

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

-----X	:	
LAWRENCE E. JAFFE PENSION PLAN, ON	:	
BEHALF OF ITSELF AND ALL OTHERS SIMILARLY	:	
SITUATED,	:	Lead Case No. 02-C5893
	:	(Consolidated)
Plaintiff,	:	
	:	CLASS ACTION
- against -	:	
	:	Judge Ronald A. Guzman
HOUSEHOLD INTERNATIONAL, INC., ET AL.,	:	
	:	
Defendants.	:	
-----X		

**APPENDIX OF UNREPORTED AUTHORITIES SUBMITTED  
IN SUPPORT OF DEFENDANTS' MOTION PURSUANT TO  
FED. R. CIV. P. 37(C) TO EXCLUDE TESTIMONY FROM  
PLAINTIFFS' PREVIOUSLY CONCEALED TRIAL  
WITNESSES**

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(Cite as: 1995 WL 478820 (N.D.Ill.))

**H**

United States District Court, N.D. Illinois, Eastern Division.

James E. MATTHEWS, Plaintiff,

v.

COMMONWEALTH EDISON COMPANY, Defendant.

No. 93 C 4140.

March 24, 1995.

Leon M. Despres, Thomas Howard Geoghegan, Robert Chuck Drizin, Despres, Schwartz & Geoghegan, Chicago, IL.

Julie Allen, Lisa D. Freeman, Sidley and Austin, Chicago, IL.

REPORT AND RECOMMENDATION

GUZ AN, United States Magistrate Judge.

\*1 TO: HONORABLE ANN C. WILLIAMS, JUDGE

TO: UNITED STATES DISTRICT COURT

This case comes to this Magistrate Judge on a referral from Judge Aspen <sup>FNI</sup> to conduct a pretrial conference and hear and enter orders on any objections to exhibits and jury instructions and motion to strike.

Pending is an action for employment discrimination pursuant to the Age Discrimination in Employment Act 29 U.S.C. § 621 and the Americans With Disabilities Act of 1990 42 U.S.C. § 12101 *et seq.* The defendant, Commonwealth Edison Company, has filed a motion in limine seeking the exclusion of Sandor Goldstein, the expert witness of the plaintiff. The motion seeks to exclude his testimony and to exclude any exhibits, reports or other memoranda prepared by him. The motion is based on two separate arguments. First, that since Mr. Goldstein's testimony all pertains to the issue of

front pay, this is an issue for the court in the 7th Circuit and not an issue that should go to the jury. Second, that testimony should not be allowed because Mr. Goldstein's analysis is too speculative.

As to the latter argument, I recommend that the motion be denied. It is too early at this point in time to know with any certainty that Mr. Goldstein's testimony will be based on speculation. We have been provided with no transcripts of any depositions taken by him or any of his affidavits or reports. Nor is there any certainty that he would testify only as to those things in his deposition or prior reports or affidavits. This should be the determination for the trial court to make as his testimony comes in, or after his testimony has been heard on a voir dire examination. Damages, as we all know, need not be determined with exact precision, but only with reasonable certainty. Reasonable certainty as to front pay or future damages is not something which can be determined in the abstract. I therefore recommend that the motion in limine in this regard be denied, or that the court reserve its ruling.

In *Fortino v. Quasar Company*, 950 F.2d 389 (7th Cir.1991) the court considered the issue of "Whether front pay is a question for the jury or for the judge in an age discrimination case." As the court pointed out, the issue turns on the question of whether front pay should be deemed legal because it resembles common law damages, and therefore triable by a jury, or equitable because it is in lieu of an equitable remedy of reinstatement. A court of equity does have the power to make an award of damages in substitution for an equitable remedy that the plaintiff wants and is entitled to as a matter of strict principle, but that for some reason is not feasible. In ruling, the court in *Fortino* indicated that it is in agreement with the 2nd Circuit that there is no right to a jury trial on this issue. Citing the case of *Dominick v. Consolidated Edison Company*, 822 F.2d 1249, 1257-58 (2nd Cir.1987). This court agrees with the decision in that case. The contrary suggestion that the right to front pay is to be

determined by the court, but the amount of front pay by the jury, is unworkable. Front pay is a substitute for the equitable remedy of reinstatement. As such, the right to front pay as well as the amount is to be determined by the court. To the extent that Goldstein's testimony pertains only to front pay, I recommend that the motion to exclude his testimony be granted.

\*2 The defendant has objected to plaintiff's exhibits 1, 4, 5, 6, 7 and 10. Exhibit 1 is the Zion Station Management Personnel Full Report dated May 9, 1991. It is objected to on the basis of relevance. The parties have agreed to a stipulation of a list of the names, ages, date of hire and job title of all employees within the electrical maintenance department at Zion Station as of August 19, 1992. With this stipulation, Exhibit 1 is no longer necessary and is withdrawn.

Exhibit 4 is a letter from Karen Redmond, the EEOC investigator to Edison dated March 4, 1993 and Exhibit 5 is the EEOC Notice of Right to Sue issued to Matthews, bearing a date of July 2, 1993. These were objected to on the basis of relevance and Exhibit 4 is also objected to on the basis of hearsay. The objections should be sustained because the facts contained in these two documents have already been agreed to in statement 65 of the Statement of Agreed Facts. Exhibit 6 is also objected to on the basis of relevance. It is recommended that the objection to Document No. ML 00005 be overruled. All other pages are withdrawn by plaintiff. ML 00005 is entitled Involuntary Nuclear Separations-Age Analysis. It states the percentage of people over the age of 40 who were discharged as a result of the work force reduction plan. As such it can be circumstantial evidence, that the defendant targeted those employees 40 years or older for elimination during its work force reduction plan implementation. All other pages of this exhibit are withdrawn.

Exhibit 7 is also objected to on the basis of relevance and it is likewise recommended that the objection be overruled. The exhibit is entitled Nuclear

Operations Management Personnel Listing-Zion Station. It contains the names of personnel at the Zion Station and certain data about each such employee. For example, one column is entitled Salary Grade and gives the salary grade of each such employee. Another is entitled Service Date and gives the date upon which each such employee commenced service. Another is entitled Birth Date and gives the date of birth for each employee, while another column apparently indicates the sex of the employee. Of particular importance is a column entitled Code, which appears to list among other things, those employees that have either medical problems or are of limited ability. This would tend to suggest that the physical disability of employees was being taken into account. This, of course, could be circumstantial evidence to help support the plaintiff's case that he was discharged in part at least because of his disability. It is therefore recommended that this objection be denied.

The objection as to Exhibit 10 is withdrawn.

The defendant next objects to Nancy Matthews, the plaintiff's wife, as a witness in this case. The objection is based upon the fact that Mrs. Matthews allegedly has no firsthand knowledge regarding the defendant's termination of plaintiff's employment and that she was not listed or disclosed in the answers to interrogatories which requested the names of all persons with information relevant to the case. As to the first objection, lack of personal knowledge, is in effect a motion to disqualify her as incompetent because she lacks any personal knowledge upon which to base her testimony. I recommend that the court reserve its ruling. Clearly, it is not possible at this point to know even the range of things as to which this witness might testify. For example, she could testify as to her husband's physical condition and ability to do certain tasks which she personally observed. Such testimony, if the plaintiff's physical ability becomes an issue, could clearly be relevant. What else she may have observed is not possible for the court to know at this time. It therefore is premature to grant the motion

to bar her as a witness on the basis of lack of competence to testify as to anything relevant.

\*3 The motion however should be sustained because of plaintiff's failure to disclose this witness during the discovery of the case. Defendants quite rightly object to the fact that they have not deposed this witness and are not prepared to examine her if she should take the stand. However, she should be barred only as a witness during the plaintiff's case in chief-not as a rebuttal witness. Rebuttal witnesses are oftentimes not known until after the trial is commenced because the need to call such a witness may not arise until the opposing party introduces an argument in issue or a fact during the course of the trial which must now, unexpectedly, be rebutted.

Defendants also object to plaintiff's list of special damages. The grounds asserted are 1) lack of foundation for the totals represented; 2) Matthews is not entitled to receive the monies listed; and 3) the issue of monetary relief is for the court or the jury. The first two objections, of course, are for the trier of fact to determine. The last is also encompassed in the motion in limine upon which I have previously given my recommendation. All amounts reflecting front pay should in fact not be presented to the jury.

We now come to plaintiff's and defendant's proposed jury instructions and verdict forms. Plaintiff's Proposed Jury Instruction No. 1 is objected to on the grounds that it is argumentative, not supported by the authority, and does not include the defendant's answer. The objection is sustained as to the second paragraph. This paragraph does not accurately state the defendant's position, in that it represents that the defendants are denying that the plaintiff is in fact disabled. I therefore recommend that this paragraph be stricken. The first paragraph should also be rewritten to indicate that the Americans With Disabilities Act makes it unlawful for an employer to intentionally discriminate against an employee with a disability so long as that employee is adequately performing the essential functions of

his job with or without reasonable accommodation. The third paragraph should be amended and the words "could have performed" should be stricken and replaced with "was performing." Finally, the 4th paragraph should be stricken, all but the first sentence. This will make a balanced and much more accurate representation of the issues which the case will be presenting to the jury.

Plaintiff's Proposed Jury Instruction No. 2 is objected to as being argumentative and unsupported by the authority. I agree with the objections in that these instructions are not sufficiently precise. For example, the first element that the plaintiff must prove is described as "That James E. Matthews is regarded as having a physical or mental impairment that substantially limits one or more major life activities." Actually, the first element that Mr. Matthews must prove is that he has a disability. Having a disability is further defined as either having or being regarded as having a condition that substantially limits one of the major activities of life. The wording of this first element in the Plaintiff's Proposed Jury Instruction No. 2 can therefore lead to confusion or be considered redundant. In element No. 3, the phrase "with or without reasonable accommodation" is left out and there are various other problems with this instruction. In lieu of this instruction, I recommend giving the Defendant's Proposed Jury Instructions No. 16 and 17. However, the Defendant's Jury Instruction No. 16 should be supplemented with the final two paragraphs of the Plaintiff's Proposed Jury Instruction No. 2 which read "In addition, James E. Matthews is not required to produce direct evidence of unlawful motive. Intentional discrimination, if it exists, is seldom admitted, but is a fact which you may infer from the existence of other facts." Plaintiff is entitled to have this included in the instructions and it is not included anywhere else.

\*4 Plaintiff's Proposed Jury Instruction No. 3 is objected to as being incomplete. This instruction is substantially similar to Defendant's Proposed Jury Instruction No. 18 with the exception of the last

paragraph in the Defendant's Jury Instruction. I recommend that the Defendant's Proposed Jury Instruction No. 18 be given without the last paragraph which has been withdrawn. Either version then is essentially acceptable.

Plaintiff's Proposed Jury Instruction No. 4 is objected to as being argumentative and prejudicial and unsupported by authority. The counterpart to this is the Defendant's Proposed Jury Instruction No. 20. Together, these two instructions are complete. Separate, neither one is actually appropriate. For example, the Plaintiff's Proposed Jury Instruction No. 4 in its paragraph no. 3 borders on being a persuasive argument to the jury rather than an instruction on the law. However, the first two paragraphs define and described the term "reasonable accommodation." Yet, the instruction as a whole, lacks a definition of what a qualified individual is. I therefore recommend that the Plaintiff's Jury Instruction No. 4 be denied, and that instead the Defendant's Proposed Jury Instruction No. 20 be given. However, since Defendant's Proposed Jury Instruction No. 20 does not contain an affirmative definition of the term "reasonable accommodation," I recommend that paragraphs 1 and 2 of Plaintiff's Proposed Jury Instruction No. 4 be included as Paragraph Nos. 2 and 3 of Defendant's Proposed Jury Instruction No. 20.

Plaintiff's Proposed Jury Instruction No. 5 is objected to as argumentative and prejudicial. It is recommended that the objection be sustained because both parties indicate that there would be no evidence to suggest that there was another position available for which the plaintiff was qualified which was denied him. The instruction therefore has no place in this particular case.

Plaintiff's Proposed Jury Instruction No. 6 is objected to as being argumentative, prejudicial and not supported by authority. Clearly, the third paragraph of this proposed instruction could easily be interrupted as giving approval to and sanctioning the testimony of Sandor Goldstein. The counterpart to this is the Defendant's Proposed Jury Instruction

No. 22. This instruction however also has problems in that the second paragraph conflicts with the proposed instructions as to punitive damages. The third paragraph also fails to include not only wages, but benefits which the plaintiff must be compensated for and this third paragraph also instructs the jury to deduct any unemployment compensation payments which the plaintiff has received. In addition to this, there is a basic difference in the approach to the damages instructions by plaintiff and the defendant. The defendant's damages instructions include the calculation of damages for both the age discrimination and disability discrimination counts, while the plaintiff has separate instructions for each count. There is also a great possibility that the jury will be confused if, for example, Defendant's Proposed Jury Instruction No. 15 which goes to the issue of double damages under the ADEA is given along with the Plaintiff's Proposed Jury Instruction No. 9 which goes to punitive damages. Without some instruction as to how to integrate these separate damages's instructions, the jury will most likely become confused and unable to fulfill its function. I therefore recommended that the parties have a conference and attempt to redraft and to integrate and coordinate their proposed damages instructions, which include Defendant's Proposed Jury Instruction No. 15, Plaintiff's Proposed Jury Instruction No. 33, Plaintiff Proposed Jury Instruction No. 6, Plaintiff's Proposed Jury Instruction No. 9, and Defendant's Proposed Jury Instruction No. 22. As amended Defendant's Revised Instruction No. 22 appears to appropriately state the law with regards to the lost benefits for which the plaintiff is entitled to be compensated. Also by dropping paragraph 3, it is in line with this court's recommendation regarding unemployment compensation benefits as collateral source payments.

\*5 Plaintiff's Proposed Jury Instruction No. 7 is objected to on the bases asserted in the motion in limine. I recommend that the objection be sustained. The instruction should not be given as indicated in the recommendation on the motion in limine.

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Plaintiff's Proposed Jury Instruction No. 8 is withdrawn. Plaintiff's Proposed Jury Instruction No. 10 is also withdrawn and Defendant's Proposed Jury Instruction No. 17 should be given in its stead.

Plaintiff's Proposed Jury Instruction No. 11 is withdrawn. Plaintiff's Proposed Jury Instruction No. 12 is also withdrawn and Defendant's Proposed Jury Instruction No. 17 should be given in its stead.

Plaintiff's Proposed Jury Instruction No. 13 is objected to as being an incomplete statement of the law. I recommend the objection be overruled and that the instruction be given. This instruction is taken almost verbatim from the Code of Federal Regulations and does include all of that portion of the code which is applicable, I believe, to this case.

Plaintiff's Proposed Jury Instruction No. 14 is objected to because portions of the instruction are allegedly not applicable to the case and prejudicial. I recommend that it be given, but only with the following modifications. Paragraph No. 6 which begins "Pay close attention to the testimony and evidence" should be modified in that all of the material beginning with the second sentence ("if you would like to take notes during the trial, ...") through the sentence which reads "A juror's notes are not entitled to any greater weight than the recollection of each juror concerning the testimony" should be stricken. The last paragraph on the second page of the instruction should be modified to include a statement that it is not likely that this case will result in any news or media coverage. As so modified, the instruction I recommend should be given.

There are no objections to the Plaintiff's Proposed Jury Instruction No. 15 and I recommend that it be given.

Plaintiff Proposed Jury Instruction No. 16 is withdrawn and Defendant's Proposed Jury Instruction No. 4 should be given instead. Plaintiff's Proposed Jury Instruction No. 17 is withdrawn as it is covered by Plaintiff Proposed Jury Instruction No. 14.

Plaintiff's Proposed Jury Instruction No. 18 is not objected to and I recommend that it be given. Plaintiff's Proposed Jury Instruction No. 19 is the Fifth Circuit Pattern Jury Instruction No. 2.11. It is not objected to and I recommend it be given.

The objection as to Plaintiff's Proposed No. 20 is withdrawn and I recommend that it be given. There was no objection to Plaintiff Proposed Jury Instruction No. 21 and I recommend that it be given. Plaintiff's Proposed Jury Instruction No. 22 is objected to, but I recommend that the objections be overruled. This is the 5th Circuit Pattern Jury Instruction on a single witness, drawing reasonable inferences, and the two different types of evidence. Plaintiff's Proposed Jury Instruction No. 23 is the 5th Circuit Pattern Jury Instruction No. 2.19 with regards to expert testimony and I recommend that it be given if there is actual expert testimony taken during the trial.

\*6 There is no objection to Plaintiff's Proposed Jury Instruction No. 24 and I recommend that it be given.

Plaintiff's Proposed Jury Instruction No. 25 is withdrawn.

Plaintiff's Proposed Jury Instruction No. 26 is denied as it is repetitive of many instructions already given. In its stead, Defendant's Proposed Jury Instruction No. 1 should be given.

Plaintiff's Proposed Jury Instruction No. 27 should be denied. It includes inaccurate statements as to the law and also instructions on the issue of good faith seniority systems which is not being asserted by the defendants in this case as a defense.

Plaintiff's Proposed Jury Instruction No. 28 is withdrawn. Plaintiff's Proposed Jury Instruction No. 29 regards the calculation of future damages and if the recommendation as to the motion in limine is followed, this instruction should obviously not be given to the jury. The same with Plaintiff's Proposed Jury Instruction No. 30.



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Plaintiff's Proposed Jury Instruction No. 31 is a punitive damages instruction, but this has already been covered by a previous instruction. This instruction should, therefore, be denied as repetitive.

Plaintiff's Proposed Jury Instruction No. 32 is withdrawn.

Plaintiff's Proposed Jury Instruction No. 34 instructs on the plaintiff's duty to minimize his damages. It is not objected to and I recommend it be given.

Defendant's Proposed Jury Instruction No. 1 is given in lieu of Plaintiff's Proposed Jury Instruction No. 26 as previously indicated. I recommend that Defendant's Proposed Jury Instruction No. 2 be given. Its simply an instruction on fairness to a corporation.

Defendant's Proposed Jury Instruction No. 3 should be given with the modification that the last two sentences in the third paragraph be stricken. I think this language would just simply be confusing to the jury.

Defendant's Proposed Jury Instruction No. 4 should be given in lieu of Plaintiff's Proposed Jury Instruction No. 16.

Defendant's Proposed Jury Instruction No. 5 I recommend be denied. It is covered by Plaintiff's Proposed Jury Instruction No. 22.

Defendant's Proposed Jury Instruction No. 16 I recommend be denied. The second paragraph is confusing.

Defendant's Proposed Jury Instruction No. 7 I recommend be given. There is no objection.

Defendant's Proposed Jury Instruction No. 8 is the 5th Circuit Pattern Jury Instruction No. 2.16 modified. I recommend it not be given and in its place, Plaintiff's Proposed Jury Instruction No. 21 be given.

Defendant's Proposed Jury Instruction No. 9 I recommend that it not be given. It is already covered by a given plaintiff's instruction. The same with Defendant's Proposed Jury Instruction No. 10, which is covered by Plaintiff's Proposed Jury Instruction No. 23.

Defendant's Proposed Jury Instruction No. 11 also I recommend be denied. The subject matter is covered by Plaintiff's Proposed Jury Instruction No. 24.

There is no objection as to Defendant's Proposed Jury Instruction No. 12. The last sentence of the last paragraph however should be modified to clearly indicate that it is Commonwealth Edison's contention that Mr. Matthews' age and physical condition played no role in the decision to terminate his employment. As stated right now, without such a preface, the sentence could be deemed by the jury to be the court's assertion of that fact.

\*7 Plaintiff's Proposed Jury Instruction No. 13 is not objected to and I recommend that it be given.

There is no objection to Defendant Proposed Jury Instruction No. 19, which is a definition of the term "essential functions" and I recommend that it be given.

Defendant's Proposed Jury Instruction No. 23 is withdrawn.

