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Collins Entertainment Corp., v. Coats & Coats Rental Amusement Opens the Door for Lost Volume Sellers, But Does Not Fully Invite Them In: An Examination of the Adoption of the Lost Volume Seller Doctrine in South Carolina

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COLLINS ENTERTAINMENT CORP. V. COATS & COATS RENTAL AMUSEMENT OPENS THE DOOR FOR LOST VOLUME SELLERS, BUT DOES NOT FULLY INVITE THEM IN: AN EXAMINATION OF THE ADOPTION OF THE LOST VOLUME SELLER DOCTRINE IN SOUTH CAROLINA

I. INTRODUCTION

In *Collins Entertainment Corp. v. Coats & Coats Rental Amusement*,[1] the South Carolina Court of Appeals affirmed the use of the "lost volume seller" doctrine for calculating damages in a breach of contract case involving the leasing and placement of gaming machines in a business.[2] This is the first time that a South Carolina court has affirmed the lost volume seller doctrine, which a majority of courts in the country have adopted,[3] and provides a new theory of recovery to certain sellers in breach of contract cases.

The South Carolina Supreme Court granted certiorari on the issue of lost volume recovery in the *Collins* case.[4] If affirmed, sellers who are determined lost volume sellers will be able to recover lost profits from a breached contract without that award being reduced by a subsequent resale. "Simply defined, a lost volume seller is one whose supply is, as a practical matter, unlimited in comparison to the demand for the product."[5] A lost volume seller is one who could and would have performed both the original breached contract and the subsequent contract regardless of the original breach.[6] Since the seller could have had the benefit of both the original sale and the resale, an award of lost profits from the original sale

1. 355 S.C. 125, 584 S.E.2d 120 (Ct. App. 2003), *cert. granted*, No. 3596, Shearhouse Adv. Sh. No. 26 at 6 (S.C. June 10, 2004).

2. *Id.* at 136–37, 584 S.E.2d at 126–27.

3. *See, e.g.*, R.E. Davis Chem. Corp. v. Diasonics, Inc., 924 F.2d 709, 711 (7th Cir. 1991) (applying lost volume seller doctrine to the sale of an MRI machine); Ullman-Briggs, Inc. v. Salton, Inc., 754 F. Supp. 1003, 1008–09 (S.D.N.Y. 1991) (applying lost volume seller doctrine to sales representation contract); Gianetti v. Norwalk Hosp., 833 A.2d 891, 898–901 (Conn. 2003) (applying lost volume seller doctrine to a hospital's employment contract); Unique Designs, Inc. v. Pittard Mach. Co., 409 S.E.2d 241, 243–44 (Ga. Ct. App. 1991) (applying lost volume seller doctrine to a contract for the sale of a lathe); Jetz Serv. Co. v. Salina Props., 865 P.2d 1051, 1055–57 (Kan. Ct. App. 1993) (applying lost volume seller doctrine to service providers); Auto Shine Car Wash Sys., Inc., v. Nice 'N Clean Car Wash, Inc., 792 N.E.2d 682, 686–87 (Mass. App. Ct. 2003) (applying lost volume seller doctrine to a contract for the sale of car wash equipment); Harvey v. Timber Res., Inc., 37 S.W.3d 814, 819 (Mo. Ct. App. 2001) (applying lost volume seller doctrine to timber sales contract); Neri v. Retail Marine Corp., 285 N.E.2d 311, 313–15 (N.Y. 1972) (applying lost volume seller doctrine to the sale of a boat).

4. *Cert. granted*, No. 3596, Shearhouse Adv. Sh. No. 26 at 6 (S.C. June 10, 2004).

5. Daniel W. Matthews, Comment, *Should the Doctrine of Lost Volume Seller Be Retained? A Response to Professor Breen*, 51 U. MIAMI L. REV. 1195, 1196 (1997).

6. *See* RESTATEMENT (SECOND) OF CONTRACTS: AVOIDABILITY AS A LIMITATION ON DAMAGES § 350 cmt. d (1981).

is necessary to put the seller in as good a position in which it would have been had the original contract been performed.[7]

Although the court of appeals' decision brings South Carolina courts within the vast majority of jurisdictions recognizing lost volume recovery, *Collins* leaves many questions unanswered about the lost volume seller doctrine, especially how South Carolina courts are to apply it.[8] The South Carolina Supreme Court has the ability to answer these questions. This Note provides an in depth analysis of the lost volume seller doctrine in general and how it should be applied in South Carolina. Part II of this Note discusses the lost volume theory of recovery in detail, examining arguments supporting and opposing the doctrine, and examining why the arguments opposing the doctrine fail. Part III examines how other courts have applied the doctrine and the different tests those courts have created to determine if a seller is a lost volume seller. Part IV examines what the current *Collins* rule means for breach of contract cases in South Carolina. Part V suggests that the South Carolina Supreme Court should affirm the adoption of lost volume recovery in South Carolina and apply a two part test that asks (1) whether a seller has the ability to enter into an additional transaction and (2) whether the seller would have entered into an additional transaction irrespective of the buyer's breach.

