on this venture with Gibson if it had known that Gibson did not intend to furnish a suitable Business Plan. It has suffered economic injury as a result of Gibson's misrepresentation, including, without limitation, the waste of corporate resources in its venture with Gibson and the lost opportunity to earn profits from the technology it has developed over the years.

(c) Gibson's misrepresentations about which products it would market.

60. During their discussions prior to the signing of the agreement and thereafter, Gibson represented to Ceton that it was committed to marketing a home entertainment system comprised of various products, including technology giving wireless speakers unique sound-reproduction capabilities.

61. Gibson's Chairman and CEO and other Gibson personnel made these representations orally in conversations with Ceton representatives, Onkyo executives, and executives from several large technology and media companies.

62. Gibson's Chairman and CEO and other Gibson personnel also made these representations in written form, as emails and attached documents.

63. One such document was a set of sales projections that Gibson prepared and provided to Ceton on or around May 25, 2013, about four weeks before the "Agreement" was signed. It showed that Gibson would market eleven different products.

64. Another such document, which Gibson prepared and provided to Ceton on or around April 29, 2013, contained forecasts for sales of wireless speakers. This is one of the products Gibson later said it would not market.

65. The representations Gibson made about its marketing intentions, both before it signed the "Agreement" and for four months afterwards, were false. Gibson knew they were false or utterly disregarded whether they were true or false.

66. On October 24, 2013, Gibson told Ceton that it was only planning to market one or two products, neither one of which took advantage of the unique capabilities of the home entertainment system being developed by Ceton.

67. By drastically reducing what products would be produced and marketed, Gibson hoped to capture the benefits of Ceton's pre-existing technology without a major investment of marketing resources or the payment of any profits to Ceton.

IV. RELIEF REQUESTED

Ceton Corp. asks the Court (a) to dismiss Gibson's claims, (b) to award Ceton damages on its counterclaims, and, to the extent allowable under applicable law, attorneys fees, costs, and prejudgment interest, and (c) to grant such other relief as is just and equitable.

DATED this 6th day of January, 2014

/s/ G. Michael Zeno, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing ***Defendant's Answer, Affirmative Defenses and Counterclaim*** with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the attorneys of record.

This 6th day of January, 2014.

ZENO BAKALIAN P.S.

/s/ G. Michael Zeno, Jr.