

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

TOTAL CONTAINMENT, INC.	:	CIVIL ACTION
	:	
v.	:	
	:	
DAYCO PRODUCTS, INC.	:	NO. 1997-cv-6013
	:	

MEMORANDUM AND ORDER

SCHILLER, J.

May 3, 2001

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INTRODUCTION

This is a contract dispute stemming from two supply agreements between plaintiff Total Containment, Inc. (“TCI”) and defendant Dayco Products, Inc. (“Dayco”), under which Dayco was to design, manufacture, and deliver TCI’s requirements for primary pipe to be used in underground gasoline transportation and containment systems. After the primary pipe deteriorated and leaked at several gas stations sites, TCI sued Dayco on a breach of warranty theory. TCI also sued Dayco for unilaterally raising the price of the primary pipe. Dayco counterclaimed for TCI’s failure to pay for pipe which Dayco had already delivered and for failure to purchase TCI’s requirements. Following a five week trial, a jury found TCI’s breach of warranty claim barred by the applicable statute of limitations. The jury then awarded \$23 million to TCI for its breach of pricing claim and \$3,715,170 to Dayco on its counterclaim.

The parties have now filed their post-trial motions. TCI seeks the court to declare, as a matter of law, that the statute of limitations does not bar its breach of warranty claim. It further requests the court to find as a matter of law that Dayco breached the warranty provision of the contract. In the alternative, TCI asks for a new trial on all issues, including the statute of limitations question. It then asserts numerous evidentiary rulings and other issues as grounds for error necessitating a new trial. Dayco moves the court to order TCI to remit its \$23 million verdict on the breach of pricing claim and for a stay of judgment. Both parties seek to mold the judgment to include pre-judgment interest.

For the reasons set forth below, I will: (1) deny TCI’s motions for judgment as a matter of law and a new trial and deny TCI’s motion for judgment as a matter of law on the breach of warranty claim; (2) grant Dayco’s motion for remittitur for all but \$1,325,808 of the \$23 million

verdict and grant its motion for a stay without bond; and (3) withhold decision on the parties' request to mold the judgment to include prejudgment interest.

FACTUAL OVERVIEW

In the late 1980s, TCI developed a new system, dubbed Enviroflex, for the underground transportation and containment of gasoline from storage tanks to gasoline dispensing pumps at gasoline stations. Enviroflex consisted of a double pipe, with an outer pipe permanently installed so as to contain any leaks that may occur. A narrower, "primary" pipe ran through the outer pipe and actually conducted the gasoline. The outer pipes were connected to sumps which were designed to collect and contain any leaks or excess gasoline flow.

TCI contacted Dayco in October 1988 for assistance in designing the Enviroflex primary pipe. In 1990, TCI and Dayco formalized their relationship and entered into a contract ("1990 Supply Agreement"). Under the 1990 Supply Agreement, Dayco agreed to design and supply primary pipe and warranted the pipe "*to be free from defects in material and workmanship when used under normal operating conditions and without misuse or abuse.*" 1990 Supply Agreement at ¶7.1 (emphasis added). In exchange, TCI was to purchase its primary pipe requirements from Dayco and from no other seller. The parties signed a second Supply Agreement in January 1993, containing similar terms and an identical warranty provision. Pursuant to the 1993 Supply Agreement, the price of the primary pipe was set at \$3.75 per foot.

A Dayco chemist, Homer Holden, tested several materials to serve as the outer cover for the primary pipe. By June 1989, Mr. Holden had preliminarily selected "Estane 5710," a polyester polyurethane material with properties of both plastic and rubber. Dayco eventually

settled on Estane 5710 as the outer coating for the primary pipe. Mr. Holden testified that he knew that Estane 5710 would degrade if exposed to water over a long period. Mr. Holden left Dayco to work for TCI in July 1990.

TCI sold over four thousand Enviroflex systems and installed them in gasoline stations around the world. Unfortunately, Estane 5710 degrades when exposed to water, due to either hydrolysis (breakdown of molecules caused by water), an insidious microbial fungus, or a combination of the two. The precise cause of the degradation was hotly contested at trial. Dayco experts opined that exposing the primary pipe to water for a prolonged period could cause the pipe to degrade. Once the pipe had been degraded by water, the primary pipe cover was then susceptible to microbial attack. TCI maintained that the microbes attacked the pipe even in the absence of standing water, such as when condensation and humidity are present.

The primary pipe in several Enviroflex systems began to deteriorate. In April 1993, TCI learned that an Enviroflex system in Puerto Rico had leaked gasoline. The primary pipe had deteriorated. Dayco examined the site and found that water had intruded into the secondary pipe and caused the pipe to degrade. Dayco submitted its findings to TCI. Subsequently, in September 1993, John Vautier of TCI informed Dayco that water was present at 45% to 50% of Enviroflex sites.

By the spring of 1993, Dayco had completed development of a polyether-based, water-resistant material for the pipe coating. The polyether-coated pipe proved to be more expensive to manufacture. TCI first received shipments the polyether pipe in 1994. Dayco sought to pass the increased cost on to TCI, but TCI refused. In August 1995, Dayco informed TCI that the cost of the polyether, water-resistant pipe would be raised to \$5.00 per foot. The five dollar price

remained in effect for five months until Dayco lowered the price to \$4.40 and credited TCI \$0.60 for each foot of material which TCI had purchased. After accounting for the credits, TCI paid a total of \$1,325,808 above what it would have paid had the price remained at \$3.75.

On July 29, 1997, TCI informed Dayco of its intent to terminate the contract. On September 24, 1997, TCI filed suit against Dayco for breach of the contract's warranty and pricing provisions. Dayco raised the four-year statute of limitations under the Pennsylvania Uniform Commercial Code as a defense. Under that statute, TCI could not sue for any claims which had accrued before September 25, 1993. In addition, Dayco countersued for nonpayment for pipe which Dayco had already delivered and for lost sales from TCI's failure to purchase its primary pipe requirements from Dayco.

At trial, Dayco maintained TCI had represented that the Enviroflex System would be dry and watertight. For instance, it pointed to a TCI brochure, referred to in the Supply Agreements and attached to them, which described the Enviroflex system as 'watertight.' Dayco insisted that it relied on those representations when it selected Estane 5710 as the outer coating of the primary pipe. TCI retorted Mr. Holden had already selected Estane 5710 as the cover material before TCI made any representations of watertightness. It also argued that 'watertight' meant that the system would not leak fluid, but that liquid could enter the system. Thus, Dayco knew that the Enviroflex System would contain water in the form of humidity, condensation, or actual standing water.

After five weeks of trial, four questions were posed to the jury. Pursuant to Dayco's statute of limitations defense, the jury was asked whether TCI "knew, or should have known, prior to September 25, 1993 that the polyester covered primary pipe was defective in material

and workmanship when used under normal operating conditions without misuse or abuse.” The jury answered “yes,” and proceeded to mark the second question, dealing with TCI’s breach of warranty claim, “N/A.” TCI’s breach of pricing claim was the third question, and the jury awarded TCI \$23,000,000 in answer to this question. To the fourth and final question, the jury awarded \$3,715,170 to Dayco for its counterclaim. I entered judgment based on the verdict on November 21, 2000.

CHOICE OF LAW

The Supply Agreements mandate that Pennsylvania law applies to this contract action. Pennsylvania law enforces choice of law contract provisions if the parties have sufficient contacts with the state whose laws the parties seek to apply and if the transaction is reasonably related to that state. *See Meade v. Florida Infusion Servs.*, 120 F. Supp. 2d 499, 501-02 (E.D. Pa. 2000). Courts must also ensure that the selected law does not obviate the fundamental public policy interests of another state whose law would govern but for the choice of law clause. *See Cottman Transmission Sys., Inc. v. Melody*, 869 F. Supp. 1180, 1183 (E.D. Pa. 1994). All three factors unquestionably favor the application of Pennsylvania law.

Because the Supply Agreements required the manufacture and delivery of pipe, a good, the governing statute is Article 2 of Pennsylvania’s version of the Uniform Commercial Code, 13 PA. CONS. STAT. ANN. § 2101 *et seq.* (“Pa.U.C.C.”). *See* Pa.U.C.C. § 2102. Both parties agree that the Pa.U.C.C. should apply.

DISCUSSION

I. TCI's Post-Trial Motions

TCI has raised numerous grounds of error which it claims necessitate a new trial or judgment as a matter of law in its favor. Most of their allegations of error attack the jury's finding that TCI's breach of warranty claim is time-barred. However, I find that: (A) the jury's finding on the statute of limitations issue had evidentiary support and; (B) TCI is not entitled to judgment as a matter of law on the statute of limitations question; (C) the jury's statute of limitations finding is not against the weight of the evidence; (D) TCI's motion for a new trial based on jury confusion is without merit; (E) the verdict was not influenced by attorney misconduct; (F) various evidentiary and other rulings do not justify a new trial; and (G) deny TCI's request that the court declare that Dayco breached the warranty provisions as a matter of law.

A. The Jury's Verdict on the Statute of Limitations Issue Had Evidentiary Support

Initially, TCI asks for a judgment as a matter of law in its favor and attacks the evidentiary foundation of the jury's conclusion that TCI knew or should have known, prior to September 25, 1993, that the polyester covered primary pipe was defective in material and in workmanship when used under normal operating conditions.

Upon a motion for judgment as a matter of law for insufficiency of evidence, the court may let the judgment stand, order a new trial, or direct entry of judgment as a matter of law. *See* FED. R. CIV. P. 50(b)(1). A court may enter judgment as a matter of law only where all of the evidence in the record fails to provide a sufficient legal evidentiary basis for a reasonable jury to find in favor of the nonmoving party. *See* FED. R. CIV. P. 50(a); *Reeves v. Sanderson Plumbing*

Prods., Inc., 530 U.S. 133, 150 (2000). Upon a motion for judgment as a matter of law, a court must view the evidence in the light most favorable to the nonmoving party, and draw every fair and reasonable inference in the non-movant's favor. *See McDaniels v. Flick*, 59 F.3d 446, 453 (3d Cir. 1995). If the record contains even the minimum quantum of evidence upon which a jury might reasonably afford relief, its verdict must be sustained. *See Keith v. Truck Stops Corp. of Am.*, 909 F.2d 743, 745 (3d Cir. 1990).

1. The Statute of Limitations under Pa.U.C.C. §2725

The question presented to the jury was whether the Pa.U.C.C.'s four-year statute of limitations barred TCI's claim for breach of the express warranty contained in the Supply Agreements. The Pennsylvania Uniform Commercial Code requires breach of contract actions to be filed within four years of the accrual of a cause of action. *See Pa.U.C.C. § 2725(a)*. Generally, a breach of warranty action accrues upon tender of delivery. *See id.* TCI filed suit against Dayco on September 24, 1997. Had the general "delivery rule" applied to this action, TCI could not sue for pipe delivered before September 25, 1993.

However, the Pa.U.C.C. provides an exception known as the "discovery rule" where a warranty explicitly extends to future performance and discovery of the breach cannot be made before the time of that performance. *See id.*; *Keller v. Volkswagon of Am.*, 733 A.2d 642, 645 (Pa. Super. Ct. 1999); *Patton v. Mack Trucks*, 519 A.2d 959, 965 (Pa. Super. Ct. 1986). In such instances, the statute of limitations is tolled until the buyer knew or had reason to know of the defect. *See Pa.U.C.C. §2725*. Because the Supply Agreements between TCI and Dayco

extended to future performance, the Pa.U.C.C. discovery rule applied.¹

TCI had a duty to use all reasonable diligence to unearth the facts and circumstances upon which its right of recovery is founded. *See Ciccarelli v. Carey Canadian Mines*, 757 F.2d 548, 555 (3d Cir. 1985). The Pa.U.C.C. discovery rule is analogous to the discovery rule applied in medical malpractice and other tort cases. Under the tort discovery rule:

The statute of limitations begins to run as soon as the plaintiff knows, or reasonably should know, (1) that he has been injured, and (2) that his injury has been caused by another party's conduct. The plaintiff need not know the exact medical cause of the injury, that his injury is due to another's negligent conduct, or that he has a cause of action.

The “polestar” of the discovery rule is not the plaintiff's actual knowledge, but rather whether the knowledge was known, or through the exercise of diligence, knowable to the plaintiff. Every plaintiff has a duty to exercise “reasonable diligence” in ascertaining the existence of the injury and its cause. Although there are very few facts which reasonable diligence cannot discover, there must be some reason to awaken inquiry and direct diligence in the channel in which it would be successful. The question whether a plaintiff has exercised reasonable diligence is usually a jury question. The statute of limitations begins to run as soon as the plaintiff has discovered or, exercising reasonable diligence, should have discovered the injury and its cause.