II. LOST VOLUME SELLER DOCTRINE

A. The Doctrine

In its simplest form, the normal goal of contract damages is to put the non-breaching party in as good a position in which it would have been had the contract been fully performed.[9] This method of calculating damages attempts to give the non-breaching party the benefit of its bargain, which is generally the difference between the non-breaching party's position after the breach and the positions that would have been had the contract been fully performed.[10] The Uniform Commercial Code [hereinafter U.C.C.] section 2-708 governs this calculation for contracts involving the sale of goods.[11] The measure of damages is "the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages . . ., but less expenses saved in consequence of the buyer's breach."[12]

This calculation may be the normal method of calculating breach of contract damages, but it is not the only method. Under U.C.C. section 2-708(2), "[i]f the measure of damages provided in subsection (1) is inadequate to put the seller in as

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7. *Id.*

8. *See supra* Part IV.

9. *See* RESTATEMENT (SECOND) OF CONTRACTS: MEASURE OF DAMAGES IN GENERAL § 347 cmt. a (1981).

10. *Id.* § 347.

11. U.C.C. § 2-708 (1998). When the transaction involves a lease instead of a sale, the non-breaching party is referred to as a lost volume lessor, and U.C.C. section 2A-528(2) governs the lost profit award. *Id.* § 2A-528(2) (2001). The same principles apply to lost volume lessors and lost volume sellers.

12. U.C.C. § 2-708(1) (1998). Codified at South Carolina Code section 36-2-708 (West 2004).

good a position as performance would have done then the measure of damages is the profit . . . which the seller would have made from full performance by the buyer,. . . ."[13] It is this language, also expressed in the *Restatement (Second) of Contracts*, section 347, comment f, that gives rise to the lost volume seller doctrine.[14]

To understand the way in which lost volume recovery departs from normal contract damages, it is helpful to understand the principle of mitigation. Under normal contract law, following a breach, the non-breaching party is required to act in such a way as to minimize its losses.[15] In South Carolina, "[a] party injured by the acts of another is required to do those things a person of ordinary prudence would do under the circumstances to mitigate damages. . . ."[16] This is not an absolute duty; it "does not require unreasonable exertion or substantial expense. . . ."[17] For a non-breaching seller, this would require the seller to act reasonably after the buyer's breach to enter into a substitute contract or otherwise lessen its losses.[18]

The lost volume seller is unable to minimize its losses by entering into a substitute transaction. The lost volume seller could have had the benefit of both the original broken contract and the additional contract.[19] Thus, a requirement that a lost volume seller's damages be reduced by the cost of a subsequent resale will not put the seller in the same position as performance of the original contract.[20] The lost volume seller is in such a position that any resale would be in addition to, not instead of, the original sale.[21] For this reason, a seller who is determined to be a lost volume seller is entitled to the profits from the original breached contract, regardless of whether it has entered into a subsequent transaction.[22]

A classic example of an application of the lost volume seller doctrine is found in *Neri v. Retail Marine Corp.*[23] The plaintiff contracted to buy a boat from the defendant for $12,587.40.[24] The plaintiff paid the defendant a $4,250 deposit, but then breached the contract and refused to make the remaining payments.[25] The

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13. U.C.C. § 2-708(2).

14. RESTATEMENT (SECOND) OF CONTRACTS: MEASURE OF DAMAGES IN GENERAL § 347, cmt. f (1981). Comment f states: "[i]f the injured party could and would have entered into the subsequent contract, even if the contract had not been broken, and could have had the benefit of both, he can be said to have 'lost volume' and the subsequent transaction is not a substitute for the broken contract."

15. *See id.* § 350.

16. Genovese v. Bergeron, 327 S.C. 567, 572, 490 S.E.2d 608, 611 (Ct. App. 1997).

17. *Id.*

18. RESTATEMENT (SECOND) OF CONTRACTS: AVOIDABILITY AS A LIMITATION ON DAMAGES § 350 cmt. c (1981).

19. *See supra* notes 6–7 and accompanying text.

20. *See supra* notes 6–7 and accompanying text.

21. *See supra* note 10 and accompanying text.

22. RESTATEMENT (SECOND) OF CONTRACTS: AVOIDABILITY AS A LIMITATION ON DAMAGES § 350 cmt. d (1981).

23. 285 N.E.2d 311 (N.Y. 1972).

24. *Id.* at 312.