Defendant's Proposed Jury Instruction No. 25 I recommend be denied. This same subject matter is covered by Plaintiff's Proposed Jury Instruction No. 19 which is the 5th Circuit Pattern Jury Instruction in unmodified form.

Defendant's Proposed Jury Instruction No. 27 is 5th Circuit Pattern Jury Instruction No. 3.1 modified. I recommend it be given.

Defendant's Proposed Jury Instruction No. 28 I recommend be given.

Defendant's Proposed Jury Instruction No. 21 is a

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*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) instruction. I do not believe that the fact pattern in this case fits the *Price Waterhouse* fact pattern. Initially, it is difficult to apply the rationale of the *Price Waterhouse* case to an Americans With Disabilities Act case because the *Price Waterhouse* language is premised upon the fact that it is improper to consider a suspect criteria in any way in reaching an employment decision.

“Congress’ intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute. In now familiar language, the statute forbids an employer to ‘fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment,’ or to ‘limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of such individual’s sex*’. 42 U.S.C. §§ 2000(e)2000(a)(1), (2) (emphasis added). We take these words to mean that gender must be irrelevant to employment decisions to construe the words ‘because of’ as colloquial shorthand for ‘but-for causation,’ as does *Price Waterhouse*, is to misunderstand them.” 490 U.S. at 239.

The Americans With Disabilities Act, on the other hand, actually requires the employer to consider the suspect criteria, i.e., the disability, and in some circumstances, to make an accommodation for it.

In *Price Waterhouse*, the Supreme Court supplemented the evidentiary framework of *McDonald Douglas* and *Burdine* for a particular type of case. As Justices Kennedy and Scalia stated in their dissent, the opinion establishes:

“That in a limited number of cases Title VII plaintiffs, by presenting direct and substantial evidence of discriminatory animus, may shift the burden of persuasion to the defendant to show that an adverse employment decision would have been sup-

ported by legitimate reasons. The shift in the burden of persuasion occurs only where a plaintiff proves by direct evidence that an unlawful motive was a substantial factor actually relied upon in making the decision.” 490 U.S. at 280, 109 S.Ct. 1775 at 1806.

\*8 For a further definition of what this “direct and substantial evidence of discriminatory animus” actually means, we can turn to the language in Justice O’Connor’s concurring opinion where she states: FN2

“Thus, stray remarks in the work place, while perhaps probative of sexual harassment, (citation omitted) cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondiscrimination makers, or statements by decision makers unrelated to the decisional process itself, suffice to satisfy the plaintiff’s burden in this regard.... Race and gender always ‘play a role’ in an employment decision in the benign sense ... For example, in the context of this case, a mere reference to “a lady candidate” might show that gender “played a role” in the decision, but by no means could support a rational fact finders inference that the decision was made “because of” sex. What is required is what Ann Hopkins showed here: direct evidence that the decision makers placed substantial negative reliance on an illegitimate criterion in reaching their decision.”

Justice O’Connor goes on to describe how this new and enhanced *McDonald Douglas* evidentiary framework would look. She states:

“First, the plaintiff must establish the *McDonald Douglas prima facie* case ... [in the traditional way]. The plaintiff should also present any direct evidence of discriminatory animus in the decisional process. The defendant should then present its case, including its evidence as to legitimate, nondiscriminatory reasons for the employment decision ... once all the evidence has been received, the court should determine whether the *McDonald Douglas*

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or *Price Waterhouse* framework applies to the evidence before it. If the plaintiff has failed to satisfy the *Price Waterhouse* threshold, the case should be decided under the principles enunciated in *McDonald Douglas and Burdine...*, *Id.* at 278." 490 U.S. 228 at 278, 109 S.Ct. 1775 at 1805.

The choice of instructions therefore is evidence dependent. The court must first decide if the evidence warrants an instruction under either the *McDonald Douglas* or the *Price Waterhouse* approach. If the threshold for the *Price Waterhouse* shifting of the burden to the defendant has been met, then the *Price Waterhouse* instruction is appropriate. It does not appear to me, from the discussions of counsel and the other pretrial materials that I have seen that the *Price Waterhouse* threshold will be met in this case, rather Commonwealth Edison appears to be denying any improper consideration of the plaintiff's disability whatsoever in its determination to discharge him. In its letter of August 22, 1994, the defendant argues that under the law, when motivating factor is used as a standard of proof, the defendant is entitled to prove that the same action would have been taken regardless of the presence of the protected factor. Apparently then, the defendant seeks an instruction regardless of whether or not the court first determines that the threshold standard in *Price Waterhouse* has been met, which will shift the burden of proof to it. The announced rationale for this position is that although the defendant does not concede that any impermissible factor was used in this case, defendant believes it should be allowed to argue "in the alternative" as part of its defense in this matter. For this reason, the defendant's counsel concludes the instruction shifting the burden to it should be given. But what defense counsel fails to realize is that it may argue in the alternative without causing a shifting of the burden of proof to it. Under the *McDonald Douglas-Burdine* evidentiary framework, the plaintiff bears the burden of proving not just that an inappropriate or impermissible factor was considered, but more than that-that it was a determining factor. In other words, that the plaintiff would

not have been discharged but for the consideration of the impermissible factor. *Holzman v. Jaymar-Ruby, Inc.*, 916 F.2d at 1298 (7th Cir.1990). So that while maintaining the burden of proof entirely upon the plaintiff, the defendant already enjoys, without a *Price Waterhouse* instruction, the alternative of arguing both that no discriminatory factor was considered and that even if such a factor was considered, it was not a determining factor. Without the *Price Waterhouse* instruction, it is the plaintiff that bears the burden of proving by a preponderance of the evidence both that an impermissible factor was considered and that it was a determining factor in the decision.

\*9 I make no specific recommendation to the court at this time in view of the heavily evidence dependent nature of this determination. Rather, I suggest that this is a determination the court should make, as explained by Justice O'Connor, "once all the evidence has been received."

In addition to the renewed *Price Waterhouse* / Defendant's No. 21, instruction defendants resubmit in their August 22, 1994 letter a redraft of Defendant's No. 14. This is the Defendant's Business Judgment Instruction. I recommend that it be given as resubmitted.

Also revised is Defendant's Instruction No. 15. This is an instruction as to liquidated damages and a definition of the willful violation that is required to trigger such damages. The instruction as revised is recommended.

Also resubmitted is Plaintiff's Instruction No. 9 which is now Plaintiff's Revised Instruction No. 9. As revised, I recommend that the instruction be given. It appears to properly advise the jury of the availability of nature, extent and propriety of punitive damages. It instructs the jury on the parameters upon which it is to base any punitive damages award. The instruction, of course, should only be given if after the close of all of the evidence the court is convinced that sufficient evidence as to willful, malicious or reckless action has been ad-

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duced.

The final resubmission is a resubmission of the Defendant's Proposed Special Jury Interrogatories. As usual, the problem with special interrogatories is that they have a tendency to become sort of a legal maze for the jury to work its way through. Regardless of the propriety of the questions being proposed to the jury, the fact of having to answer each and every such question in sequence itself may become an impediment to reaching a final verdict. In addition, it is impossible to know the appropriateness of the questions and the sequence of such questions until if not all, at least a majority of the evidence has been heard. I therefore make no recommendation with regards to the Defendant's Special Jury Interrogatories.

Turning now to the proposed list of voir dire questions. Defendants object to Plaintiff's First Proposed Question and I would sustain the objection unless the words "if the evidence warranted it" are added to the question. The same with the second proposed question. There is an objection to questions 5 and 6 which I recommend be overruled. If any prospective juror feels its appropriate for large companies to use reduction in force plans to eliminate older employees, the plaintiff clearly has the right to know about it. Question No. 7 is withdrawn.

There is an objection to Defendant's Proposed Question No. 20. I can see no basis for objection to that question. I recommend that the objection be overruled. Similarly with Question No. 26, if there is a prospective juror who has had a dispute or whose friend or close family member has had a dispute with Commonwealth Edison, clearly the defendants are entitled to know that. Proposed Questions 40, 41, 43 and 44 all go to the prior work experiences either with or without unions or experiences in being laid off or discharged of the prospective jurors. I see no reason why the defendants should not be able to find out any prospective juror's history in this regard. I recommend that the objections be overruled. Similarly with Question No.

48. It seeks to find out whether or not any of the prospective jurors or family members or friends have ever suffered from an illness on the job that effected their ability to work and what their experience was with the company that they were working for when that occurred. I see nothing wrong with this line of questioning. It tends to disclose to the defendant the possible attitudes which prospective jurors may have developed in regard to issues that will be central in this case.

\*10 Questions 51 through 58 go to the attitude of the prospective jurors with respect to the company's obligations to its employees and its right to reduce its work force and clear its work force of employees who are not performing adequately. My only objection to this set of questions is that its entirely too long. Defendants should be made to generalize in one or two questions the issues being probed by Questions 51 through 58 in order to void wasting time and monotonous repetition.

Any objections to this Report and Recommendation must be filed with the Clerk of the Court within ten (10) days of receipt of this notice. See Fed.R.Civ.P. 72(b); 28 U.S.C. § 636(b)(1). Failure to object constitutes a waiver of the right to appeal. *Egert v. Connecticut General Life Ins. Co.*, 900 F.2d 1032, 1039 (7th Cir.1990).

FN1. Reassigned to Judge Ann C. Williams on September 22, 1994.

FN2. There is disagreement between the plurality opinion and Justice O'Connor's concurring opinion on the initial threshold requirement which triggers the shift in the burden of proof to the defendant. Justice O'Connor states that her threshold standard differs substantially from that proposed by the plurality. The plurality opinion on the other hand asserts that "After comparing [the two standards] we do not understand why the concurrence suggests that they are meaningfully different from each other...." The plurality opinion would require that

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Not Reported in F.Supp., 1995 WL 478820 (N.D.Ill.), 7 A.D. Cases 1636, 9 A.D.D. 33

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plaintiff show that “gender played a motivating part in an employment decision...”

Since the plurality considers both standards to be equivalent, the court, it would seem, may apply either in its decision making process.

N.D.Ill.,1995.

Matthews v. Commonwealth Edison Co.

Not Reported in F.Supp., 1995 WL 478820

(N.D.Ill.), 7 A.D. Cases 1636, 9 A.D.D. 33

END OF DOCUMENT

TAB B

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## H

Only the Westlaw citation is currently available.

United States District Court, E.D. Wisconsin.

H. Scott LYMAN, an individual, Cardiostat Medic-  
al LLC, a Wisconsin Limited Liability Company,  
Plaintiffs,

v.

ST. JUDE MEDICAL S.C., INC., a Minnesota Cor-  
poration, Defendant.

**No. 05-C-122.**

May 27, 2008.

**Background:** In suit alleging improper termination of ten-year sales representative agreement just two years into the contract, both parties moved to exclude the opposing party's expert, and manufacturer also filed various motions in limine.

**Holdings:** The District Court, Rudolph T. Randa, Chief Judge, held that:

- (1) representative's expert's testimony was admissible to establish probable amount and trend of representative's sale of manufacturer's products;
- (2) data which formed the basis for manufacturer's expert's projections of sales representative's future sales was not reliable since expert accepted the data on the word of counsel without independently verifying the reliability of the data; and
- (3) parol evidence did not bar admission of pre-contract negotiations for purposes of proving representative's damages.

Motions granted in part and denied in part.

### [1] Evidence 157 555.2

157 Evidence

157XII Opinion Evidence

157XII(D) Examination of Experts

157k555 Basis of Opinion

157k555.2 k. Necessity and Sufficiency. Most Cited Cases

To help ensure the reliability of expert testimony, court considers whether the theory can be and has

been verified by the scientific method through testing, whether the theory has been subjected to peer review, the known or potential rate of error, and the general acceptance of the theory in the scientific community. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

### [2] Evidence 157 508

157 Evidence

157XII Opinion Evidence

157XII(B) Subjects of Expert Testimony

157k508 k. Matters Involving Scientific or Other Special Knowledge in General. Most Cited Cases

Despite the court's role as a gatekeeper, expert testimony is liberally admissible under the Federal Rules of Evidence. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

### [3] Evidence 157 555.9

157 Evidence

157XII Opinion Evidence

157XII(D) Examination of Experts

157k555 Basis of Opinion

157k555.9 k. Damages. Most Cited Cases

In suit alleging improper termination of ten-year sales representative agreement just two years into the contract, accountant's expert testimony was admissible to establish probable amount and trend of representative's sale of manufacturer's products through the duration of the agreement for purposes of determining present-value, mitigated damages caused by alleged breach of contract; none of the assumptions underlying accountant's projection models, which included model based on minimum sales quotas and a regression analysis, were inherently unreliable, and the accounting of expenses, and accounting of mitigation were not erroneous. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

### [4] Evidence 157 555.2

157 Evidence

**157XII Opinion Evidence****157XII(D) Examination of Experts****157k555 Basis of Opinion**

157k555.2 k. Necessity and Sufficiency. Most Cited Cases

If data underlying the expert's opinion is so unreliable that no reasonable expert could base an opinion on them, the opinion resting on that data must be excluded. Fed.Rules Evid.Rule 703, 28 U.S.C.A.

**[5] Evidence 157 ↪555.9****157 Evidence****157XII Opinion Evidence****157XII(D) Examination of Experts****157k555 Basis of Opinion**

157k555.9 k. Damages. Most Cited

**Cases**

Data which formed the basis for accountant's projections of sales representative's future sales was not reliable in determining damages since expert accepted the data on the word of counsel without independently verifying the reliability of the data. Fed.Rules Evid.Rule 703, 28 U.S.C.A.

**[6] Witnesses 410 ↪269(1)****410 Witnesses****410III Examination****410III(B) Cross-Examination**

410k269 Limitation of Cross-Examination to Subjects of Direct Examination

410k269(1) k. In General. Most Cited

**Cases**

For purposes of judicial economy, "one-appearance" rule would be adopted with respect to certain third-party witnesses, and thus, following defendant's direct examination, counsel for plaintiffs could cross-examine witnesses without being limited to matters covered in the direct examination; "one-appearance" rule would not apply to key witness since the scope of direct examination was likely to be time-consuming and to distract from the presentation of plaintiffs' case. Fed.Rules Evid.Rule 611, 28 U.S.C.A.

**[7] Federal Civil Procedure 170A ↪1278****170A Federal Civil Procedure****170AX Depositions and Discovery****170AX(A) In General**

170Ak1278 k. Failure to Respond; Sanctions. Most Cited Cases

In exercising its discretion to exclude a witness, courts examine the following factors: (1) prejudice or surprise to the party's opponent; (2) whether the prejudice can be cured; (3) the likelihood of disruption; and (4) bad faith or willfulness in not complying with discovery rule governing initial disclosure of witnesses. Fed.Rules Civ.Proc.Rules 26(a)(1)(A)(i), 37(c)(1), 28 U.S.C.A.

**[8] Federal Civil Procedure 170A ↪1278****170A Federal Civil Procedure****170AX Depositions and Discovery****170AX(A) In General**

170Ak1278 k. Failure to Respond; Sanctions. Most Cited Cases

In breach of contract suit, defendant would be precluded from calling four witnesses who were not named in its initial disclosures; while the names of two of the witnesses surfaced during the course of discovery, plaintiffs were never made aware of the subjects of their knowledge and whether they were likely to have discoverable information that might be used to support defendant's defenses, and therefore, the failure to disclose was not harmless inasmuch as plaintiffs made a strategic decision not to depose these individuals, nor was the failure with respect to any of those four witnesses substantially justified. Fed.Rules Civ.Proc.Rules 26(a)(1)(A)(i), 37(c)(1), 28 U.S.C.A.

**[9] Evidence 157 ↪427****157 Evidence**

157XI Parol or Extrinsic Evidence Affecting Writings

157XI(A) Contradicting, Varying, or Adding to Terms of Written Instrument

157k427 k. Evidence for Purpose Other



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Than Varying Rights or Liabilities Dependent Upon Terms of Writing. Most Cited Cases

Parol evidence rule does not bar the introduction of prior oral or written negotiations or agreements for a purpose other than to modify or contradict the unambiguous terms of a written contract.

**[10] Evidence 157 ↪423(1)**

157 Evidence

157XI Parol or Extrinsic Evidence Affecting Writings

157XI(A) Contradicting, Varying, or Adding to Terms of Written Instrument

157k423 Nature and Extent of Liability

157k423(1) k. In General. Most Cited

Cases

In suit alleging improper termination of sales representative agreement, parol evidence did not bar admission of pre-contract negotiations for purposes of proving representative's damages; such evidence would not be offered to vary or contradict the written contracts.

**[11] Evidence 157 ↪146**

157 Evidence

157IV Admissibility in General

157IV(D) Materiality

157k146 k. Tendency to Mislead or Confuse. Most Cited Cases

**Federal Civil Procedure 170A ↪1973**

170A Federal Civil Procedure

170AXV Trial

170AXV(A) In General

170Ak1970 Counsel's Conduct and Arguments

170Ak1973 k. Statements as to Facts, Comments and Arguments. Most Cited Cases

**Federal Civil Procedure 170A ↪2011**

170A Federal Civil Procedure

170AXV Trial

170AXV(C) Reception of Evidence

170Ak2011 k. In General. Most Cited

Cases

In suit alleging improper termination of sales representative agreement, evidence, argument or reference to the financial condition, net worth, revenues, or profits of manufacturer or its parent company would not be barred on ground that it was unfairly prejudicial; any potential prejudice could be cured through an appropriate limiting instruction. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

**[12] Evidence 157 ↪146**

157 Evidence

157IV Admissibility in General

157IV(D) Materiality

157k146 k. Tendency to Mislead or Confuse. Most Cited Cases

**Federal Civil Procedure 170A ↪1973**

170A Federal Civil Procedure

170AXV Trial

170AXV(A) In General

170Ak1970 Counsel's Conduct and Arguments

170Ak1973 k. Statements as to Facts, Comments and Arguments. Most Cited Cases

In suit alleging improper termination of sales representative agreement, all evidence, argument or reference related to manufacturer's unstated intent or motive for terminating the representative agreement would not be barred on ground that it was unfairly prejudicial. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

**[13] Evidence 157 ↪146**

157 Evidence

157IV Admissibility in General

157IV(D) Materiality

157k146 k. Tendency to Mislead or Confuse. Most Cited Cases

Evidence that manufacturer's parent company was the target of a class action securities lawsuit was relevant to liability claims and to damages in suit

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alleging improper termination of sales representative agreement, and its admission would not be barred on ground that it was unfairly prejudicial. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

**[14] Costs 102 ↪ 208**

102 Costs

102IX Taxation

102k208 k. Duties and Proceedings of Taxing Officer. Most Cited Cases  
Reasonableness of attorney fees and court costs incurred by any party in breach of contract litigation present a question of law for the court after a verdict is rendered by the jury.

**[15] Contracts 95 ↪ 168**

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k168 k. Terms Implied as Part of Contract. Most Cited Cases  
Every contract includes an implied covenant of good faith and fair dealing, whereby a party under a contract may not unjustifiably hinder the other party's performance under the contract.

**[16] Principal and Agent 308 ↪ 89(7)**

308 Principal and Agent

308II Mutual Rights, Duties, and Liabilities

308II(B) Compensation of Agent

308k89 Actions for Compensation

308k89(7) k. Admissibility of Evidence. Most Cited Cases  
Sales representative could introduce, in addition to evidence of manufacturer's breaches of the express terms of the contract, evidence of manufacturer's breach of the implied covenant of good faith and fair dealing since representative intended to introduce evidence that manufacturer breached many of the express terms of the contract, as well as evidence that manufacturer engaged in additional intentional conduct that interfered with representative's performance under the agreement, and since the en-

tire course of conduct could not be so easily separated.

**[17] Witnesses 410 ↪ 6**

410 Witnesses

410I In General

410k6 k. Place Where Attendance May Be Required; Obtaining Presence of Witness from Without Jurisdiction. Most Cited Cases

A court is not required to quash a properly served subpoena even if it requires a party witness to travel more than 100 miles. Fed.Rules Civ.Proc.Rule 45(b)(2), (c)(3)(A)(ii), 28 U.S.C.A.