Bohus v. Beloff, 950 F.2d 919, 924-25 (3d Cir. 1991) (cites, internal quotes, and footnotes omitted) (outlining discovery rule in medical malpractice action); *see also Cochran v. GAF Corp.*, 666 A.2d 245, 249 (Pa. 1995). *Northampton County Cmty. College v. Dow Chem.*,

1. The discovery rule is an exception to the rule a buyer's cause of action accrues upon tender of delivery. *See* Pa.U.C.C. § 2725. Consequently, the party “claiming the benefit of the exception bears the burden of establishing that [the party] falls within it.” *Cochran v. GAF Corp.*, 666 A.2d 245, 248-49 (Pa. 1995). TCI sought to meet this burden through a clause in the 1990 Supply Agreement which read, “Expiration or termination of this Agreement for any reason shall not affect the rights or obligations provided for herein, nor shall such expiration or termination affect [various provisions of the contract, including the express warranty], *which shall survive and continue at all times thereafter.*” 1990 Supply Agreement at ¶6.2; 1993 Supply Agreement at ¶6.2 (emphasis added). This phrase unambiguously warranted future performance of the goods beyond the four year limit of Pa.U.C.C. § 2725. *See Patton v. Mack Trucks, Inc.*, 519 A.2d 959, 962 (Pa. Super. Ct. 1986) (requiring clear and unambiguous expression of intent that warranty extends beyond the usual period for Pa.U.C.C. discovery rule to apply).

U.S.A., 566 A.2d 591, 598-600 (Pa. Super. Ct. 1989). Reasonable diligence is an objective, not subjective standard. *Cochran*, 666 A.2d at 249. Once the plaintiff possesses the salient facts concerning the occurrence of its injury and who or what caused it, the plaintiff has the ability to investigate and pursue its claim; the statute of limitations begins to run. *Ciccarelli*, 757 F.2d at 554 (setting forth tort discovery rule in asbestos case); *O'Brien v. Eli Lilly & Co.*, 668 F.3d 704, 709 (3d Cir. 1981) (DES case).

Whether and when a plaintiff should know of a defect is frequently a question for a jury. *See Bohus*, 950 F.2d at 924-25; *Hoeflich v. William S. Merrell Co.*, 288 F. Supp. 659, 662 (E.D. Pa. 1968) (declaring that the date of discovery of defect is question to be submitted to jury); *Colonna v. Rice*, 664 A.2d 979, 981 (Pa. Super. Ct. 1995) (statute of limitations tolled until plaintiff knows that it has been injured and that injury was caused by another party's conduct).²

2. Evidence Supports the Jury's Finding

Accordingly, the jury was asked under the heading "Statute of Limitations" whether TCI, "knew, or should have known, prior to September 25, 1993 that the polyester covered primary pipe was defective in material and workmanship when used under normal operating conditions

2. There are a number of cases to the effect that the "tort discovery rule" does not apply in contractual or commercial contexts. *See e.g. Northampton County Cmty. College v. Dow Chem., U.S.A.*, 566 A.2d 591, 599 (Pa. Super. Ct. 1989) (citing *Patton* for the proposition that "the tort discovery rule does not apply to breach of warranty actions"); *Firestone & Parson, Inc. v. Union League of Phila.*, 672 F. Supp. 819, 822 (E.D. Pa. 1987) (Fullam, Ch.J.) ("Pennsylvania courts do not extend the "discovery rule" exception to commercial transactions"). While that statement is true in the usual goods contract case, the discovery rule applies where the contract clearly and unambiguously extends to future performance. *See Pa.U.C.C. § 2725; O'Brien*, 668 F.2d at 711 (under Pa.U.C.C. cause of action be deemed to have accrued on date of discoverability where contract explicitly extends to future performance). *See Patton*, 519 A.2d at 963-65. Where the discovery rule exception to Pa.U.C.C. §2725 is applicable, analogy to the tort discovery rule may prove fruitful. Of course, in evaluating the reasonableness of the plaintiff's diligent inquiry, a court should be mindful of the inherent differences between a hapless tort victim and sophisticated commercial parties to a contract. *See Cochran v. GAF Corp.*, 666 A.2d 245, 249 (Pa. 1995) (declaring reasonable diligence standard flexible enough to account for differences between persons and their capacity to meet certain situations).

without misuse or abuse.” In other words, the jury was asked to determine when TCI should have learned that the primary pipe degraded inside the Enviroflex system. The jurors answered the question “Yes,” thereby fixing September 25, 1993 as the “discovery date.” From the evidence presented at trial, the jury could have reasonably made that conclusion.

By September 25, 1993, TCI had hired Mr. Homer Holden, who knew two key facts: (1) that the cover material for the primary pipe was susceptible to degradation when exposed to water; and (2) that water would be present in the Enviroflex system. Mr. Holden held a bachelor’s in mathematics and chemistry and completed some graduate course work in organic chemistry. At Dayco, Mr. Holden rose to the position of Plastic Products Development Manager, and was responsible for choosing the coating for the primary pipe to be used in the Enviroflex system. *See* Tr. Trans. Oct. 20, 2000 (a.m.) at 76-77, 89. Called as a witness for TCI, Mr. Holden testified that he knew that the Estane 5710 material he had selected was a polyester polyurethane³ substance and that material could degrade if exposed to moisture. *See* Tr. Trans. Oct. 25, 2000 (p.m.) at 131. He had previously designed a hose for a street cleaner using a polyester polyurethane substance. The hose had been thrown into some grass clippings and deteriorated. Mr. Holden contacted the manufacturer of the material, B.F. Goodrich, to discover more about the hose. B.F. Goodrich advised him to use a different material with better water resistance. *See* Tr. Trans. Oct. 20, 2000 (a.m.) at 102-04. He also stated that when Estane 5710 was chosen as the coating material for the Enviroflex system, he knew that it was more susceptible to water degradation than other polyurethane substances. *See* Tr. Trans. Oct. 20,

3. Polyurethanes are a group of materials with the elastic properties of rubber that can also be heated and molded into shape. *See* Tr. Trans. Oct. 25, 2000 (a.m.) at 98.

2000 (p.m.) at 150.

Mr. Holden also testified that he knew as early as 1989 that standing or pooled water would be present in the Enviroflex system. *See* Tr. Trans. Oct. 20, 2000 (a.m.) at 86; Oct. 25, 2000 (p.m.) at 124-26. Specifically, he testified that he expected that water would be present as a “normal operating condition” for the Enviroflex system, if only in locations subject to humidity or rainy weather. *See* Tr. Trans. Oct. 25, 2000 (p.m.) at 133-34, 197-98. Soil could be present in the system as well. *See* Tr. Trans. Oct. 25, 2000 (p.m.) at 124; Tr. Trans. Oct. 23, 2000 (a.m.) at 11-12. Mr. Holden left Dayco in July 1990 and started working for TCI as Director of Research. Tr. Trans. Oct. 23, 2000 (a.m.) at 49-51, 57. Thus, by September 25, 1993, a key TCI executive knew both that the primary pipe would degrade if exposed to water and that water or soil would be present in some Enviroflex systems. These facts alone allowed TCI to know of the potential material defect in the pipe and of its right to sue Dayco.

Other TCI employees corroborated that TCI knew that water would enter the Enviroflex system. Mike Webb, TCI’s founder and the inventor of the Enviroflex system, testified that the primary pipe was designed to function with water and soil present, and TCI submitted it to be tested by United Laboratories in 1989 with such parameters in mind. *See* Tr. Trans. Nov. 6, 2000 (a.m.) at 65, 90. Jeff Boehmer, TCI’s operations manager in 1990, explained that water could enter the system through sumps and electrical conduits. *See* Tr. Trans. Oct. 12, 2000 (a.m.) at 69-70.

In addition, TCI learned that an Enviroflex system leaked in Puerto Rico in April 1993 after the primary pipe deteriorated. TCI sent a sample of the Puerto Rico pipe to Dayco for analysis. A product development specialist with Dayco, Jeffrey Winter, issued a report on May

24, 1993 and concluded that the “cover degraded by contact with water.” Def. Exh. 985 at 1. Dayco immediately shared its May 24, 1993 report with TCI. *See* Tr. Trans. Nov. 13, 2000 (p.m.) at 170 (testimony of Jeff Winter). Mr. Boehmer of TCI admitted that TCI learned that there may be problems with the cover material during the summer of 1993. *See* Tr. Trans. Oct. 12, 2000 (p.m.) at 114-15. On September 17, 1993 John Vautier of TCI told Mr. Winter that 45% to 50% of TCI sumps were filled with water.

In sum, by September 25, 1993, TCI possessed information that the pipe cover was composed of a polyester polyurethane substance, that the cover could degrade if exposed to water, and knew that water would be present in some sites where the Enviroflex system would be installed for extended or recurring periods. In addition, it knew of at least one site where the primary pipe actually degraded. Accordingly, the jury had sufficient evidence to support its finding on the statute of limitations question.

3. TCI’s Arguments that the Jury’s Finding Lacked Sufficient Evidence Fail

TCI attacks the jury’s finding for three alleged flaws. First, TCI maintains that it did not learn the “true cause” of the primary pipe failure – that Estane 5710 was susceptible to microbial fungal attack – until after September 25, 1993, when it conducted its own experiments on the primary pipe. Even if microbial fungal attack is the true cause of the primary pipe’s degradation, the jury could find that TCI was still on notice as to a potential defect of the pipe as of September 25, 1993.

Second, TCI argues that Mr. Holden only knew that the polyester polyurethane material

he selected was subject to hydrolysis at a slow rate after prolonged exposure. As discussed above, there was evidence on the record that some sections of primary pipe could be subject to prolonged or repeated exposure to water, which could allow the pipe to degrade.

TCI lastly argues that the jury lacked evidence to preclude recovery for pipe delivered after September 25, 1993. TCI's argument fails for two reasons. First, it misconstrues how the statute of limitations operates. Once the court has determined, as here, that the contract extends to future performance of the warranty (as the court did here at TCI's urging), the statute of limitations begins to run as of the date upon which the plaintiff discovered or should have discovered the defect and learned it had a cause of action, even if the exact cause or exact defendant remained unknown. *See* Pa.U.C.C. § 2725(b). The date of delivery of the pipe thus becomes irrelevant. With the discovery date now fixed at September 25, 1993, Dayco is entitled to judgment in its favor on the breach of warranty claim.

Second, even if TCI could recover for damages relating to pipe for which delivery was tendered after September 25, 1993, TCI introduced no evidence relating to the amount of damages attributable to allegedly defective pipe delivered after that date. Without objection by either party, I instructed the jury on how to devise a damage award:

The law does not permit you to award damages based merely on sympathy or speculation. You may only compensate for injuries that have been proven, and you may only award the amount of money that will fairly compensate for those injuries. You may award damages for any loss that satisfies the following three requirements:

1. the breach of contract was the proximate cause of the loss;
2. the party has proven the value of the loss by a reasonable degree of certainty; and
3. it was reasonably foreseeable, at the time the parties entered into the contract, that the non-breaching party would suffer such a loss as a result of a breach.

Jury Instructions at 45-46; Tr. Trans. Nov. 15, 2000 (a.m.) at 61; *see also* Pa.U.C.C. § 2715 (remedy for consequential damages); *Sulakshna, Inc. v. Transmedia Network*, 207 B.R. 422, 432 (Bankr. E.D. Pa. 1997); *In re 222 Liberty Assocs.*, 101 B.R. 856, 863 (Bankr. E.D. Pa. 1989).

The jury had no reasonably certain evidentiary basis upon which to base an award for pipe delivered after the date TCI discovered or should have discovered the breach. As I stated during oral arguments on this issue, at some point TCI elected to pursue an “all or nothing” approach to its breach of warranty claim, and failed to introduce any identifiable evidence relating to the lost profits or other damages relating solely to pipe delivered after that date. *See* Tr. Trans. Nov. 14, 2000 (p.m.) at 152.

B. TCI Is Not Entitled to Judgment as a Matter of Law on the Statute of Limitations Question

TCI also seeks to overturn the jury’s finding by positing that it is entitled to judgment as a matter of law. TCI’s arguments are unavailing.

1. Dayco Timely and Fairly Raised its Statute of Limitations Defense

TCI argues that Dayco raised its statute of limitations defense late and unfairly. However, a review of the course of this litigation reveals that Dayco has repeatedly raised the statute of limitations as a defense. Dayco first raised the defense in its answer, and the timeliness of the lawsuit became one of the bases for its summary judgment motion. TCI responded to that motion by arguing that factual issues remained as to when TCI could have discovered the defect in the primary pipe. Dayco again raised the issue in guise of a motion in limine, seeking to exclude all evidence as to TCI’s time barred claims. TCI’s memorandum in opposition to this motion appended its summary judgment response, again signifying that TCI thought factual

issues remained as to when TCI learned of the defect. In both instances, the court did nothing more than refuse to dispose of the case as a matter of law in Dayco's favor on the statute of limitations issue. Referring to Dayco's motion in limine on the statute of limitations issue, I commented towards the conclusion of trial:

I ruled it wasn't – it didn't dispose of the case. [Dayco] filed a motion that wanted me to rule at that point that the statute of limitations applied and so on before there could be legal argument and evidence and so and so [sic] forth. The jury has to decide, not me, it's a factual question.