25. *Id.*

plaintiff sued for the recovery of his deposit, and the defendant eventually resold the boat to a third party for the same price that the plaintiff agreed to pay.[26]

In awarding lost profits to the defendant, the court distinguished between the loss of a sale for an individual selling his personal automobile and an automotive dealer who has an inventory of automobiles, when, the contract for the original sale is breached and the item is later resold.[27] The court's illustration is a classic example of why lost volume recovery is sometimes necessary to give the seller the benefit of its bargain:

> [I]f a private party agrees to sell his automobile to a buyer for $2,000, a breach by the buyer would cause the seller no loss (except incidental damages, i. e. [sic] expense of a new sale) if the seller was able to sell the automobile to another buyer for $2000 [sic]. But the situation is different with dealers having an unlimited supply of standard-priced goods. Thus, if an automobile dealer agrees to sell a car to a buyer at the standard price of $2000 [sic], a breach by the buyer injures the dealer, even though he is able to sell the automobile to another for $2000 [sic]. If the dealer has an inexhaustible supply of cars, the resale to replace the breaching buyer costs the dealer a sale, because, had the breaching buyer performed, the dealer would have made two sales instead of one.[28]

In situations in which a seller has an unlimited supply of goods in relation to demand, an award of lost profits is justified. If the buyer in the illustration did not breach the contract, the dealer was capable of performing both the original sale and the additional sale to the third party.[29] Since both sales would have been made regardless of the original buyer's breach, an award of lost profits is needed to put the seller in the position it would have been had the original buyer not breached.

Although a majority of American courts have accepted the lost volume seller doctrine,[30] at least one jurisdiction has expressly rejected the theory. The reasoning this court used in rejecting the theory of lost volume recovery will illustrate the weaknesses in the arguments opposing lost volume recovery and help illustrate why lost volume recovery is the proper measure of damages in certain situations.

B. Northeastern Vending Co. v. P.D.O., Inc.

The Pennsylvania Superior Court rejected the lost volume seller doctrine in *Northeastern Vending Co. v. P.D.O., Inc.*[31] on a number of grounds, but principally because of a perceived negative effect on the seller's duty to mitigate.[32]

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26. *Id.*
27. *Id.* at 314.
28. *Id.*
29. Neri v. Retail Marine Corp., 285 N.E.2d 311, 314 (N.Y. 1972).
30. *See supra* note 3 and accompanying text.
31. 606 A.2d 936 (Pa. Super. Ct. 1992).
32. *Id.* at 938.

Northeastern placed cigarette and amusement machines in P.D.O.'s place of business pursuant to a lease agreement similar to that in *Collins*.[33] P.D.O. breached the agreement and removed Northeastern's machines.[34] After the breach, Northeastern did not retrieve its machines for nearly seven months,[35] and then "stored the machines in its warehouse where it maintain[ed] several hundred other machines."[36]

The court declined to apply the lost volume seller doctrine because it "would encourage the non-breaching party to do nothing to minimize its damages" and because the lost volume seller doctrine "conflicts with the purpose behind awarding contract damages."[37] It appears that the court may have been troubled that Northeastern did not retrieve its machines in a timely manner.[38]

The *Northeastern* court stated that the lost volume seller doctrine erodes the seller's duty to mitigate.[39] Contrary to this claim, "[t]he lost volume seller, by definition, does not remain idle. Rather, in order to make a lost volume claim, the seller must *actively* pursue a second contract."[40] The lost volume seller, after the other party's breach, will, in the ordinary course of business, seek other contracts.[41] In the case of Northeastern's actions following the breach, while it did not retrieve the exact machines that P.D.O. removed from its premises, it did maintain a warehouse of several hundred other machines.[42] The fate of the exact machines removed from P.D.O's place of business was not necessary to a lost volume recovery determination.[43] The issue the court should be concerned with is whether, through its normal course of business or other means, Northeastern sought additional contracts.[44] If Northeastern did carry on its business in a normal manner, and entered into an additional contract, that contract would be in addition to, not instead of, the original contract with P.D.O.[45] Further, even if Northeastern did not enter into a subsequent transaction, but did seek out other transactions, it would be entitled to lost profits as well.[46] Since Northeastern maintained an inventory of several hundred other machines, it easily could have, in the normal course of business, leased any of the other machines regardless of the original contract's breach.

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33. *Id.* at 937.
34. *Id.* at 937–38.
35. *Id.* at 939.
36. *Id.* at 937–38.
37. Northeastern Vending Co. v. P.D.O., Inc., 606 A.2d 936, 938 (Pa. Super. Ct. 1992).
38. *Id.* at 939.
39. *Id.* at 938.
40. Matthews, *supra* note 5, at 1214.
41. Matthews, *supra* note 5, at 1214.
42. *Northeastern*, 606 A.2d at 937–38.
43. *See* R.E. Davis Chem. Corp. v. Diasonics, Inc., 924 F.2d 709, 711–12 (7th Cir. 1991) (stating in dicta that a lost volume seller was not required to prove which later buyer purchased the exact goods that were the subject of the original contract if the goods were interchangeable).
44. Matthews, *supra* note 5, at 1214.
45. Matthews, *supra* note 5, at 1214.
46. *See infra* note 70 and accompanying text.

