

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

ROBERT BILLET PROMOTIONS, INC. : CIVIL ACTION
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IMI CORNELIUS, INC. : NO. 95-1376

MEMORANDUM AND ORDER

HUTTON, J.

October 13, 1998

Presently before the Court is the Defendant IMI Cornelius, Inc.'s Motion for Judgment as a Matter of Law, for a New Trial, and to Alter and/or Amend the Judgment (Docket No. 79) and Plaintiff Robert Billet Promotions, Inc.'s response thereto (Docket No. 87). For the following reasons, the Defendant's Motion is denied.

I. BACKGROUND

Plaintiff, Robert Billet Promotions, Inc. ("RBP"), manufactures, distributes and sells the Drink Tank. The Drink Tank is a patented portable beverage dispenser. The product is intended to be a more effective manner to dispense beverages to crowds in sports stadiums, amusement parks, and other venues.

In late 1993 and early 1994, RBP approached defendant, IMI Cornelius, Inc. ("Cornelius"), with a proposal that the two companies collaborate in the production and distribution of the Drink Tank. This collaboration would expand the product's market area and revenue. Cornelius had international affiliates and

distributors in 42 countries. Cornelius also had hundreds of distributors around the United States which would allow RBP to save time and money by selling the Drink Tank through Cornelius' existing distribution network. In return, Cornelius would take on a new product line and potentially earn revenue.

RBP contacted Cornelius for the first time in December of 1993. Robert Billet ("Billet"), founder of RBP, and RBP employee Bill Thompson ("Thompson") met with Cornelius' representatives John Tengwall ("Tengwall") and Rick Knasel ("Knasel"). The meeting took place at RBP's offices in Ambler, Pennsylvania. After the meeting, Tengwall called RBP and asked Billet to make a presentation on the Drink Tank to Cornelius' representatives at their office in Anoka, Minnesota. Billet agreed and gave a presentation to six Cornelius representatives in January of 1994. After this January 1994 meeting, RBP met with Cornelius' marketing team.

Subsequently, Tengwall requested a report from RBP to evaluate the potential of Drink Tank and Cornelius' opportunities in that regard. RBP prepared the requested report which included confidential information such as target products for the Drink Tank, RBP's clients, and possible manufacturing and selling stations. RBP sent this report to Tengwall. RBP also provided a Drink Tank to inspect. Cornelius reverse engineered the Drink Tank to determine its components and how it was manufactured. RBP estimated Cornelius' costs to manufacture the Drink Tank at \$375

per unit. This figure was based on Cornelius' size and ability to purchase components at wholesale. At that time, RBP spent approximately \$580 per unit to manufacturer the Drink Tank.

Tengwall used the manufacturing information and presentation prepared by RBP to make a presentation to other Cornelius' representatives. Tengwall then received the necessary approval to proceed with the negotiations for the Drink Tank. After preliminary negotiations, the parties met on May 4, 1994. After the meeting, Cornelius told RBP to have its attorney prepare a draft of a contract to memorialize their agreement. At the conclusion of the May 4, 1994 meeting, Tengwall further stated to Billet that the parties had an "agreement." Tengwall also asked for permission to attend a meeting RBP had with Coca-Cola concerning the Drink Tank. Billet was hesitant to take a Cornelius representative but agreed after Tengwall confirmed that the parties had an "agreement." In a memorandum, Tengwall later described the relationship at that stage as an "agreement in principal."

Nevertheless, the parties did not agree on many details of the relationship at the May 4, 1994 meeting, including price and quantity. After the parties exchanged numerous drafts of the material terms of the agreement, a July 21, 1994 letter provided, inter alia, that: (1) the agreement would be for 15 months; (2) Cornelius would pay a \$60,000 up front fee; (3) a \$146.25 basis per tank would be paid to RBP; (4) a commitment of 1,250 tanks during

the 15 month period and an additional 2,500 tanks if Cornelius opted to renew for another 12 months; (5) Cornelius would be the exclusive manufacturer, distributor and seller of the Drink Tank; (6) RBP would continue to promote the product; (7) RBP would receive a \$1,000 per day consulting fee plus expenses; (8) Cornelius would bear marketing costs; (9) RBP would manufacture covers for the Drink Tank and sell them to Cornelius for between \$22-25; and (10) Cornelius had an option to purchase the Drink Tank for \$1,350,000 and 10% royalty for ten years on net sale price of all Drink Tanks and related products. Moreover, the July 21, 1994 letter provided three contingencies. First, RBP was to supply information to Cornelius in a timely manner. Second, Cornelius operations staff would visit RBP's vendors. Third, Cornelius would receive approval from its parent company in England.

Prior to a trade show that Cornelius and RBP representatives were to attend together, Michael Madsen, Cornelius' Vice President promised Billet that he would bring an executed final written copy memorializing the agreement. Instead, Madsen told RBP that Cornelius decided that it would not manufacture the Drink Tank. Madsen stated that Cornelius had insufficient space for the project at Remcor Products Company, Cornelius' manufacturing company. Madsen also cited difficulties in verifying the manufacture price of the tank due to a lack of information provided by Billet. While Billet was unhappy with these chain of events, he attempted to work

with Cornelius on an alternate proposal made by Madsen. Negotiations continued from October 1994 to February 1995. During these negotiations, however, Cornelius informed RBP that it would act only as a distributor of the Drink Tank. Finally, in February of 1995, RBP ceased negotiations with Cornelius and decided to commence this action.

On March 8, 1995, RBP filed a complaint seeking damages from Cornelius and Remcor under seven theories of liability. Count I against Cornelius is the only count to survive at this stage. Count I was for breach of an oral contract. In this count, RBP claimed that the May 4, 1994 agreement in principle was "a valid and enforceable oral contract pursuant to which Cornelius agreed to act as RBP, Inc.'s exclusive manufacturer, distributor and seller of the Drink Tank on behalf of RBP Inc." Pl.'s Compl. at ¶ 81. RBP claimed that Cornelius breached the contract by subsequently refusing to manufacture the Drink Tank and, therefore, was liable for damages in excess of \$100,000.00. Id. at ¶¶ 82-83.

Upon Cornelius' Motion for Summary Judgment, this Court found that the May 4, 1994 oral agreement was too indefinite to establish an enforceable obligation. See Robert Billet Promotions, Inc. v. IMI Cornelius, Inc., No. CIV.A.95-1376, 1996 WL 195384, at *3 (E.D. Pa. Apr. 18, 1996), rev'd, 107 F.3d 863 (3d Cir. 1997) (unpublished table decision). Quoting the deposition of Robert Billet, the Court found that as of May 4, 1994, the parties had not agreed to

such crucial elements as price, quantity, or the duration of the agreement. See id. The Court rejected RBP's attempt to supply these terms from a July 21, 1994 draft agreement that the parties never executed. It found that this document, titled "Proposal (Revised 7/21/94)," was one of a series drafted in the course of negotiations, and did not memorialize or expand upon the May 4 agreement. As the oral agreement was excessively vague, and the July 21 draft was just one of many attempts to reach a written agreement, there was no basis on which to grant RBP relief. Therefore, the Court granted summary judgment in favor of Cornelius on the breach of oral contract theory.