Leslie E. Miller, Todd R. Seelman, Grimshaw & Harring PC, Denver, CO, Michael J. Cohen, Thomas M. Hruz, Meissner Tierney Fisher & Nichols SC, Milwaukee, WI, for Plaintiffs.  
Brian G. Cahill, David J. Turek, Paul F. Heaton, Gass Weber Mullins LLC, Milwaukee, WI, for Defendants.

**DECISION AND ORDER**

RUDOLPH T. RANDA, Chief Judge.

\*1 This case is set for a jury trial to commence the week of June 2, 2008. In December 2002, the plaintiffs, H. Scott Lyman ("Lyman") and CardioStat Medical LLC ("CardioStat"), entered into a ten-year Representative Agreement with the defendant, St. Jude Medical S.C., Inc. ("St.Jude"), to sell and support cardiac rhythm management ("CRM") products in Southeast Wisconsin. In 2004, St. Jude terminated the Agreement just two years into the contract.

Now before the Court are numerous motions *in limine*, which are set forth and discussed separately below.<sup>FN1</sup>

**I. Expert testimony**

Both parties retained experts in the field of accounting to assist with the calculation of damages in the

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instant case. Both parties now move to exclude the opposing party's expert.

The admissibility of expert testimony is governed by Fed.R.Evid. 702, as revised in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). Rule 702 provides that if

scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise ...

The inquiry breaks down into three general areas: (1) the testimony must be "helpful," which dovetails with the relevance requirements of Fed.R.Evid. 401-403; (2) the expert must be qualified by knowledge, skill, experience, training or education; and (3) the testimony must be reliable and fit the facts of the case.

[1] Under the third part of the analysis, the Court examines whether (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. Fed.R.Evid. 702. The Court acts as a "gatekeeper for expert testimony, only admitting such testimony after receiving satisfactory evidence of reliability." *Dhillon v. Crown Controls Corp.*, 269 F.3d 865, 869 (7th Cir.2001). To help ensure the reliability of expert testimony, the Court considers, for example, whether the theory can be and has been verified by the scientific method through testing, whether the theory has been subjected to peer review, the known or potential rate of error, and the general acceptance of the theory in the scientific community. *Cummins v. Lyle Indus.*, 93 F.3d 362, 368 (7th Cir.1996).

[2] Finally, despite the Court's role as a gatekeeper,

expert testimony is liberally admissible under the Federal Rules of Evidence. See, e.g., *Canino v. H.R.P., Inc.*, 105 F.Supp.2d 21, 28 (S.D.N.Y.2000)(in view of liberal thrust of FRE and presumption of admissibility of expert testimony, doubts about usefulness of expert testimony should be resolved in favor of admissibility)."Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 595, 113 S.Ct. 2786.

#### A. Background

\*2 In this case, the parties' experts should assist the jury in making the following determination: *assuming an improper termination of the Representative Agreement by St. Jude, based on the evidence adduced at trial pertaining to the probable amount and trend of Plaintiffs' sale of St. Jude's CRM products through the duration of the Agreement, what are Plaintiffs' present-value, mitigated damages caused by St. Jude's breach of contract?*

Plaintiffs' ten-year contract with St. Jude provided for an initial 4-year guarantee period. CardioStat FN2 was to receive \$775,000 for the first year, \$750,000 for the second and third years, and \$725,000 for the fourth year, for a cumulative total of \$3,000,000. This portion of the damages calculation is not in dispute.

After the 4-year guarantee period (*i.e.*, for the final six years), the contract provided that CardioStat would be paid strictly on commissions from its sales of St. Jude CRM products: 17% commission for a cardiac pacemaker, and 7% for a defibrillator.

The parties also executed a Separate Letter Agreement ("SLA") in October 2002. The SLA gave CardioStat a "put" option, to wit: "the sole and exclusive right, irrevocable within the time period provided for exercise" to require St. Jude to purchase CardioStat's "business." The sale price would

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equal twenty percent of the net sales generated in CardioStat's contractually defined territories for the 12-month period immediately preceding the date the option was exercised.

CardioStat was an independent sales representative business, so it was not responsible for any of the costs related to producing, marketing or handling the CRM products until the point they were ready to be sold and used. CardioStat's costs were therefore relatively fixed over time, even if sales were projected to increase. The contract provided that CardioStat was responsible for automobile expenses directly related to his sales activities and for Lyman's paging service.

Finally, Lyman's income with his current employer, Articure, must also be accounted for purposes of mitigation.

#### **B. St. Jude's motion: Daniel Gotter**

[3] St. Jude moves to exclude plaintiffs' expert witness, Daniel Gotter ("Gotter"). Gotter is a Certified Public Accountant (CPA), a Certified Valuation Analyst (CVA), and an Accredited Business Valuator (ABV). Gotter is a shareholder with the accounting firm of Winter, Kloman, Moter & Repp, S.C. Gotter specializes in litigation support, accounting and tax services directed toward closely-held business, business valuations, business succession, and estate planning. He holds a Bachelor of Business Administration (in accounting) from the University of Wisconsin-Milwaukee. Gotter has testified as an expert in numerous federal and state court civil cases across the state of Wisconsin.

Gotter provides five different models to assist the jury in its damages projections. Plaintiffs argue that each damage scenario is supportable and reasonable based upon the evidence that Gotter reviewed as the basis for his opinions, and which will be presented at trial for consideration by the jury. St. Jude objects generally to this "leave it to the jury" approach. But there is nothing which *requires* an ex-

pert to opine conclusively on an ultimate issue. Rather, the province of an expert is to provide testimony that will assist the trier of fact. There is no question that Gotter's testimony will assist the jury in its calculation of damages, should that prove to be necessary.

\*3 St. Jude also takes issue with each individual projection model:

*Model A* is based on minimum sales quotas, which come from the contract documents themselves. St. Jude argues that it is improper to use sales quotas to project future sales because Gotter is using his own "untestable logic" to assume that there is a logical relationship between quotas and sales. However, like the mutually-agreed upon expectations for performance, the assumption that sales would track quotas is not an illogical assumption. St. Jude cites *Zenith Electronics Corp. v. WH-TV Broadcasting Corp.*, 395 F.3d 416 (7th Cir.2005), which excluded an expert opinion as to the projected sales of satellite TV boxes in a newly-forming marketplace. The expert in *Zenith Electronics* was properly excluded because he provided nothing but a "bottom line" based on his self-proclaimed expertise. In this case, Gotter thoroughly analyzed Lyman's contractually-assigned sales territory, which was anything but newly-forming or hypothetical. Lyman's territory with St. Jude was the same territory in which he sold CRM products for 18 years prior to joining St. Jude.

*Model B* is based on the projections drafted by John C. Heinmiller ("Heinmiller") during St. Jude's recruitment of Lyman. Heinmiller is the Chief Financial Officer of St. Jude's parent company. St. Jude argues that Gotter cannot be allowed to "blindly accept" projections of future sales. Again, the Heinmiller memo, just like the minimum sales quotas in the contract, reflect the mutually agreed-upon expectations of the parties with respect to future sales. St. Jude cites *Target Market Publishing, Inc. v. ADVO, Inc.*, 136 F.3d 1139 (7th Cir.1998), which rejected internal sales projections as the basis for the expert's projections. Once again, *Target Market*

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is distinguishable, as the assumptions underlying those projections were deemed unreasonable, largely because they relied upon penetration into newly-forming marketplaces. 136 F.3d at 1144. *Target Market* is also distinguishable because CardioStat exceeded its contractual quotas during its initial performance under the contract, whereas the joint venture in *Target Market* was floundering. In short, *Target Market* does not create a *per se* rule against the use of internal sales projections.

**Model C** is a regression analysis based on CardioStat's past sales at St. Jude, valuing a sale on the implant date (as opposed to the sale date). St. Jude takes issue with the use of implant date because the contract provides that plaintiffs are compensated according to sales date. St. Jude accuses Gotter of manipulating the data to avoid the impact of "bulk sales." The use of implant date as opposed to sales date is a reasonable method to project future sales because it more accurately accounts for the efforts of the salesperson. Bulk sales, on the other hand, are made at the corporate level with minimal involvement from the salesperson. The use of implant date is not so unreasonable that it renders Gotter's opinions unreliable.

\*4 St. Jude also argues that Gotter's regression model is unreliable because the R-squared value from the regression explains only 15.4% of the increase in sales volume. However, use of the "t-statistic" is a better measure than  $R^2$  to determine the reliability of a regression model. (D. 131, Decl. of Kenneth West). In this case, the t-statistic measurement demonstrates that Gotter's regression model is statistically significant. *Id.* Therefore, the Court finds that Gotter's regression model is a potentially reliable measure of damages in the instant case.<sup>FN3</sup>

**Model D** projects future sales by multiplying the projected sales revenues from Model A by a factor of 1.65. This model is based on two assumptions: (1) CardioStat's sales quotas for years 5 through 10 would continue their historical increase of \$1 million per year as in Model A; and (2) CardioStat

would outpace those projected quotas by 165%, as it did in Year 2 for St. Jude. **Model E** is based on the language in the SLA projecting the possibility that CardioStat's net sales for a 12-month period ending on November 1, 2007 would be \$8,000,000. None of the assumptions underlying these models are inherently unreliable. The testimony and facts presented at trial will dictate whether damages will be calculated pursuant to either model. Gotter's models assist the jury by performing the calculations.

Finally, St. Jude argues that Gotter's accounting of expenses was erroneous because he failed to account for an increase in costs along with an increase in sales. As noted above, plaintiffs' costs in this case were fixed, and they would not be expected to increase in step with an increase in sales. St. Jude also takes issue with the accounting of mitigation, arguing that Gotter failed to apply the same principles to replacement income as to projected income. Gotter had a defensible basis for the differential treatment. These matters, like many of the criticisms lodged against Gotter's expert opinions, are best saved for cross examination at trial.

For all of the foregoing reasons, St. Jude's motion to exclude Gotter's testimony and report is denied.

### C. Plaintiffs' motion: Randall D. Wilson

Plaintiffs move to exclude St. Jude's expert witness, Randall D. Wilson ("Wilson"). Wilson is a certified public accountant for SMART Business Advisory and Consulting LLC. Mr. Wilson received his Bachelor of Science degree in accounting from Indiana University. Mr. Wilson also received a law degree from Chicago-Kent College of Law. He has 17 years experience in public accounting and consulting services. The focus of Mr. Wilson's career has been on forensic accounting and fraud investigations.

Wilson provides two projections: one weighted, and one unweighted. His projections are derived from

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Plaintiffs' alleged sales during the time they sold St. Jude CRM products. Wilson's original regression resulted in a negative sloping trendline because CardioStat's sales performance decreased from 2003 to 2004. Recognizing that CardioStat's sales data fluctuated immensely from month to month, Wilson weighted the sales data to obtain a positive sloping trendline for years five through ten of the Representative Agreement. Wilson concluded that Plaintiffs' potential damages were \$1,880,630, including \$256,435 in lost future commissions and \$528,480 for the lost put option. Wilson also provides criticisms of the conclusions and methodologies of plaintiffs' expert witness, Daniel Gotter.

\*5 The basis for Wilson's projections is Deposition Exhibit 272, which purports to be a summary of Plaintiff's CRM sales data during Plaintiffs' tenure at St. Jude. This document was produced by St. Jude during the course of discovery, but Wilson did not independently verify the source and accuracy of the data. Wilson did cross-check the information against other documents, but the bottom line is that Wilson never talked to anyone at St. Jude to verify the accuracy of the information in any of the documents he reviewed. Wilson's information was received solely from St. Jude's counsel.

Further undercutting the reliability of Wilson's opinions and projections is the fact that Wilson never talked to a single St. Jude employee about the facts of this case. As a result, Wilson does not know the identity of the CRM products sold by St. Jude or sold by Plaintiffs on behalf of St. Jude, Wilson does not know the identity of the cardiologists and electro-physiologist customers assigned to Plaintiffs, and Wilson never examined the professional certifications of the sales personnel who took over responsibility for calling on some of Plaintiffs' accounts.

[4] In conjunction with FRE 702, FRE703 provides that:

The facts or data in the particular case upon which an expert bases an opinion or inference

may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.

Under Rule 703, the data used by an expert to form his opinion need not be admissible under the rules of evidence. *See* WEINSTEIN'S FED. EVID. 2D, § 703.03. However, if the data underlying the expert's opinion is "so unreliable that no reasonable expert could base an opinion on them, the opinion resting on that data must be excluded." *In re TMI Litig.*, 193 F.3d 613, 697 (3d Cir.1999). In other words, Rule 703 "was not intended to abolish the hearsay rule and to allow a witness, under the guise of giving expert testimony, to in effect become the mouthpiece of the witnesses on whose statements or opinions the expert purports to base his opinion." *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F.Supp.2d 794, 808 (N.D.Ill.2005).

[5] The data which forms the basis for Wilson's projections are not reliable. Wilson should have independently verified the reliability of the data before opining on plaintiffs' future sales, as opposed to accepting it at the word of St. Jude's counsel. Therefore, the Court must exclude Wilson's testimony with regard to his projections. *See In re TMI*, 193 F.3d at 697-98 (upholding exclusion of expert testimony where sole basis for the testimony was summaries prepared by party's attorney); *Montgomery County v. Microvote Corp.*, 320 F.3d 440, 448-49 (3d Cir.2003) (underlying data was unreliable where expert did not base his opinion on primary data, did not know what the document was, who created it, or how it was created); *Crowley v. Chait*, 322 F.Supp.2d 530, 546-47 (D.N.J.2004) (where expert relied on summaries prepared by counsel and conducted little independent investigation, "to allow him to offer testimony to a jury as to conclusions he has reached on the basis of this highly filtered version of events, is unacceptable").

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\*6 Aside from his projections, St. Jude argues that Wilson's opinions with regard to Gotter's opinions should still be admitted. The Court disagrees. These opinions are similarly tainted with the foundational concerns discussed above. For example, some of Gotter's projections are based on the Heinmiller projections, and Wilson opines that "Based on Lyman's deposition transcript, it would appear that [Lyman] was of the opinion that Heinmiller utilized the projections to sell him on the job at SJM. Lyman did not necessarily believe that he would be able to achieve the projections that were presented to him." Rebuttal Report at 8. However, Wilson never spoke with Heinmiller to verify this assumption, even though he perceived the need to do so. As a result, Wilson is in no better position to criticize Gotter's opinions than a lay person. Any probative value Wilson's opinions may have with regard to Gotter's opinions is outweighed by the danger of unfair prejudice and the possibility of misleading the jury. *See* Fed.R.Evid. 403.

For all of the foregoing reasons, Plaintiffs' motion to exclude Wilson's testimony and expert report is granted.

## II. Plaintiffs' remaining motions *in limine* [D. 150]

### A. Require St. Jude to produce certain witness for plaintiffs' case-in-chief

Plaintiffs intend to call adversely seven St. Jude witnesses in their case-in-chief. Three of these witnesses will not appear voluntarily: Heinmiller (CFO and Executive Vice President of St. Jude's parent company), James Lia ("Lia") (plaintiffs' former direct supervisor, now Regional Sales Director for St. Jude), and Joann Bartos ("Bartos") (succeeded Plaintiffs as sales representative). Plaintiffs served Heinmiller with a trial subpoena, which is subject to a motion to quash, discussed below. *See* Section III, H.

Plaintiffs argue that St. Jude must produce these

witnesses for plaintiffs' case-in-chief because St. Jude intends to call them as part of its own case-in-chief. In the alternative, plaintiffs argue that St. Jude should be precluded from introducing live testimony from these witnesses if St. Jude refuses to produce them for plaintiffs' case-in-chief.

[6] In response, St. Jude argues that the Court should adopt the "one-appearance" rule for Lia, Bartos, as well as additional witnesses <sup>FN4</sup> under FRE 611, which allows the Court to control the mode and order of interrogation and presentation of witnesses. For example, the parties have arrived at the following accommodation for Thomas O'Brien ("O'Brien") (VP of sales for southern part of the country): St. Jude will produce O'Brien at trial during St. Jude's case-in-chief for direct examination by St. Jude. Following this direct examination, counsel for plaintiffs may cross-examine O'Brien without being limited to matters covered in the direct examination.

With respect to some witnesses (excluding O'Brien), St. Jude takes the position that it be allowed to conduct its full direct examination during plaintiffs' case-in-chief, as opposed to a traditional cross-examination. Plaintiffs concede to this request and the Court adopts the one-appearance rule with respect to third-party witnesses Bartos, Kajfosh, Dr. Lanzarotti, and Dr. Niazi. These witnesses will be permitted to appear only once, when they are called during plaintiffs' case-in-chief, and St. Jude will be allowed to conduct its full direct examination at that time.

\*7 Plaintiffs do not concede to the one-appearance rule with respect to Ames, Lia, and Heinmiller. Ames is now a former employee of St. Jude who agreed to appear voluntarily on behalf of plaintiffs. The Court agrees that St. Jude should not be allowed to conduct a direct examination of Ames during plaintiffs' case-in-chief. St. Jude's request in this regard does not appear to be animated by judicial economy, as it actually has no way of compelling Ames' attendance during its own case-in-chief.

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As for Lia, plaintiffs' concerns with respect to trial management and the presentation of its case carries the day. Lia is a key witness, and the scope of direct examination by St. Jude is likely to be time-consuming and to distract from the presentation of plaintiffs' case. Further, in arranging the order of its witnesses, plaintiffs budgeted for specific amounts of time, which risks significant disruption if additional time is allotted for St. Jude's examination. FN5

Therefore, the Court adopts the one-appearance rule with respect to Bartos, Kajfosh, Dr. Lanzarotti, and Dr. Niazi. The mode and interrogation of these witnesses will proceed as discussed above. The Court will not adopt the one-appearance rule with respect to Ames and Lia.

#### **B. Preclude St. Jude from calling certain witnesses at trial**

Plaintiffs move to preclude St. Jude from calling four witnesses who were not named in St. Jude's initial disclosures: Jeffrey Caprini, Dave Hendrick, Tracy Kopf, and Dan Reeder. None of these witnesses were deposed during discovery in this case. In addition, two of them (Reeder and Hendrick) were not identified in St. Jude's interrogatory responses.

Each party, "without awaiting a discovery request, [must] provide to the other parties ... the name ... of each individual likely to have discoverable information-along with the subjects of that information-that the disclosing party may use to support its claims or defenses ..."Fed.R.Civ.P. 26(a)(1)(A)(i). Parties are under a continuing duty to supplement these disclosures. *See* Fed.R.Civ.P. 26(e)(1).

[7] If a party fails to make a proper disclosure, the party "is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or was harmless."Fed.R.Civ.P. 37(c)(1). In exercising its discretion to exclude a witness, courts

examine the following factors: (1) prejudice or surprise to the party's opponent; (2) whether the prejudice can be cured; (3) the likelihood of disruption; and (4) bad faith or willfulness in not complying. *See Bronk v. Ineichen*, 54 F.3d 425, 432 (7th Cir.1995).

[8] While the names of Kopf and Caprini surfaced during the course of discovery, plaintiffs were never made aware of the subjects of their knowledge and whether they were likely to have discoverable information that might be used to support St. Jude's defenses, as required by the rule. Therefore, the failure to disclose was not harmless inasmuch as plaintiffs made a strategic decision not to depose these individuals. Nor was the failure with respect to any of these four witnesses substantially justified.

\*8 At this late stage, St. Jude's general averment that these witnesses will only provide "background information" that is largely irrelevant is unavailing, and also begs the question of why St. Jude would seek to introduce irrelevant testimony into an already lengthy trial.

St. Jude fails to demonstrate how its lack of disclosure was substantially justified or harmless, and plaintiffs' motion to exclude these witnesses will be granted.