The court stated that Northeastern failed to fulfill its duty to mitigate its damages.[47] What could Northeastern have done to minimize its damages?[48] The court admits that Northeastern maintained a warehouse full of other machines.[49] If, after P.D.O.'s breach, Northeastern entered into a similar leasing arrangement with another business, this would not reduce Northeastern's damages because it would have been entirely possible, and presumably simple, to fulfill both the original breached contract and the additional contract.

C. Schiavi Mobile Homes, Inc. v. Gironda

In *Schiavi Mobile Homes, Inc. v. Gironda*,[50] the Supreme Judicial Court of Maine faced a situation in which a lost volume seller was not entitled to a lost profits award. The plaintiff, a mobile home dealer, contracted to sell a mobile home to the defendant.[51] After the defendant breached the contract, the defendant's father offered to purchase the mobile home in his son's place.[52] The plaintiff rejected the offer and later resold the mobile home to a third party.[53]

The court stated that since Maine had not yet considered the validity of lost volume recovery, the plaintiff has a general duty "to take reasonable steps to mitigate [its] damages."[54] The court further clarified that there was "no evidence in the record that the Plaintiff's failure to sell to its customer's father rested on any legitimate ground."[55] Therefore, "it cannot now be heard to complain that its sale to a third party resulted in lost profits."[56]

This case presents a unique situation. The third party attempted to purchase the goods only because of the original buyer's breach. The defendant's father was not in the market to purchase a mobile home and only offered to do so to aid his son.[57] Therefore, this is a situation in which the seller could have made the additional sale, but not without the buyer's breach because the resale buyer would not have been available.

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47. *Northeastern*, 606 A.2d at 939.

48. One thing the *Northeastern* court failed to address in its criticism of the lost volume seller doctrine is that the duty to mitigate normally only requires the non-breaching party to act reasonably following a breach to minimize its losses. *See supra* notes 15–18 and accompanying text. The lost volume seller doctrine does not necessarily erode this duty, since it generally requires sellers to have the capacity to enter into additional contracts and the intent to take on additional contracts. In essence, since lost volume sellers are generally retail sellers, not private individuals, in the course of their day to day business they will act reasonably. If the seller normally gets new business through customer referrals or advertising, then staying open for business or continuing to advertise should fulfill any general duty to mitigate, regardless of whether the lost volume seller doctrine applies.

49. *Northeastern*, 606 A.2d at 939.

50. 463 A.2d 722 (Me. 1983).

51. *Id.* at 723.

52. *Id.*

53. *Id.*

54. *Id.* at 724.

55. *Id.* at 725.

56. Schiavi Mobile Homes, Inc. v. Gironda, 463 A.2d 722, 726 (Me. 1983).

57. *See id.* at 724.

III. TESTS COURTS USE TO DETERMINE IF A SELLER IS A LOST VOLUME SELLER

As noted before, the vast majority of jurisdictions have adopted the lost volume seller doctrine in some fashion.[58] From this overwhelming acceptance, a few different applications of the lost volume seller doctrine have been adopted.

A. Ullman-Briggs: *Two-Part Test*

The court in *Ullman-Briggs, Inc. v. Salton, Inc.*[59] developed a widely-used test to determine if a seller is a lost volume seller. Ullman-Briggs was a manufacturer's representative company that solicited orders from merchants to sell their products.[60] Salton manufactured and distributed small electrical appliances.[61] Ullman-Briggs contracted to be Salton's exclusive distributor to J.C. Penney.[62]

Following Salton's breach of the distributorship contract, Ullman-Briggs sued and argued that it should receive lost profits under the lost volume seller doctrine.[63] The court stated that for a seller to be a lost volume seller, it must "demonstrate that it had the subjective intent to take on [additional contracts]" and "as an objective component, [a seller] must also establish that it had the capacity to take on extra [contracts]."[64] This two-part test was not satisfied because Ullman-Briggs admitted that it "would not have had the subjective intent to take on [extra contracts] if Salton had not terminated the contract."[65]

This two-part test was used in *Lone Star Ford, Inc. v. McCormick.*[66] Lone Star, the defendant appellant, employed Drury as an advertising spokesperson.[67] While the defendant employed Drury, he secured an additional job and secured further employment after the defendant breached the contract.[68]