On appeal, the Third Circuit agreed that the May 4 agreement in principle was "too indefinite to permit the court to fashion an appropriate remedy." Robert Billet Promotions, Inc. v. IMI Cornelius, Inc., No. 96-cv-1435, at 5 (3d Cir. Feb. 13, 1997) (citing Linnet v. Hitchcock, 471 A.2d 537, 540 (Pa. Super. 1984)). However, the Third Circuit held that this Court erred in its treatment of the July 21, 1994 draft. Although RBP's theory of liability was premised upon Cornelius' breach of an oral contract, the Third Circuit found that "[t]he critical question is . . . whether RBP ever accepted the proposed terms contained in Cornelius' July 21 letter." Id. at 6. Finding a remaining issue of fact on this question, the Third Circuit reversed summary

judgment against RBP and remanded the case back to this Court for further proceedings.

Subsequently, the parties made several pre-trial motions. First, RBP made a motion to amend the complaint in order to allege a count for breach of a written contract. This Court denied that motion concluding that Cornelius would suffer undue prejudice as a result of the addition of a new theory of liability after discovery closed and the case was listed for trial. See Robert Billet Promotions, Inc. v. IMI Cornelius, Inc., No. CIV.A.95-1376, 1997 WL 827063, at *2-3 (E.D. Pa. Nov. 19, 1997). Second, Cornelius filed another summary judgment motion and argued that Minnesota law applied in this case. In this motion, Cornelius argued that Minnesota's Statute of Frauds barred RBP's action. This Court denied this motion under the law of the case doctrine. See Robert Billet Promotions, Inc. v. IMI Cornelius, Inc., No. CIV.A.95-1376, 1997 WL 763027, at *2 (E.D. Pa. Dec. 10, 1997). On April 6, 1998, after a five days of trial, the jury returned a verdict in favor of the Plaintiff. The jury awarded \$750,000 in direct damages and \$750,000 in consequential damages. Subsequently, Cornelius filed the present motion for judgment as a matter of law, new trial, or remittitur.

II. DISCUSSION

A. Judgment as a Matter of Law

1. Standard

Federal Rule of Civil Procedure 50 governs the entry of judgment as a matter of law. A court may grant a motion for judgment as a matter of law if "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a). The United States Court of Appeals for the Third Circuit has set forth the standard for when a court may grant a renewed motion for judgment as a matter of law under Rule 50(b):

Such a motion should be granted only if, in viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability. In determining whether the evidence is sufficient to sustain liability, the court may not weigh the evidence, determine the credibility of witnesses, or substitute its version of the facts for the jury's version.

McDaniels v. Flick, 59 F.3d 446, 453 (3d Cir. 1995), cert. denied, 516 U.S. 1146 (1996). A court may grant a Rule 50(b) motion only when, "without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment." 5A James W. Moore, Federal Practice and Procedure § 50.07[2], at 50-76 (2d ed.) (footnote omitted). To prevail on such a motion, however,

the moving party must have moved for judgment as a matter of law before the close of all of the evidence. See Fed. R. Civ. P. 50(b).

2. Application of Minnesota Law

In its motion, Cornelius contends that Minnesota law governs this case. Thus, Cornelius argues, Minnesota's Statute of Frauds bars this action. No matter what merit Cornelius' underlying choice of law argument may have, Cornelius' argument that Minnesota law applies is simply too late. Cornelius, content with summary judgment under Pennsylvania law until it was reversed by the Third Circuit, now attempts to apply the law of another state to bar Plaintiff's claim. As RBP correctly states, the choice of law question has already been settled under the "law of the case" doctrine.

The law of the case doctrine dictates that "'when a court decides upon a rule of law, that rule should continue to govern the same issues in subsequent stages in the litigation.'" In re Resyn Corp., 945 F.2d 1279, 1281 (3d Cir. 1991) (quoting Devex Corp. v. General Motors Corp., 857 F.2d 197, 199 (3d Cir. 1988)); see also 18 Moore's Federal Practice § 134.20-23 (3d ed. 1997); 18 Charles A. Wright, Arthur R. Miller, et al., Federal Practice and Procedure § 4478 (1981 & Supp. 1997). This judicial principle operates generally to bar parties from relitigating issues already decided

in previous decisions by the trial court. See Continental Cas. v. Diversified Indus., 884 F. Supp. 937, 948-49 (E.D. Pa. 1995).

In the case at bar, both parties briefed the choice of law question in their original summary judgment motions before this Court. The Court determined to apply Pennsylvania law. Upon RBP's appeal, Cornelius framed all of its arguments under Pennsylvania law and the Third Circuit found against it applying Pennsylvania law. See Robert Billet Promotions, No. 96-cv-1435, at 3-15. Although the choice of law question was not expressly discussed by either court, there can be no doubt this Court's application of Pennsylvania law amounted to a summary determination that Pennsylvania law applies. Cornelius was free to move in this Court for reconsideration of its finding. In addition, Cornelius could have briefed and argued the issue to the Third Circuit. This Court finds that failing to pursue both of these options amounted to a concession that Pennsylvania law applied.¹ While the Third Circuit may choose to review this issue, the Court finds that Pennsylvania law properly supplied the rules of decision for this case.

3. No Contract as of May 4, 1994 as the "Law of the Case"

Defendant next contends that Plaintiff presented no facts during the trial that supported a finding of an oral contract other

¹ The Court recognizes that in its argument before the Third Circuit, Cornelius had to defend this Court's grant of summary judgment under Pennsylvania law. Nevertheless, Cornelius could have made its argument that Minnesota law applied in the alternative.

than the "agreement in principle" reached by the parties on May 4, 1994. Defendant submits that, because this Court and the Third Circuit found this May 4 oral agreement too indefinite to constitute a contract, judgment as a matter of law is warranted. Plaintiff correctly counters that Defendant's argument-- that a contract was never formed-- is the identical argument made to the Third Circuit Court of Appeals and is, therefore, barred by the "mandate rule."

The "mandate rule" bars a district court from "reconsidering or modifying any of its prior decisions that have been ruled on by the court of appeals." United States v. Stanley, 54 F.3d 103, 107 (2d Cir. 1995); see Al Tech Specialty Steel v. Allegheny Int'l Credit, 104 F.3d 601, 605 (3d Cir. 1997); 18 Moore's Federal Practice § 134.23[1][a]. These rules apply in the case of any issue that has actually been decided, whether expressly or by necessary implication. See Stanley, 54 F.3d at 107; Bolden v. SEPTA, 21 F.3d 29, 31 (3d Cir. 1994). As long as the court or courts have manifested a decision on an issue, absent extraordinary circumstances the matter may be reviewed only upon appeal to a superior appellate court. See id.