Tr. Trans. Nov. 15, 2000 (a.m.) at 29. In reaching that conclusion, the court relied on TCI's representations that the discovery rule applied and that factual issues remained.

TCI also argues that Dayco did not raise the statute of limitations question in its opening statement or elicit evidence on the issue until late into the trial. TCI's argument on this point fails for several reasons. First, there is no rule of civil procedure of which the court is aware which *requires* a party to raise a legal issue in its opening statement, under penalty of waiver.⁴ Second, if (as TCI argued to the court) there remained factual issues on the statute of limitations question, TCI itself could have raised them in its opening statement and introduced evidence on that point.⁵ Third, Dayco did elicit a substantial amount of evidence relating to the statute of limitations defense early on in the trial from Homer Holden's cross examination.

TCI also argues that Dayco submitted its jury instructions late, depriving TCI of the knowledge that the statute of limitations would be an issue at trial. TCI knew by the summary

4. Dayco counsel's mistaken belief while making his opening statement that the statute of limitations issue was out of the case, *see* Tr. Trans. Nov. 15 (a.m.) at 27-28, does not remove the issue from the jury's consideration because Dayco took all necessary steps to preserve the issue.

5. Indeed, as the party seeking the benefit of the discovery rule exception to the Pa.U.C.C. statute of limitations, TCI had the burden of establishing the discovery rule applied. *See Cochran v. GAF Corp.*, 666 A.2d 245, 248-49 (Pa. 1995).

judgment phase at the latest that the statute of limitations question posed a factual issue.

Counsel for Dayco made it abundantly clear in the pretrial conference that it would seek a charge on the statute of limitations and take exception if the Court failed to give one. *See* Tr. Trans. Oct. 10, 2000 at 44. Dayco did not submit its instructions so late as to preclude TCI from effectively responding with evidence. In addition, TCI had ample time to devise a statute of limitations charge on its own, and in fact, it did so.

Third, TCI claims that Dayco dilatorily and unfairly revised its list of exhibits for the direct examination Jeff Winter the night before he was called as a witness to include testimony on the statute of limitations issue. The parties had previously established a protocol, approved by the court, for the early exchange of such lists. However, the court has not been shown any precedent establishing a protocol violation as a ground for judgment as a matter of law. Moreover, TCI failed to object to the introduction of these exhibits during trial. A trial court will not ordinarily take note of errors and the grounds therefor that were not pointed out to the court at the proper time. *See* FED. R. CIV. P. 46; *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1306 (3d Cir. 1997); 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §2472, at 95-96 (2d ed. 1995).

Finally, the Court alerted the parties that it was concerned about the statute of limitations issue by bringing to the attention of the attorneys, prior to TCI's rebuttal case,⁶ that the jury would need to decide how much water entered the Enviroflex system and "who [knew] what and when." Tr. Trans. Nov. 8, 2000 (a.m.). Counsel for TCI responded, "We'll deal with this at the charging conference." *Id.* On the first day of the charging conference, also held prior to TCI's

6. TCI called its first rebuttal witness on November 14, 2000. *See* Tr. Trans. Nov. 14, 2000 (a.m.).

rebuttal, I clearly indicated that the Pa.U.C.C. Statute of Limitations would govern. *See* Nov. 9, 2000 (a.m.) at 68. TCI's challenge to the timeliness and fairness of the statute of limitations defense is devoid of any merit.

2. TCI Is Not Entitled to Judgment as a Matter of Law on Concealment and Estoppel Grounds

a. Timeliness of TCI's Motion

TCI next argues that it is entitled to judgment as a matter of law because Dayco is estopped from asserting the statute of limitations as a defense. TCI did not explicitly make a Rule 50 motion on this basis. Only a party who has asserted a ground in a motion for judgment as a matter of law may reassert the matter post-trial. *See* FED. R. CIV. P. 50(b); *Mosley v. Wilson*, 102 F.3d 85, 90 (3d Cir. 1996); *U.S. v. Wall*, 592 F.2d 154, 159-60 (3d Cir. 1979). This rule bars a court from unnecessary re-examination of facts decided by a jury. *Simmons v. City of Phila.*, 947 F.2d 1042, 1076-77 (3d Cir. 1992). Although Dayco maintains that TCI did not fulfill this procedural prerequisite for its motion as a matter of law on concealment grounds, TCI orally raised a Rule 50 motion attacking the sufficiency of the statute of limitations defense. *See* Tr. Trans. Nov. 14, 2000 at 123. In addition, I note that TCI took exception to the court's decision that a concealment instruction and separate interrogatory was unwarranted. *See* Tr. Trans. Nov. 15, 2000 (a.m.) at 13 and 66. Without deciding whether these steps properly preserved the issue as grounds for judgment as a matter of law, I will consider the merits of TCI's argument.

b. TCI's Concealment and Estoppel Arguments Fail

TCI seeks a declaration that it is entitled to judgment as a matter of law on the statute of limitations issue because Dayco should have been estopped from asserting it as a defense. The

evidence adduced at trial provided no basis for such a conclusion.

Under the equitable principles of estoppel, a defendant cannot raise a statute of limitations defense if the defendant concealed or defrauded the plaintiff so that the plaintiff would relax its vigilance or deviate from its right of inquiry. *See Northampton County Area Cmty. College v. Dow Chem., U.S.A.*, 566 A.2d 591, 600 (Pa. Super. Ct. 1989); *Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548, 556 (3d Cir. 1985); *Hoeflich v. William S. Merrell Co.*, 288 F. Supp. 659, 661 (E.D. Pa. 1968).

The sufficiency of a plaintiff's claims of concealment and estoppel are legal questions. *See Ciccarelli*, 757 F.2d at 557. Estoppel must be proved by clear and convincing evidence. *See McDowell v. Raymond Indus. Equip.*, No. 00-5945, 2001 U.S. Dist. LEXIS 1142, at *6 (E.D. Pa. Feb. 6, 2001); *Hubert v. Greenwald*, 743 A.2d 977, 981 (Pa. Super. Ct. 1999); *Stonehenge Square Ltd. v. Movie Merchants, Inc.*, 685 A.2d 1019, 1024 (Pa. Super. Ct. 1996).

A plaintiff need not prove fraud in the strictest sense; unintentional concealment upon which the plaintiff relied will suffice. *See Montanya v. McGonegal*, 757 A.2d 947, 950-51 (Pa. Super. Ct. 2000). At a minimum, though, the defendant must commit some affirmative, independent act of concealment upon which the plaintiffs justifiably rely. *See Martin Lumber and Cedar Co. v. PPG Indus.*, 223 F.3d 873, 878 (8th Cir. 2000); *Ciccarelli*, 757 F.2d at 556; *Northampton County*, 566 A.2d at 600. Mistake, misunderstanding, or lack of knowledge on the part of the plaintiff are not sufficient to estop a statute of limitations defense. *See Ciccarelli*, 757 F.2d at 556; *Montanya*, 757 A.2d at 950. In addition, the time limit for filing suit is not waived simply because of an adversary refuses to agree that the plaintiff's claims is valid. *See Firestone & Parson, Inc. v. Union League of Phila.*, 672 F. Supp. 819, 822 (E.D. Pa. 1987).

As I indicated at trial, there is simply insufficient evidence to clearly and convincingly prove that Dayco concealed from TCI that it had a claim against Dayco. *See* Tr. Trans. Nov. 15, 2000 (a.m.) at 11-12. By the summer of 1993, TCI had learned that the primary pipe at one of its stations had decayed, and Dayco had alerted TCI that the pipe “degraded by contact with water.” Def. Exh. 985 at 1. If, as TCI maintains, that normal operating condition of the pipe included exposure to humidity, condensation and occasional pools of water, that alone should have triggered TCI’s need for inquiry.

Alternatively, if, as TCI maintains, microbes caused the degradation of the pipe, again, its duty to inquire as to the cause was triggered. While TCI may have been unaware of the purported role microbes played in the degradation of the primary pipe cover, there is no evidence that Dayco did anything to cause TCI to relax its vigilance or deviate from its right of inquiry. Dayco consistently maintained that the cause of the primary pipe cover degradation was hydrolysis, a position it maintained at trial. An adversary’s refusal to agree to the plaintiff’s theory of liability does not transform its statements into acts of concealment. *See Martin Lumber and Cedar*, 223 F.3d at 878; *Firestone & Parson, Inc.*, 672 F. Supp. at 822 (adversary’s refusal to concede legitimacy of plaintiff’s claims not sufficient to constitute concealment). At most, the evidence shows that Dayco suspected microbes might play a role in the pipe degradation and did not communicate that information to TCI. Such silence or inaction does not rise to the level of an “affirmative act of concealment.” Lastly, Dayco said or did nothing to indicate that the statute of limitations would not be enforced.

Rather, the question was at what point did TCI learn that it had a claim against Dayco. As I said at trial, “I think that the jury heard argument that Dayco had information and TCI didn’t get

it. They heard argument from Dayco that TCI had information and didn't do anything with it. And that's what they — that's what the jury heard.” The Court properly advised the jury of that issue as part of its charge on the discovery rule, and presented that question to the jury. *See* Jury Instructions at 24; Tr. Trans. Nov. 15, 2000 (p.m.) at 48. The jury has made its finding that TCI knew (or should have known) of the potential defect in the primary pipe before September 25, 1993. That finding should not be disturbed.

C. The Statute of Limitations Finding was not against the Weight of the Evidence so as to Warrant a New Trial

TCI similarly attacks the jury's finding as against the weight of the evidence. A jury's verdict can be stricken as against the weight of the evidence only where a miscarriage of justice would result if the verdict were to stand. *See Delli Santi v. CNA Ins. Cos.*, 88 F.3d 192, 201 (3d Cir. 1996). A district court may not substitute its judgment of the facts and the credibility of the witnesses for that of the jury. *See id.* I find that the jury could properly conclude, without committing a miscarriage of justice, that TCI waited too long to bring its claims after it should have learned of an alleged defect in the Dayco pipe.

D. TCI's Motion for a New Trial Based on Jury Confusion Is Without Merit

TCI next speculates that the jury's verdict was the result of “confusion” and requires a new trial. Based on my knowledge of the witnesses, testimony, and issues involved in this action, as well as my charge to the jury and the jury's verdict and interrogatory answers, I find their arguments without merit. *See Weisgram v. Marley Co.*, 528 U.S. 440, 452 (2000) (declaring trial court in best position to evaluate entitlement to a new trial). A court may order a new trial on the basis of jury confusion only where required to prevent injustice. *See Blanca v.*

Raymark Indus., 972 F.2d 507, 512 (3d Cir. 1992) (reversing trial court which ordered new trial on the basis of jury confusion). Courts take a restrictive approach to overturning a jury's verdict because of the sanctity of jury verdicts afforded by the Seventh Amendment. *See Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 364 (1962); *Hotel Assocs. v. Holiday Inns*, 152 F.R.D. 206, 212 (D. Utah 1993). Furthermore, "a court may not inquire into the internal workings of the jury's decisional processes on the mere suspicion of confusion." *See id.* (citing *Beron v. Kramer-Trenton Co.*, 402 F. Supp. 1268, 1271 n.5 (E.D. Pa. 1975); *Sullo v. Texaco, Inc.*, No. 82-5333, 1985 U.S. Dist. LEXIS 21312, at *10 (E.D. Pa. Mar. 28, 1985)).

Hotel Associations is particularly instructive of how greatly a trial judge must respect a jury's verdict in the face of suspected confusion. The jury returned once with special verdicts and the deputy clerk began to publish them. *See Hotel Assoc.*, 152 F.R.D. at 208. The trial judge halted the publication midway when he realized his instructions had not been followed and ordered them the jurors to resume deliberations when it became obvious they had not followed his instructions. *See id.* The jury returned a second time with a verdict, only to learn the court had improperly given it instructions on how to answer certain interrogatories. *See id.* at 209-10. The court issued clarifying instructions, and then sent the jury out for a third and final time, and the jury returned with its verdict. *See id.* at 210-11. The court initially granted a new trial on the basis of juror confusion, but subsequently reversed itself. *See id.* at 208. Instead, the court focused on whether the jury had understood the central and critical issue in the case and upheld the jury's verdict. *See id.* at 212-14. Thus, even upon the appearance of juror confusion, the court must focus on whether the jury was confused in rendering its verdict on the final, central issue.

1. There Is No Concrete Evidence of Jury Confusion

The TCI jury evinced fewer and far less potent signs of confusion than the jury in *Hotel Associations*. The jury asked the court to “Explain question number one, that’s the statute of limitations as it pertains to pages 21 through 25 in the jury instructions.” Tr. Trans. Nov. 15, 2000 (p.m.) at 8. Asking for clarification is not necessarily a sign of confusion. With the counsel of both parties and without objection, I responded, “Read the question carefully and carefully read the instructions as given.” *Id.* at 10. The jury asked no further questions on the statute of limitations question. The jury then unequivocally found against TCI on Question 1 (the statute of limitations interrogatory), and avoided answering Question 2 (the breach of warranty question) by marking it “N/A.” In so doing, the jury followed my instructions to the letter: after answering yes to Question 1, they skipped Question 2 and proceeded to Question 3.