The court noted that the contract was "a nonexclusive, personal services contract . . ." and did not require the plaintiff to "devote his time during normal business hours on a daily, weekly, or monthly basis. . . ."[69] With respect to Lone Star's argument that Drury was required to mitigate his damages, the court stated that "[t]he mere fact that an injured party is able to make arrangements for disposition of the services that he was to supply under a contract does not necessarily mean that, in doing so, he will avoid loss."[70]

To determine if Drury was a lost volume seller, the court applied the *Ullman-Briggs* two-part test,[71] and held that Drury satisfied the test because he "was

58. *See supra* note 3.
59. 754 F. Supp. 1003 (S.D.N.Y. 1991).
60. *Id.* at 1004.
61. *Id.*
62. *See id.* at 1005.
63. *Id.* at 1008.
64. *Id.* at 1008–09.
65. Ullman-Briggs, Inc. v. Salton, Inc., 754 F. Supp. 1003, 1009 (S.D.N.Y. 1991).
66. 838 S.W.2d 734 (Tex. App. 1992).
67. *Id.* at 737.
68. *Id.* at 740.
69. *Id.*
70. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 350 cmt. d (1981)).
71. *See supra* notes 59–65 and accompanying text.

engaged in similar contractual work at the time he executed the agreement with [the defendant], and he entered into an additional contract during the term of the agreement and before the breach by [the defendant]."[72]

Although not mentioning it expressly, the *Ullman-Briggs* court appears to draw heavily from comment f of the *Restatement (Second) of Contracts* section 347, which states that "[i]f the injured party could and would have entered into the subsequent contract, even if the [first] contract had not been broken, and could have had the benefit of both, . . ." then the seller is a lost volume seller.[73] The *Restatement* requires the same objective and subjective proof that the *Ullman-Briggs* court requires. According to the *Restatement*, a seller could have entered into the subsequent contract if it had the objective capacity to fulfill both the original contract and the subsequent contract. [74] Further, the seller would have entered into the subsequent contract if it had the subjective intent to enter into another contract regardless of the original contract's breach.[75]

B. Diasonics: *Three-Part Test*

One of the more frequent tests courts use to determine if a seller is a lost volume seller originated in *R.E. Davis Chemical Corp. v. Diasonics, Inc.* [hereinafter *Diasonics I*].[76] Davis contracted with Diasonics to purchase a medical diagnostic machine.[77] After making a $300,000 down payment, Davis breached the contract.[78] Diasonics then sold the machine to a third party for the same price, and Davis sued to recover its down payment.[79]

The court in *Diasonics I* held, for the first time in Illinois, that a seller could recoup lost profits if it was a lost volume seller.[80] Although the court adopted the lost volume seller doctrine, it did not specifically adopt the *Ullman-Briggs* test. Instead of focusing on the seller's capacity to make an additional sale, the court stated that "the relevant questions include, not only whether the seller could have produced the breached units in addition to its actual volume, but also whether it would have been profitable for the seller to produce both units."[81]

The court adopted a three-part requirement that a seller prove "(1) that it possessed the capacity to make an additional sale, (2) that it would have been profitable for it to make an additional sale, and (3) that it probably would have made

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72. Lone Star Ford, Inc. v. McCormick, 838 S.W.2d 734, 740 (Tex. App. 1992).

73. RESTATEMENT (SECOND) OF CONTRACTS: MEASURE OF DAMAGES IN GENERAL § 347 cmt. f (1981).

74. *See id.*

75. *See id.*

76. 826 F.2d 678, 681 (7th Cir. 1987) (adopting for the first time in Illinois the rule that a lost volume seller is entitled to recoup its lost profts) [hereinafter *Diasonics I*]; R.E. Davis Chem. Corp. v. Diasonics, Inc., 924 F.2d 709 (7th Cir. 1991) (holding that Diasonics is a lost volume seller, but remanding for further damages calculations) [hereinafter *Diasonics II*].

77. *Diasonics I*, 826 F.2d at 679.

78. *Id.* at 680.

79. *Id.*

80. *Id.* at 681.

81. *Id.* at 684.

an additional sale absent the buyer's breach."[82] This test requires an objective showing that the seller could have made an additional sale, a subjective showing that the seller probably would have made an additional sale, and a showing that the additional sale would have been profitable. Thus, this test incorporates a profitability requirement to the two-part test in *Ullman-Briggs*.