In this case, Defendant essentially asks this Court to find, as a matter of law, that no contract existed on May 4 and, therefore, grant judgment in their favor because Plaintiff made no other breach of oral contract claims. The Court already granted

this relief when it ruled in Defendant's favor on the first summary judgment motion. The Third Circuit reversed this Court's decision and found that:

The district court erred, however, in concluding that there existed no disputes of fact concerning whether a subsequent letter between parties constituted part of a binding contract. Cornelius sent the letter in question to Robert Billet on July 21, 1994. See Appellant's App. at 90-92. This letter, and the circumstances surrounding it, indicate that the letter is a proposal by which Cornelius offered a set of terms to RBP

The critical question is thus whether RBP ever accepted the proposed terms contained in Cornelius' July 21 letter. We approach this question by asking whether the events surrounding the July 21 proposal constitute acceptance by RBP of the material terms of an agreement.

Robert Billet Promotions, No. 96-cv-1435, at 6. As this excerpt of the opinion reveals, while the Third Circuit agreed that the May 4 agreement was too indefinite, it also concluded that circumstances may have existed surrounding the July 21, 1994 letter that constituted a binding oral contract. Thus, under the mandate rule, this Court must make the necessary assumption that the Third Circuit also concluded that Plaintiff's Count I stated a claim for breach of contract other than the May 4 agreement. See Stanley, 54 F.3d at 107. Therefore, the Court denies Defendant's motion for judgment as a matter of law.

B. New Trial

1. Standard

Federal Rule of Civil Procedure 59(a) governs a motion for a new trial. A court may grant a new trial "to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States" Fed. R. Civ. P. 59(a). A court may grant a new trial on the grounds of: (1) improper admission or exclusion of evidence; (2) improper instructions to the jury; (3) misconduct of counsel; (4) newly discovered evidence; or (5) a finding that the jury's verdict is against the weight of the evidence. See Griffiths v. Cigna Corp., 857 F. Supp. 399, 410-11 (E.D. Pa. 1994), aff'd, 60 F.3d 814 (3d Cir. 1995) (unpublished table decision). A new trial may be granted even when judgment as a matter of law is inappropriate. See Wagner v. Fair Acres Geriatric Ctr., 49 F.3d 1002, 1017 (3d Cir. 1995). The decision to grant or deny a new trial under Rule 59(a) rests almost entirely in the sound discretion of the trial court. See Shanno v. Magee Indus. Enters., 856 F.2d 562, 567 (3d Cir. 1988).

The Court's inquiry in evaluating a motion for a new trial on the basis of trial error is twofold. First, the Court must determine whether an error was made in the course of the trial. See Bhaya v. Westinghouse Elec. Corp., 709 F. Supp. 600, 601 (E.D.

Pa. 1989) (quoting Fed. R. Civ. P. 61), aff'd, 922 F.2d 184 (3d Cir. 1990), and cert. denied, 501 U.S. 1217 (1991). Second, the Court must determine "whether that error was so prejudicial that refusal to grant a new trial would be 'inconsistent with substantial justice.'" Id.

2. Failure to Exclude Testimony of Plaintiff's Damages Expert

Defendant moves for a new trial alleging that this Court made two errors with respect to admitting Plaintiff's damage expert testimony. First, Defendant contends that this Court should have excluded the testimony because Plaintiff's expert, Charles S. Lunden ("Lunden"), relied on a treatise not disclosed in his report. Second, Defendant suggests that this Court erred in refusing to exclude Plaintiff's expert testimony on consequential damages because the expert had no independent basis for his calculation of consequential damages other than his discussions with the Plaintiff.

a. Failure to Include Rule 26(a) Report

Defendant argues this Court erred in admitting Plaintiff's expert testimony because the expert relied on an undisclosed source in determining that Cornelius would have renewed the agreement for a second term. The Court held a Daubert hearing to determine the admissibility of the offered testimony, during which Lunden represented that the text Dunn on Damages allows a damage assessor

to make this assumption under the financial circumstances present in this case. As an expert, Lunden is entitled to rely on the Dunn treatise, if reasonably relied upon by experts in his field in the ordinary course of business. See Fed. R. Evid. 703. The Court, therefore, deferred to Lunden on this point and permitted the testimony. Defendant objects, however, on the grounds that Lunden did not disclose Dunn on Damages in his report as a basis for his opinion as required on Federal Rule of Civil Procedure 26(a) and Rule 703 of the Federal Rules of Evidence.

Federal Rule of Civil Procedure 26(a)(2)(B) states:

Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Fed. R. Civ. P. 26(a)(2)(B). Rule 703 of the Federal Rules of Evidence provides, inter alia, that: "The facts or data in the particular case upon which an expert bases an opinion or inference

may be those perceived by or made known to the expert at or before the hearing." Fed. R. Evid. 703.

The automatic disclosure provisions governed by Federal Rule of Civil Procedure 26 require the disclosure of expert reports. The purpose behind "requiring expert reports is 'the elimination of unfair surprise to the opposing party and the conservation of resources.'" Reed v. Binder, 165 F.R.D. 424, 429 (D.N.J. 1996) (quoting Sylla-Sawdon v. Uniroyal Goodrich Tire Co., 47 F.3d 277, 284 (8th Cir.), cert. denied, 516 U.S. 822 (1995)). Federal Rule of Civil Procedure 37(c)(1) controls where a party fails to comply with Rule 26(a) or 26(e)(1). It states:

A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at trial . . . any witness or information not disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions.

Fed. R. Civ. P. 37(c)(1).

"The exclusion of critical evidence is an extreme sanction, not normally imposed absent a showing of willful deception or flagrant disregard of a court order by the proponent of the evidence.'" In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 791-92 (3d Cir. 1994), cert. denied, 513 U.S. 1190 (1995) (quoting Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 905 (3d Cir. 1977), overruled on other grounds, Goodman v. Lukens Steel Co., 777

F.2d 113 (3d Cir. 1985), aff'd, 482 U.S. 656 (1987)); see also Newman v. GHS Osteopathic, Inc., 60 F.3d 153, 156 (3d Cir. 1995).

When determining whether to exclude expert testimony under Rule 37(c), a court must consider:

(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 other cases of the court, and (4) the bad faith or willfulness in failing to comply with the district court's order.

Meyers, 559 F.2d at 904-905. Moreover, "[t]he importance of the excluded testimony is an important final consideration." Gibson v. National R.R. Passenger Corp., 176 F.R.D. 190, 192 (E.D. Pa. 1997) (citing Meyers, 559 F.2d at 905); see also Tunis Bros. Co., Inc. v. Ford Motor Co., 124 F.R.D. 95, 97-98 (E.D. Pa. 1989) (discussing 37(c) considerations).