The only palpable evidence of confusion is the jury’s \$23,000,000 award on Question 3, TCI’s breach of pricing claim. However, there is nothing in the juror’s response which indicates that they misunderstood or could not apply the court’s instructions on the statute of limitations question. Rather, it evinces confusion as to the maximum value of the breach of pricing claim. While I address that problem below at length, I note here that the answer to Question 3 should not impact the separate and distinct analysis which the jury was called upon to conduct on the statute of limitations issue.

2. The Statute of Limitations Question did not “Surprise” the Jury

TCI also argues that the jury was confused because they did not learn of the statute of limitations issue until late in the case. However, Mr. Holden and Mr. Boehmer provided a substantial amount of testimony early on in the trial which bore on the statute of limitations

issue, undermining TCI's argument. Furthermore, as discussed above, the statute of limitations issue was a part of the case from the beginning. It is disingenuous for TCI to complain of injustice because it failed to address an extant issue (and one of Dayco's primary defenses). Again, as I noted above, the burden of escaping the statute of limitations was upon TCI. *See Cochran v. GAF Corp.*, 666 A.2d 245, 248-49 (Pa. 1995).

3. The Jury Instructions and Verdict Sheet Did Not Cause Jury Confusion

TCI also attacks the verdict sheet⁷ and the jury instructions⁸ as the source of the jury's

7. QUESTION 1

Statute of Limitations

Do you find by a preponderance of the evidence that Total Containment, Inc. knew, or should have known, prior to September 25, 1993 that the polyester covered primary pipe was defective in material and workmanship when used under normal operating conditions without misuse or abuse.

Yes _____ No _____

If YES, proceed to Question 3 [Breach of Pricing Claim]; if NO, proceed to Question 2 [Breach of Warranty].

8. I charged the jury:

As a defense to TCI's claim that Dayco breached a warranty provision in its contracts, Dayco has raised a statute of limitations – that is, Dayco argues that it is too late to sue in a court of law.

It has been suggested by TCI that Dayco has raised in its closing argument the statute of limitations defense for the first time. I instruct you that this defense was properly raised by Dayco. In fact, it has been raised as a defense since the beginning of the case, and Dayco may properly attempt to prove it as a defense in this case.

Dayco has the burden to prove TCI filed its claims too late.

A claim for breach of contract must be filed in Court within four years from when TCI discovered or should have discovered Dayco's alleged breach. TCI filed suit on September 25, 1997. If you find that TCI knew, reasonably should have known, or with the exercise of reasonable diligence would have known of Dayco's alleged breach prior to September 25, 1993, you must find that any claims relating to primary pipe supplied prior to September 25, 1993 are out of time, and TCI is barred from asserting such claims.

TCI claims that Dayco had information regarding the causes of pipe degradation prior to September 25, 1993 which was not shared with TCI. Dayco denies this and claims TCI had such information prior to that date.

Tr. Trans. Nov. 15, 2000 (p.m.) at 47-48; Jury Instructions at 22-24. The Court adds that both parties agreed, before

confusion. TCI points to: (a) the court's finding that an estoppel by concealment instruction was unwarranted; and (b) instructions to the jury relating to pipe delivered after September 25, 1993.

I address each in turn.

a. Concealment and Estoppel

TCI's argument on this point is a revival of its contention that it was entitled to an instruction on concealment and estoppel. Taken as a whole, the instructions properly informed the jury of all of the issues and the applicable law. *See Limbach Co. v. Sheet Metal Workers Int'l Ass'n*, 949 F.2d 1241, 1259 n.15 (3d Cir. 1991) (en banc). As discussed above, TCI was not entitled to an instruction on concealment and estoppel. *See supra* I.B.3.b. The jury instructions did address TCI's contention that it did not learn of the problem with the primary pipe until after the 'discovery date' of September 25, 1993, and even addressed the contention that Dayco may have possessed some information which it did not share with TCI. *See* Jury Instructions at 24; Tr. Trans. Nov. 15, 2000 (p.m.) at 48. However, as a matter of law, TCI failed to prove concealment and estoppel. Accordingly, jury confusion cannot be predicated on the court's refusal to give an instruction on that point.

b. Polyester-covered Primary Pipe Delivered after September 25, 1993

The verdict sheet properly directed the jury to find TCI's claims time barred if TCI knew or should have known of the defect before September 25, 1993, without reference to when the pipe was delivered. TCI claims that the verdict sheet conflicted with the jury instruction that only claims "relating to primary pipe supplied prior to September 25, 1993" would be barred.

charging the jury, that Dayco bore the burden of proof on the statute of limitations question.

TCI never offered any evidence of damages caused by pipe delivered before September 25, 1993 as opposed to pipe delivered thereafter. In addition, and as TCI ardently argued, the Pa.U.C.C.'s discovery rule, rather than its delivery rule, governs this action. Accordingly, TCI's cause of action accrued as of the date when TCI should have discovered the defect regardless of when a particular shipment of the primary pipe was delivered. The contract between the parties called for a stream of deliveries of the same pipe which extended before and after September 25, 1993 — the date by which TCI knew or should have known of the defect. For TCI to insist on recovery for pipe delivered after September 25, 1993 would pose a dilemma. Under that theory, TCI knew or should have known of the design defect in the primary pipe, continued to accept delivery nonetheless, and continued to sell the pipe for installation in gasoline stations.⁹ Such a

9. TCI places mistaken reliance on a Pennsylvania Supreme Court decision which allows a buyer who knowingly purchases and resells a defective product to nonetheless recover consequential damages. *See AM/PM Franchise Ass'n v. Atlantic Richfield Co.*, 584 A.2d 915 (Pa. 1990). That case is not controlling here for many reasons.

First, *AM/PM Franchise* is factually distinguishable. The buyers, AM/PM Franchise Association members were franchisees of Atlantic Richfield ("ARCO"). *See id.* at 918. The franchise members rented their premises from ARCO and purchased their requirements of gasoline from ARCO as well. *See id.* at 918-19. ARCO began providing an experimental unleaded gasoline which proved to be defective. *See id.* at 918-19. Nonetheless, the franchise members were not given the option of purchasing ordinary unleaded gas. *See id.* at 918. In that case, the court found that the franchise members' recovery would not be limited by a duty to purchase cover goods (i.e. commercially reasonable substitutes) because the buyers' contractual commitments to ARCO meant that the franchise members "could not 'cover.'" *Id.* at 922. Given that the buyers were also franchisees of the seller and actually leased their place of business from ARCO, the lack of choice on the franchisees' part is understandable. In contrast, TCI is an independent corporation. If it felt contractually bound to purchase defective pipe, it could have sought a declaratory judgment terminating their obligation to Dayco. Moreover, Dayco *did* offer TCI the option of purchasing the water-resistant polyether pipe in the spring of 1993, providing TCI with a means to cover or mitigate its losses. *See* Tr. Trans. Nov. 13, 2000 at 166-67.

Second, *AM/PM Franchise* interpreted the Pa.U.C.C.'s consequential damages section, section 2715, to excuse the buyer from finding cover. The Pennsylvania Supreme Court expressly felt its conclusion compelled by the broad approach to contractual remedies taken by the drafters of the U.C.C. and embodied in section 2715. *See id.* at 923 (citing Pa.U.C.C. § 1106). Here, in contrast, the buyer, TCI, is not being faulted for failing to cover but for failing to sue within the appropriate period.

The Court also notes that insofar as TCI reads *AM/PM Franchise* to allow a buyer to recover damages for a defective product it purchased which it knew to be defective, such a reading is out of line with scholarship and prevailing case law interpreting the U.C.C. *See* 1 JAMES J. WHITE AND ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 576-77

result would defeat the purpose of the statute of limitations as a vehicle of repose for a seller: The philosophy enshrined in section 2725 reflects the common goal of statutes of *limitation* which aim to *limit* a seller's liability rather than expand it. *See Insurance Co. of N. Am. v. Carnahan*, 284 A.2d 728, 729-730 (Pa. 1971) (stating that purpose of any statute of limitations is to discourage presentation of stale claim and prevent prejudice to potential defense); Chris Williams, *The Statute of Limitations, Prospective Warranties, and Problems of Interpretation in Article Two of the UCC*, 52 GEO. WASH. L. REV. 67, 69 (1983) (section 2725 incorporates policies behind traditional statutes of limitation). To that end, the drafters combined two rules within section 2725: the delivery rule for ordinary warranties and the discovery rule for prospective warranties. *See id.* at 78-82 (discussing history of Uniform Commercial Code statute of limitation). TCI elected to sue under a prospective warranty theory which afforded TCI a longer period to file suit. However, the jury found that TCI failed sue even within that more relaxed period. Thus, TCI's claims are time barred. Even where the discovery rule is applicable, courts cannot hesitate to bar a buyer's suit brought outside the proper period. *See e.g. Grand Island Express v. Timpte Indus.*, 28 F.3d 73 (8th Cir. 1994).

The Court notes that it charged the jury that only "claims relating to primary pipe supplied prior to September 25, 1993" would be "out of time." However, that text (prepared by Dayco) actually provided TCI with a more salutary instruction than the law allowed.

(4th ed. 1995) (discussing duty to mitigate when buyer knew of defect; compiling cases). Pennsylvania law requires mitigation in other contexts. *See Bafile v. Borough of Muncy*, 588 A.2d 462, 465 (Pa. 1991) (non-breaching party must make reasonable efforts to mitigate losses); *Fortney v. Tennekoon*, No. 95-4685, 1998 U.S. Dist. LEXIS 3926, at *33-34 (E.D. Pa. Mar. 12, 1998); RESTATEMENT (SECOND) CONTRACTS § 350(1) and cmt. b (disallowing recovery of damages when non-breaching party knows that other party will not perform). Accordingly, insofar as TCI's reading may be correct, I predict that the Pennsylvania Supreme Court would not expand its holding where a buyer discovered a defect and failed to sue the seller within four years thereafter.

Nonetheless, the jury found against TCI. No injustice has been wrought here, and no new trial is warranted on the basis of jury confusion.

E. The Verdict Was Not Influenced by Attorney Misconduct

TCI next argues that it is entitled to a new trial because of three instances of purported misconduct by Dayco's counsel: (a) that Dayco counsel referred to TCI's complaint in his closing argument; (b) that he mentioned water problems with an Enviroflex system in Paraguay; and (c) that he made arguments and introduced evidence that TCI had committed a "fraud."

1. Reference to TCI's Complaint

TCI first objects to Dayco's reference to TCI's Complaint in this action, which had not been received into evidence. The complaint alleged a problem with the Puerto Rico Enviroflex site in the spring of 1993. TCI first raised this objection in its briefs supporting its post-trial motions. TCI had the opportunity to object during or immediately after Dayco's closing. Indeed, after closing arguments and before the case was submitted to the jury, counsel for TCI evinced that they were aware of Dayco's use (and purported misuse) of the Complaint, but failed to object. *See* Tr. Trans. Nov. 15, 2000 (a.m.) at 7. If TCI were truly aggrieved by opposing counsel's mention of the complaint, it should have objected at the time. As such, TCI must be deemed to have waived its objection to counsel's closing. *See* FED. R. CIV. P. 46; 9A Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure*, §2472 at 97 (1995).

Moreover, I find that TCI cannot object to a judicial admission it made, "drafted by counsel for the express purpose of limiting and defining the facts at issue." *In re Cendent Sec. Litig.*, 109 F. Supp.2d 225, 230 (D. N.J. 2000). The allegation in the complaint, unless amended or explained, bound TCI through subsequent stages of the proceeding. *See id.*; *see also Sicor*

Ltd. v. Cetus Corp., 51 F.3d 848, 859 (9th Cir. 1995) (holding statement in complaint may serve as judicial admission unless subsequently amended).

TCI finds fault in the use of excerpts from the complaint because it lost the ability to explain or place in context the quoted statements. However, the reference to TCI's complaint was not the first time TCI or the jury was called upon to evaluate what TCI learned as a result of the Puerto Rico incident. Other evidence relating to the Puerto Rico site was admitted at trial. Thus, TCI's claims that it was prejudiced by its inability to cross examine or introduce evidence which would put the events which transpired in Puerto Rico in a more favorable light are harmless, if not wholly without merit.

2. Reference to Paraguay

TCI next asserts that Dayco counsel prejudiced the jury by mentioning, without supporting evidence in the record, water problems in an Enviroflex system in Paraguay. After discussing the Puerto Rico incident, Dayco counsel stated, "[a]nd then there's Paraguay, the same month. Problems with water in the system." Tr. Trans. Nov. 14, 2000 (p.m.) at 242-43. He then returned to a discussion of the Puerto Rico site. This brief section of counsel's closing had evidentiary support. An April 23, 1993 letter from Esso (Exxon) to John Morrison of TCI referred to the Paraguay site and read, "As you may know, that particular site has a very high water table that really challenges the tightness of the whole installation set in place." *See* Def. Exh. 979 at 1. Thus, Dayco's counsel did no more than describe one of many facts which TCI knew before September 25, 1993.