The *Diasonics I* court adopted the lost volume seller doctrine for the first time under Illinois law after devoting much analysis to the lost volume seller theory of recovery, and the *Diasonics II* court then applied the new test to the facts of the case.[83] The *Diasonics II* court stated that Diasonics satisfied the first prong of the test because "[t]he evidence [was] undisputed that Diasonics possessed the capacity to manufacture one more MRI."[84] The subjective part of the test was satisfied by showing that Diasonics was "'beating the bushes for all possible sales'"[85] and pursuing "every possible lead."[86] Oddly enough, after developing a new three-part test for determining if a seller is a lost volume seller, the *Diasonics II* court did not devote any discussion to whether the resale would have been profitable.[87] Therefore, the *Diasonics* three-part test for determining if a seller is a lost volume seller can be satisfied by a showing that the seller had the objective capacity to enter into an additional sale, that the additional sale was for the same price as the original sale, and that the seller actively sought out an additional sale.[88]

The *Diasonics II* court ruled on another issue that sometimes arises in lost volume seller cases: whether the seller has to resell the exact goods the buyer contracted to buy.[89] In *Diasonics II*, the court stated that "the generic MRI units manufactured by Diasonics were interchangeable and thus were not identified to any particular customer until just prior to delivery."[90] Therefore, since the goods were interchangeable, Diasonics was not required to prove to which specific buyer it later resold the goods.[91] Instead, upon showing that Diasonics fell within the three-part test, the court determined it was a lost volume seller regardless of whether it could point to a specific buyer who purchased the specific MRI machine from the breached sale.[92]

The Kansas Court of Appeals adopted the *Diasonics* test in *Rodriguez v. Learjet, Inc.*[93] Rodriguez contracted with Learjet to buy an airplane and paid a $250,000 deposit.[94] Rodriguez breached the contract and refused to make further

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82. *Diasonics II*, 924 F.2d 709, 711 (7th Cir. 1991) (citing *Diasonics I*, 826 F.2d 678, 685 (7th Cir. 1987)).

83. *Id.*

84. *Id.*

85. *Id.* (quoting the trial record).

86. *Id.*

87. While *Diasonics II* does not discuss this prong of the test, the *Diasonics I* court stated that Diasonics later resold a unit for the original contract price. *Diasonics I*, 826 F.2d at 680.

88. The third prong to the *Diasonics* test is subjective and therefore dependent on the seller's intention to resell, not on any market demand for the goods. *See supra* note 65 and accompanying text.

89. *Diasonics II*, 924 F.2d 709, 711 (7th Cir. 1991).

90. *Id.*

91. *Id.* at 712.

92. *See id.* at 711–12.

93. 946 P.2d 1010 (Kan. Ct. App. 1997).

94. *Id.* at 1012.

payments.[95] Learjet retained the deposit pursuant to a liquidated damages clause and entered into a subsequent contract to sell the plane to a third party.[96] Rodriguez argued that the subsequent sale should be treated as a substitute transaction and the profits from the resale should reduce the damages.[97] The *Rodriguez* court, citing *Diasonics II*, applied the three-pronged test requiring the seller to prove it had the capacity to enter into a subsequent transaction, the subsequent transaction would have been profitable, and the seller probably would have made the additional sale absent the buyer's breach.[98]

The *Rodriguez* court's analysis under the three-part test is also incomplete. Under the first prong of the test, the court stated that "Learjet was operating at 60 percent capacity during the relevant time period and that Learjet was able to accelerate its production schedule to produce more of the model 60 planes in any given year."[99] Under the profitability prong of the test, the court stated that "Learjet also presented testimony about its accounting system which indicated that an additional sale would have been profitable to Learjet" and that the additional sale was priced similarly to the original.[100] Although the *Rodriguez* court discussed the profitability prong of the test, it never discussed the third prong requiring that the seller would have entered into the additional contract absent the buyer's breach.[101]

The Connecticut Supreme Court also expressly adopted the *Diasonics* three-pronged test in *Gianetti v. Norwalk Hospital*[102] and applied it to a services contract. The plaintiff, a plastic surgeon, was granted full clinical privileges as a staff physician, a contract position renewable on an annual basis at the defendant hospital.[103] He had similar privileges at other area hospitals.[104] After his privileges at the defendant hospital were not renewed, plaintiff increased his practice at other hospitals.[105] The plaintiff argued that he was a lost volume seller and the income from subsequent services provided to other hospitals should not mitigate his damages.[106]

Although the court adopted the *Diasonics* three-part test, it held that the record did not contain enough evidence to determine if the plaintiff possessed the capacity to enter into additional employment contracts with other hospitals.[107] The court also held the evidence was insufficient to determine if the plaintiff would have entered into additional contracts with other hospitals regardless of the defendant's denial of

95. *Id.*
96. *Id.* at 1012–13.
97. *See id.* at 1014.
98. *Id.* at 1015 (citing *Diasonics II*, 924 F.2d 709, 711 (7th Cir. 1991)).
99. Rodriguez v. Learjet, Inc., 946 P.2d 1010, 1015 (Kan. Ct. App. 1997).
100. *Id.*
101. It is possible that, in its analysis of Learjet's objective ability to manufacture more jets, the court meant to satisfy the subjective requirement as well, but this begs the question: Why have two different prongs of a test if they require only one analysis?
102. 833 A.2d 891 (Conn. 2003).
103. *Id.* at 894–95.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 902.