In the instant action, these considerations weigh against the Defendant's argument that the Court erred by allowing Plaintiff to present Lunden's expert testimony. First, the prejudice to the Defendant, if any, is minimal. As the Plaintiff correctly notes, Defendant was put on notice of the reliance on this treatise when this Court held a Daubert hearing on the second day of trial. Mr. Lunden testified on the third and fourth day of trial. Thus, there was sufficient time to consult Dunn on Damages and proceed with effective cross examination. Moreover, in its motion, Cornelius

did not state that it was prejudiced in any manner by this error. This Court finds that the Defendant was not unduly prejudiced or unfairly surprised by the error in Plaintiff's expert report.

Second, this Court finds that the Plaintiff did not act willfully or in bad faith. Although the Plaintiff admits the error, the mistake appeared inadvertent. In the copy of the expert report that Lunden had during the Daubert hearing, Dunn on Damages was listed as a source relied on. For whatever reason, this Court and the Defendant had copies of the expert report without such a reference. This Court cannot conclude that this mistake was intentional or made in bad faith nor has the Defendant alleged it as such.

Finally, Plaintiff's expert testimony was clearly essential to the success of his case. The Plaintiff sought to recover damages arising from the alleged breach, and without the proposed evidence, the Plaintiff would have suffered significant problems advancing this evidence to the jury. Accordingly, the Defendant's motion for a new trial is denied on this ground.

b. Consequential Damage Testimony Too Speculative

Defendant next asserts that permitting Lunden to testify as to consequential damages was error and warrants a new trial because Lunden's opinion was too speculative. Cornelius argues that most, if not all, of Lunden's testimony was based on conversations with the Plaintiff. This Court, in response to Defendant's motion in

limine to exclude Lunden's testimony on similar grounds, held:

The fourth, and last, significant flaw in Lunden's proffered testimony lies in his computation of consequential damages. Although Lunden consulted a number of industry sources to arrive at the potential market for the Plaintiff's promotion and vending services, he ultimately relies on discussions he had with Robert Billet. Although the Defendants argue that Lunden's assumptions in reaching these figures are also speculative, and that Lunden is merely "parroting the Plaintiff's claimed damages," (Def.'s Supp. Mem. of Law at 2), the Court finds that they are sufficiently straightforward that the proper remedy is in cross-examination rather than exclusion. See Diaz v. Delchamps, Inc., 1998 WL 57068, *3 (E.D.La. February 9, 1998); Boyar, 954 F. Supp. at 9. Accordingly, Lunden's testimony as to consequential damages will be admitted.

Robert Billet Promotions, Inc. v. IMI Cornelius, Inc., No. CIV.A.95-1376, 1998 WL 151806, at *5 (E.D. Pa. Apr. 1, 1998). In the present motion, Defendant again objects to Lunden's testimony as impermissible under the Rules of Evidence because Lunden was only acting as a "mouthpiece" for the Plaintiff.

Federal Rule of Evidence 702 governs the admission of expert testimony in federal court. Rule 702 provides:

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

Fed. R. Evid. 702. The Rule has three major requirements: (1) the proffered witness must be a qualified expert; (2) the expert must

testify about matters requiring scientific, technical, or specialized knowledge; and (3) the expert's testimony must "fit" the facts of the case. See Kannankeril v. Terminix Int'l, Inc., 128 F.3d 802, 806 (3d Cir. 1997) (citing Paoli, 35 F.3d at 741-42); see also Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592 (1993) (finding that a Rule 702 determination is a preliminary question of law for the Court, under Federal Rule of Evidence 104(a)).

Under the Supreme Court's Daubert decision, the Court assumes a "gatekeeping" function to protect against the admission of expert testimony that is unreliable or unhelpful to the trier of fact. See id. at 592-95; United States v. Velasquez, 64 F.3d 844, 850 (3d Cir. 1995). "This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." Daubert, 509 U.S. at 592-93. Although the Supreme Court first announced this approach in the context of scientific testimony, federal courts subsequently have extended it-- albeit in a more generalized form-- to the evaluation of "technical" forms of expert knowledge. See, e.g., Tyus v. Urban Search Management, 102 F.3d 256, 263 (7th Cir.) (applying Daubert to social science testimony), cert. denied, 117 S. Ct. 2409 (1997); Velasquez, 64 F.3d at 850 (applying Daubert to handwriting expert); Stecyk v. Bell Helicopter Textron, Inc., 1998 WL 42302, *1-2 (E.D.

Pa. January 5, 1998) (applying Daubert to engineering expert testimony); Lithuanian Commerce Corp. v. Sara Lee Hosiery, 1997 WL 75706, at *5 (D.N.J. Dec. 4, 1997) (applying Daubert to accountant offered as damages expert). Accordingly, the Court applied Daubert in evaluating the admissibility of Lunden's damages testimony.²

Rule 702 has three requirements. The Rule first requires that the expert be qualified to testify. See Paoli, 35 F.3d at 741. Rule 702 also requires that the testimony must "fit" under the facts of the case. See Velasquez, 64 F.3d at 850. In its motion for a new trial, the Defendant does not assign error to the Court's determination of these requirements. Rather, Defendant argues that this Court committed error with respect to Rule 702's third requirement that the expert testimony be reliable. See Kannankeril, 128 F.3d at 806. "Daubert explains that the language of Rule 702 requiring the expert to testify to scientific knowledge means that the expert's opinion must be based on the 'methods and procedures of science' rather than on 'subjective belief or unsupported speculation'; the expert must have 'good grounds' for his or her belief." Paoli, 35 F.3d at 742 (emphasis in original). In the context of scientific testimony, a court must consider the scientific validity of the method in dispute, with reference to the factors announced in Daubert, 509 U.S. at 593-95, and in United

² Although an accountant's damages testimony is perhaps even less "scientific" than an engineer's or handwriting analyst's, the Court felt obliged to employ the Daubert approach in "an exercise of caution." Velasquez, 64 F.3d at 850.

States v. Downing, 753 F.2d 1224, 1238-39 (3d Cir. 1985). See Paoli, 35 F.3d at 742. These factors include:

(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 techniques'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.

Kannankeril, 128 F.3d at 807 n.6.

Of course, these factors were designed to test the reliability of scientific methods of proof. In the context of more technical testimony, like the validity of an accountant's assessment of contractual damages, the Daubert approach must be applied in a more general manner. See Tyus, 102 F.3d at 263. See generally 29 Charles A. Wright & Victor J. Gold, Federal Practice and Procedure: Evidence § 6266 nn.62-63 (1997) (noting areas in which courts have extended and refused to extend the Daubert analysis). Therefore, the Court must consider the above factors-- to the extent they are applicable-- in an effort to determine whether Lunden's opinion is based on "good grounds," with an emphasis on the process employed rather than the conclusions reached.³ See Kannankeril, 128 F.3d at

³ However, the Court must not be overly concerned with reliability where expert testimony will truly help a jury. "[T]he reliability requirement must not be used as a tool by which the court excludes all questionably reliable evidence. The ultimate touchstone [of admissibility] is helpfulness to the

806; Paoli, 35 F.3d at 742.