Again, TCI failed to object at the proper time (though its failure to do so in light of the hundreds of documents adduced at trial is understandable). In any event, TCI's argument is

without merit because it is not reasonably probable that the single remark influenced the verdict. Closing arguments must be supported by evidence admitted in the case and reasonable inferences drawn therefrom. *See Fineman v. Armstrong World Indus.*, 980 F.2d 171, 210 (3d Cir. 1992); *Ayoub v. H.N. Spencer*, 550 F.2d 164, 170 (3d Cir. 1977). However, only where extraneous matter has a reasonable probability of influencing the verdict is relief warranted. *Fineman*, 980 F.2d at 211. In one case, a single remark in a trial lasting several weeks was held not to constitute grounds for a new trial. *See Great Bay Hotel & Casino v. Tose*, 34 F.3d 1227, 1236 (3d Cir. 1994). The single remark here, at the conclusion of a trial spanning five weeks, fails to meet this standard.

TCI's contention that Dayco's reference to Paraguay "doubled" the available evidence on the statute of limitations question is actually unfounded. Dayco also relied on evidence elicited from Homer Holden and other TCI employees regarding what they knew about Estane 5710's susceptibility to water and the presence of water in Enviroflex systems. Indeed, a discussion of Mr. Holden and others knew served as a segue-way into Dayco's closing discussion of the statute of limitations issue. *See Tr. Trans. Nov. 14, 2000 (p.m.) at 241-43.*

3. Suggestion of fraud¹⁰

TCI also argues that Dayco accused TCI of committing a fraud. In particular, TCI assails instances in Dayco's opening remarks where it accused TCI of misrepresenting that its system would be watertight. *See Tr. Trans. Oct. 11, 2000 (p.m.) at 50, 75.*

Dayco's actual comments and arguments do not rise to the level of misconduct or prejudicial statements which carry a reasonable probability that the verdict was improperly

10. TCI's argument here also served as the basis for a mistrial motion filed on October 12, 2000.

influenced. See *Great Bay Hotel & Casino v. Tose*, 34 F.3d 1227, 1236 (3d Cir. 1994); *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 207 (3d Cir. 1992); *Finley v. National R. Passenger Corp.*, 1 F. Supp. 2d, 440, 443 (E.D. Pa. 1998). Dayco carefully avoided using the words “fraud” or “fraudulent.” While counsel for Dayco chose poor wording, he did so in the course of pursuing a valid argument. Dayco’s stance throughout the trial was that it designed the primary pipe to operate in “normal operating conditions” as required by the warranty. It posited that the parties intended “normal operating conditions” to mean a dry and watertight environment. The jury was called upon to decide what the parties intended “normal operating condition” to mean. See Tr. Trans. Nov. 15 (a.m.) at 51-52; Jury Instructions at 28-30; *Martin v. Monumental Life Ins. Co.*, Nos. 00-3307 & 00-3308, 2001 U.S. App. LEXIS 844, at *22-23 (3d Cir. Jan. 23, 2001) (extrinsic evidence admissible to establish contracting parties’ intent as to ambiguous term).

The case which TCI relies upon to set the standard for attorney misconduct is distinguishable. In *Finley*, defense counsel referred to the plaintiff’s disability pension in a FELA action. See *Finley*, 1 F. Supp. 2d at 441-42. The Supreme Court had previously ruled that such evidence is inadmissible in a FELA action because of its prejudicial potential. See *id.* at 443 (citing *Eichel v. New York Cent. R.R.*, 375 U.S. 253 (1963)). With highly prejudicial evidence already placed before the jury, the court then concluded that it was left with no discretion and granted a mistrial. See *Finley*, 1 F. Supp. 2d at 443-44.

In contrast, Dayco counsel, at worst, used an inapt term to describe a legitimate argument. He did not introduce evidence of intentional misrepresentations by TCI. Rather, the thrust of his argument was that TCI had communicated to several parties, including Dayco, United

Laboratories, and the U.S. Patent Office, that the Enviroflex system would be dry and watertight.

In sum, Dayco committed no attorney misconduct which justifies a new trial.

F. Various Evidentiary and Other Rulings Do Not Justify a New Trial

Motions for a new trial predicated on the improper introduction of evidence are subject to the harmless error standard of Federal Rule of Civil Procedure 61, which reads:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

FED. R. CIV. P. 61; *Becker v. Arco Chem. Co.*, 207 F.3d 176, 180 (3d Cir. 2000).

1. The Court Properly Allowed Evidence on TCI Representations that the Enviroflex System Would be Watertight

TCI objects on relevancy grounds to statements which TCI made regarding the watertightness of the Enviroflex system made after Dayco selected the coating for the primary pipe cover in June 1989. “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” FED. R. EVID. 401. All relevant evidence is admissible unless excluded by another rule or statute. *See* FED. R. EVID. 402; *Becker*, 207 F.3d at 189 (3d Cir. 2000).

TCI’s watertight representations are relevant to establish Dayco’s contention that the Enviroflex system was designed to be dry and watertight, and that Dayco relied on those

specifications in designing, mass producing, and selling the primary pipe. While those representations may have been made after Mr. Holden selected Estane 5710 in June 1989, Dayco could have revised its product design based upon new product specifications later issued by TCI. *See* Tr. Trans. Nov. 13, 2000 (p.m.) at 185-86. When Dayco learned in 1993 that water was present in the Enviroflex system, it began development of an polyether-based, water-resistant material for the pipe coating. *See* Tr. Trans. Nov. 7, 2000 (a.m.) at 22; Nov. 13, 2000 (p.m.) at 166. At the very least, learning between 1990 and 1992 that the Enviroflex system was not watertight would have allowed Dayco to design a new primary pipe, prevent the installation of the Estane 5710 pipe, and mitigate its damages. Thus, TCI's representations as to watertightness were relevant.

2. The Court Properly Refused to Deem Admitted Certain Matters Requested by TCI

TCI next finds error with the court's refusal to deem admitted facts for which TCI served Requests for Admission (RFAs) pursuant to Federal Rule of Civil Procedure 36. TCI argues that Dayco had no good faith basis to deny these RFAs.

TCI originally served its requests for admission upon Dayco in October 1999.¹¹ Dayco

11. The RFAs read:

8. Admit that Dayco saw the tank sump to be used in the Enviroflex System before and during its design and selection of material for the "original version of the Primary Pipe."

9. Admit that Dayco saw the tank sump lids to be used in the Enviroflex System before and during its design and selection of material for the "original version of the Primary Pipe."

10. Admit that Dayco saw the dispenser sumps to be used in the Enviroflex System before and during its design and selection of materials for the "original version of the Primary Pipe."

11. Admit that Dayco saw the seals, washers and fittings to be used in the Enviroflex System before and during its design and selection of material for the "original version of the Primary Pipe."

responded on November 22, 1999, objecting to the form of the requests and refusing to answer all but RFA No. 35. As to RFA No. 35, Dayco claims that it lacked the knowledge whether Dayco employees had seen the 1989 brochure or a draft thereof. Eleven months later, on the eve of trial, TCI filed a motion to deem the RFAs admitted. Dayco responded two days later, denying “as stated” each of the disputed RFAs. TCI again raised its motion three weeks into the trial. The Court ordered Dayco to explicitly respond to the RFAs by either admitting or denying them outright. Dayco’s final response denied all outstanding RFAs and pointed to the testimony of Jeff Winter in support.

Rule 36 allows a party to serve RFAs on an adversary. Each matter for which admission is requested must be separately set forth. *See* FED. R. CIV. P. 36. If the adversary answers incompletely or objects to the RFA:

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served.

FED. R. CIV. P. 36. The purpose of this rule is to narrow the issues for trial to those issues which are genuinely contested. *See United Coal Cos. v. Powell Constr. Co.*, 839 F.2d 958, 967 (3d Cir.

12. Admit that there were no written materials provided to Dayco between 1987 and March 1990 that included technical specification stating that Enviroflex System would be dry and/or water tight.

23. Admit that Dayco was aware, prior to the 1990 Supply Agreement, that water could enter the Enviroflex System for at least intermittent time periods.

35. Admit that Dayco designed and selected the material for the outer cover of the “original version of the Primary Pipe” prior to TCI providing Dayco with a copy of the 1989 brochure, which is bearing [sic] bates stamp number LSMW 13441-13444.

The Court was not provided with an original copy of the RFAs. The language quoted here is extracted from Dayco’s response dated Nov. 22, 1999.

1988). Where an issue represents a genuine evidentiary dispute for trial, the party may deny the RFA. *See United Coal*, 839 F.2d at 968; *Caruso v. Coleman Co.*, 93-cv-6733, 1995 U.S. Dist. LEXIS 7934, at *14 (E.D. Pa. June 7, 1995) (Naythons, M.J.).

As Dayco properly pointed out during trial, “A request for admission, except in a most unusual circumstance, should be such that it could be answered yes, no, the answerer does not know, or a very simple direct explanation as to why he cannot answer, such in the case of privilege.” *United Coal*, 239 F.2d at 968. An RFA is improper where the fact sought to be elicited would be a half-truth, or phrased in such a way that more than minimal explanation is required. *See United Coal*, 839 F.2d at 968; *In re Bell Atl. Corp. Sec. Litig.*, 91-514, 1996 U.S. Dist. LEXIS 1182, at *4 (E.D. Pa. Feb. 5, 1996); *Johnstone v. Cronlund*, 25 F.R.D. 42, 46 (E.D. Pa. 1960). Thus, the use of the word “denied” often suffices under the rule. *See United Coal Cos.*, 839 F.2d at 967.

With these precepts in mind, I ordered Dayco to admit the RFAs unless it was prepared to refute them with admissible evidence. Dayco denied them and informed the court that it was prepared to refute the RFAs with the testimony of Jeff Winter. The court notes that TCI waited nearly a full year until the eve of trial to challenge Dayco’s original responses, and waited three weeks to challenge Dayco’s supplemental responses. In so doing, it undercut the purpose of Rule 36 to narrow the issues for trial and to avoid the parties’ and the court’s time on purportedly “uncontested” issues. *See United Coal*, 839 F.2d 958, 967 (3d Cir. 1988). As such, Dayco’s denial and reliance on the testimony of Mr. Winter sufficed.

In addition, the RFAs were vague, misleading, and could lead to an admission which would constitute a “half-truth.” For instance, RFA No. 23 called upon Dayco to admit that water

would be present in the Enviroflex system for “intermittent time periods,” when the length and frequency of water presence in the system was contested at trial. The remaining RFAs called upon Dayco to admit what it knew and saw “before and during its design and selection of material for the ‘original version of the Primary Pipe,’” which was a compound question and covered too vague a time period for Dayco to be able to give a concise response. Mr. Winter testified that the “selection” process involved more than Homer Holden’s preliminary selection of the material in June 1989. *See* Tr. Trans. Nov. 13, 2000 (p.m.) at 185-86. Accordingly, the Court properly denied TCI’s motion to deem admitted the facts contained in these RFAs.

Lastly, the court notes that the failure to deem these RFAs admitted did not adversely impact a substantial right of TCI. The RFAs were unrelated to the core question involved in the jury’s finding on the statute of limitations question: when should TCI have learned there was a defect in the primary pipe.

3. The Court Properly Excluded the Testimony of Richard Mills

TCI sought to call Richard Mills, a witness who had knowledge concerning a leak from an Enviroflex system in Hawaii. Judge Ludwig issued an order closing discovery on January 6, 2000. *See* Order of Dec. 17, 1999, docket no. 53. Counsel for TCI learned of Mr. Mills in the summer of 2000, but first identified Mr. Mills in its pretrial memorandum filed on October 4, 2000, one week before trial was to commence. Because Mr. Mills lived in Houston, counsel for TCI proposed that the parties travel to Houston, mid-trial, to take Mr. Mills’ testimony.

Mr. Mills’ testimony was excluded because of TCI’s failure to live up to its obligations to timely supplement discovery and comply with prior orders of this court. Parties must disclose potential witnesses even absent formal discovery requests, and supplement discovery responses

with “special promptness as the trial date approaches.” *Kotes v. Super Fresh Food Mkts.*, 157 F.R.D. 18, 19 (E.D. Pa. 1994) (citing FED. R. CIV. P. 26(a)(1), 26(e)). In addition, a trial court may ensure complete discovery by issuing pretrial orders and sanctioning those who fail to fulfill their obligations. *See id.* Thus, a court may order the exclusion of evidence for failure to comply with a discovery order, *see* FED. R. CIV. P. 37(b)(2)(B); *In re TMI Litig.*, 193 F.3d 613, 721 (3d Cir. 1999), or for unfair prejudice caused by the introduction of late evidence. *See Giorno v. Temple Univ. Hosp.*, 875 F. Supp. 267, 271 n.4 (3d Cir. 1995). Although an extreme remedy, a court is justified ordering exclusion where:

- (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified, (2) the ability of that party to cure the prejudice, (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court, and (4) bad faith or willfulness in failing to comply with the district court's order.