#### **C. Exceed page limitation for testimony of Marc Sportsman**

Marc Sportsman ("Sportsman") is a former Vice President of St. Jude, who now resides in Kansas City, Missouri. Sportsman was involved with the recruitment of Lyman to St. Jude. In anticipation of Sportsman's unavailability at trial (as he is a third party and lives outside of the Court's subpoena range), the parties arranged to videotape Mr. Sportsman's deposition and designate the same as trial testimony.

Sportsman has material knowledge regarding Lyman's success in the CRM industry in Milwaukee;



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the negotiation of the Representative Agreement and Separate Letter Agreement; and Lyman's transition to sales representative for St. Jude. Sportsman will also testify regarding the negotiation of plaintiffs' salary guarantee and other aspects of the Representative Agreement, including St. Jude's assurances that it would hire a dedicated TSS (Technical Support Specialist) person to support plaintiffs' business with St. Jude.

Plaintiffs move to introduce 2 hours and 21 minutes of testimony from Sportsman's deposition.<sup>FN6</sup> This amounts to over 100 pages of the deposition transcript, but Civil L.R. 16.3(a)(6) provides that "[r]eading or playing more than 5 pages from a deposition will not be permitted unless the Court finds good cause." St. Jude objects to the introduction of 56 pages of the proposed testimony, arguing that this portion is either irrelevant or constitutes inadmissible hearsay.

For the reasons discussed below (Section III, A), Sportsman's testimony is not barred by the parol evidence rule. His testimony regarding pre-contract negotiations with plaintiffs is relevant to liability and damages. Therefore, the Court finds good cause for exceeding the page limit under Civil L.R. 16.3(a)(6). St. Jude's hearsay objection is overruled: the deposition testimony (D. 175, Exhibit A at 170:10) shows that Sportsman conclusively identified the document he was testifying about.

### III. St. Jude's remaining motions *in limine* [D. 137]

#### A. Pre-contract negotiations and projections [St. Jude's Motion No. 2]

St. Jude moves for the exclusion of any evidence related to pre-contract negotiations, drafts, projections and other parol evidence, including the pre-contract sales projections jointly developed by Lyman and Heinmiller (the "Heinmiller projections"). St. Jude argues that such evidence is irrelevant in light of the Representative Agreement's "Merger

and Integration" clause that nullifies any prior oral or written negotiations or agreements.

\*9 [9] Parol evidence may not be used as evidence to modify or contradict the unambiguous terms of a written contract. See *Caulfield v. Caulfield*, 183 Wis.2d 83, 92, 515 N.W.2d 278 (Ct.App.1994). However, the parol evidence rule does not bar the introduction of such evidence for a different purpose. See, e.g., *Ziegler Co., Inc. v. Rexnord, Inc.*, 139 Wis.2d 593, 608 n. 11, 407 N.W.2d 873 (1987) (refusing to apply the parol evidence rule and an integration clause when the extrinsic evidence was not offered to vary, contradict or even assist in the interpretation of a written document, but rather to show a separate element of a claim at issue); *Kramer v. Alpine Valley Resort, Inc.*, 108 Wis.2d 417, 426, 321 N.W.2d 293 (1982) ("The parol evidence rule only applies if the writing is intended by both parties to be the final and complete expression of their agreement and only bars evidence intended to vary such expression").

[10] Plaintiffs will not seek to introduce any parol evidence in an attempt to modify or contradict the terms of the written contracts in this case. For example, the Heinmiller projections are being offered for purposes of proving plaintiffs' damages, as discussed above. St. Jude cites *TAS Distributing Co., Inc. v. Cummins Engine Co.*, 491 F.3d 625, 636-37 (7th Cir.2007), which held that evidence of pre-contractual projections during negotiations cannot be considered proof of damages and is barred by the parol evidence rule. However, in the instant case, the Heinmiller projections supplement the expectations of the parties in the Representative Agreement (and Separate Letter Agreement), wherein the parties expressly agreed on the payment of future sales commissions based on the volume of sales. The Heinmiller projections do not, as in *TAS*, contradict the written terms of the contract. See *TAS*, 491 F.3d at 637.<sup>FN7</sup>

As for other evidence of pre-contract negotiations, including evidence demonstrating why Lyman left his highly lucrative position at Guidant, as well as

the value of the terms of the contract (including the put option), none of this evidence is being offered to vary or contradict the written contracts. Rather, such evidence is relevant to the factual issues in the case regarding liability and damages.

Therefore, St. Jude's motion to exclude pre-contract negotiations and projections will be denied.

### **B. St. Jude financial information [No. 3]**

[11] St. Jude moves to exclude the introduction of any evidence, argument or reference to the financial condition, net worth, revenues, or profits of St. Jude or its parent company, St. Jude Medical, Inc. St. Jude argues that this evidence is inadmissible under FRE 403 as unfairly prejudicial because it may give the jury the false impression that a verdict would have little effect on the corporation's bottom line. Evidence of St. Jude's financial condition is relevant to the projection of plaintiffs' sales over the course of his Representative Agreement with St. Jude. Any potential prejudice can be cured through an appropriate limiting instruction. St. Jude's motion to exclude evidence regarding its financial condition will be denied.

### **C. Motive or intent for claimed breach of contract [No. 4]**

\*10 [12] St. Jude moves to exclude the introduction of any evidence, argument or reference related to St. Jude's unstated intent or motive for terminating the Representative Agreement. St. Jude argues that motive is irrelevant to a claim for breach of contract. St. Jude also argues that any probative value is outweighed by the potential prejudice if the Court allows evidence of St. Jude's motive to be presented at trial.

The Court understands the general proposition that if a party "has a legal right to terminate the contract ... its motive for exercising that right is irrelevant." *Tuf Racing Prods., Inc. v. American Suzuki Motor Corp.*, 223 F.3d 585, 589 (7th

St. Jude takes that simple rule and distorts it into a rather confusing motion which apparently anticipates a wide range of hypothetical, unstated evidence that plaintiffs might introduce at trial. The Court is in no position to hold, *in limine*, that any evidence somehow related to "motive" or "pretext" would be irrelevant to the claims and defenses in the instant case, especially when it has no idea what that evidence might be. In a general sense, such evidence could be relevant in the jury's determination of whether (or not) St. Jude terminated Lyman/ plaintiffs for cause.

Moreover, St. Jude fails to meet its burden under FRE 403 that the probative value of such evidence is outweighed by the danger of unfair prejudice or of misleading the jury. Therefore, St. Jude's motion to exclude all evidence of motive or intent will be denied.

### **D. Evidence of class action lawsuit [No. 5]**

[13] St. Jude's parent company, St. Jude Medical, Inc., is the target of a class action securities lawsuit currently pending in Minnesota federal district court. The lawsuit generally alleges that St. Jude Medical engaged in "channel stuffing," whereby it sold large quantities of CRM products through bulk sales in excess of a hospitals' needs, thereby boosting the current financial reporting period. St. Jude argues that any pleadings from that case, including a subpoena issued by the U.S. Department of Justice, should be excluded as inadmissible hearsay. St. Jude also argues that any reference to the class action suit should be barred as unduly prejudicial under FRE 403.

First, St. Jude argues that the class action pleadings are inadmissible hearsay, and the pleadings will be offered for purposes of proving the truth of the matters asserted therein. *See* Fed.R.Evid. 801(c). Plaintiffs intend to use the pleadings in its cross-examination of Heinmiller, who is a named defendant in the class action suit. If the pleadings are offered for an impermissible hearsay purpose, St.

Jude will have the opportunity to object at that particular time.

Second, evidence of the class action lawsuit is relevant to plaintiffs' liability claims and to damages. One of the proffered justifications for St. Jude's termination of Lyman was his conduct with respect to a bulk sale that occurred at St. Luke's Medical Center. Therefore, the fact and allegations of the class action lawsuit are relevant to determining whether St. Jude terminated plaintiffs for cause under the contract or for some other impermissible purpose.

<sup>FN8</sup> Also, in projecting sales (and damages), plaintiffs argue that St. Jude unreasonably interfered with their ability to maximize sales with St. Jude, and St. Jude's conduct with respect to bulk sales is one of the ways that plaintiffs allege interference. Even though the class action complaint alleges that St. Jude Medical, Inc. engaged in channel stuffing in 2005 and 2006, and plaintiffs were selling products for St. Jude in 2003-2004, at a minimum the class action lawsuit corroborates plaintiffs' theories about bulk sales in 2003-2004.<sup>FN9</sup>

\*11 Finally, the probative value of evidence regarding the class action lawsuit is not substantially outweighed by the danger of unfair prejudice under FRE 403. Any danger that the jury will accept the allegations of the class action lawsuit and assume that St. Jude is a "bad actor" can be alleviated by a properly-worded limiting instruction.

#### E. Evidence of attorney fees [No. 6]

[14] The Representative Agreement contains an attorney fee-shifting clause. St. Jude moves to exclude the introduction of any evidence or argument as to the amount or reasonableness of the attorney fees and court costs incurred by any party in this litigation. Plaintiffs do not oppose this motion, which is granted. This issue presents a question of law for the Court after a verdict is rendered by the jury. See *Huff v. Dobbins, Fraker, Tennant, Joy & Perlstein*, 243 F.3d 1086, 1090 (7th Cir.2001)

("attorney's fees are a matter for the court, not the jury"); *Cintas Corp. v. Perry*, 517 F.3d 459, 470 (7th Cir.2008) ("district court is in a superior position to observe the work of the attorneys ... and appraise the appropriate value of their services").

#### F. Choice of law [No. 7]

The Representative Agreement contains a choice of law provision directing the application of Minnesota law. St. Jude moves for the application of Wisconsin law, unless the parties demonstrate a conflict or meaningful difference with Minnesota law. Plaintiffs do not oppose this motion, which is granted. See *Schimpf v. Gerald, Inc.*, 52 F.Supp.2d 976, 1002 (E.D.Wis.1999) (if there is no "outcome determinative" conflict, the "law of the forum applies"); *Kochert v. Adagen Medical Int'l, Inc.*, 491 F.3d 674, 677 (7th Cir.2007) (ignoring choice of law clause where parties identified no conflict between states' laws).

#### G. Good faith and fair dealing [No. 8]

[15] Plaintiffs allege and will attempt to prove at trial that St. Jude breached the express terms of the Representative Agreement, as well as the implied covenant of good faith and fair dealing. Every contract includes an implied covenant of good faith and fair dealing, whereby a party under a contract may not unjustifiably hinder the other party's performance under the contract. See, e.g., *In re Hennepin County 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 502-03 (Minn.1995); *Metro Ventures, LLC v. GEA Assocs.*, 291 Wis.2d 393, 414-15, 717 N.W.2d 58 (2006).

St. Jude moves to exclude at trial any argument that St. Jude's breaches of the express terms of the written contract also constituted a breach of the implied covenant of good faith and fair dealing. St. Jude argues that the law does not support this "double-dipping" argument based on the same conduct. "Minnesota law does not recognize a separate claim for breach of the duty of good faith ... when it

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arises from the same conduct incorporated in claims for breach of express terms in the contract.” *Seren Innovations, Inc. v. Transcontinental Ins. Co.*, No. A05-917, 2006 WL 1390262 at \*8 (Minn.Ct.App.2006) (unpublished) (citing *Wild v. Rarig*, 302 Minn. 419, 234 N.W.2d 775, 790 (1975)).

\*12 [16] Plaintiffs intend to introduce evidence that St. Jude breached many of the express terms of the contract, as well as evidence that St. Jude engaged in additional intentional conduct that interfered with plaintiffs' performance under the Agreement. Therefore, plaintiffs' claim for breach of the implied covenant is actually separate from the claims under the express terms of the contract. Further, the entire course of conduct cannot be so easily separated. While the claims themselves are separate, there should be nothing to prevent a jury from concluding that an express breach merely provides further evidence that a party intentionally interfered and breached the implied covenant of good faith and fair dealing. St. Jude's motion to exclude argument that breaches of the express terms of the contract also constitute a breach of the implied covenant of good faith and fair dealing will be denied.

#### **H. Quash Trial Subpoena for John Heinmiller [D. 171]**

Plaintiffs served John Heinmiller with a trial subpoena at his place of work in St. Paul, Minnesota. St. Jude moves to quash Heinmiller's subpoena on the grounds that it was served outside of this judicial district and outside of 100-miles from this courthouse. See Fed.R.Civ.P. 45(b)(2)(A), (B).

Fed.R.Civ.P. 45(b)(2)(B) provides that “*Subject to* Rule 45(c)(3)(A)(ii), a subpoena may be served at any place ... outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection.” (emphasis added). In turn, Fed. R. Civ. 45(c)(3)(A)(ii) provides that on timely motion, the issuing court “must quash or modify a subpoena that ... requires a per-

son who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person ...”

The majority of courts interpret these provisions together to mean that a court may compel the trial testimony of a party or a party's officer even when the person to be compelled resides beyond the 100-mile range for subpoenas. See *Venzor v. Chavez Gonzalez*, 968 F.Supp. 1258, 1267 (N.D.Ill.1997); *Am. Fed'n of Gov't Employees Local 922 v. Ashcroft*, 354 F.Supp.2d 909, 915-16 (E.D.Ark.2003); *Archer Daniels Midland Co. v. Aon Risk Servs., Inc.*, 187 F.R.D. 578, 587 (D.Minn.1999); *In re Vioxx Prods. Liab. Litig.*, 438 F.Supp.2d 664, 666-67 (E.D.La.2006). As noted by the court in *Vioxx*, the “person who is not a party or an officer of a party” language of Rule 45(c)(3)(A)(ii) “supports the inverse inference that Rule 45(b)(2) empowers the Court with the authority to subpoena ... an officer of a party, to attend a trial beyond the 100 mile limit.” 438 F.Supp.2d at 667.

However, the Court disagrees with this interpretation of the provisions of Rule 45. Rule 45(b)(2) sets forth certain requirements for a subpoena to be properly served and to have the force to compel attendance. Rule 45(c)(3)(A)(ii) provides specific circumstances under which a court must quash a subpoena, “but it does not alter the requirements for proper service of a subpoena.” *Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. 213, 217-18 (E.D.La.2008). Therefore, to compel attendance at trial, the person “must be served with a subpoena in one of the places listed in Rule 45(b)(2) and not be subject to the protection in Rule 45(c)(3)(A)(ii), which protects nonparty witnesses who work or reside more than 100 miles from the courthouse, but not parties or party officers.” *Id.* at 218 (emphasis in original).

\*13 The Court agrees with the reasoning in *Big Lots Stores* and the other courts that adhere to the purported minority interpretation of the interplay between Rule 45(b)(2) and Rule 45(c)(3)(A)(ii). As

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one court noted, the majority position makes a “jump” that “may not logically follow from the text of the Rule.” *Mazloum v. District of Columbia Metropolitan Police Dep’t*, 248 F.R.D. 725, 727-28 (D.D.C.2008). “There is simply no ‘negative implication’ ... that Rule 45(c)(3)(A)(ii) subjects to subpoena officers of parties who are more than 100 miles from the place of trial whether or not they are within the range of the subpoena power defined in Rule 45(b)(2).” *Johnson v. Land O’Lakes, Inc.*, 181 F.R.D. 388, 397 (N.D.Iowa 1998).

[17] Ultimately, the “upshot of Rule 45(c)(3)(A)(ii) with respect to *party* witnesses is ... that a court is not *required* to quash a *properly* served subpoena even if it required a party witness to travel more than 100 miles.” *Id.* at 728 (emphasis in original); *see also JamSports and Entertainment, LLC v. Paradama Prods., Inc.*, No. 02 C 2298, 2005 WL 14917 (N.D.Ill.2005) (“Read in context, the cross-reference of Rule 45(c)(3)(A)(ii) in Rule 45(b)(2) is meant to reflect that even if service of a subpoena is otherwise proper under Rule 45(b)(2), the subpoena is to be quashed if it imposes a requirement identified in Rule 45(c)(3)(A)(ii)”).

Therefore, because service of the Heinmiller trial subpoena did not comply with any of the requirements of Rule 45(b)(2), it must be quashed. The Court appreciates the importance of Heinmiller’s adverse testimony to plaintiffs’ case-in-chief. However, Fed.R.Civ.P. 32(a)(4)(D) allows the introduction of videotaped deposition testimony when the attendance of a witness cannot be obtained by subpoena. *See Big Lots Stores*, at 219 (“It is true that a witness’s live testimony is often preferable to the presentation of deposition testimony. But the Federal Rules anticipate the unavailability of a witness and provide mechanisms to ensure that a party can first gather that witness’s testimony and then present it at trial”).

**NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:**

1. St. Jude’s motion to exclude certain expert opin-

ions of Plaintiffs’ expert Daniel Gotter [D. 124] is **DENIED**;

2. Plaintiffs’ motion to exclude the expert testimony and report of St. Jude’s expert Randall D. Wilson [D. 120] is **GRANTED**;

3. Plaintiffs’ motion to require St. Jude to produce certain witnesses for plaintiffs’ case-in-chief [D. 150] is **GRANTED-IN-PART** and **DENIED-IN-PART**, consistent with the foregoing opinion (see Section II, A);

4. Plaintiffs’ motion to preclude St. Jude from calling certain witnesses to testify at trial [D. 150] is **GRANTED**;

5. Plaintiffs’ motion to exceed the page limitation for the testimony of Marc Sportsman [D. 150] is **GRANTED**;

6. St. Jude’s motion for an order excluding any evidence or argument related to pre-contract negotiations, drafts, projections, and other parol evidence [D. 137] is **DENIED**;

\*14 7. St. Jude’s motion to exclude any evidence, argument or reference at trial related to the financial condition, net worth, profits or revenues of St. Jude or its parent company St. Jude Medical, Inc. [D. 137] is **DENIED**;

8. St. Jude’s motion to exclude any evidence, argument or reference at trial related to St. Jude’s unstated intent or motive for terminating the Representative Agreement and other claims breaches of contract [D. 137] is **DENIED**;

9. St. Jude’s motion to exclude any evidence, argument or reference at trial related to the pending class action lawsuit *In re St. Jude Medical, Inc. Securities Litigation* [D. 137] is **DENIED**;

10. St. Jude’s motion to exclude any evidence or argument at trial as to the amount or reasonableness of the attorneys’ fees and courts costs incurred by any party in this action [D. 137] is **GRANTED**;

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11. St. Jude's motion to apply Wisconsin law to all substantive issues, unless a meaningful conflict exists between Wisconsin and Minnesota law [D. 137] is **GRANTED**;

12. St. Jude's motion to exclude any argument at trial that St. Jude's alleged breaches of the express terms in the written contract also constituted a breach of the implied covenant of good faith and fair dealing [D. 137] is **DENIED**;

13. St. Jude's motion to quash the trial subpoena of John Heinmiller [D. 171] is **GRANTED**.

**SO ORDERED.**

FN1. St. Jude requests oral argument on its motions *in limine*. The Court finds that oral argument is unnecessary. See Civil L.R. 7.1(e).

FN2. Lyman is the sole owner and employee of CardioStat.

FN3. St. Jude objects to the Declaration of Kenneth West because he was not previously disclosed as an expert witness in this case. (D.169, 170). Dr. West's testimony only became relevant in response to St. Jude's *Daubert* challenge, so there was no requirement of prior disclosure. The use of supplemental evidence to defeat St. Jude's *Daubert* challenge is proper, and the Court will not strike the Declaration. See, e.g., *Nightlight Sys. Inc. v. Nitelites Franchise Sys., Inc.*, 2007 WL 4563875 at \*8-9 (N.D.Ga.2007).

FN4. These witnesses are: Richard Ames, Chris Kajfosz, Dr. Lanzarotti, and Dr. Niazi. (D. 178, St. Jude's response at 5).