Defendant argues that Lunden's testimony was unreliable as it related to consequential damages because he had no basis for his opinions other than his discussions with Mr. Billet. Thus, under Rule 702's reliability prong, the Court must inquire into Lunden's methodology. Lunden testified that, in preparing his damages report, he interviewed Mr. Billet, reviewed documents produced in the course of this litigation, examined beverage industry documents, consulted the treatise Dunn on Damages, and researched accounting rules for measuring damages to a new venture.⁴ For

trier of fact." Velasquez, 64 F.3d at 849-50.

⁴ To elicit this information, the following colloquy occurred between the Court and Lunden at the Daubert hearing:

Q: So if it's not in the basic agreement and all of your assumptions on damages you tell me come from your major assumption is this basic agreement, what expertise other than the report of somebody else saying what they want to do and hope to do and maybe will do in Cornelius, what expertise independent of that did you bring to bear to reach these conclusions, if any? If you didn't use the basic agreement and you're just reporting from one of the litigant's employees about what his projections were, what did you bring to the table, as they say, in your expertise to reach any of these projections if you didn't use the basic agreement? Forget what Mr. So and So said. What did you do other than adopt those things because they are favorable to your client, what did you bring to the table, if anything?

A: I would point to two things that I did. I looked at the profit projections that the defendant made in terms of trying to understand what his expectations were in moving forward, how many units he expected to be sold pursuant to the contract. Secondly I looked at what I considered to be a reasonable estimate of the market size.

R. at 22 (3/31/98). Based on this and other responses by Lunden, this Court concluded that Lunden had good grounds other than his discussions with Mr. Billet to give his opinion. See Robert Billet Promotions, 1998 WL 151806, at *3-4 (concluding that Lunden could testify as an expert).

consequential damages, Lunden estimated the potential promotions market, and projected the number and value of promotion opportunities lost as a consequence of the alleged breach. This Court finds that Lunden applied an appropriate methodology, upon which businessmen and accountants would rely in the ordinary course of their trades. Plaintiff's expert had sufficient evidence, or in the words of the Third Circuit, "good grounds" to rely on this data to draw the conclusion reached that RBP would have profited from a contractual relationship with Cornelius. As demonstrated above, Lunden used other means to reach his opinion as to consequential damages. Because Lunden's assumption based on those facts is not clearly speculative, Cornelius' motion must be denied.

3. Failure to Instruct the Jury

a. No Contract Formed Until Contract Is in Writing

Defendant argues the Court erred in refusing to include the following instruction to the jury: "If the parties contemplate that their agreement cannot be considered complete, and its terms assented to before it is reduced to writing, no contract exists until execution of the writing." Defendant asserts that there was testimony at trial for an inference that Cornelius would not consider itself bound until the parties executed a written contract. Defendant also states that case law supports such an instruction. See Essner v. Shoemaker, 393 Pa. 422, 425, 143 A.2d 365, 366 (1958) ("And, if the parties themselves contemplate that

their agreement cannot be considered complete, and its terms assented to, before it is reduced to writing, no contract exists until the execution of the writing."); see also Schulman v. J.P. Morgan Inv. Management, Inc., 35 F.3d 799, 807 (3d Cir. 1994) ("Under Pennsylvania law, when one party has expressed an intent not to be bound until a written contract is executed, the parties are not bound until that event has occurred.").

This Court disagrees that failure to include this instruction was error. The evidence offered by the Defendant does not support an inference that Cornelius did not intend to be bound until the execution of a written contract. Defendant points to handwritten notes of Tengwall, a former employee of Cornelius, which state that several steps needed to consummate an agreement with RBP. See R. at 58 (4/2/98). This is insufficient evidence of an intent to be bound by writing only. Defendant also points to the testimony of various witnesses that Defendant argues indicates the parties intended to put their agreement in writing. Nevertheless, the fact that the parties intended to memorialize their agreement in writing does not mean that the parties did not have an oral agreement or that they intended to be bound only by writing. See Shovel Transfer & Storage, Inc. v. Pennsylvania Liquor Control Bd., 699 A.2d 1324, 1329 (Pa. Commw. Ct. 1997) ("In this Commonwealth it is well established that 'parties may bind themselves contractually prior to the execution of a written document through mutual

manifestations of assent, even where a later formal document is contemplated.'" (quoting Krause v. Great Lakes Holdings, Inc., 387 Pa. Super. 56, 63, 563 A.2d 1182, 1185 (1989)), appeal granted, --- A.2d --- (Pa. Apr. 22, 1998); Luber v. Luber, 418 Pa. Super. 542, 548, 614 A.2d 771, 773 (1992) ("Where the parties have reached an oral agreement, the fact that they intend to reduce the agreement to writing does not prevent enforcement of the oral agreement."); Compu Forms Controls, Inc. v. Altus Group, Inc., 393 Pa. Super. 294, 305, 574 A.2d 618, 624 (1990) ("As we have recognized, if the parties agree on essential terms and intend them to be mutually binding, a contract is formed even though the parties intend to adopt a formal document later which will include additional terms."); see also Pennsylvania Bar Institute, Pennsylvania Suggested Standard Civil Jury Instructions § 15.01 (1991) ("If you find that an oral contract existed in this case, it is irrelevant that the party seeking to enforce the contract did not take steps to obtain a written contract, despite his or her apparent ability and opportunity to do so."). Therefore, this Court denies Defendant's motion for a new trial on this ground.

b. Burden of Proof

Defendant next argues that this Court erred in instructing the jury that an oral contract must be proven by a preponderance of the evidence, rather than by clear and convincing evidence. The Pennsylvania Supreme Court has not decided which standard of proof

applies when proving the existence of an oral contract. See Pinizzotto v. Parsons Brinkerhoff Quade & Douglas, Inc., 697 F. Supp. 886, 886 (E.D. Pa. 1988). At first glance, there appears to be a conflict of authority on this issue in the Pennsylvania Superior Court and federal courts sitting in Pennsylvania. Compare Sikora v. Temple Univ., No. CIV.A.85-0668, at *4 (E.D. Pa. June 10, 1988); Browne v. Maxfield, 663 F. Supp. 1193, 1197 (E.D. Pa. 1987); Greene v. Oliver Realty, Inc., 363 Pa. Super. 534, 526 A.2d 1192 (1987), with Steelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc., 862 F. Supp. 1361, 1365 n.6 (E.D. Pa. 1994), aff'd in part, vacated in part on other grounds, 63 F.3d 1267 (3d Cir. 1995), and cert. denied, 516 U.S. 1172 (1996); Pinizzotto, 697 F. Supp. at 886; Robertson v. Atlantic Richfield Petroleum, 371 Pa. Super. 49, 60, 537 A.2d 814, 820 (1987).