In re TMI Litig., 193 F.3d 613, 721 (3d Cir. 1999); *Kotes*, 157 F.R.D. at 20. In addition, a court should consider the importance of the testimony or evidence to the proponent’s case. *See Sowell v. Butcher & Singer, Inc.*, 926 F.2d 289, 302 (3d Cir. 1991); *Kotes*, 157 F.R.D. at 20.

Exclusion of Mr. Mills testimony was appropriate here. TCI knew of Mr. Mills from a suit filed against both TCI and Dayco in Hawaii, and counsel for TCI had deposed him in June 1999. Trial counsel himself averred that he learned of Mr. Mills as early as the summer of 2000. *See* Tr. Trans. Oct. 20, 2000 (a.m.) at 68. Dayco first learned that TCI intended to call Mr. Mills a week before trial, surprising Dayco. Further, Dayco’s ability to cure the prejudice was limited. Mr. Mills resides in Houston. While trial was underway, TCI suggested that counsel for the parties fly to Houston to record his testimony. Such a move would have either disrupted the trial or counsel’s ability to prepare for it. Although Dayco had previously deposed Mr. Mills in

reference to the Hawaii suit against TCI and Dayco, Dayco was entitled to explore new issues relevant to the instant dispute and not primarily at issue in the Hawaii action. As to the final factor, TCI certainly knew of Mr. Mills for a substantial time prior to trial, and trial counsel could have learned of him before. *See Meyers v. Pennypack Woods Home Ownership Assoc.*, 559 F.2d 894, 904-05 (3d Cir. 1977) *overruled on other grounds by Goodman v. Lukens Steel Co.*, 777 F.2d 113 (3d Cir. 1985) (factoring counsel's ability to learn of witness before trial into evaluation of bad faith). Certainly by "late summer" of 2000, when trial counsel actually learned of Mr. Mills, he should have immediately contacted Dayco rather than waiting until just before trial.

Furthermore, TCI sought to call Mr. Mills for the proposition that the primary pipe cover failed at "dry sites." *See* TCI Substituted Suppl. Brief in Support of Post Trial Motions, docket no. 210, at 46. TCI introduced ample other evidence to support its theory that fungal microbes, rather than water, caused the degradation of the primary pipe cover. As such, Mr. Mills testimony was not so important to TCI's case theory as to outweigh the prejudice to Dayco or to adversely impact a substantial right.

4. The Court Was Correct to Allow Dayco's Experts to Testify

TCI challenges my decision to allow Dayco's two scientific experts, Dr. Paul So and Dr. Richard Gross, to testify. Whether an expert may testify is entrusted to the trial judge's discretion. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999); *Elcock v. Kmart Corp.*, 233 F.3d 734, 740-41 (3d Cir. 2000). Scientific evidence is admissible if it will assist the trier of fact to understand the evidence or a facts in issue. *See* FED. R. EVID. 702. Experts may testify if they meet three requirements: qualifications, reliability, and 'fit.' *See Elcock*, 233 F.3d

at 741. Neither the expertise of Dayco’s witnesses nor the fitness of their testimony and opinions have been challenged. Rather, TCI focuses on the experts’ reliability.

Scientific expert testimony is reliable when based on “methods and procedures of science” rather than subjective belief or speculation. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 (1993); *Elcock*, 233 F.3d at 745; *In re Paoli R.R. Yard Litig.*, 35 F.3d 717, 742 (3d Cir. 1994) (“Paoli”). A trial judge must determine if the expert’s opinion “could reliably follow from the facts known to the expert and the methodology used.” *Paoli*, 35 F.3d at 744.

In *Daubert*, the Supreme Court promulgated several factors to guide a court’s inquiry into the scientific reliability of an expert opinion. *See Daubert*, 509 U.S. at 593-94. The Third Circuit had previously put forth others. *See U.S. v. Downing*, 753 F.2d 1224, 1238-39 (3d Cir. 1985). The combined list includes:

- (1) whether a method consists of a testable hypothesis;
- (2) whether the method has been subject to peer review;
- (3) the known or potential rate of error;
- (4) the existence and maintenance of standards controlling the technique's operation;
- (5) whether the method is generally accepted;
- (6) the relationship of the technique to methods which have been established to be reliable;
- (7) the qualifications of the expert witness testifying based on the methodology; and
- (8) the non-judicial uses to which the method has been put.

Paoli, 35 F.3d at 742 n.8 (citing *Daubert* and *Downing*); *see also Elcock*, 233 F.3d at 745-56; *Booth v. Black & Decker*, No. 98-6352, 2001 U.S. Dist. LEXIS 4495, at *8-9 (E.D. Pa. Apr. 12, 2001) (Reed, J.). While all of these factors may or may not be relevant in a particular case, in all cases, the expert must be held to the same level of intellectual rigor that the expert would use “outside the courtroom when working in the relevant discipline.” Margaret A. Berger, *The Supreme Court’s Trilogy on the Admissibility of Expert Testimony*, in *REFERENCE MANUAL ON SCIENTIFIC EVIDENCE*, at 19 (Federal Judicial Center, 2d ed. 2000) (citing *Kumho Tire*, 526 U.S.

at 152 (1999)). The court should allow experts who meet these standards to testify, and leave the ultimate credibility of their opinions to the jury. *See Schieber v. City of Phila.*, No. 98-5648, 2000 U.S. Dist. LEXIS 17952, at *8 (E.D. Pa. Dec. 13, 2000) (Shapiro, S.J.) (citing *Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 807 (3d Cir. 1997)).

a. Dr. So

In keeping with the charge of the Supreme Court and the Third Circuit, I held a *Daubert* hearing to determine the reliability of Dr. So's testimony. *See* Tr. Trans. Oct. 24, 2000 (p.m.) at 3-58. Dr. So holds a doctorate in metallurgical materials engineering and performs work involving the manufacture, processing, design critique of plastics materials. *See id.* at 7-9. He specializes in determining the failure of different types of materials. *See id.* at 9.

At the *Daubert* hearing, Dr. So opined that the Estane 5710 primary pipe cover, if exposed to water over a period of time, was susceptible to hydrolysis even in the absence of microbes. *See id.* at 13-14. In order to simulate the effects of prolonged exposure to water, he raised the temperature to seventy degrees centigrade (70°C or 158°F). *See id.* at 15-19. Dr. So also conducted two other experiments in which he exposed the primary pipe to air heated to 70°C, one with 75% humidity and the other in an oven at approximately 10% humidity. *See id.* at 20-23. His experiment showed that the primary pipe exposed to water lost 90% of its tensile strength when exposed to water at 70°C for eight weeks. *See id.* at 17. In contrast, the pipe exposed to 75% humidity lost 90% of its tensile strength after ten weeks. *See id.* at 26. The pipe exposed to the dry air suffered no significant degradation. *See id.* at 21.

When he was asked how long the same chemical processes would take at room temperature (20°C) for the pipe exposed to water, he stated:

This is something that was never asked of us, however there is a rule of thumb that you could use to do that, and the rule of thumb is that for every ten degrees increase in temperature, you can expect the rate to go up by a factor of two.

Id. at 18. When asked by the court, Dr. So stated that the primary pipe would lose 90% of its tensile strength over “about five years.” *Id.*¹² He admitted that a more accurate conversion could be made by using the Arrhenius equation. *See id.* at 18-19. The Arrhenius equation allows scientists to mathematically predict performance of a substance at room temperature over extended periods by raising temperature levels for short intervals. *See Glaxo Wellcome, Inc. v. Pharmadyne Corp.*, 32 F. Supp.2d 265, 277 n.15 (D. Md. 1998); WALTER J. MOORE, PHYSICAL CHEMISTRY, at 362-64 (4th ed. 1972) (attached as Exh. B to Dayco’s Letter Brief in Opposition to TCI’s Motion to Exclude the Testimony of Dr. Paul So, dated Oct. 12, 2000; *see also Diamond v. Diehr*, 450 U.S. 175, 178 n.2 (1981) (describing application of Arrhenius equation to curing of rubber).

TCI’s sole allegation of error is that Dr. So failed to use the Arrhenius equation because he conducted his experiment at only one temperature (70°C) instead of two. Dr. So agreed that conducting the experiment at a second temperature would have allowed him to employ the Arrhenius equation and arrive at a better estimate of how long it would take the pipe to degrade. *See Tr. Trans. Oct. 24, 2000 (p.m.) at 19-20.*

However, that did not impact on the thrust of Dr. So’s testimony: that the primary pipe degraded when exposed to water alone over a period of roughly five years. TCI has not challenged his ability to conclude that the primary pipe degrades when exposed to water over a

12. Dr. So, however, could not convert the rate of reaction from the 75% humid air at 70°C to 20°C, because 20°C air would not contain 75% humidity. *See Tr. Trans. Oct. 24, 2000, at 25-26.*

long period. His opinion was supported by ample, scientifically reliable evidence. He developed an experiment to see if water could degrade the pipe alone, and conducted a control to see if the cause was the water or the temperature.

In addition, Dr. So's conclusion as to the time frame in which degradation occurs was also admissible. Dr. So further testified that the Arrhenius equation is not necessarily more reliable, but more quantitative. *See id.* at 43.¹³ "People," Dr. So explained, have conducted several studies on a number of materials, and for each the reaction rate is approximately two for every ten degree rise in temperature. *Id.* A chemistry textbook which Dayco submitted to the court bolsters his view. *See* WENDELL H. SLABAUGH & THERAN D. PARSONS, GENERAL CHEMISTRY, at 175 (1966) (attached as Exh. A to Dayco's Letter Brief in Opposition to TCI's Motion to Exclude the Testimony of Dr. Paul So, dated Oct. 12, 2000). According to the text, past experiments showed that the reaction rate doubles for each 10°C increase, even if application of this rule yields only an approximate result. *See id.* Furthermore, use of this "rule of thumb" for translating the rate of degradation at 70°C to 20°C was considered reliable by at least one polymer chemist – Homer Holden, even though he mistakenly used the word Fahrenheit instead of Centigrade. Mr. Holden, who testified for TCI, analyzed the polyether-based primary pipe cover which Dayco developed after the Puerto Rico incident. In a letter to TCI's insurance carrier, he stated, "it is generally understood that for every ten degrees Fahrenheit [sic] rise in temperature, the rate of chemical reaction doubles." *See* Tr. Trans. Oct. 24, 2000 (p.m.) at 34.

While conducting the experiment at a second temperature may have allowed Dr. So to

13. Using the Arrhenius equation, one would chart the time and temperature quantities as coordinates on a Cartesian-style graph. With enough data points, one could divine the slope of the resultant line – which would be the rate of chemical reaction. *See* Tr. Trans. Oct. 24, 2000 (p.m.) at 43.

predict the rate of deterioration more accurately, the thrust of his opinion, as well as his estimate of five years for deterioration of the primary pipe at 20°C, was based on scientifically reliable data and procedures. Thus, Dr. So's opinions maintained the intellectual rigor of his field and met the *Daubert* and *Downing* standards of scientific reliability. See *Kumho Tire*, 526 U.S. at 152; *Paoli*, 35 F.3d at 742 n.8.

Lastly, I note that to the extent Dr. So may have erred as to the length of time it would take to degrade the pipe, such error was harmless. Dayco's microbiology expert, Dr. Richard Gross, opined that the pipe decayed quickly because water degraded the pipe to a sufficient extent that microbes could attack it, a process which surely happened at a faster rate.

b. Dr. Gross and the High Springs, Florida Videotape

I also conducted a "quasi-Daubert" hearing on the admissibility of the testimony of Dr. Gross. Dr. Gross holds a doctorate in organic polymer chemistry with training in microbiology. Relying in part on Dr. So's evaluation that pooled water in the Enviroflex system caused Estane 5710 to deteriorate, he opined that the water which caused the deterioration caused the molecular weight to decrease, which, in turn, allowed microbes to eat away at the primary pipe coating. See Tr. Trans. Nov. 9, 2000 (a.m.) at 11 (testimony at *Daubert* hearing); Tr. Trans. Nov. 13, 2000 (a.m.) at 15 (testimony before jury).

TCI's sole objection to his testimony post-trial is his reliance on a videotape of a secondary pipe, which was shown to the jury. The video depicted the inside of a secondary pipe from an Enviroflex system installed in High Springs, Florida. The primary pipe had been removed a year earlier, and given to Dr. Gross for analysis. Watching the video, one could get the impression that there were portions of the pipe flooded with dirty water.

TCI moved to exclude Dr. Gross' testimony because he correlates the location of water inside the secondary pipe with degradation along the length of the primary pipe. TCI also faulted his treatment of the High Springs video as indicative of conditions in the Enviroflex systems elsewhere.