FN5. St. Jude argues that Lia, who lives in Naperville, is outside of the Court's subpoena power because a map search indicates that the shortest driving route from

Naperville to this courthouse is 103.1 miles. See Fed.R.Civ.P. 45(b)(2)(B) (subpoena may be served at any place outside the district but within 100 miles of the place specified for trial). St. Jude did not formally move to quash Lia's subpoena, but the argument is without merit, as the proper measurement is a straight line measurement, or "as the crow flies." See *Hill v. Equitable Bank, Nat. Ass'n*, 115 F.R.D. 184, 186 (D.Del.1987). Using the GeoBytes "city distance tool," Naperville is 90 miles from Milwaukee. <http://www.geobytes.com/citydistancetool.htm>.

FN6. The actual deposition lasted 7 hours.

FN7. As noted by the court in *TAS*, "Had TAS and Cummins intended the minimum royalty payments to set a minimum sales floor but in fact meant to require Cummins to pay significantly more than the amount outlined in the minimum royalty payment schedule, they were obligated, under Illinois law, to include this understanding within the four corners of the contract." 491 F.3d at 637.

FN8. St. Jude argues that this goes to motive and intent, which is irrelevant as argued in one of St. Jude's motions *in limine* (# 4). As discussed above, this argument is without merit. In this context, evidence with regard to St. Jude's motivation for terminating the contract are separate from whether St. Jude actually terminated the contract "for cause."

FN9. Magistrate Judge Noel granted a motion to compel the production of documents by St. Jude Medical dating back to October 2004.

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END OF DOCUMENT

TAB C



Westlaw

Not Reported in F.Supp.2d  
Not Reported in F.Supp.2d, 1998 WL 566668 (N.D.Ill.)  
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**H**

The Law

Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois.  
SCRANTON GILLETTE COMMUNICATIONS,  
INC., Plaintiff,  
v.

William O. DANNHAUSEN, et al., Defendant.

No. 96 C 8353.

Aug. 26, 1998.

MEMORANDUM AND ORDER ON DEFENDANTS' MOTION IN LIMINE

URBOM, Senior District J.

\*1 The defendants, William O. Dannhausen, Eugene H. McCormick, Jerry Curtice, Laurie N. Dlugos, and McCormick Communications Group Ltd., move in limine to exclude twenty-three witnesses<sup>FN1</sup> and twenty-nine documents<sup>FN2</sup> that the plaintiff failed to produce pursuant to the defendants' discovery requests as required by the Federal Rules of Civil Procedure; in particular, Rule 26(e)(2). The plaintiff contends, however, that it has fully complied with all its discovery obligations and therefore its witnesses and documents at issue should not be barred from trial.

FN1. Edward Gillette, Linda Lambden, Dan Serum, Tim Campbell, Tami Morrell, Sheldon Schultz, Adrienne Miller, Danny McBride, Keith Doak, Adrena Bauman, Jim Henderson, John Parrish, Nora McElroy, Frank Johnson, Nancy Horvat, Lorence Wenke, Juanita Jones Wilmore Paul Thomas, Bill Longfellow, Alden Longfellow, John Nelson, Lynn Whitmore, and Frank Paulo.

FN2. Plaintiff's Exhibits 79, 80, 89, 90, 91, 92, 113, 115, 117, 126, 128, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 172, 173, 179, 180, 222, and 225.

The general purpose of the Federal Rules of Civil Procedure is to promote liberal discovery in an effort to narrow the issues for trial and to prevent unfair surprise. Rule 26(e)(2), in line with this purpose, imposes a duty on a party to amend and supplement previous discovery requests when its prior response is known to be incomplete or incorrect and if the correction is not otherwise communicated to the other party during discovery. FED. R. CIV. P. 26(e)(2).<sup>FN3</sup> No motion to compel is necessary. *Id.* See also 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE 26.132[3] (3d ed.1998) (citing *Alldread v. City of Grenada*, 988 F.2d 1425, 1436 (5th Cir.1993) ("Rule 26 imposes no requirement, express or implied, that a motion to compel precede a court's imposition of a sanction ... for failure to supplement expert interrogatory responses."). Rather the duty to supplement discovery requests lingers on without subsequent solicitation. *Pasant v. Jackson Nat'l Life Ins. Co.*, 137 F.R.D. 255, 257 (N.D.Ill.1991). The Rule, however, does not require a party to tender any information not within the scope of previous discovery requests. See FED. R. CIV. P. 26(e)(2). Furthermore, a party need not supplement its answers to prior discovery if the information has been made known to the other party otherwise through the discovery process. See FED. R. CIV. P. 26(e) advisory committee's note (1993).

FN3. Although the plaintiff's original filing of its case was in the Circuit Court of Cook County, the rule governing the parties conduct in discovery is essentially the same; "[a] party has a duty to seasonably supplement or amend any prior answer or response whenever new or additional information subsequently becomes known to that party." Ill. Sup.Ct. Rule 213(i).

Rule 26(e)(2) itself does not provide sanctions for its violation. FED. R. CIV. P. 26(e); *Pederson v.*

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*Louisiana State Univ.*, 912 F.Supp. 892, 935-36 (M.D.La.1996). Nor does Rule 37(c)(1)'s exclusionary mandate apply to its violations. See, e.g., *Brasic v. Heinemann's Inc. Bakeries*, 1996 WL 495562, at \*3 (N.D.Ill.1996) (finding that Rule 37(c)(1) applies only to violations pertaining to mandatory disclosures and not discovery requests.). Rather sanctions for failure to comply with Rule 26(e)(2) fall squarely within the trial court's discretion. *Moore v. Boating Industry Associations*, 754 F.2d 698, 715 (7th Cir.1985), vacated, *Boating Industry Associations v. Moore*, 474 U.S. 895, 106 S.Ct. 218, 88 L.Ed.2d 218 (1985), *aff'd in part and rev'd in part*, *Moore v. Boating Industry Associations*, 819 F.2d 693 (7th Cir.1987); see also *Scaggs v. Consolidated Rail Corp.*, 6 F.3d 1290, 1295 (7th Cir.1993) ("The district court has broad discretion when deciding if sanctions for discovery violations should be imposed"); *Heidelberg Harris, Inc., v. Mitsubishi Heavy Industries, Ltd., and MLP U.S.A.*, 1996 WL 680243, at \*8 (N.D.Ill.1996) ("The [ ] Court has broad discretion in determining whether to impose sanctions ....") (citations omitted).

\*2 Should the court determine a party has in fact violated Rule 26(e)(2) by failure to timely supplement its answers to interrogatories or requests for document production the court may, at its discretion, impose sanctions including excluding the evidence, granting a continuance, or any other action this court deems appropriate under the circumstances. FED. R. CIV. P. 26(e) advisory committee's note (1970); see also *Holiday Inn, Inc. v. Robertshaw Controls Co.*, 560 F.2d 856, 858 (7th Cir.1997). The decision to award sanctions, in light of a violation of the discovery rule, the court must consider not only the importance of the evidence to the case but must weigh that importance against the possible prejudice to the contesting party resulting from its admission into evidence. *Moore*, 754 F.2d at 515; see also 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE 26.132[2] (3d ed.1998) (other factors to guide the court's determination include "[t]he possibility of curing prejudice

by granting a continuance" and "[t]he explanation, if any, for the party's failure to comply with the duty to supplement."). Indeed, the goal behind Rule 26(e)(2) is to prevent any unfair, prejudicial surprise at trial. See *Heidelberg Harris, Inc., v. Mitsubishi Heavy Industries, Ltd., and MLP U.S.A.*, 1996 WL 680243, at \*8 (N.D.Ill.1996) (" '[t]he purpose of [Rule 26(e)(2)] is to prevent trial by ambush.' " (quoting *Gorman v. Chicago Housing Authority*, 1991 WL 10893, at \*2 (N.D.Ill.1991))).

#### Application and Analysis

Initially the plaintiff filed its claim in the Circuit Court of Cook County. For nearly two years, while the case remained in that court, the parties actively engaged in discovery. In particular, the defendants served at least one set of interrogatories and two sets of document requests in an effort to obtain any information that may lead to admissible evidence at trial. The plaintiff responded to the defendants' first set of interrogatories naming nineteen potential witnesses. The plaintiff's supplemental response named no further witnesses. With respect to the defendants' request for documents, the plaintiff responded generally that its investigation was ongoing and all relevant documents would be produced at a time in the future agreed upon by the parties. Occasionally, the plaintiff objected on grounds that the request called for confidential business communications.

In December of 1996, the plaintiff voluntarily dismissed its claim in Cook County and filed the present suit in this court under the Lanham Act. In today's telephonic conference I ruled that the discovery procedures of the state court action were effective but that no obligation to supplement discovery answers continued after the state court action was dismissed. A discovery deadline was set for July 3, 1997, in this federal court action. Even so, no further discovery requests were made by either party during the first five months of litigation in this court.

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\*3 On June 30, 1997, the plaintiff filed a motion to amend its complaint and to extend discovery beyond the July 3, 1997, deadline. The motion to amend was granted. In ruling on the motion to extend discovery Judge Lindberg at least allowed further discovery relating to the new amendments to the plaintiff's complaint; more specifically, claims against Jerry Curtice, a new defendant, and a new claim for trade dress infringement. The parties disagree with respect to any further limitations or allowances made by Judge Lindberg.

Subsequently, the defendants served another set of interrogatories and document requests on the plaintiff. Objecting on the basis of the limited discovery order, the plaintiff tailored its answers and document production to fall within its purview as the plaintiff's counsel understand it.

In August, the defendants moved to compel the plaintiff to answer the interrogatories and to produce the documents requested. On August 22, 1997, the motion was granted. A deadline of August 28, 1997, was set for the plaintiff's response. No response was made on or before this deadline.

On August 29, 1997, one day after the deadline, the plaintiff produced two boxes of documents. These boxes contained at least fifteen of the twenty-nine documents the defendants seek to bar from trial. In addition, the plaintiff supplemented its answers to the defendants interrogatories revealing at least six potential witnesses.

Furthermore, in its Memorandum in Opposition to the defendants' Motion in Limine, the plaintiff explains that nine <sup>FN4</sup> additional witnesses had not been previously disclosed because it did not have knowledge of them until the filing of the pretrial order. I shall exclude them. The plaintiff has not shown diligence in searching for them or that allowing them to testify would not be unfair to the defendants.

FN4. Danny McBride, Keith Doak, Adrena Bauman, Jim Henderson, John Parrish,

Nora McElroy, Bill and Alden Longfellow and John Nelson.

Conclusion

IT IS ORDERED that the defendants' Motion in Limine is granted as to the following witnesses:

Lynn Whitmore

Linda Lambden

Dan Serum

Sheldon Schultz

Tim Campbell

Adrienne Miller

Frank Paulo

Juanita Wilmore

Frank Johnson

Danny McBride

Keith Doak

Adrena Bauman

Jim Henderson

John Parrish

Nora McElroy

Bill Longfellow

Alden Longfellow

John Nelson

and the motion otherwise is denied.

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END OF DOCUMENT

TAB D

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(Cite as: 2004 WL 421984 (N.D.Ill.))

**H**

United States District Court, N.D. Illinois, Eastern  
Division.

TY, INC., Plaintiff,

v.

PUBLICATIONS INTERNATIONAL, LTD., De-  
fendant.

**No. 99 C 5565.**

Feb. 17, 2004.

Avrum Sidney Katz, Joseph Eben Cwik, Michael  
A. Bondi, Welsh & Katz, Ltd., Chicago, IL, for  
Plaintiff.

Anthony C. Valiulis, Kimberly A. Krugman, Much,  
Shelist, Freed, Denenberg, Ament & Rubenstein,  
P.C., Michael John Merrick, Penny, Nathan, Kahan  
and Associates, Ltd., Chicago, IL, Wayne B.  
Giampietro, Stitt, Klein, Daday & Aretos, Arling-  
ton Heights, IL, E. Leonard Rubin, John L. Hines,  
Jr., Sachnoff & Weaver, Ltd., Chicago, IL, Paul M.  
Faker, William F. Patry, Baker, Botts LLP, New  
York, NY, for Defendant.

*MEMORANDUM OPINION AND ORDER*

ZAGEL, J.

\*1 This is a copyright and trademark infringement  
suit brought by Ty, Inc. ("Ty") against Publications  
International, Ltd. ("PIL"), in connection with PIL's  
publication and sale of books featuring Ty's Beanie  
Babies plush toys. Before me are PIL's Motion for  
Reconsideration, or, in the Alternative, to Strike  
and its Motion to Strike Plaintiff's Motion for  
Leave to Take Discovery Against Counsel for PIL.

*Motion for Reconsideration*

On October 22, 1999, Ty served its first discovery  
requests on PIL, including Interrogatory 8:  
"Identify each person, including but not limited to  
expert witnesses, having knowledge of discoverable

matters who may be called by you to testify as a  
witness at trial, and for each such person ... please  
state what you anticipate to be the substance of said  
person's testimony at trial." Ty also served Interrog-  
atory No. 9 in which it asked PIL to "[s]pecify the  
facts and witnesses with knowledge of the facts  
supporting the affirmative defense to the Complaint  
in this action." In response to both interrogatories,  
PIL named six individuals.

At the request of both parties, an expedited eight-  
week discovery period was scheduled with a cutoff  
date of May 2, 2000. Neither party requested a dis-  
covery extension, and discovery did indeed close  
on May 2. Two months thereafter, Ty moved for  
summary judgment in connection with its copyright  
and trademark related claims, which I granted as to  
the copyright claims but denied as to the trademark  
claims. Ty then moved for summary judgment for  
monetary relief as to its copyright claim, which I  
granted and subsequently entered final judgment on  
the claim under Federal Rule of Civil Procedure  
54(b).

PIL appealed both summary judgment rulings, and  
the Seventh Circuit reversed. *Ty, Inc. v. Publica-  
tions Int'l, Ltd.*, 292 F.3d 512 (7th Cir.2002), *cert.  
den.*, 537 U.S. 1110, 123 S.Ct. 892, 154 L.Ed.2d  
783 (2003). Rehearing and rehearing *en banc* were  
denied by the Court on July 11, 2002, and Ty's Peti-  
tion for Certiorari before the U.S. Supreme Court  
was denied on January 13, 2003. *Ty, Inc. v. Publica-  
tions Int'l, Ltd.*, 537 U.S. 1110, 123 S.Ct. 892, 154  
L.Ed.2d 783 (2003). On February 3, 2003, PIL  
served supplemental interrogatory responses,  
identifying 14 new persons with information relev-  
ant to PIL's defenses and who may be called upon  
at trial, none of which were included in its re-  
sponses to Interrogatories No. 8 and 9 while discov-  
ery was open.<sup>FNI</sup> On June 5, 2003, I struck the 14  
additional witnesses from PIL's supplementary in-  
terrogatory responses-and its ability to call these  
witnesses at trial-on the ground that PIL had failed  
to supplement its interrogatory response as required

by Rule 26 and that Rule 37 sanctions were therefore justified. *Ty, Inc. v. Publications Int'l, Ltd.*, No. 99 C 5565, 2003 WL 21294667, at \*7 (N.D.Ill. June 4, 2003). PIL now moves for reconsideration of that decision.

FN1. The supplemental response itself named 15 additional trial witnesses, but one of them, Scott Rogers, was identified and deposed during discovery, so Ty has no objection to PIL's naming him as a potential trial witness.

PIL first argues that it should be permitted to amend its witness list because a party is not required to identify trial witnesses until the pretrial conference. See *Hottenstein v. Burlington N. R.R. Co.*, No. 96 C 8616, 1998 WL 378429 (N.D.Ill. July 1, 1998) (denying motion to preclude witnesses disclosed after close of discovery because "a party is not required to identify trial witnesses until the pretrial order."); *Kedzior v. Talman Home Fed. Sav. & Loan Ass'n of Illinois*, No. 89 C 4188, 1990 WL 70855, at \*7 (N.D.Ill. May 10, 1990) ("the better and more widely adopted rule is that it is inappropriate to expect counsel to provide this information until the pretrial conference."). While this is so, the problem with PIL's amendments is that the individuals it seeks to add were never identified during discovery as persons having relevant knowledge to the issues in this case, despite Ty's interrogatories seeking this information. Federal Rule of Civil Procedure 26 requires a party to provide other parties with "the names and, if known, the addresses and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses ..., identifying the subjects of the information." Fed.R.Civ.P. 26(a)(1)(A). Rule 26 also requires a party to supplement or amend its disclosures and discovery responses if it learns that the information disclosed or the response is "incomplete or incorrect and if the additional corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed.R.Civ.P.

26(e)(1). The purpose of supplementary discovery "is to prevent trial by ambush." *Heidelberg Harris, Inc. v. Mitsubishi Heavy Indus., Ltd.*, No. 95 C 0673, 1996 WL 680243, at \*8 (N.D. Ill. Nov 21, 1996). "If a party is allowed to withhold the supplementation of its discovery responses until after fact discovery is closed, the purpose of [Rule 26] is effectively frustrated because the opposing party is denied the opportunity to conduct discovery on the supplemental responses." *Id.* Therefore, it is not PIL's belated identification of trial witnesses, but rather its belated identification of people with knowledge relevant to the issues in this case, in violation of Rule 26, to which Ty objects.

\*2 PIL further argues that even if it did violate Rule 26, I failed to engage in the requisite analysis in determining to impose exclusion under Rule 37. The rule provides that "[a] party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1)... is not, unless such failure is harmless, permitted to use as evidence at a trial ... any witness or information not so disclosed." Fed.R.Civ.P. 37(c)(1). "The fundamental purpose of Rule 37 is to ensure that the merits of the case can be addressed at trial without any party suffering prejudice as a result of nonfeasance or malfeasance during discovery." *Weiland v. Linear Constr., Ltd.*, No. 00 C 6172, 2002 WL 31307622, at \*2 (N.D. Ill. Oct 15, 2002). The Seventh Circuit has stated that "the sanction of exclusion is automatic and mandatory unless the sanctioned party can show that its violation of Rule 26(a) was either justified or harmless." *Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 742 (7th Cir.1998). However, the Court has also stated that "[t]he determination of whether a Rule 26(a) violation is justified or harmless is entrusted to the broad discretion of the district court." *Mid-America Tablewares, Inc. v. Mogi Trading Co., Ltd.*, 100 F.3d 1353, 1363 (7th Cir.1996); see also *Salgado*, 150 F.3d at 739. "A district court need not make explicit findings concerning the existence of a substantial justification or the harmlessness of a failure to disclose." *David v. Caterpillar, Inc.*, 324 F.3d 851, 857 (7th

Cir.2003). However, “the following factors should guide the district court’s discretion: (1) the prejudice or surprise to the party against whom the evidence is offered; (2) the ability of the party to cure the prejudice; (3) the likelihood of disruption to the trial; and (4) the bad faith or willfulness involved in not disclosing the evidence at an earlier date.” *Id.* at 857.

In connection with my earlier ruling, I found that PIL’s failure to supplement its interrogatory response as required by Rule 26 was unjustified:

PIL’s proffered justification for supplementing its witness list at this late stage is the alleged “relatively late production” of key documents relating to Ty’s misuse, the same justification offered above for additional merits discovery. Although parties may supplement relevant discovery responses with documents and information that has become available since the close of discovery, it has been clearly established, as discussed above, that PIL had access to the documents from which it derived these fourteen proposed witnesses for three weeks prior to the close of discovery. However, PIL did not name these additional witnesses before the May 2, 2000 cutoff. Furthermore, PIL made no attempt to supplement their responses by naming these witnesses during the two months between the close of discovery and the filing of Ty’s summary judgment motion. As with its request for additional merits discovery, PIL chose not to name these fourteen witnesses when discovery was open or shortly thereafter. Because PIL has offered no explanation, let alone a reasonable one, as to why it did not do so, I am striking the fourteen new witnesses from its responses.