However, the body of case law that supports the application of the clear and convincing standard is derived from case law requiring a heightened standard in cases of (1) alleged oral modification to written contract, (2) oral contract to make a will, and (3) claims against decedent's estate based on oral contract. See, e.g., Pellegrine v. Luther, 403 Pa. 212, 169 A.2d 298, 299 (1961) ("The law is well settled that a written agreement can be modified by a subsequent oral agreement provided the latter is based upon a valid consideration and is proved by evidence which is clear, precise and convincing."); Hatbob v. Brown, 394 Pa. Super.

234, 575 A.2d 607, 612 (1990) (applying clear and precise standard when an oral contract creating or modifying a will is sought to be enforced); Krause v. Great Lakes Holdings, Inc., 387 Pa. Super. 56, 563 A.2d 1182, 1187 (1989) (applying clear and precise standard when fraud is claimed in the formation of a contract), appeal denied, 524 Pa. 629, 574 A.2d 70 (1990); Miller v. Wise, 33 Pa. Super. 589, 593 (1907) (discussing oral contract that allegedly modified a written agreement).

This Court holds that it was not error to apply the preponderance of the evidence standard because this case involved a simple oral contract. This case did not involve a situation that normally invoked the clear and convincing evidence standard under Pennsylvania law. Further, this Court found it significant that the Pennsylvania Suggested Standard Civil Jury Instructions state that oral contracts are just as enforceable as written ones. Compare Pennsylvania Bar Institute, Pennsylvania Suggested Standard Civil Jury Instructions § 15.00 (1991), with Pennsylvania Bar Institute, Pennsylvania Suggested Standard Civil Jury Instructions § 15.01 (1991). Indeed, even more significant, the instructions fail to mention the clear and precise standard. See id. Therefore, this Court is satisfied that it applied the correct standard and Defendant's motion for a new trial is denied on this ground as well.

4. Failure to Include Waiver Issue in Jury Interrogatory

Defendant argues that this Court erred in failing to include a question on waiver of a party's contract rights in the jury interrogatory. This Court cannot agree. At trial, the Court concluded that a question on waiver was not necessary for two reasons. First, the Court found that a jury instruction on the waiver issue was sufficient. The instruction read:

A party may waive or give up its contract rights. A party who sanctions or fails to protest the breach of a contract waives its right to recover for a breach of that contract. That party also cannot recover damages for non-performance or use breach as a defense in a lawsuit on that contract. A breach of a contract may be waived either by implication or by express agreement. The party waiving a breach must know about the breach at the time of the waiver.

R. at 161-62 (4/3/98). Second, the Court found that the questions on the jury interrogatory properly dealt with the waiver issue. If the jury concluded by a preponderance of the evidence that RBP waived its contract rights, then the jury could answer "no" to the question "Do you find by a preponderance of the evidence that Defendant breached that contract?" See R. at 3 (4/6/98). Thus, for these reasons, the Court finds it did not commit error in refusing to include a waiver question on the jury interrogatory.⁵

⁵ Even if the Court committed error, the Plaintiff makes a persuasive argument that Defendant waived his objection to the failure to include the waiver of contract rights question on the jury interrogatory. Where a defendant fails to object to the form and language of special verdict forms or to the jury charges, before closing arguments or at the close of charging before the jury retires to deliberations, and the form had been submitted to

5. Renewal Period as Damages

Defendant next challenges the award of direct damages arguing that there was no evidence that Cornelius would have exercised the option in the July 21, 1994 letter.⁶ The July 21, 1994 letter provided for an initial 15 month, 1,250 tanks commitment by Cornelius. Additionally, the letter provided Cornelius with an additional 12 month, 2,500 tank option that could be exercised at Cornelius' discretion. Because this option was at their sole discretion, Defendant argues these damages should not be

counsel, objections are waived. See Fed. R. Civ. P. 51 ("No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection."); see also Tose v. First Pa. Bank, N.A., 648 F.2d 879, 900 (3d Cir. 1981); Hoffman v. Sterling Drug, Inc., 485 F.2d 132, 138-39 (3d Cir. 1973); Callwood v. Callwood, 233 F.2d 784, 788 (3d Cir. 1956). Thus, any arguments not raised prior to the time that the jury retires are waived. However, the Third Circuit recognizes a judicially created exception to Rule 51, known as the "plain error" doctrine. See Beardshall v. Minuteman Press Int'l Inc., 664 F.2d 23, 27 (3d Cir. 1981). This doctrine permits a court to review instructions to which no timely objection was raised where the error is "fundamental and highly prejudicial" and the failure to consider the error would result in a "miscarriage of justice." Id. The error must be so outrageous as to affect the fairness, integrity or public reputation of judicial proceedings. See Wright v. Farmers Co-Op of Ark. & Okla., 620 F.2d 694 (8th Cir. 1980).

In this case, an examination of the record reveals that the Defendant failed to object to the jury interrogatory before the verdict form was in the hands of the jury. R. at 163-71 (4/3/98). It was only after the jury posed a question on a separate matter that the Defendant raised his objection to this Court's failure to include its waiver question on the jury interrogatory. R. at 3 (4/6/98). Moreover, as Plaintiff notes, Defendant made no argument that the error is "fundamental and highly prejudicial" and the failure to consider the error would result in a "miscarriage of justice" as set forth in the plain error exception by the Third Circuit. Therefore, if error was committed, the Court is persuaded that Defendant waived any objection on this issue.

⁶ In this section of their motion, Defendant again argues that consequential damages should not have been submitted to the jury because the expert testimony on the subject was unsupported by competent evidence. This Court already addressed this issue above and, therefore, will not revisit it here.

recoverable nor submitted to the jury because they are speculative and uncertain.

This Court does not agree. There was evidence sufficient for a jury to conclude by a preponderance of the evidence that Cornelius would have exercised its option. For instance, when questioned concerning the 1,250 tank commitment and the option, Mr. Billet testified:

We questioned -- when we were discussing why the commitments were 1,250 units, we expected them to sell a lot more. The answer was that 1,250 units was not something we should be really concerned with.

John Tengwall informed us that this was a number, but it was not a number -- 1,250 units - - they would not be in this business if all they were going to do was sell 1,250 units. It's not worth it to Cornelius to handle an item that only sells 1,250 units, that they expected to sell four to five thousand units.