However, Dr. Gross specifically stated that he did not conduct a "foot-by-foot" correlation of water presence and pipe decay, he merely noted a trend. Tr. Trans. Nov. 9, 2000 (a.m.) at 30. As to their second ground, I granted TCI's motion: Dr. Gross could only rely on the video insofar as it depicted a particular pipe at a particular place and time. See Order of Nov. 13, 2000, docket. no. 174. Dr. Gross testified in conformity with my instruction. After viewing the video which showed water had accumulated in the secondary pipe at the High Springs site without draining in the sumps, he stated:

Seeing that amount of large water in the system, again, taught me something, it said at least about this site *and, again, we can't talk about other sites*, at this site, that it appears that it wasn't set up in the way I would have expected based on what I have learned about the Enviroflex system.

Tr. Trans. Nov. 13, 2000 (a.m.) at 53 (emphasis added).

Second, Dr. Gross had a firm basis for his opinions even without the video. Dr. Gross formed his opinion based on several experiments which he conducted, and the video only served to corroborate his conclusions. See Nov. 9, 2000 (a.m.) at 13-14, 15-16; Nov. 13, 2000 (a.m.) at 51. He testified to the jury at length about his studies. In one experiment, he took Estane 5710 pellets and ground them into powder. See *id.* at 22-24. One set he exposed some Estane 5710 to water to decrease its molecular weight while and another batch remained dry. See *id.* at 24. He inoculated both batches with microbes recovered from the Reading, Pennsylvania site. See *id.* at

22. He found that the microbes degraded the Estane 5710 more quickly when exposed to water. *See id.* at 24.

In a second study, he took several batches of freshly extruded pipe, exposed them to the microbes, and then subjected each to either 50%, 75%, or 95% humidity for twelve weeks. *See id.* at 27-28. A control batch was not exposed to water, and exhibited minimal growth. *See id.* at 29-31. At 75% humidity, the microbes easily colonized and degraded the Estane 5710. *See id.* at 31. The microbes met with even greater success at the 95% humidity level.

TCI has not challenged the scientific reliability of these experiments, which alone could serve as the basis for his scientific opinion. Thus, I allowed him to testify.

5. The Court Properly Admitted the High Springs, Florida Videotape

The video was made by snaking a camera through the secondary pipe. At the bottom of the screen, distance markers purported to indicate how far the camera had traveled along the length of the pipe. However, the numbers were inaccurate, and even began counting backward at one point.

I admitted the videotape because it was relevant under Federal Rule of Evidence 401 to support a theory that pooled water caused a breakdown in the primary pipe. The video illustrated for the jury, at least for one site, the conditions inside the secondary pipe. Despite TCI's contention to the contrary, use of the video was not unfairly prejudicial. Relevant evidence should be excluded only where its probative value is substantially outweighed by unfair prejudice. *See* FED. R. EVID. 403. Courts are empowered to give cautionary instructions to cure prejudice, and jurors are presumed to follow such an instruction. *See Waldorf v. Shuta*, 142 F.3d 601, 628 (3d Cir. 1998); *Fineman v. Armstrong World Indus.*, 980 F.2d 171, 207 (3d Cir. 1992).

I limited use of the video in two important aspects. First, the offensive numbers were screened from the jury by stipulation mandated by court order. *See* Order of Nov. 13, 2000, docket. no. 174. Second, immediately before the jury watched the video, I gave them a cautionary instruction:

Now, before you see this video, I want to instruct you about certain things because it's important you know. Dr. Gross asked for a movie of the secondary pipe. It didn't happen right away and the following video depicts a portion of the interior of a particular secondary containment pipe at a particular place and time. It was taken one year after Dayco's primary pipe had been removed from that secondary containment pipe.

It may not be correct to assume from this video that the same conditions existed when the Dayco primary pipe was in place or that the same conditions exist in other secondary containment pipes.

Tr. Trans. Nov. 13, 2000 (a.m.) at 49. I repeated the instruction when the video finished. *See id.* at 51. Accordingly, no unfair prejudice resulted from showing the High Springs, Florida video to the jury.

G. TCI Is Not Entitled to Judgment as a Matter of Law that Dayco Breached the Warranties in the Supply Agreements

In light of the jury's determination that TCI's breach of warranty claim is time-barred, I need not consider whether Dayco breached the Supply Agreement Warranties as a matter of law.

II. Dayco's Post-Trial Motions

Dayco has filed two post-trial motions: one for remittitur and one for a stay of judgment. Upon consideration of those motions, I will order TCI to remit its \$23,000,000 recovery to the extent it exceeds \$1,325,808 and grant the motion for a stay.

A. Motion for Remittitur or New Trial

One of TCI's claims was that Dayco had breached the pricing provision of the 1993 Supply Agreement for the primary pipe. On that point, the jury awarded TCI \$23,000,000. I entered judgment without modifying the verdict in any way, deferring Dayco's motion for remittitur until after post-trial motions had been filed. I now: (1) grant its motion; (2) reject TCI's arguments against remittitur; (3) limit the scope of issues at retrial; (4) reserve decision on the admission of new evidence at retrial; and (5) reserve decision on the appropriateness of summary judgment motions.

1. Dayco is Entitled to Remittitur

A trial judge may grant a new trial where a jury's award works a miscarriage of justice. *See Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 211 (3d Cir. 1992). In addition, remittitur with an option of a new trial may be ordered if the verdict exceeds any rational appraisal or estimate of damages based on evidence put before the jury. *See Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1101 (3d Cir. 1995). The Third Circuit has recognized that a trial judge is in the best position to determine if a jury has arrived at a rationally based conclusion. *See id.* at 1100. Elsewhere, the court explained:

The rationalization for, and use of, the remittitur is well established as a device employed when the trial judge finds that a decision of the jury is clearly unsupported and/or excessive. Its use clearly falls within the discretion of the trial judge, whose decision cannot be disturbed by this court absent a manifest abuse of discretion.

Spence v. Bd. of Educ., 806 F.2d 1198, 1201 (3d Cir. 1986) (citations omitted); *see also Delli Santi v. CNA Ins. Cos.*, 88 F.3d 192, 206 (3d Cir. 1996). The court may allow only a portion of a jury award to stand which is supported by sufficient evidence and "clearly identifiable as representing the jury's determination of the amount due by the defendants," even if the balance of

the jury's award is set aside by the court. *See Garrett v. Faust*, 183 F.2d 625, 629 (3d Cir. 1950); 11 Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice and Procedure* § 2815, at 159 (2d ed. 1995). Thus, the court has three alternatives: to order remittitur to the lowest amount which the jury could award, to allow the plaintiff to keep the maximum amount supported by the evidence, or to follow a path between these two extremes. *See Robert Billet Promotions, Inc. v. IMI Cornelius, Inc.*, No. 95-1376, 1998 U.S. Dist. LEXIS 16080 (E.D. Pa. Oct. 13, 1998).

Here, the evidence presented at trial shows that TCI's breach of pricing claim had a maximum principal value of \$1,325,808. TCI's Vice President of Operations, Jeffrey Boehmer, testified that in August 1995, Dayco increased the cost of the Enviroflex primary pipe from \$3.75 to \$5.00 per foot. The five dollar price remained in effect for five months until Dayco lowered the price to \$4.40 and refunded the \$0.60 per foot overcharge. Mr. Boehmer testified that TCI's damages consisted of the difference between the \$3.75 price in the contract and the increased rate of \$4.40 – a total of \$1,325,808. TCI's damages expert, economist Dr. William Latham, reaffirmed Mr. Boehmer's figure. The verdict sheet prepared by TCI on this issue supplied the same number. Thus, even TCI suggested that \$1,325,808 is the maximum amount which it could recover on its breach of pricing claim. To allow TCI anything greater would be unsupported by the proofs adduced at trial and a miscarriage of justice. Thus, I order TCI remit all but \$1,325,808 of its recovery on the breach of pricing claim.

2. TCI's Arguments Against Remittitur

TCI opposes remittitur on several grounds: (a) TCI asserts, for the first time, that its breach of pricing claim could also give rise an award for lost profits; (b) it hypothesizes that the

award represents damages stemming from Dayco's purported breach of warranty for pipe delivered subsequent to September 25, 1993; (c) it also insists that should the court order remittitur, any new trial should redetermine all issues, including those already resolved by the jury's verdict. I reject each of TCI's contentions.

a. No Evidence Supports Lost Profits Recovery on TCI's Breach of Pricing Claim

The breach of pricing claim cannot sustain a \$23 million award for lost profits. Based on the evidence adduced at trial, the jury could not conclude, absent speculation or sympathy for TCI, that Dayco's breach of the pricing provision proximately caused \$23 million in damage. I instructed the jury on how to devise a damage award:

The law does not permit you to award damages based merely on sympathy or speculation. You may only compensate for injuries that have been proven, and you may only award the amount of money that will fairly compensate for those injuries. You may award damages for any loss that satisfies the following three requirements:

1. the breach of contract was the proximate cause of the loss;
2. the party has proven the value of the loss by a reasonable degree of certainty; and
3. it was reasonably foreseeable, at the time the parties entered into the contract, that the non-breaching party would suffer such a loss as a result of a breach.

Jury Instructions at 45-46; Tr. Trans. Nov. 15, 2000 (a.m.) at 61; *see also Sulakshna, Inc. v. Transmedia Network*, 207 B.R. 422, 432 (Bankr. E.D. Pa. 1997); *In re 222 Liberty Assocs.*, 101 B.R. 856, 863 (Bankr. E.D. Pa. 1989). *Accord Miller Oral Surgery, Inc. v. Dinello*, 611 A.2d 232, 237 (Pa. Super. Ct. 1992) (holding recovery of lost profits requires proof that the loss was caused by defendants' conduct and provide the trier of fact with a reasonable basis on which to calculate such damages).

TCI has not proven it lost \$23 million due to the price increase by a reasonable degree of certainty. Preliminarily, the court notes the record is devoid of any testimony or evidence linking Dayco's price increase to lost sales or lost business opportunities. TCI's economic expert, Dr. William Latham III, specified that the breach of pricing claim yielded damages solely in the past. *See* Tr. Trans. Nov. 3, 2000 at 29.¹⁴ Dr. Latham linked lost profits to Dayco's allegedly defective pipe and opined that because TCI had to spend substantial sums to replace the leaking pipes, it lost sales and could not obtain financing for business development. *See* Tr. Trans. Nov. 3, 2000, 9:30 a.m. at 53.

Nonetheless, TCI has combed the record for evidence to support a \$23 million award.¹⁵ TCI has exhumed only two shards which juxtapose its breach of pricing claim with damages for lost profit and revenue.

First, TCI points to a comment made by a Dayco salesperson, Mr. Brian Short, that Dayco was aware that TCI was in a "competitive situation" and might be hampered by a price increase. Tr. Trans. Oct. 30, 2000 (p.m.) at 192. This comment alone does not justify a \$23 million award. There is no evidence that Dayco could have foreseen that breaching the pricing provision would cause such a high amount of consequential damages to TCI. The total amount of the overcharge at the price of \$4.40 a foot was \$1,325,808. Neither Mr. Short nor any other witness testified how the increased price actually caused TCI's losses. To the contrary, the evidence suggests that

14. Dr. Latham did testify that incidental damages resulted because TCI did not have the funds on hand to invest, and accordingly adjusted the \$1,325,808 figure to a present value of \$1,813,766. However, the parties have agreed not to pursue adjustments for present value other than the 6% interest allowed by Pennsylvania law. *See* Tr. Trans. Nov. 14, 2000 (a.m.) at 136-37.

15. I note that I afforded the parties an extended post-trial briefing schedule which allowed them to thoroughly search the record for support of their claims.

TCI's lost profits began to mount well before Dayco unilaterally raised its prices in 1995. TCI's own witness testified that as early as 1994, TCI already began to lose a substantial share of the market for underground gasoline storage. *See* Tr. Trans. Oct. 26, 2000 (p.m.) at 146-49. Finally, there is no evidence which would allow the jury to conclude, to a reasonable degree of certainty, that TCI's damages from the breach of pricing claim amounted to \$23 million.

TCI also relies on a market survey analysis introduced into evidence which referred to "pricing" as a factor which hampered TCI's growth. *See* Exh. P-476. However, a review of the testimony surrounding the introduction of that exhibit shows that it was not Dayco's price increase which led to the 'pricing' woes bemoaned in the marketing report. Mr. Randy Braun, TCI's former Vice President of Marketing and Sales, testified that TCI's pricing to end-users was already 15% higher than its competitors, *see* Tr. Trans. Oct. 26 (a.m.) at 87, *before* Dayco raised its prices. He explained the high price was because TCI's system was to be the "high-end" or "Cadillac" system for the underground containment of gasoline. *See* Tr. Trans. Oct. 26, 2000 (a.m.) at 132:16-18. He then opined that the fungal degradation of the pipe led to TCI's loss of reputation as the "Cadillac" of underground storage systems. *See* Tr. Trans. Oct. 26 (a.m.) at 147:6-13. The exhibit made no mention of Dayco's pricing increase as a cause of TCI's lost sales. Only speculation could have allowed the jury to link the two.