\*3 *Ty, Inc.*, 2003 WL 21294667, at \*7. I explained PIL’s failure to take discovery as follows:

The fact of the matter is that PIL chose not to explore these issues when discovery was open. It is inexplicable why PIL did not take whatever discovery it needed in this regard when it had the chance. Any alleged shortcoming is the result of its own calculated decision not to pursue the defense in dis-

covery.... I can infer-and I do infer-that in all likelihood, counsel for PIL made a strategic decision, just as any lawyer makes strategic decisions, to explore other issues at the expense of leaving the misuse defense undeveloped. I suspect that the value of the defense may not have been fully apparent to PIL until Judge Posner hinted that a misleading statement in Ty’s standard copyright licenses “might constitute copyright misuse, endangering Ty’s copyrights.” *Ty, Inc.*, 292 F.3d at 520. Alternatively, it may well have been that PIL intended to raise this defense, as it now asserts, but that it did not need discovery in order to do so. In any event, PIL has made their bed, and Ty is entitled to have them lie in it.

*Id.* at 7, 7 n. 6. Accordingly, I rejected PIL’s claim that its late disclosure was justified because of Ty’s allegedly late production of the documents. The best explanation for PIL’s failure comes from its own brief:

In a perfect world PIL would have been able to review the documents, develop a strategy, identify the witnesses and amend the answers within the three weeks left in discovery or the two months thereafter before the parties became locked in the summary judgment proceedings. Unfortunately, PIL was at the time represented by two small-firm practitioners, dwarfed by Ty’s large-firm team, and was unable to do so.

While this may be true, it unequivocally reveals that PIL’s failure was its own doing.

Along with the lack of justification, allowing the new trial witnesses to testify-with discovery now closed-would prejudice Ty. Two of the named witnesses are Ty’s trial attorneys and have been from the onset of this case. Compelling them to testify against their own client would prejudice Ty at this late stage. Even accepting PIL’s offer to not seek disqualification of the attorneys, forcing them to testify against their own client is against public policy, as explained by the Seventh Circuit:

The roles of attorney and witness are usually in-



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compatible. A witness is supposed to present the facts without a slant, while an attorney's job is to advocate a partisan view of the significance of the facts. One person trying to do both is apt to be a poor witness, a poor advocate, or both.

*Gusman v. Unisys Corp.*, 986 F.2d 1146, 1148 (7th Cir.1993); see also *United States v. McCorkle*, No. 93 C 6528, 1994 WL 317702, at \*3 (N.D.Ill. June 23, 1994) ("There is a strong policy against allowing lawyers to also act as witnesses."). While it may be true that documents involving the attorneys may be offered into evidence by PIL at trial, that is very different from forcing them to take the witness stand against their own client.

\*4 Regarding the remaining witnesses, Ty has not had the opportunity to depose them or otherwise develop evidence to contest their anticipated testimony. See *Scranton Gillette Communications, Inc. v. Dannhausen*, No. 96 C 8353, 1998 WL 566668 (N.D.Ill. Aug.26, 1998) (precluding plaintiff from presenting trial witnesses not disclosed until the filing of the pretrial order because allowing them to testify would be unfair to defendants); *Boynton v. Monarch*, No. 92 C 140, 1994 WL 463905 (N.D.Ill. Aug.25, 1994) (it would constitute unfair surprise to the defendant to admit the testimony of a witness plaintiff disclosed only in the pretrial order-and not in supplemental answers to interrogatories-because defendant had no opportunity to depose the witness). Ty should not be put in the position of having to scramble to track down these individuals to see what they may say if called to testify, and then prepare rebuttal evidence or testimony, when it should be focusing its resources on preparing for trial. PIL claims that Ty can "hardly be prejudiced or surprised" because the identity of the witnesses was obtained from Ty's own document production.<sup>FN2</sup> However, merely because the names of these witnesses appeared, among hundreds of other names, somewhere in the thousands of pages of documents produced by Ty, does not mean that Ty should have anticipated that PIL would call these individuals as trial witnesses and

deposed them accordingly. See *Boynton*, 1994 WL 463905 (plaintiff could not name trial witnesses who were not disclosed during discovery even if the witnesses' names appeared on documents produced by defense because the mere appearance of the names on documents produced did not give defendant sufficient knowledge of the witnesses' relevance to the case prior to the close of discovery, and allowing the witness to testify would constitute "unfair surprise" to the plaintiff); *United States v. 2016 N. 77th Court*, No. 91 C 7755, 1993 U.S. Dist. LEXIS 2523, at \*14 (N.D.Ill. March 3, 1993) (recommending that court reject government's claim that it should be permitted to call certain witnesses at trial notwithstanding that it had not identified these witnesses in response to an interrogatory, because the government produced documents that revealed the "existence and knowledge of these persons; the mere production of documents did not satisfy the government's discovery obligations).

FN2. PIL additionally claims that with respect to new witness Ty Warner, it had specifically identified Warner as someone who it wanted to depose during discovery. While this may be true, the fact remains that the aforementioned deposition was never taken. More importantly, Ty Warner-just like the other new witnesses-was never identified, either initially or as a supplement before the close of discovery, in PIL's Interrogatory No. 8 or 9.

PIL also asserts that if there is any prejudice to Ty, it can be cured by Ty "pick[ing] up the phone" to see how these witnesses will testify because each of the new witnesses has some type of relationship with Ty. Apart from being pure speculation, such a remedy might well be of no value to Ty for purposes of impeachment at trial. More importantly, the assertion that each witness is somehow in Ty's control is simply not true. Although some of the named individuals may have, at one time, been employees of Ty's former licensees, the licenses between Ty and these licensees have since expired

or been terminated, so there is no "relationship" between Ty and any of the non-trial counsel individuals. As a final assertion, PIL claims that any prejudice could also be cured by reopening discovery to allow Ty to depose the new witnesses. However, we are well past the discovery cutoff in this case, and I will not permit PIL to use the new witness designations as a backdoor method for reopening discovery. *See Great-West Life & Annuity Ins. Co. v. Weisz Michling Hofman, P.C.*, No. 01 C 2470, 2002 WL 1067707 (N.D.Ill. March 25, 2002) (denying defendants' motion to reopen discovery because defendants did not see fit to conduct requested discovery before close of discovery). Accordingly, I find that any prejudice to Ty cannot be cured or that if it can be cured, it can be done so only at great expense to Ty. Therefore, I deny PIL's motion seeking reconsideration of my decision to preclude it from naming the aforementioned fourteen witnesses.

#### *Alternative Motion to Strike*

\*5 In the event that I uphold my prior ruling striking PIL's amendments-which I do-PIL asks that I also strike the amended interrogatory responses recently served by Ty identifying its trial witnesses. As background, on March 7, 2000, PIL served its second interrogatories on Ty, including Interrogatory 15: "State the name, address and telephone number of each person Plaintiff intends to call as a witness at the trial of this case, and the subject matter of the testimony to be given by that individual." On March 17, 2000, when discovery was still ongoing, Ty responded that it "has not yet identified the witnesses it intends to call at trial." On September 16, 2003, Ty filed its Supplemental Response to PIL's Interrogatory No. 15 identifying six individuals whom it expected to call as trial witnesses. Ty claims that it did not disclose the identity of these witnesses until this date because it did not determine who it would call as trial witnesses until then.

PIL argues that for the same reasons for which I

have struck its supplemental responses, I should also strike Ty's supplemental responses. However, there is a material difference between the six witnesses disclosed by Ty and the fourteen witnesses disclosed by PIL. All of Ty's witnesses were identified as persons with relevant knowledge, either by PIL or by Ty, and were deposed by the parties during discovery. In other words, there was no Rule 26 violation. PIL cannot reasonably claim that it did not know about the potential for these six individuals to be designated as witnesses. Therefore, PIL will suffer no harm or surprise as a result of Ty's supplementation. Rather, PIL's only viable claim is one of timing-that Ty has somehow acted in bad faith by never attempting to answer during discovery PIL's Interrogatory No. 15 seeking the identity of Ty's trial witnesses and by waiting seven months after the return of jurisdiction to this Court before doing so. However, although there is no absolute prohibition on interrogatories seeking identification of trial witnesses, such information "is not typically divulged during the discovery stage of a trial." *Kedzior*, 1990 WL 70855, at \*7. Instead, "the better and more widely adopted rule is that it is inappropriate to expect counsel to provide this information until the pretrial conference." *Id.* at \*7. Accordingly, the timing of this disclosure is not an appropriate basis, by itself, to strike these witnesses.

#### *Motion to Strike Plaintiff's Motion for Leave to Take Discovery Against Counsel for PIL*

In the fall of 2003, Ty discovered that in approximately August of 2003, Judge Richard A. Posner-the author on appeal in this case concerning the issue of copyright fair use-wrote an unpublished article entitled "Fair Use and Statutory Reform in the Wake of Eldred," which was written with William F. Patry, counsel for PIL. Accordingly, Ty moved to take limited discovery against Patry concerning the drafting of the foregoing article and his dealings with Judge Posner. At the November 20, 2003 status hearing, I suggested that there were two areas appropriate for inquiry: (1) whether Patry made

representations to others about the article or about the work he was doing with Judge Posner, except any representations he made to his own client; and (2) whether the article in any way, even in its draft forms, touched upon the precise issue which was raised in the appeal in this case. On December 2, Ty wrote to Patry requesting the aforementioned discovery along with additional information beyond the scope of what I found to be reasonable. Patry responded on December 16 by providing answers to the two areas suggested at the November 20 status and to some areas beyond the scope of those suggestions and by simultaneously moving to strike Ty's motion seeking discovery against Patry. As it prepared its opposition to PIL's motion to strike, Ty submitted another request seeking more information beyond the scope of my November 20 suggestions. Patry responded on January 8, 2004 by noting his continued objection to this line of discovery but nonetheless providing some more information. In its January 16 opposition to the motion to strike, Ty requested that I require Party to disclose two more categories of information: (1) whether he and Judge Posner are still collaborating on the Article and whether there is any plan for future collaboration between the two; and (2) correspondence between the two, whether in electronic or other form.

\*6 In response to the motion at hand, I find that Patry has now given more information than I said was reasonable on November 20. This is certainly enough information for Ty, if it should so choose, to file either a motion to recuse Judge Posner in the Seventh Circuit or a complaint under the Rules of the Judicial Council of the Seventh Circuit Governing Complaints of Judicial Misconduct or Disability. Accordingly, I see no reason for further inquiry.<sup>FN3</sup>

FN3. This case demonstrates that lack of civility does not always occur from lawyers who fear they will come up short on the law. White moved for limited discovery relating to Patry's relationship with Judge Posner on the ground that "[s]uch

information is relevant and may be essential in the event Ty later deems it necessary to file a motion in the Court of Appeals concerning Judge Posner's continued involvement in this case." Patry had the better argument on this issue but he ought to reconsider his rhetoric. In response, he wrote in part:

... The Court should summarily dismiss Plaintiff's frivolous, *ethically challenged motion*....

... Ty, although raising the gravest type of allegations that can be made against a judge, *cowardly does so only by implication* ... Like *Senator McCarthy's lists*, Ty will not say what they think the impropriety is ... [Ty] *lacks the courage and the ethical compass* to do so. Instead they are *misusing this Court in an unseemly effort to besmirch blameless reputations*.

... Since Ty *lacks the courage* to state what the alleged misconduct is, we are, of course, left to conjecture.

... I am *deeply disgusted* by the nature and manner of the accusations Ty's counsel infer (since they *lack the courage* of stating them). *It is a new low even for them*.... Ty chose to file a *sneak attack*... inferring the gravest violations of ethical canons. Such behavior simply cannot be countenanced.

... The motion should be denied summarily and PIL should be awarded all attorney's fees and costs in having to reply to *such a regrettable breach of procedure and common decency*, unsupported by any valid legal or factual basis.

(emphasis added). The passages I have emphasized have no place in legal dis-

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course. Patry should learn to hold his thunder until he is actually accused of some form of wrongdoing and, even then, ought to be far more careful. Insofar as he thought he was defending an excellent judge, it does no service to Judge Posner (who needed no defenders) to have a simple, neutral question in this court's record characterized as an accusation of the "gravest type."

For the reasons above, PIL's Motion for Reconsideration or, in the Alternative, to Strike and its Motion to Strike Plaintiff's Motion for Leave to Take Discovery Against Counsel for PIL are DENIED.

N.D.Ill.,2004.

Ty, Inc. v. Publications Intern., Ltd.

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TAB E

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(Cite as: 2008 WL 1883435 (N.D.Ill.))

## H

Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois, Eastern  
Division.

LANCELOT INVESTORS FUND, L.P., Plaintiffs,  
v.

TSM HOLDINGS, LTD., Ranger Credit Company,  
LLC, Ranger Credit Partners II, Ltd., Design Extended  
Service, Ltd., George C. Mcingvale, Jr., and  
Debora Mcingvale, Defendants.

No. 07 C 4023.

April 28, 2008.

Bryan Frederick Stroh, William Jay Dorsey, Katten  
Muchin Rosenman LLP, Chicago, IL, for Plaintiff.  
Carie-Megan Ann Flood, James Matthew Goodin,  
Patrick Sean Coffey, Simon A. Fleischmann, Locke  
Lord Bissell & Liddell LLP, Travis Brett  
Wolfinger, Fox, Hefter, Swibel, Levin & Carroll,  
LLP, Chicago, IL, Eugene B. Wilshire, Kevin M.  
Madden, Wilshire Scott & Dyer P.C., Houston, TX,  
for Defendants.

### *MEMORANDUM OPINION AND ORDER*

JEFFREY COLE, United States Magistrate Judge.

## I

### **BACKGROUND**

\*1 Defendants have lodged two counterclaims against Lancelot: fraud in the inducement of their loan agreement and fraud in the inducement and breach of a post-foreclosure contract, for which damages "in excess of \$400,000.00" were pled. Lancelot issued discovery requests for a calculation of these damages on October 19, 2007, meaning that responses were due 30 days later on November 19, 2007. Fed.R.Civ.P. 33(b)(2); 34(b)(2)(A); 36(a)(3). While responses were pending, the court

entered an order that discovery would be completed by February 1, 2008. (Dkt.# 37). Defendants' discovery responses-provided on November 19th-included no calculation of damages, but merely reiterated the defendants' claim that they were in excess of \$400,000. Lancelot expressed its dissatisfaction, and after a series of unsuccessful conferences to resolve the dispute, it filed a motion to compel on January 3, 2008.

On January 8, 2008, I granted Lancelot's motion, and directed the defendants as follows:

Supplemental answers to the interrogatories will be provided by 1/14/08. Financial statements and tax returns are to be provided by 1/14/08, and compliance with the remaining outstanding document requests shall be on or before 1/23/08.

(Dkt.# 46). Defendants supplemented their discovery responses on January 14th, but failed once again to provide any support for their damage claim, despite the court's order.

Lancelot deposed defendants, George McIngvale and Debora McIngvale, on January 18th and 30th, respectively. They maintained their claim for damages in excess of \$400,000 throughout the depositions, but provided no information in support. On January 23rd, the defendants produced what they claimed to be all remaining documents' responsive to Lancelot's discovery requests. There still was no damages computation beyond the allegation in the counterclaim. Discovery closed a week later.

On February 4th, the parties jointly asked Judge Coar to extend the discovery deadline to February 28 2008, for certain limited purposes, which included the completion of the depositions of the McIngvales "to give testimony related to subsequent documents that defendants are producing in this case that were not available to plaintiff at the time the [McIngvales] were originally deposed. The plaintiff explicitly reserved the right to seek sanc-

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tions against the defendant for alleged discovery violations, "including without limitation the dismissal of their counterclaims, attorneys' fees and costs, and such other relief as this Court deems just and proper." (Dkt.# 50). Judge Coar granted the motion (Dkt.# 53).

On February 22, 2008, I entered an order giving the defendants leave to redepose the McIngvaes in Chicago with each deposition not to exceed three hours. [Dkt. # 61]. On March 3, 2008, Lancelot complained by email to defendants that its "final" production still did not contain any documents supporting their damages claim. Defendants assured Lancelot that they would produce a detailed accounting of damages relating to their counterclaim so that the issue could be addressed during the continued depositions of the McIngvaes on March 5, 2008. (*Response to Plaintiff's Motion to Exclude*, at 2). But on that day, before the depositions could begin, defendants informed Lancelot that final calculations had not been completed. (*Id.*, at 3). Significantly, defendants state that before they completed their final spreadsheet, they "could only surmise what the final figure was ...." (*Response to Plaintiff's Motion to Exclude*, at 2).

\*2 The parties quarreled once again but, according to defendants, "came to an agreement-that was placed on the record-that defendants would provide a final damage calculation by the following Tuesday (March 11) and Mr. McIngvale would appear for deposition-once again in Chicago-the following Wednesday (March 12)." (*Id.*, at 4). Defendants, despite it having been placed on the record, provide no transcript of it. Lancelot attached the transcript to its reply brief, and it indicates that Lancelot reserved the right to object to defendants' supplementing their damage claims. (*Plaintiff's Reply*, Ex. B).

On March 11, 2008, defendants provided Lancelot with what they claimed to be their final damage calculations. The final calculation was, as advertised, in excess of \$400,000; very much in excess: \$2,029,256.65. Defendants claim that along with

the final calculation, they produced support in the form of a spreadsheet and 1000 pages of invoices, receipts, and pay records. (*Response to Plaintiff's Motion to Exclude*, at 4). Actually, according to their responses on the issue of damages:

Duplicate copies of the back up documentation ... are contained in the documents identified as TSM 10243-11390. Additional documentation establishing these damages is contained in the bank statements previously produced to Plaintiff and the specific calculation of those expenses have been prepared by Defendants in summary form and are contained in the documents identified as TSM 10243-11390 .... expenses are detailed in the bank statements previously produced and the documents produced as TSM 0243-11390. (*Plaintiff's Rule 37 Motion to Exclude Late Disclosed Evidence*, Ex. C, at 19/39, 37/39). But according to Lancelot, as of March 13, 2008, the 1000 pages of documents-TSM 10243-11390-had yet to be produced. (*Plaintiff's Rule 37 Motion to Exclude Late Disclosed Evidence*, ¶ 21).

Lancelot now moves for an order prohibiting the defendants from introducing into evidence any tardily produced documents or discovery responses or seeking damages in excess of the previously disclosed \$400,000 on the counterclaim. The defendants argue that Lancelot had the documentation underlying the defendants' damage claim all along, and thus it is not prejudiced by the fact that the damage calculation was not produced until March 11, 2008.

There is an insouciant quality to the defendants' responsive brief. It cites not a single case in support of its arguments and offers not a single excuse for the defendants' non-compliance with Rule 26 and two court orders, despite the Seventh Circuit's repeated admonition that unsupported arguments are waived,<sup>FN1</sup> that it is not the role of the court to do a party's work,<sup>FN2</sup> and notwithstanding the clear requirement of Rule 37(c)(1) that noncompliance with the disclosure requirements of Rule 26 can result in automatic exclusion of evidence in the ab-

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sence of substantial justification.

FN1. See *U.S. ex rel. Fowler v. Caremark RX, L.L.C.*, 496 F.3d 730, 743 (7th Cir.2007); *R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!*, 462 F.3d 690, 701 (7th Cir.2006); *Kramer v. Banc of Am. Sec., LLC*, 355 F.3d 961, 964 n. 1 (7th Cir.2004).

FN2. See *United States v. Amerson*, 185 F.3d 676, 689 (7th Cir.1999); *United States v. Lanzotti*, 199 F.3d 954, 960 (7th Cir.1999).

## II

### ANALYSIS

#### A.

#### **Defendants Failed to Make Timely Initial Disclosures And Ignored Two Subsequent Deadlines**

“We live in a world of deadlines.... The practice of law is no exception.” *Raymond v. Ameritech Corp.*, 442 F.3d 600 (7th Cir.2006)

“Lawyers and litigants who decide to play by rules of their own invention will find that the game cannot be won.” *United States v. Golden Elevator, Inc.*, 27 F.3d 301, 302 (7th Cir.1994)

\*3 Throughout the range of the law, there are time limits imposed on parties at every stage of the case. Some are mandatory and admit of no deviations; others are more flexible. But in each instance, parties who do not pay heed to Shakespeare's injunction-“Defer no time delays have dangerous ends.” Henry VI, Part I (1592) Act III, sc. ii 1.33-FN3 imperil their own interests. The Seventh Circuit has warned that ignoring deadlines is the surest

way to lose a case. *United States v. Golden Elevator, Inc.*, 27 F.3d 301, 302 (7th Cir.1994). See also *Harris v. Owens-Corning Fiberglass Corp.*, 102 F.3d 1429, 1433 (7th Cir.1996). Even a day's delay can be fatal. See, e.g., *Brosted v. Unum Life Insurance Co. of America*, 421 F.3d 459 (7th Cir.2005); *Reales v. Consolidated Rail Corp.*, 84 F.3d 993, 996 (7th Cir.1996).