R. at 39 (3/31/98). Along the same lines, Richard Barkley, President of Cornelius, stated the following in discussing the Drink Tank agreement with Cornelius' parent corporation: "There is some risk associated with taking or paying for 1250 tanks over the next fifteen months The return on sales is quite high once we achieve the break even level so even though there is some risk in the first few months, over the long term, it could be a very attractive product for us." Pl.'s Ex. 71. Finally, Mr. Lunden testified as an expert that there are start up costs and slower sales associated with new ventures at the beginning of the contract. Lunden explained, however, that towards the end of the

contract, Cornelius could be expected to exercise the option based upon profit projections prepared by Cornelius' employees. These projection anticipated profits over the next five years under the Drink Tank project. Pl.'s Ex. 23. As discussed previously, Lunden supported his position based on the treatise Dunn on Damages. Therefore, based on this evidence, the Court cannot conclude that it committed error in submitting the renewal period as damages.

6. Jury Verdict Contrary to the Weight of the Evidence

Finally, Cornelius asserts that it is entitled to a new trial because the jury's verdict is against the weight of the evidence. Cornelius argues the verdict is against the weight of the evidence because there was uncontroverted evidence of waiver of any breach of contract by the Plaintiff even if a contract was created.⁷ As support for this argument, Defendant points to the time period between October 1994, when Madsen informed RBP that Cornelius would not manufacture the Drink Tank, to February 1995, when RBP finally ceased further negotiations for an alternative arrangement between

⁷ Defendant makes two other arguments for a new trial already addressed by this Court. First, Defendant argues that a new trial is necessary by reiterating the argument that Plaintiff presented no facts during the trial that supported a finding of an oral contract other than the "agreement in principle" reached by the parties on May 4, 1994. The Defendant already made this same argument in its motion for judgment as a matter of law. While this Court recognizes that the standards for a new trial and judgment as a matter of law are not the same, this Court denies Defendant's motion for a new trial on the same grounds as discussed above. Second, Defendant argues that the jury's verdict is against the weight of the evidence because Cornelius had the sole discretion to renew the option. This argument was already discussed and the Court finds that there is sufficient evidence to support the jury's verdict.

the companies. Defendant states "[a]t no time during that period did RBP withdraw from the negotiations or seek enforcement of the original contract." Def.'s Mem. of Law in Support of Motion for Judg. as Matter of Law at 32. Thus, the Defendant urges this Court to order a new trial because this evidence weighs against the jury's verdict.

The Court will not grant a new trial on this ground. The Court agrees with the Defendant that one may waive the breach of a contract. See Formigli Corp. v. Fox, 348 F. Supp. 629, 646 (E.D. Pa. 1972). In the case at bar, however, Defendant argues that Plaintiff must object right away to Defendant's breach or waive any right to sue. Further, Defendant argues that Plaintiff cannot continue to negotiate an alternative proposal without waiving the right to sue for breach of contract. "The law does not require such an extreme attitude on the part of one who has been subjected to a breach of contract." Wilfred Co. v. Westmoreland Metal Mfg. Co., 200 F. Supp. 55, 58 (E.D. Pa. 1959). The fact that the parties continued to transact small items of business or try to work out an alternative arrangement does not constitute a waiver of the breach under Pennsylvania law. See id. Moreover, it is apparent from the record that Plaintiff strongly objected to Cornelius' decision not to manufacture the Drink Tank. See R. at 63 (3/31/98). Simply because RBP did not bring suit immediately does not mean it chose to waive its right to sue on the breach.

Therefore, the Court must deny Defendant's motion for a new trial.

C. Remittitur

1. Standard

Under federal law, a district court may review damages awards for excessiveness. See Kazan v. Wolinski, 721 F.2d 911, 914 (3d Cir. 1983). Properly employed, the remittitur may "restore the verdict to acceptable limits." Schneffer v. Board of Ed. of Delmar Sch. Dist., 506 F. Supp. 1300, 1308 (D. Del. 1981). Although there is no set standard by which to determine the acceptable limit in a given case, three approaches by which courts determine the amount of the remittitur have emerged from the case law. First, a court may "reduce the verdict to the lowest amount that could reasonably be found by the jury." 6A J. Moore, J. Lucas & G. Grother, Jr., Moore's Federal Practice § 59.08[7], at 59-195 (1986). Alternatively, a court may "reduce the verdict only to the maximum that would be upheld by the trial court as not excessive, apparently on the theory that the jury intended to award the plaintiff the maximum legal damages and the court should not invade the province of the jury except to reduce the amount of the verdict to that point." Id. at 59-195, 59-197. Between these two extremes, a court may exercise its own discretion and adjust the verdict to "a figure that the court believes a proper functioning jury should have found." Id. at 59-197.

A motion for remittitur is left to the discretion of the trial

judge, who is in the best position to evaluate the evidence presented and determine whether or not the jury has come to a rationally based conclusion. See Spence v. Board of Educ., 806 F.2d 1198, 1201 (3d Cir. 1986). When the trial judge finds that the jury's decision is clearly unsupported and/or excessive in light of the evidence, and where no clear judicial error or pernicious influence can be identified, the court should order the plaintiff to remit a portion of the verdict in excess of the maximum amount supportable by the evidence or, if remittitur is refused, to submit to a new trial. See id. at 1201; Kazan v. Wolinski, 721 F.2d 911, 914 (3d Cir. 1983). The jury's verdict must be so large as to "shock the conscience" of the court. See id.; see also Dunn v. Hovic, 1 F.3d 1371, 1381 (3d Cir.), modified, 13 F.3d 58 (3d Cir.), and cert. denied, 510 U.S. 1031 (1993).

2. Reduction of Direct Damages

Defendant argues that, if the Court does not grant judgment as a matter of law or a new trial, this Court should remit Plaintiff's direct damages to reflect that the alleged basic agreement committed Defendant for only one year. Thus, based on Defendant's previous argument that it had complete discretion in exercising the option for another 2,500 tanks, Defendant asks this Court to reduce the damages to \$254,687.50.

The Court denies Defendant's request to reduce direct damages because it finds Defendant's figure of \$254,687.50 as Plaintiff's

direct damages to be low for two reasons. First, Defendant failed to include the 2,500 tanks under the option. While this option was to be exercised at Cornelius' discretion, this Court already concluded that there was sufficient evidence for the jury to consider it as damages. Thus, this would add 2,500 tanks at \$146.25 per tank or \$365,625.00 to Defendant's figure. Moreover, Defendant failed to include at least 2,500 tank covers for the same reason at \$9.50 per cover or \$35,625.00. This Court says "at least" because there was testimony that each Drink Tank could require several covers. See R. at 155 (4/1/98). Second, Defendant failed to include the \$1,000 per day consulting fee. Defendant objects to the jury's consideration of these fees because the alleged oral contract did not provide for any minimum consulting fees. However, the jury heard testimony from Lunden and Billet that they expected Cornelius to require 80 days of consulting from RBP.⁸ See R. at 154 (4/1/98). The Court concludes that the jury could have properly relied on this testimony in its assessment of direct damages. Therefore, a consulting fee of \$1,000 per day at 80 days or \$80,000.00 must be added to Defendant's estimate of Plaintiff's direct damages.