his privileges.[108] Therefore, the court remanded the case to the trial court without discussing the profitability portion of the test.[109]

IV. LOST VOLUME SELLER DOCTRINE IN SOUTH CAROLINA FOLLOWING *COLLINS*

The South Carolina Court of Appeals relied on *C.I.C. Corp. v. Ragtime, Inc.*[110] in its *Collins* decision. The facts of the two cases are similar. Each case involved a plaintiff who owned gaming and amusement machines it leased to business owners, who would place the machines in their businesses, with the two sharing the profits the machines produced.[111]

In *Collins*, the court of appeals did not extensively analyze the lost volume seller doctrine. The court cited only two foreign cases and the *Restatement (Second) of Contracts* to support the doctrine.[112] The *Collins* court ostensibly adopted the New Jersey Appellate Division's reasoning in *C.I.C. Corp.*[113]

In *C.I.C. Corp.*, the plaintiff owned a warehouse full of coin operated machines, four of which it leased to the defendant.[114] After the defendant breached the contract by removing the machines, the plaintiff recovered the machines and stored them in its warehouse, where they would be released to another customer in the ordinary course of business.[115] Upon finding that the "plaintiff had a warehouse full of a variety of coin-operated machines and could have placed as many as it could have found customers for," the court held that plaintiff was a lost volume seller and was under no duty to mitigate.[116]

The *Collins* court, following this reasoning, held that "once Collins showed it had sufficient inventory 'to place as many [machines] as it could have found customers for,' it likewise established that any other deals it would have made would have been in addition to, rather than instead of, the prior agreement."[117]

The courts in both *C.I.C. Corp.* and *Collins* determined a seller was a lost volume seller upon a showing that it possessed a warehouse of machines and that the seller could have "placed as many as it could have found customers for."[118] Other courts that have confronted similar situations involving the leasing of profit producing machines have used similar means to determine if a seller is a lost volume seller.

In *Jetz Service Co. v. Salina Properties*,[119] the court had to determine if the plaintiff, who was "in the business of supplying coin-operated laundry equipment,"

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108. Gianetti v. Norwalk Hosp., 833 A.2d 891, 902–03 (Conn. 2003).

109. *Id.* at 903 n.10.

110. 726 A.2d 316 (N.J. Super. Ct. App. Div. 1999).

111. Collins Entm't Corp. v. Coats & Coats Rental Amusement, 355 S.C. 125, 130, 584 S.E.2d 120, 123 (Ct. App. 2003); *C.I.C. Corp.*, 726 A.2d at 317.

112. *See Collins*, 355 S.C. at 137 n.13, 584 S.E.2d at 126 n.13.

113. *See id.*

114. *See C.I.C. Corp.*, 726 A.2d at 317.

115. *Id.* at 317–18.

116. *Id.* at 320–21.

117. *Collins*, 355 S.C. at 137, 584 S.E.2d at 127 (quoting *C.I.C. Corp.*, 726 A.2d at 320) (alteration in original) (citations omitted).

118. *Id.*; C.I.C. Corp. v. Ragtime, Inc., 726 A.2d 316, 320 (N.J. Super. Ct. App. Div. 1999).

119. 865 P.2d 1051 (Kan. Ct. App. 1993).

was "a 'lost volume lessee.'"[120] Jetz contracted with Salina Properties for the placement of five washer-dryer units.[121] After Salina breached the contract, Jetz retrieved its washer-dryer units and placed them in its warehouse, along with the rest of its inventory of washer-dryer units.[122] The court found that Jetz had "several warehouses in which it [had] available for lease about 1,500 used washers and dryers; [and] continually look[ed] for new locations in which to install laundry equipment. . . ."[123] Under these circumstances, the court held that Jetz was in fact a lost volume lessee and did not have a duty to mitigate its losses.[124]

Like the *Collins* and *C.I.C. Corp.* courts, the *Jetz* court found a seller in the business of leasing coin-operated machines was a lost volume seller when the seller had a large inventory of machines on hand and continually sought out new customers.[125] While none of these courts expressly stated it, they appear to be following a two-part, subjective and objective requirement test similar to the one used in *Ullman-Briggs* and *Lone Star Ford.* Since the sellers maintained warehouses where they stored numerous machines, they had the objective capacity to enter into additional contracts regardless of the original contract's breach. The sellers also continuously looked for new customers in the normal course of business. Thus, they satisfied the subjective intent to enter into additional contracts.