FN3. The Seventh Circuit is partial to Twelfth Night. *Sanders v. Venture Stores, Inc.*, 56 F.3d 771, 775 (7th Cir.1995) (“ ‘In delays there lies no plenty.’ ”). No matter. The point is the same.

In the instant case, the defendants repeatedly failed to produce critical damage information that should have been available to them from the moment the case was filed and to which the plaintiff was undeniably entitled. Rule 26(a)(1)(A)(iii) requires parties to provide initial disclosures by each side, without awaiting a discovery request, of:

a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered.<sup>FN4</sup>

FN4. The former provision in force when defendants' disclosures were initially due was not significantly different. Then Rule 26(a)(1)(c) required “a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered.”



The time for making such a disclosure was set by Judge Coar as November 1, 2007. (Dkt.# 37); see Fed.R.Civ.P. 26(a)(1)(c). The defendants' failure to have met that deadline prompted Lancelot to make a discovery request for the information, the response to which by the timing of the request was due November 19th. The defendants' response was inadequate, necessitating a motion to compel. I granted the motion and set a new deadline, which regardless of how one interprets the order, was no later than January 23, 2008, and was intended to have been January 14 th for damage computations and supporting documentation. The defendants ignored the new deadline as well.

The defendants offer no explanation whatsoever for having missed two consecutive court-imposed deadlines. Instead, they argue that the parties agreed that they would let the required production slide until March 11. First, that is not exactly what the parties agreed. Lancelot had no real choice—"The harm had occurred at the time of the late disclosures, and the bell could not be unring." *Finwall v. City of Chicago*, 239 F.R.D. 494, 500 (N.D.Ill.2006). Second, Lancelot reserved its right to object to supplementation of the defendants' damages claim. Finally, it is unrealistic to suggest that the agreement, whatever else it was, contemplated a five-fold plus increase in the claim.

While it is true that \$2,029,256.65 is "in excess of \$400,000," it is an amount so disproportionately greater than \$400,000 as to effectively constitute a new damage claim. At a minimum, the claim that the damages were "in excess of \$400,000" gave insufficient notice that the defendants would ultimately claim damages in excess of \$2 million. The lack of adequate notice of the real amount of the damages made all the more urgent timely and complete discovery. The defendants' repeated and inexcusable non-disclosure of the information needed to defend against that claim could scarcely be more incompatible with Rule 26.

\*4 Pretrial discovery is one of the most significant innovations of the Federal Rules of Civil Proced-

ure. See *Hickman v. Taylor*, 329 U.S. 495, 500, 67 S.Ct. 385, 91 L.Ed. 451 (1947). Prior to the enactment of the Rules in 1938, the parties had no effective means of discovering information. In fact, it was commonly accepted that "[t]o require the disclosure to an adversary of the evidence that is to be produced would be repugnant to all sportsmanlike instincts." 6 Wigmore, *Discovery*, 845 at 490 (3rd Ed.1940). See also 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2001, at 14, § 2002, at 21 (1970). Here is how the Supreme Court put it in *Carpenter v. Winn*, 221 U.S. 533, 540, 31 S.Ct. 683, 55 L.Ed. 842 (1911):

Another consideration leading to the same conclusion is found in the fact that a bill of discovery [in equity] cannot be used merely for the purpose of enabling the plaintiff in such a bill to pry into the case [at law] of his adversary to learn its strength or weakness. A discovery sought upon suspicion, surmise, or vague guesses is called a 'fishing bill,' and will be dismissed. Story, Eq. Pl. §§ 320 to 325. Such a bill must seek only evidence which is material to the support of the complainant's own case, and prying into the nature of his adversary's case will not be tolerated. The principle is stated by a great authority upon equity thus: 'Nor has a party a right to any discovery except of facts and deeds and writings necessary to his own title under which he claims; for he is not at liberty to pry into the title of the adverse party.' 2 Story, Eq. Jur. § 1490...."

Indeed, it had once been thought that "the amount of damages is not an issue, but follows the determination of the issues in the case, and discovery [through a bill of discovery] is granted only in aid of the issues." *Munger v. Firestone Tire & Rubber Co.*, 261 F. 921, 923 (2nd Cir.1919).

The long accepted view that once regarded discovery as an intolerable form of prying has been replaced by the modern attitude toward discovery that regards secrecy as uncongenial to truth-seeking and trial by ambush as destructive of the overarching goal that cases be justly determined on their merits.

See *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 253, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978) (Powell, J., concurring and dissenting); *Hickman*, 329 U.S. at 500; Rule 1, Federal Rules of Civil Procedure.<sup>FN5</sup> The defendants' non-compliance with two court orders regarding the deadlines for production-three if the initial disclosure date is counted-cannot be squared with the desideratum of the federal discovery rules.

FN5. See also, Vanderbilt, Introduction to Cases And Materials On Modern Procedure And Judicial Administration, 42 (1952) ("The fundamental premise of the federal rules is that a trial ... is an orderly search for truth in the interest of justice rather than a contest between two legal gladiators with surprise and technicalities as their chief weapons....").

Courts are entitled-indeed they must be able-to enforce deadlines. *Reales*, 84 F.3d at 996. "Doing so means the use of sanctions, even severe ones ..., when parties ignore the ongoing proceedings and demand the right to set their own deadlines.... Toleration of delay could string out the case interminably, its pace established by the most slothful of the parties." *Matter of Kilgus*, 811 F.2d 1112, 1118 (7th Cir.1987).

## B.

### **Defendants' Late Disclosure Was Neither Justified Nor Harmless**

\*5 Rule 37(c)(1) provides that "a party that without substantial justification fails to disclose information required by Rule 26(a)... is not, unless such failure is harmless, permitted to use as evidence at a trial ... any witness or information not so disclosed." The sanction of exclusion under Rule 37(c)(1) is " 'automatic and mandatory unless the party to be sanctioned can show that its violation of Rule 26(a)

was either justified or harmless.'" *Mid-America Tablewares, Inc. v. Mogi Trading Co., Ltd.*, 100 F.3d 1353, 1363 (7th Cir.1996). See also *Keach v. U.S. Trust Co.*, 419 F.3d 626, 639 (7th Cir.2005). Like all exclusionary rules, see *New York v. Harris*, 495 U.S. 14, 22, 110 S.Ct. 1640, 109 L.Ed.2d 13 (1990); *United States, v. Doe*, 465 U.S. 605, 617, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984), Rule 37 has a deterrent purpose. See *Cunningham v. Hamilton County, Ohio* 527 U.S. 198, 208, 119 S.Ct. 1915, 144 L.Ed.2d 184 (1999); *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976); *Pickholtz v. Rainbow Technologies, Inc.* 284 F.3d 1365, 1376 (Fed.Cir.2002); *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1372 (11th Cir.1997)-a goal that is achieved by removing the incentives to disregard the discovery rules.

At bottom, Rule 37 is expressive of the basic axiom of experience that "[l]iability is the beginning of responsibility. The individual is held accountable for what he has done in order that he may be responsive in what he is going to do. Only thus do people gradually learn by dramatic imitation to hold themselves accountable, and liability becomes a voluntary deliberate acknowledgment that deeds are our own, that their consequences from us." John Dewey, *Morals and Conduct*, in *Man and Man: The Social Philosophers*, 484-485 (J. Cummins and R. Linscott Ed.1954). See *U.S. Freight Co. v. Penn Cent. Transp. Co.*, 716 F.2d 954, 955 (2nd Cir.1983) ("General is a goal under Rule 37; unconditional impositions of sanctions are necessary to deter 'other parties to other lawsuits' from flouting 'other discovery orders of other district courts.'").

Here, the defendants offer no excuse; thus, the only question is whether their repeated failures to have complied with Rule 26 and to have met two court-ordered deadlines was harmless. Defendants' response brief states that "it is not clear how the production of these documents prejudices Lancelot." (*Response to Plaintiff's Motion to Exclude*, at 7) (Emphasis supplied). What a curious in-

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version. It is not the *production* about which the plaintiff complains; it is the extreme *tardiness* of the production that is prejudicial. Fidelity to Rule 26 demanded at least a calculation of the \$400,000 figure, followed if necessary by timely supplementation pursuant to Rule 26(e)(1). After all, unless there was a total disregard of Rule 11, the defendants must have calculated at least that amount prior to the filing of the complaint. Nonetheless, there was no initial calculation and no timely supplementation. There was only the unsupported and, as it turned out, substantially understated allegation that the damages were in excess of \$400,000.<sup>FN6</sup>

FN6. If Rule 26(e) does not give litigants a license to rely on supplements produced after a court-imposed deadline, even if the court's pretrial time limit is satisfied, *Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655, 662 (N.D.Ga.2001), it most assuredly does not excuse a party's lack of diligence and allow it "to ignore the Court's deadlines," reopen discovery, and "claim different damages." *St. Paul Mercury Ins. Co. v. Capitol Sprinkler Inspection, Inc.* 2007 WL 1589495, \*9 (D.D.C.2007).

\*6 Consequently, the plaintiff had no way to confirm even that number, and the McIngvales' depositions had to be postponed. (*Response to Plaintiff's Motion to Exclude*, at 7). When the depositions reconvened on March 11th, the damages had soared from "in excess of \$400,000" to in excess of \$2,000,000. Coming as it did after the close of discovery, disclosure of the supposed support for this amount is palpably unfair and prejudicial to Lancelot. That prejudice is not cured by the disclosure of documents the defendants say (but never prove) was enough to have allowed Lancelot to easily calculate the damages all along. (*Response to Motion to Exclude*, at 6-8). First, Rule 26 requires that the calculation be done by the party claiming damages, not its opponent, who under the defendants' unsupportable theory is left to sift through ex-

tensive records of the defendants and guess at what the damage claim is. The primary thrust of 1993 amendments to the Federal Rules of Civil Procedure was to allow parties to rely on their opponent's disclosures as required in Rule 26, to replace the traditional adversary discovery practice. *Bonin v. Chadron Community Hosp.* 163 F.R.D. 565, 569 (D.Neb., 1995). The defendants' argument undoes that purpose.

Second, under Rule 34, which is made applicable by Rule 26(a)(1)(c), the producing party must make available for inspection and copying the documents or other evidentiary material, not privileged or protected from disclosure, on which the computation of damages is based, as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request. The evidence is compelling that Lancelot could not readily or easily have divined the defendants' claimed damages: after all, the defendants, themselves, failed to make the required computations by November 1, 2007. An additional two-and-a-half months did not cure the problem. Another two months after that elapsed without any results. In fact, despite supposedly having poured over the documentation for about five months, they could only "surmise" what their damages might be. If the defendants, whose records they were, could not make the computations in a timely way based on the documents that the defendants say they produced, Lancelot cannot be expected to have done so.

The determination of whether a Rule 26(a) violation is substantially justified—an issue not addressed by the defendants—or harmless is entrusted to the broad discretion of the district court. Denying the plaintiff's motion would, under the circumstances of this case, be an abuse of discretion and disserve the goal of deterrence that animates Rule 37. The defendants' violations are not rendered harmless because no trial date has been set. If that were the test, most violations of Rule 26 would be outside the reach of Rule 37. If the drafters of the Rule wanted

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(Cite as: 2008 WL 1883435 (N.D.Ill.))

it to be linked to the existence of the trial schedule, they would have said so. In any event, the answer to that argument is *Finwall v. City of Chicago*, 239 F.R.D. 504, 507 (N.D.Ill.2006), *affirming Finwall v. City of Chicago*, 239 F.R.D. 494, 507 (N.D.Ill.2006):

\*7 Finwall seems to argue that the fact that no additional extensions were available was of no moment because no trial date had been set and, as a consequence, plenty of time remained for expert discovery. But, as the magistrate judge correctly concluded, “[l]ate disclosure is not harmless within the meaning of Rule 37 simply because there is time to reopen discovery.” Order at 11 [citations omitted]. Finwall also prejudiced the court and other litigants by failing to comply with the court’s discovery schedule. A court has a legitimate interest in managing each case before it, including enforcing deadlines, to ensure prompt and orderly litigation.... Fulfilling its duty to efficiently manage its docket benefits not only the parties to a particular case, but also the parties to every case pending before the court: delays in one case needlessly tie up the court’s docket and impose delays in the court’s other cases.

Perhaps Judge Coar might be amenable to reopening discovery to allow Lancelot to again redepose the McIngvales on these recent calculations and supporting documents and to conduct whatever additional discovery on the escalated damage claim might be necessary. But as things now stand, Lancelot’s motion is granted and the tardy calculations and purportedly supporting evidence cannot be used at trial pursuant to Rule 37’s automatic and mandatory rule of exclusion. Additionally, the defendants must pay “the reasonable expenses, including attorney’s fees, caused by [their] failure.” Rule 37(c). Finally, Rule 37(c)(1)(B) authorizes as a sanction that the jury be informed of the party’s failure to have provided the discovery. That sanction is appropriate in this case.

The plaintiff’s motion to exclude late disclosed evidence [# 68] is GRANTED.

N.D.Ill.,2008.  
Lancelot Investors Fund, L.P. v. TSM Holdings, Ltd.  
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**H**

Only the Westlaw citation is currently available.  
United States District Court, N.D. Illinois, Eastern  
Division.

UNITED STATES OF AMERICA, Plaintiff

v.

Ronald MIKOS, Defendant

No. 02 CR 137.

Dec. 9, 2003.

Ronald Mikos, pro se, John M. Beal, Cynthia Louise Giacchetti, Law Office of Cynthia Giacchetti, Richard H. McLeese, Attorney at Law, Chicago, IL, for Defendants.

MEMORANDUM OPINION AND ORDER RE-  
GARDING DEFENDANT'S MOTION IN LIMINE  
TO EXCLUDE GOVERNMENT'S PROPOSED  
EXPERT TESTIMONY OF CHARLES PETERS  
RELATING TO COMPARATIVE BULLET LEAD  
ANALYSIS

GUZMÁN, J.

\*1 Defendant moves this Court to preclude the government from introducing at trial expert evidence or testimony regarding the comparison of bullets or bullet fragments recovered from the victim with bullets allegedly seized from the vehicle of the Defendant, in particular the proposed expert testimony of Charles Peters. In support of this motion, the Defendant argues that admission of such unreliable expert opinion testimony would violate Mr. Mikos' Fifth Amendment right to due process, Sixth Amendment right to a fair trial, and Eighth Amendment right to be free from cruel and unusual punishment.

The Defendant Ronald Mikos is charged in this case with the murder of Joyce Brannon. Ms. Brannon's body was discovered on January 27, 2002. She had been shot six times. Another potential government expert, Robert Tangren, has identified these six bullets/bullet fragments as being .22

caliber bullets. On February 6, 2002, federal agents searched a vehicle which the Defendant was driving at the time of his arrest. Allegedly taken from that vehicle was a Remington ammunition box containing eighty .22 caliber cartridges. These items were sent to the FBI Laboratory in Washington, D.C.

Pursuant to Rule 16(a)(1)(E) the government has identified Charles Peters, an examiner for the FBI laboratory, as an expert witness. Peter's one-page Report of Examination (Exhibit 1) indicates that he has used Inductively Coupled Plasma Optical Emission Spectroscopy (ICP-OES) to measure the presence of seven elements in lead samples taken from bullets from the victim and bullets in twenty-five of the cartridges from the box. Based on those measurements, and using an FBI definition of what is "analytically indistinguishable" Peters claims that the bullets from the victim and all but one of the bullets from the box recovered in the Defendant's car are analytically indistinguishable from one another. Peters then concludes that because the bullets from the victim and the bullets from the ammunition box are "analytically indistinguishable," these bullets "likely originated from the same manufacturers' source (melt) of lead." Peters' Report then goes further to indicate that the cartridges originally in the ammunition box were assembled and packaged on or about November 23, 1988, suggesting that all the analyzed bullets came from the box and were assembled and packaged on that date. In addition to the one page "Report of Examination" the Government has provided written notes, pictures, and 70 pages of the printout from the ICP-OES analysis. This documentation appears to support the ICP-OES measurements done by Peters and that the bullets are "analytically indistinguishable" using the FBI's definition.

The defense is not at this time challenging the measurements themselves. However, the defense claims that the Government has supplied no underlying basis or support for Peters' conclusion that, because these lead samples are "analytically indis-

tinguishable," the bullets from the victim and the bullets from the cartridges in the box "likely originated from the same manufacturers' source (melt) of lead." This last conclusion is important because, if true, it serves to limit the number of bullets which have the same composition and therefore makes it more likely that the bullets found in the victim's body came from the Defendant's box of bullets of indistinguishable composition. However, this is only true if all bullets which come from the same batch have the same composition and if bullets from other batches do not.<sup>FN1</sup> The probative impact of such a conclusion is also limited by the extent to which only a relatively small number of bullets came from the batch in question. Thus, the danger, the defense argues, is that the jury will assume that it is very likely that the bullets which killed the victim came from the Defendant's box of bullets when in fact and science, such a conclusion is not warranted.

FN1. "One of the important premises underlying comparative bullet lead analysis is that different sources of lead have a different elemental composition. This premise is an important one for comparative bullet lead analysis because if most or all sources of lead had the same elemental composition, then a match between bullets would have little significance." *Government's Memorandum in Opposition to Defendant's Motion In Limine on Proposed Bullet Lead Expert Under Rule 702 of The Federal Rules of Evidence*. (Government's Memorandum), at 17. "Another important premise underlying comparative bullet lead analysis is that sources of lead are homogeneous, i.e. that bullets produced at or around the same time will have analytically indistinguishable lead content. This premise is an important one for comparative bullet lead analysis because if bullets manufactured at or around the same time were not homogeneous, then no significance could be drawn from the fact that known and ques-

tioned bullets were analytically indistinguishable." *Government's Memorandum* at 25.

\*2 The lead that is used by manufacturers to make bullets is supplied by secondary lead smelters. These smelters generally obtain lead from recycled lead-acid batteries. During the smelting process the lead is melted and purified or refined in a molten state. Antimony is added if needed for purposes of hardening. Defendant argues that the lead is processed so as to keep the amount of these elements at certain acceptable and carefully controlled levels. While, as explained above, the government contends that the amount of other elements besides lead is not so closely controlled but rather depends upon whatever scrap lead and other elements the manufacturer might have on hand at the time of the melt. After melting, the lead is cast into ingots (commonly called pigs) or into cylindrical billets. The ammunition manufacturer receives the lead in this form. Manufacturers who receive ingots (pigs) remelt the lead and cast it into billets. Manufacturers who receive billets produce bullets without remelting. The billets are inserted into an extruder where the lead is formed into lead wire. The wire is cut into pieces which are then formed into individual bullets. After they are made, the bullets are then stored until they are required to fill an order. At that time, they are assembled into cartridges and packaged into boxes. The date code on the box reflects when the cartridges are packaged into boxes.