When the Court adds these additional amounts, it cannot

⁸ Defendant objects to Mr. Lunden's use of 80 days because he stated in his expert report under Rule 26 of the Federal Rules of Civil Procedure that 45 days were the expected number of consulting fees. This Court finds that any prejudice that resulted was minor and, therefore, it is proper to include the 80 days of consulting in the assessment of damages.

conclude that the jury's verdict "shocks the conscience" of this Court. See Kazan, 721 F.2d at 914 (holding that the jury's verdict must be so large as to "shock the conscience" of the court). These additional amounts plus Defendant's calculation results in an amount over \$700,000 as Plaintiff's direct damages. Moreover, Mr. Lunden testified that Plaintiff's direct damages were \$743,750. The jury verdict was \$750,000 in direct damages. Therefore, the Court concludes that the verdict is sufficiently close to both this Court's determination and Lunden's determination of Plaintiff's damages. Therefore, this Court denies Defendant's request to reduce Plaintiff's direct damages.

3. Reduction of Consequential Damages

Defendant also argues that this Court should eliminate Plaintiff's consequential damages because the damages are unsupported by the evidence. Damages in a breach of contract action are designed to place the injured party in the position it would have been had the contract been performed. See William B. Tanner Co. v. WIOO, Inc., 528 F.2d 262, 271-72 (3d Cir. 1975). To recover consequential damages, plaintiff must show specifically that defendant had reason to know of the special circumstances causing the loss and that the injury was foreseeable. See McDermott v. Party City Corp., 11 F. Supp.2d 612, 624 (E.D. Pa. 1998) ("It is well-settled that to recover consequential damages, plaintiff must show specifically that defendant had reason to know

of the special circumstances causing the loss and that the injury was foreseeable."); see also Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854). Foreseeability is to be determined from the point in time when the contract was formed. See Hazleton Area Sch. Dist. v. Bosak, 671 A.2d 277, 282 (Pa. Commw. Ct. 1996).

Defendant argues there was no such foreseeability in this case. Defendant also cites to Minasian v. Standard Chartered Bank, 109 F.3d 1212, 1216 (7th Cir. 1997), where the Seventh Circuit found that an expert did not gather any data on the subject, survey the published literature or do any of the other things that a genuine expert does before forming an opinion. See id. Defendant equates the Mr. Lunden's efforts in this case to that of the expert in Minasian and urges this Court to throw out the jury's award of consequential damages. Defendant does not, however, challenge Lunden's calculation of damages, but rather the inferences underlying Lunden's calculation of consequential damages.

This Court already found Mr. Lunden's testimony reliable and not based solely on conversations with Mr. Billet. Rather, the Court concluded that Lunden also relied on the following: (1) the interviewed of Mr. Billet; (2) documents produced in the course of this litigation; (3) beverage industry documents; (4) the treatise Dunn on Damages; (5) accounting rules for measuring damages to a new venture. Lunden then estimated the potential promotions market and projected the number and value of promotion opportunities lost

as a consequence of the alleged breach. Moreover, while this Court recognizes that some of Lunden's assumptions may have come from Mr. Billet (including profit margin of 40% and \$10,000 average cost of event), this Court found that many of Defendant's argument went to weight and not admissibility. Therefore, in its ruling on Defendant's motion to preclude Lunden's testimony, the Court concluded that cross examination was a better method for challenging the basis of Lunden's calculation. See, e.g., Diaz, 1998 WL 57068, at *3 ("This opinion is pure speculation unless there is some evidence to support it, and thus until evidence is adduced indicating that Diaz, a 20 year old paraplegic with brain damage, is likely to be able physically and mentally to perform his prior work, or work earning him the same salary, it is without foundation. However, such is the fodder for cross-examination, and thus the objection goes to weight, rather than admissibility."); Boyar, 954 F. Supp. at 9 (noting that cross examination rather than exclusion is proper remedy where challenge is to expert's inferences and assumptions, and not to the factual basis of expert's calculation of damages). Indeed, if Mr. Lunden had not gathered any data, surveyed any literature or do any of the things that experts usually do in forming opinions as the expert in Minasian, this Court would have never allowed Mr. Lunden to testify in the first place. On the contrary, however, the Court found after a Daubert hearing that Mr. Lunden did have a reasonable basis

for his opinion. Thus, the Court rejects Defendant's comparison to Minasian and finds Lunden's expert testimony reliable.

Turning to the calculation of the consequential damages then, Plaintiff only alleged one type of damage-- lost revenue from the opportunities of manufacturing and distributing the Drink Tank through Cornelius. According to Lunden's report and testimony, there are 3,000 major Coca-Cola promotional events per year of which RBP would participate in 10% or 300. Over the life of the alleged oral contract, 2.2 years or 37 months, RBP missed out on 675 promotional opportunities as a result of Cornelius' breach. Lunden further stated that, at \$10,000 per event, RBP lost \$6,750,000 in revenue. Thus, at a 40% profit margin, RBP lost \$2,700,000 in profits.

Moreover, Plaintiff presented sufficient evidence for a jury to conclude that Cornelius was aware of these lost profits to RBP. Plaintiff's counsel asked Mr. Billet if the opportunities were discussed with Cornelius. Mr. Billet responded: "Everything was discussed with Cornelius because it was also a benefit to Cornelius." R. at 75 (3/30/98). Further, both Thompson and Billet testified that promotional activities and marketing opportunities available to both RBP and Cornelius were discussed with Cornelius. R. at 74-75 (3/30/98), at 77-79 (4/1/98).

Using Lunden's calculations, Plaintiff suffered consequential damages of \$2,700,000. In addition, Plaintiff

presented evidence that Cornelius was aware of these consequential damages at the time of the agreement. The jury awarded \$750,000 in consequential damages. This award hardly "shocks the conscience" of the Court in light of Mr. Lunden's calculation. Therefore, Defendant's motion to remit the damages is denied.

An appropriate Order follows.

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

ROBERT BILLET PROMOTIONS, INC. : CIVIL ACTION
: :
v. : :
: :
IMI CORNELIUS, INC. : NO. 95-1376

O R D E R

AND NOW, this 13th day of October, 1998, upon consideration of Defendant IMI Cornelius, Inc.'s Motion for Judgment as a Matter of Law, For a New Trial, and to Alter and/or Amend the Judgment (Docket No. 79) and Plaintiff Robert Billet Promotions, Inc.'s response thereto (Docket No. 87), IT IS HEREBY ORDERED that the Defendant's Motion is **DENIED**.

BY THE COURT:

HERBERT J. HUTTON, J.