The South Carolina Supreme Court should affirm the holding in *Collins* that the lost volume seller doctrine is a valid form of recovery in certain circumstances. More specifically, the supreme court should also clarify exactly what type of test South Carolina courts should adopt to determine if individual sellers are in fact lost volume sellers entitled to lost profits awards. The two part objective-subjective test that other courts use, and which appears to have its roots in the comments to the *Restatement*, is a satisfactory determinant of what qualifies a seller as a lost volume seller.[126]

This two-part test is incorporated into the three-part *Diasonics* test, which also includes a profitability requirement.[127] The *Diasonics I* court, when developing its three-part test, did not devote extensive time explaining the necessity of a profitability requirement and only cited one law review article.[128] In light of this limited analysis and the court's less than thorough application of the profitability element,[129] the South Carolina Supreme Court should reject adding profitability as a requirement to proving lost volume seller status. The *Diasonics* courts did not supply an adequate justification for its necessity and further, did not explain how courts are to apply it.[130]

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120. *Id.* at 1057.
121. *Id.* at 1053.
122. *Id.*
123. *Id.* at 1057.
124. *Id.*
125. Jetz Serv. Co. v. Salina Properties, 865 P.2d 1051, 1057 (Kan. Ct. App. 1993).
126. *See supra* note 73 and accompanying text.
127. *See supra* Part III.B.
128. *Diasonics I*, 826 F.2d 687, 684 (7th Cir. 1987) (citing Goetz & Scott, *Measuring Seller's Damages: The Lost Profits Puzzle*, 31 STAN. L. REV. 323 (1979)).
129. *See supra* notes 84–88 and accompanying text.
130. *See supra* notes 84–88 and accompanying text.

In *Diasonics II*, the profitability requirement was satisfied because the resale price was the same as the original contract price, but that arguably does not indicate whether a seller is a lost volume seller.[131] If a car dealer enters into a contract with a buyer for the purchase of an automobile for the sticker price of $20,000 and the buyer later breaches, why would that same seller not be a lost volume seller if it later resold the automobile for $19,000? The car dealer would have the capacity to make the additional sale if it had other similar cars available and would likely have the subjective intent to make an additional sale. What if the resale price, while still being lower, gives the dealer a profit nonetheless? The *Diasonics* court did not answer these questions, nor did it supply an adequate justification for the need of a profitability requirement.[132]

Status as a lost volume seller is based on the seller's inability to mitigate losses through post breach conduct and has nothing to do with whether an additional sale would have been profitable. South Carolina courts should look to whether a seller had the ability to enter into an additional sale and whether that seller would have entered into another sale irrespective of the buyer's breach. Moreover, court determination of whether a specific additional sale would have been profitable could make application of the lost volume seller doctrine overly complicated and difficult. Usually, the determination of whether a seller is a lost volume seller is not difficult to make.[133]

Most retail sellers will have sufficient inventory or supply to easily satisfy the first prong of this test, and a court could easily presume that a seller would want to enter into an additional transaction. It is unlikely that a retailer in the business of selling a particular good would not want to enter into another transaction if it possessed the inventory or the supply to do so. Therefore, in most cases, determining a seller is a lost volume seller should not be difficult; but, if profitability were added as an element, application of the doctrine would be markedly different. Courts then would have to devise a test for measuring profitability and receive evidence from each side to prove that the additional sale was profitable.

At most, a court should be concerned with whether the additional sale was economically rational. If it was rational for the seller to enter into the additional contract, it should not matter if it was profitable or not.

V. CONCLUSION

The South Carolina Supreme Court should affirm the *Collins* decision, thereby bringing South Carolina within the vast majority of jurisdictions that have adopted the lost volume seller doctrine. The court should also clarify the manner in which South Carolina courts are to apply the lost volume seller doctrine. The two-part test from *Ullman-Briggs*, used by the court in *Lone Star Ford* and in effect used by the courts in *Jetz Services* and *C.I.C. Corp.*, adequately addresses the issue of whether

131. *See supra* note 88 and accompanying text.

132. *See supra* notes 87–88 and accompanying text.

133. As noted, *supra* notes 34–41 and accompanying text, it takes a very unusual situation, similar to what the court faced in *Schiavi Mobile Homes, Inc. v. Gironda*, 463 A.2d 722 (Me. 1983), for a seller to lose its status as a lost volume seller.

a particular seller is a lost volume seller. The objective component will determine whether the seller had the capacity to enter into an additional sale, while the subjective component will determine whether the seller would have entered into the sale regardless of the buyer's breach. If these two requirements are satisfied, then a seller will be entitled to lost profits to put it in as good a position as it would have been in if the buyer had not breached.

Profitability should not be used as an element in this determination because it would make the test more difficult to apply and does not have any bearing on whether a seller is a lost volume seller. The correct line of inquiry should determine whether it would have been possible for the seller to mitigate its losses through post sale conduct. The South Carolina Supreme Court should adopt this two-part test.

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