In sum, the evidence put forth at trial does not show that TCI sustained \$23 million in damages as a result of Dayco's breach of the pricing provision of the 1993 Supply Agreement. *See Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1101 (3d Cir. 1995) (finding remittitur appropriate where jury's award is not a rational estimate of damages based on the evidence at trial).

b. The Jury did not Award TCI \$23,000,000 for the Breach of Warranty Claim

Similarly, TCI is not entitled to the \$23 million award on the grounds that it is compensation for breach of the warranty claim. The jury specifically and unequivocally found that TCI knew or should have known of the breach before September 25, 1993. Therefore, TCI's breach of warranty claim is time-barred. That the jury understood this elemental point is underscored by the jury's answer to the breach of warranty interrogatory. The jury marked the question "N/A" and otherwise left the page untouched. The jury's answers show that it understood that TCI was entitled to nothing on its breach of warranty claim.

Nonetheless, TCI seeks to resurrect its warranty claim for pipes purchased after September 25, 1993, the date by which TCI knew or should have known of the Dayco's alleged breach. As discussed above, *supra* I.A, the statute of limitations runs from the date TCI discovered or should have discovered the breach. Therefore, TCI cannot justify the \$23 million award as damages for defective pipe delivered after September 25, 1993. TCI adduced no evidence of damages traceably solely to pipe delivered after September 25, 1993. Thus, TCI is not entitled to the \$23 million award as compensation for breach of warranty.

c. The \$23 Million Award Does Not Reflect Juror Compromise

In essence, TCI seeks to disturb the jury's resolution of the statute of limitations and breach of warranty issues on the theory that the jury's \$23 million award is a compromise award. But the jury's finding that TCI's claims are time-barred may not be disturbed. Where the parties have a right to trial by jury, "no fact tried by a jury shall otherwise be re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII;

Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 359 (1962). Under the common law, as it exists in the Third Circuit today, the court has an obligation to sustain a jury's answer to a special interrogatory if there exists a theory under which all of the jury's findings are consistent. *See id.* at 364; *Bolden v. SEPTA*, 21 F.3d 29, 32 (3d Cir. 1994).¹⁶ A completely new trial may be granted only if the jury's findings can reasonably be said to constitute a compromise. *See Vizzini*, 569 F.2d at 760-62; 11 Charles Alan Wright, Arthur R. Miller, and Kay Kane, 11 *Federal Practice and Procedure*, § 2814, at 155-56 (2d ed. 1995).

TCI argues that ordering remittitur of the award mandates a new trial because the \$23 million award on the breach of pricing claim is the product of a compromise which also resulted in the preclusion of its breach of warranty claim. It then engages in some creative arithmetic to show that the jury's \$23 million award could have been based on the percentage of primary pipe delivered after the 'discovery date' of September 25, 1993. Its argument fails for two reasons. First, TCI is not entitled to recover for defects in the pipe after the discovery date of September 25, 1993. *See supra*, I.A.1. Second, only speculation would allow TCI to draw the inference that a question entitled "Breach of Pricing" contains a surreptitious compromise award on a breach of warranty claim. The jurors unequivocally found the breach of warranty claim barred by the statute of limitations. That the jurors understood this point is underscored by their response, "N/A," to the Breach of Warranty question. Thus, this case is unlike those in which the jury finds for the plaintiff but awards a low recovery – a combination which reasonably indicates a compromise verdict. *See e.g. Stanton v. Astra Pharms., Inc.*, 718 F.2d 553 (3d Cir. 1983)

16. Of course, where the evidence does not reasonably support the magnitude of the jury's award, the court has the discretion to order remittitur or grant a new trial. *See supra* Section II.A.1.

(ordering new trial on liability and damages because of suggestion of juror compromise where original jury found in favor of plaintiff but awarded a low amount of damages).

d. Damages on the Breach of Pricing Claim is a Separate and Distinct Issue

TCI next argues that the statute of limitations finding and the breach of pricing claim are inextricably woven, requiring a total retrial if remittitur is granted. Generally, when remittitur is ordered, the party against whom it is entered has the option of accepting remittitur or demanding a new trial limited to the issue of damages. *See Hetzel v. Prince William County*, 523 U.S. 208, 211-12 (1998); *Spence*, 806 F.2d at 1205; 11 Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice and Procedure* § 2815, at 169 (2d ed. 1995). The choice between remittitur and a new trial is mandated by the Seventh Amendment guarantee of trial by jury. *See Hetzel*, 523 U.S. at 211-12. A partial new trial limited to the issue of damages is warranted rather than total re-litigation where the issues of liability and damages are distinct, separable and did not influence the determination of other issues at trial. *See Becker v. Arco Chem. Co.*, 207 F.3d 176, 180 (3d Cir. 2000) (partial trial warranted where outcome of one issue requiring retrial did not influence other issues); *Vizzini v. Ford Motor Co.*, 569 F.2d 754, 760 (3d Cir. 1977) (citing *Gasoline Products Co., Inc. v. Champlin Refining Co.*, 283 U.S. 494 (1931)) (authorizing trial court to order partial new trial where liability and damage issues not inextricably woven); 11 Charles Alan Wright, Arthur R. Miller and Kay Kane, 11 *Federal Practice and Procedure*, § 2814, at 150 (2d ed. 1995). This is particularly true for contract cases where the maximum value of the plaintiff's claim may be ascertained from the evidence. *See e.g. Keystone Floor Products Co. v. Beattie Mfg. Co.*, 432 F. Supp. 869, 884 (E.D. Pa. 1977).

Accordingly, TCI is not entitled to retry the statute of limitation issue. That question is separate and distinct from the issues involved in evaluating the amount of damages due on the breach of pricing claim. First, the statute of limitations question called upon the jury to determine when TCI learned of the susceptibility of the polyester pipe to water or microbes. The breach of pricing claim involved a separate factual analysis: was Dayco justified in raising its price for the water-resistant, polyether pipe. Second, the Court is not ordering retrial of Dayco's liability on the breach of pricing claim – the first jury found that Dayco is liable and Dayco has not sought to disturb that finding. Rather, the only remaining issue is the quantification of damages, which is certainly a circumscribed, separate, and distinct inquiry. Thus, it is appropriate to order remittitur with the option of a new trial limited to damages on the breach of pricing claim.

3. Evidence at the Retrial

I asked the parties whether, at a second trial, TCI could introduce new evidence not on the record at the original trial. On retrial, district courts have the discretion to admit or to exclude new evidence. *See Martin's Herend Imports, Inc. v. Diamond & Gem Trading United States of Am. Co.*, 195 F.3d 765, 774 (5th Cir. 1999); *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1449 (10th Cir. 1993); 11 Charles Alan Wright, Arthur R. Miller, and Kay Kane, *Federal Practice and Procedure*, § 2803, at 50 (2d ed. 1995). However, the Court must be guided by considerations of fairness to the parties, *Martin's Herend Imports*, 195 F.3d at 774; *Cleveland*, 985 F.2d 1438, and must avoid undue prejudice to either party. *Habecker v. Clark Equip. Co.*, 942 F.2d 210, 218 (3d Cir. 1991).

Instantly, the parties have not yet brought to the court's attention precisely what evidence

which they wish to present in a retrial. Accordingly, the Court will defer decision on this issue until motions in limine are filed before retrial, if a new trial is requested.

4. Availability of Summary Judgment as Alternative to Retrial

I asked the parties if TCI could not bring in new evidence in a new trial, whether a new trial on the breach of pricing claim would be viable. Both parties agreed that this court could not preclude a retrial based solely on Dayco's remittitur motion. Dayco raised the possibility of resolving the remaining dispute on summary judgment, akin to summary disposition following a remand for new trial. *See e.g. United States v. United States Gypsum Co.*, 340 U.S. 76, 86 (1950) (affirming summary judgment following remand); *Perlmutter v. U.S. Gypsum Co.*, 54 F.3d 659, 662 (10th Cir. 1995) (finding appellate court mandate for new trial does not preclude entry summary judgment); *Publishers Resource, Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 559 (7th Cir. 1985) (declaring new trial unnecessary and unhelpful although appellate court originally remanded for new trial); *Shelkofsky v. Broughton*, 388 F.2d 977, 979 (5th Cir. 1968) (upholding summary judgment following remand where original trial based on incomplete materials); *Dow Corning Wright Corp. v. Osteonics Corp.*, 939 F. Supp. 65, 68 (D. Mass. 1996), *aff'd in part and rev'd in part on other grounds*, 122 F.3d 1440 (Fed. Cir. 1997) ("Where no material factual issues are present, a summary judgment proceeding is the functional equivalent of a new trial.") *Cf. Sales v. State Farm Fire & Casualty Co.*, 902 F.2d 933, 936-37 (11th Cir. 1990) (summary judgment is inappropriate substitute for retrial upon remand when genuine issue of material fact remains). Again, although the Court requested that the parties brief whether it is possible to dispose of this case without a second jury, the Court will defer decision on this issue.

B. Motion for a Stay of Judgment

Dayco has also moved for a stay of judgment pursuant to Federal Rule of Civil Procedure 62. TCI does not contest granting a stay, but insists that bond be posted to protect its rights to collect on the \$23,000,000 judgment. However, I have set aside that award. Thus, I will grant the motion for a stay without the need for Dayco to post bond.

III. Alter or Amend the Judgments to Include Pre-judgment Interest

To determine the amount of pre-judgment interest owed in contract cases, Pennsylvania follows the approach of section 354 of the Second Restatement of Contracts, which provides, “If the breach consists of a failure to pay a definite sum in money or to render a performance with fixed or ascertainable monetary value, interest is recoverable from the time for performance on the amount due less deductions to which the party in breach is entitled.” RESTATEMENT (SECOND) OF CONTRACTS § 354(1) (1981); *Burkholder*, 607 A.2d at 747; *Verner*, 500 A.2d at 481.¹⁷ As the Restatement suggests, I must first net the parties’ outstanding obligations under the contract before adding prejudgment interest.

At this stage, I am unable to properly net the parties’ liabilities because the parties’ obligations remain uncertain until TCI either elects remittitur or wins a second judgment. I will therefore deny without prejudice the parties’ motions to amend the judgment to include prejudgment interest. The matter may be raised again after TCI either accepts remittitur or further proceedings fix the amount which TCI is owed on its breach of pricing claim.

¹⁷ Although Dayco’s claim is for both wrongly rejected goods and lost profits, the parties have agreed not to pursue adjustments for present value other than the 6% interest allowed by Pennsylvania law. *See* Tr. Trans. Nov. 14, 2000 (a.m.) at 136-37. *But see* RESTATEMENT (SECOND) OF CONTRACTS § 354 cmt. c (1981).

CONCLUSION

In light of the foregoing, TCI's is not entitled to a new trial or to judgment as a matter of law, and the jury's findings on the Statute of Limitations and Breach of Warranty questions will be sustained. Dayco is entitled to remittitur of all but \$1,325,808 of the jury's \$23 million verdict on TCI's Breach of Pricing Claim.

When jurors return verdict awards which are not supported by sufficient evidence, trial courts are placed in a terrible bind: they have a constitutional duty to preserve jury findings on the one hand and an obligation to ensure verdicts have evidentiary support on the other. The solution devised here today preserves three of four of the jury's findings in their entirety, and allows the fourth to stand inasmuch as evidence supports it.

An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

TOTAL CONTAINMENT, INC.	:	
	:	CIVIL ACTION
	:	
v.	:	
	:	
DAYCO PRODUCTS, INC.	:	NO. 1997-cv-6013
	:	

ORDER

AND NOW, this 3rd day of May, 2001, upon consideration of the various post-trial motions and responses thereto, and in light of the foregoing, it is hereby **ORDERED** that:

- (1) Defendant Dayco Products' ("Dayco") Motion for Remittitur or a New Trial limited to the issue of damages on Plaintiff Total Containment's ("TCI") Breach of Pricing Claim (docket no. 206-1) is **GRANTED IN PART AND DENIED IN PART**. If TCI files an acceptance of remittitur to the amount of \$1,325,808, Dayco's Motion for a New Trial will be denied. If TCI refuses remittitur, a new trial will be ordered limited to the issue of damages on the breach of pricing claim.
- (2) TCI shall file its acceptance or refusal of remittitur with the court within ten (10) days of the filing of this Memorandum and Order.
- (3) Defendant Dayco's Motion for a Stay Pursuant to Rule 62(b) (docket no. 206-2) is **GRANTED** , without bond.
- (4) Plaintiff TCI's Motions for Judgment as a Matter of Law and for a New Trial (docket nos. 207-1 & 207-2) are **DENIED**.
- (5) Plaintiff TCI's Motions to Amend the Judgment to Include Prejudgment Interest (docket no. 207-3) is **DENIED WITHOUT PREJUDICE**.
- (6) All other motions are **DENIED AS MOOT**.

Schiller, J.