Absent some scientifically sound basis for concluding that the composition of all bullets coming from the same batch is indistinguishable, (even by the FBI's own definition of "indistinguishable"), Peters would have no basis for giving an opinion that assumes this as true, i.e., that the bullets from the body and the bullets from the Defendants box of ammunition came from the same batch because they are of indistinguishable composition. The government offers as support for Peters' conclusion that bullets with the same composition must come from the same batch, the fact that theoretically there is an

infinite number of permutations which can result from the mixing of the seven elements normally found in bullet lead and that it is therefore extremely unlikely that any two batches made at separate times would, by chance, have the same composition. The government also argues that thirty years of real world experience in this field, the scientific data that lead batches are extraordinarily unusual, and the case law recognizing both the relevance and significance of such testimony also support Peters' opinion. Further, the government points out that the process by which bullets are made is not tightly controlled. Bullet manufacturers will throw into the melt whatever odds and ends of scrap metal they happen to have in addition to the actual lead. This largely random process is even more likely to lead to a unique composition of elements for every batch. However, it is undisputed that at least some manufacturing quality control exists with respect to the composition of elements which any given bullet may have. Therefore, the number of different compositions to be found emanating from any batch of molten lead may not number in the millions, but rather may be limited by the quality control parameters of the manufacturer. To what extent such controls or other consistencies practiced in bullet manufacturing limit the actual variations in composition of bullet lead, is unknown.

\*3 It appears to us that Peters' opinions are grounded in two separate areas of expertise. The actual analysis of the two lead bullet compositions is a question of chemistry or chemical engineering. As pointed out above, this part of Peters' proposed testimony is not challenged at this time. The second portion of Peters' proposed testimony is essentially a statistical conclusion, i.e., Peters proposes an opinion as to a problem of probability. How probable is it that bullets having compositions so nearly identical as to be deemed "analytically indistinguishable" came from the same "source"? The answer to this question lies in statistical analysis. Given sufficient information a mathematician or statistician can accurately determine the probability of a

given event, such as the likelihood that two bullets with the same elemental composition would have been manufactured from the same source. Herein, however, lies the government's problem. It is best stated in the government's own brief: "Indeed, the fact that no quantitative estimates can be made does not mean that the evidence has no value, only that the process of attempting to put a quantitative estimate on this value contains so many variables that such an estimate cannot now reasonably be made."Government's Memorandum at 17. If a scientifically valid estimate cannot reasonably be made, how then can an expert give an opinion? The government's response, as we see it, is that even though an opinion cannot be given as to the precise probability of such an event, there is sufficient data from the few studies that have been made, the fact that theoretically there is an almost infinite number of permutations which can result from the mixing of the seven elements normally found in bullets as well as thirty years of real world experience in this field, and the case law recognizing both the relevance and significance of such testimony to support the conclusion that indistinguishable lead batches are extraordinarily unusual. We are not persuaded by this reasoning. It is precisely as the government states-there are too many variables, each of which could greatly affect the probability of the predicted event, to conclude that any one result is more likely than the other. Peters' ultimate conclusion is based upon a series of determinations that lack scientific accuracy. For example-on a very basic level, there is no precise or even generally accepted definition of what a "source" of lead for bullets is. Is a "source" defined in terms of weight of melted bullet lead from which the bullets are finally extruded or is it defined by the length of time during which the manufacturing process runs, or is it a combination of both? The likelihood of homogeneity in elemental composition of all bullets coming from a batch which is poured over the course of several days and consists of tens of thousands of pounds of molten lead may be quite different from the likelihood of homogeneity in composition of bullets coming from a batch which is poured over the



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course of only a few hours and consists of only 1,000 pounds of molten lead. How often does the composition of available scrap metal which some manufacturers mix in with their bullet lead change? Is it the same over a long period of time for any particular manufacturing facility or does it change from day to day? If a source is poured over a substantial period of time, how often during this process does the mix of trace elements thrown into the melt change? Is it different for each manufacturer, or even for each batch of bullets produced? Do results differ when the "source" is from a secondary smelter from which ingots or billets are made and shipped to the manufacturer as opposed to the remelting of ingots by the bullet manufacturer itself?

\*4 Further, the reports cited by the opposing parties appear to reach contradictory results regarding both the uniqueness of the element composition of bullets prepared from the same "source" and the homogeneity of the element composition of bullets prepared from the same source. None of these studies involve an adequately representative and randomly selected sample which could support or rebut general conclusions as to the validity of the government's underlying principles for all lead bullet analysis situations. Both sides agree that bullets with the same elemental composition can result from different sources or melts of lead. The government argues that this is a random occurrence with an extremely small probability. But, in truth, no one can say with any reasonable degree of scientific certainty what the probability or even the range of probabilities is.

The government references the FBI's "historical data base" as support for its position here. According to the Government's Memorandum, the FBI database contains 27,000 samples from approximately 1,837 different sources. (Government's Memorandum at 22, fn 20.) As Defendant points out the government fails to provide information about the source of these 27,000 samples, how they were selected, and, assuming they were gathered

over the last thirty years, whether they were collected at the same rate during the last thirty years, or whether their collection concentrated in a certain time period or came from any particular geographic location. The defense argues that the 27,000 samples actually come from only 9,000 bullets. (Three samples are taken of each bullet, resulting in 27,000 samples.) Further, the defense argues the 9,000 bullets consist of bullets, bullet fragments, or shotgun pellets sent in by various law enforcement offices for analysis. The important point, however, is that the record before us does not reflect that the samples were gathered in any approved scientific manner so as to be considered as representative of the bullet population as a whole. The samples were not randomly collected according to any scientifically accepted sampling method. For these reasons, Defendant concludes, the FBI's historical database fails to satisfy accepted scientific methodology and, consequently, cannot form the basis for expert opinion testimony under the requirements of *Daubert*. The court agrees.

Moreover, if Defendant's statistics are correct, a sample of 1,837 is extremely small to be used to reliably extrapolate principles as to the total bullet population. According to the Defendant, the United States produces approximately 5,000,000,000 bullets per year, so the bullet production over the thirty years represented by the FBI database equals 150 billion bullets. While an expert in statistics may be able, once the precise variables in the manufacturing process have been established, to design a study which need only utilize a seemingly very small sample size, that is not the case before us. The Court is not convinced that general conclusions upon which to base an expert opinion as to the source of bullets can be based upon results documented in the FBI's historical database. An expert opinion can carry a great deal of weight with the trier of fact. For this reason expert opinions must be based upon reliable data. In this case, which involves an opinion as to probability, that means that there must be some basis in support of the opinion that a statistician or mathematician would consider

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to be at least arguably scientifically valid. Peters' experience in the field and the FBI's experience over the last 30 years as reflected by its database lack scientific methodology and are therefore, in essence, anecdotal evidence. As such they ought not to be utilized as a basis upon which to construct an expert opinion. The number of samples collected and comparisons done by both Peters and the FBI may seem great, but given the number of bullets produced every year and the fact that the FBI database spans thirty years, the relevant population is huge. It is therefore not safe, no matter how tempting, to draw conclusions from such prior experiences unless scientific standards have been incorporated to assure that a representative sample has been obtained. As pointed out above, that has not been done in this case. For this reason, the government's argument that the Defendant's criticisms go to the weight of the proposed expert testimony and not its admissibility is not convincing. Because the testimony comes in the form of an opinion from an expert in chemical analysis, the jury is quite likely to believe that his opinion as to the source of the bullets also comes from the application of rigorous scientific standards. That is not so. Nor is it sufficient to rely upon cross-examination to counter the effects of an opinion that is not founded upon facts established by valid scientific methodology.

\*5 The inability of these "studies" to provide a basis for Peters' testimony is illustrated by the government's argument that "the level of bismuth in the questioned and known bullets in this case is remarkably unusual." (Government's Memorandum at 21) But as the defense points out, "remarkably unusual" as compared to what? The government admits that it has no data from Remington as to the bismuth levels in the .22 caliber bullets they have manufactured over many years. Moreover, bismuth contents in the range of 330-370 ppm up to 500 ppm can be found in the FBI's own database. There is, therefore, absolutely no way to know if the bismuth level in these bullets is in fact "remarkably unusual". It may be so in Peters' experience, but as we have pointed out, given the huge population

with which we are concerned (in the billions), Mr. Peters' experience is no more than anecdotal evidence. Such evidence can be particularly misleading because it appears logical and reasonable. If agent Peters has not, in years of experience and after hundreds of analyses, previously encountered such a high quantity of bismuth, then why should we not conclude that this is a highly unusual occurrence? The answer to that question lies in the huge size of the bullet population and the relative insignificance of agent Peters' own personal experience in such a huge population. An expert witness opinion on an issue of chemical analysis and comparisons can carry with it the imprimatur of great learning, advanced technology and scientific validity in the mind of the trier of facts. Juries often tend to give such testimony great weight. Given the lack of scientific foundation for the opinion, the government's expert ought not to be allowed to opine as to a common source for the bullets recovered from the Defendant and those recovered from the body of the victim.

Rule 702 of the Federal Rules of Evidence provides

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Under Rule 702, trial courts act as gatekeepers, to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The Rule 702 inquiry focuses on the "scientific validity of the principles that underlie" the proposed testimony. *Id.* at 594-95. Such "scientific validity" is required to satisfy the Rule's requirements of relevance and reliability. *Id.*

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To be reliable under Rule 702, expert testimony must constitute “scientific knowledge.” As the United States Supreme Court explained:

\*6 The adjective “scientific” implies a grounding in the methods and procedures of science. Similarly, the word “knowledge” connotes more than subjective belief or unsupported speculation. [I]n order to qualify as “scientific knowledge,” an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation-i.e., “good grounds,” based on what is known. In short, the requirement that an expert’s testimony pertain to “scientific knowledge” establishes a standard of evidentiary reliability.

Id. at 590. (Footnote omitted).

We understand that the FBI Laboratory has performed comparative bullet lead analysis (CBLA) for many years. Furthermore, we understand that persons from the FBI Laboratory, including Charles Peters, have for years been allowed to testify at trials as to their opinions regarding the source of tested bullets based on CBLA. In our opinion, however, the required standard of scientific reliability is met only as to the proposed opinion testimony that the elements composition of the bullets recovered from the body is indistinguishable from the composition of the bullets found in the Defendant’s car. There is no body of data to corroborate the government’s expert’s further opinion that from this finding it follows that the bullets must or even likely came from the same batch or melt. The motion to exclude the expert testimony of Charles Peters relating to comparative bullet lead analysis is therefore granted in part and denied in part.

SO ORDERED

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**H**

Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois, Eastern  
Division.

BASF CORPORATION, Plaintiff,

v.

THE OLD WORLD TRADING COMPANY, INC.,

Defendant.

**No. 86 C 5602.**

Sept. 8, 1992.

MEMORANDUM OPINION AND ORDER

LEINENWEBER, District Judge.

\*1 On May 25, 1992, the court made Findings of Fact and Conclusions of law upon which judgment was entered in favor of the plaintiff, BASF Corporation ("BASF"), in the amount of \$2,498,726, together with prejudgment interest and attorney's fees. BASF now seeks to alter or amend the judgment pursuant to Federal Rules of Civil Procedure 59(e) and to amend the Findings of Fact and Conclusions of Law pursuant to Rule 52(b).

Rule 59(e) Motion

1. BASF points out that on the Rule 58 judgment order entered by the court, the last sentence inadvertently ends with the words "this case is dismissed in its entirety." What the court meant to say was that all of BASF's claims had been dealt with and disposed of. The last sentence of the Rule 58 judgment order is hereby amended to read as follows:

"The court has previously granted Old World's motion for summary judgment on Count II. The court reserves jurisdiction over the award of costs, attorney's fees, and prejudgment interest."

2. BASF next contends that the court erroneously failed to award BASF its profits on lost customer

sales occurring in the 1988 antifreeze year, i.e., the period between April 1, 1987 and March 31, 1988. With respect to lost customer sales for the 1988 antifreeze year, the court made Finding of Fact No. 36 that defendant, Old World Trading Company, Inc. ("Old World"), terminated its business relationship with Dearborn Chemical Company ("Dearborn") with the conclusion of the 1987 antifreeze year which was March 31, 1987, and did not purchase inhibitor chemicals from Dearborn after that date. The court, therefore, declined to award BASF any lost profits due to lost 1988 antifreeze sales. BASF asks the court to amend the judgment to include damages for at least a portion of 1988 because it contends that Old World continued to blend the Dearborn formula up to at least July 24, 1987.

The basis for the court's Finding of Fact was the testimony of George Beck ("Beck") and other witnesses called by BASF, and the absence of any direct evidence of sales of the Dearborn formula to Old World customers in 1988, even though there was some evidence that Old World continued to blend the Dearborn formula at some of its blending stations.

Specifically, Beck, a salesman for Dearborn in charge of the Old World account, testified that Dearborn lost the Old World account for the 1988 season, when Old World went exclusively with the Peak formula and gave Dearborn no more orders (Tr. 1225-1226). Richard Tumm, Dearborn's director of sales, testified in a similar vein (Tr. 444 and 458-459). John Hurvis, Old World's chairman, testified that the relationship with Dearborn ended on or about that date (Tr. 612 and 632-633). The evidence to the contrary consisted of blending records which indicate some blending may have occurred after April 1, 1987 (presumably with leftover Dearborn inhibitors in stock). There was also testimony of Larry Birch ("Birch") of Citgo attempting to interpret a reference in a memorandum to the effect that Old World was holding 90,000 gallons of the Dearborn formula for sale by Citgo. However, in

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the same memo, Birch is advised of the BASF lawsuit against Old World based on the formula failing to meet Ford's specifications. There was no evidence that Citgo ever sold or even took possession of this product.

\*2 BASF next argues that the records Old World produced and identified through Jeff Grizzle at his deposition show that all of Old World's blenders continued to blend the Dearborn formula for varying periods of time after April 1, 1987, up until July, 1987. However, these records were to the best of the court's knowledge not submitted to the court as part of the record in the case. These records, at least the summary prepared and submitted by BASF, does not tell to whom the antifreeze was sold. The evidence was that the heaviest call for antifreeze commenced in late July or early August (Tr. 458). Finally, the customers claimed lost by BASF were aware of BASF's pending lawsuit against Old World and the charge that the Old World antifreeze did not meet its claims. It is hard to believe that BASF lost any sales because of the false claims of Old World after April 1, 1987.

3. BASF also claims that the court's market share analysis improperly used the entire antifreeze market instead of just the private label market. It contends that its share of the non-Old World private label market was 28 percent in 1985 and rose to 34 percent in 1988, instead of the 15.6 percent to 21.2 percent of the total antifreeze market utilized by the court in its damage calculations. However, BASF did not introduce evidence of the respective market shares in the private label market.

BASF in its reply brief explained how it computed its percentage of the private label market. It deduced the market share percentage of Union Carbide, manufacturer of Prestone, from the total market and computed BASF's percentage share of that remaining on the theory that all of Union Carbide's market share was in the branded market. However, the evidence disclosed that Union Carbide was a strong player in the private label market and did not exit this portion of the antifreeze market until near the

end of the 1987 antifreeze year <sup>FNI</sup> (Finding of Fact No. 20). Thus, during the damage period as established by the Findings of Fact, Union Carbide was a strong competitor of BASF in the private label market. See Defendant's ex.D. It may well have been the competition provided by Old World that led Union Carbide to the decision to get out of the private label market, which, of course, greatly benefited those that remained in it, such as BASF and Old World. Therefore, in the absence of direct testimony on the subject, to conclude what the respective market shares are of the private label market would require the court to undergo a great deal of speculation, which the court is unwilling to do.

It can be argued that the court in awarding damages to BASF based on market share of the total antifreeze market has already engaged in speculation.

See Findings of Fact and Conclusions of Law, p. 24, n. 2. However, the court had no choice but to speculate in order to award BASF some damages, which the court felt was deserved. Some speculation is always required when it is necessary to construct a world absent some offending conduct. This is usually referred to as requiring the wrongdoer to bear the risk of the uncertainty which his wrong created. *Otis Clapp & Son, Inc. v. Filmore Vitamin Co.*, 754 F.2d 738 (7th Cir.1985). BASF's trial strategy was to go for the "home run" and shoot for 100 percent of the business that went from BASF to Old World and ignore the probability that some or most of the business would go elsewhere. This forced the court to devise its own formula for the award of damages and, in doing so, the court used the best available evidence introduced at trial.

\*3 It was clear from the testimony of representatives of each of the customers in question who were called to testify by BASF and Old World, that each was angered at BASF because of perceived price inflexibility, that each had a relationship with one or more of BASF's other private label competitors before it purchased from Old World, that each considered others at the time it was considering purchasing from Old World, and that some of them did

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purchase a portion of their requirements from others besides Old World. In fact, both Citgo and Phillips had actually terminated BASF as a supplier before awarding the business to Old World. Phillips said it would not have purchased from BASF under any circumstances. Findings of Fact Nos. 50 and 51. The court rejected Old World's argument that it should award BASF nothing for these accounts (and the five others to which there was no testimony) because it was possible in a market where Old World was not making misrepresentations that BASF might well have been more competitive (Finding of Fact No. 54). However, being competitive is not the same as getting orders. It is not enough to say that the accounts had they not gone to Old World would have gone (or remained) with BASF. "*Post hoc ergo propter hoc* will not do...." *Schiller & Schmidt, Inc. v. Nordisco Corporation*, Nos. 91-2195, 91-2781, slip op. 10-11(7th Cir. July 23, 1992). The short of the matter is that BASF presented damage opinion evidence that gave the court no alternative short of total victory, to which it was clearly not entitled. The court attempted to fashion as fair an award as possible under the circumstances and the evidence. This is all it was required to do. *Otis Clapp*, at 744. The court declines to alter the award of damages or the Findings of Fact in support of them.

4. BASF complains next about the court's failure to order disparagement of profits, enhancement, or punitive damages. Under the Lanham Act, an award is governed by equitable principles. The court exercised its discretion in declining to apply any of these three elements to the award. The court sees no reason to alter these portions of the court's Conclusions.

5. BASF was awarded prejudgment interest to "be compounded annually." The year is the anti-freeze year, i.e., April 1 to March 31. The prejudgment interest is to continue until the judgment is final. BASF's two calculations are rejected and it is ordered to submit a third.

#### Old World's Counterclaim

The court found in favor of Old World on its claim against BASF for product disparagement. There was evidence that BASF employees told customers that Old World used reclaimed glycol or "bottoms." The court found that this charge was not true. Accordingly, the court will not disturb the counterclaim.

#### Rule 52(b) Motion

#### Request to Amend Findings

#### Finding No. 4

The court fails to see any inaccuracy in Finding No. 4.

#### Finding No. 37

The evidence at the trial disclosed that the engine by which Janeway Engineering was conducting the Dynamometer test overheated, which the court equated with equipment failure.

#### Finding No. 33

\*4 The court found that Old World had misrepresented its product by claiming that it met certain specifications for which it had not tested. The purpose of quality control is to insure that a product is within certain specifications. Since the Old World product was not within specifications, quality control is irrelevant, unless it claimed that it performed to a certain quality control level, which Old World did not.

#### Finding No. 17

BASF attempted to call as witnesses certain individuals who were dissatisfied with the Old World

product. The court disallowed this evidence partially on the basis of Rule 403. The court felt, and continues to feel, that anecdotal evidence, unless accompanied by testimony that such evidence was statistically significant, was irrelevant and would consume too much time. The court did suggest that BASF compile a list of consumer complaints and, if accompanied by testimony that the number of complaints was statistically significant, the court would consider the evidence. BASF did not provide the court with the statistical significance of the number of complaints. Admission of such evidence would invite Old World to call satisfied customers and the trial would still be going on.

freeze year runs from April 1 of the previous year to March 31 of the year in question. See Findings of Fact and Conclusions of Law, p. 4 n. 1.

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#### Finding No. 34

The court found that the Old World product met the Cummins' specification. By that, the court meant to find that the Old World product met the Cummins' low silicate level. Accordingly, the court will amend the last sentence of Finding No. 34 to read as follows:

“The court, therefore, finds that Old World did not make a misrepresentation to the extent that it claimed that its AF met the Cummins' low silicate specification.”

#### Finding Nos. 37 and 38

The court declines to make any changes in Finding Nos. 37 and 38.

#### CONCLUSION

The court amends the Rule 58 judgment entered in the case as described in paragraph 1 above. The court also amends the last sentence of Finding of Fact No. 34. The remainder of BASF's motion is denied.

IT IS SO ORDERED.

FN1. It should be recalled that the anti-