UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

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

APPENDIX OF UNREPORTED AUTHORITIES SUBMITTED IN SUPPORT OF DEFENDANTS' *DAUBERT* MOTION TO EXCLUDE "EXPERT" TESTIMONY OF CATHERINE A. GHIGLIERI, CHARLES CROSS, AND HARRIS L. DEVOR

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TABLE OF CASES

TAB A

HOnly the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.
AMAKUA DEVELOPMENT LLC, a Nevada Limited Liability Company, Plaintiff,
v.
H. Ty WARNER, an individual; Ty Inc., a Delaware Corporation; Ty Warner Hotels & Resorts LLC, a Delaware Limited Liability Company; and JTL Capital LLC, a Texas Limited Liability Company, Defendants.
No. 05 C 3082.

July 10, 2007.

Daniel L. Rasmussen, Erik M. Andersen, Payne & Fears, LLP, Irvine, CA, Todd H. Flaming, Schopf & Weiss LLP, Chicago, IL, for Plaintiff.
Gregory J. Scandaglia, Eric J. Munoz, James Robert Ahler, Matthew Boyd Steffens, Therese Lynn Tully, Scandaglia & Ryan, Chicago, IL, for Defendants.

MEMORANDUM OPINION AND ORDER DENYING SUMMARY JUDGMENT

MARK FILIP, United States District Judge.
*1 Plaintiff, Amakua Development LLC (also "Amakua" or "Plaintiff"), filed this diversity suit against Defendants, H. Ty Warner (also "Mr. Warner"), Ty Inc. ("Ty Inc."). Ty Warner Hotels & Resorts LLC (also "Warner Hotels," and together with Mr. Warner and Ty Inc., the "Warner Defendants"), and JTL Capital LLC ("JTL") in the District Court for the Central District of California (the "California Court"), (D.E.1.) On May 11, 2005, the California Court transferred the suit to this Court on the grounds that it lacked personal jurisdiction over Mr. Warner and that venue was improper. (D.E. 38 (attached as Exhibit A to D.E. 53) .) This Court subsequently ruled that the suit was properly brought under the district court's diversity jurisdiction and that California law controlled Counts II (which the Court then dismissed) and III (for common law fraud). (*See* D.E. 69 at 7, 16-18, 24.)

The suit involves the sale of a resort hotel and surrounding property located in Los Cabos, Mexico. Plaintiff alleges that, after bringing the Defendants together so that Warner Hotels could purchase the hotel portion of the property from JTL, the Defendants cut Plaintiff out of the deal, in breach of a Confidentiality and Non-Circumvention Agreement (the "Noncircumvention Agreement") Plaintiff had executed with the Warner Defendants, Plaintiff's operative complaint (D.E.64) alleges state law claims against the Warner Defendants for breach of the Noncircumvention Agreement (Count I), fraud (Count III), quantum meruit (Count IV), and intentional interference with contract against JTL (Count V). (*See* D.E. 64.) Plaintiff claims some $30 million in alleged damages.

This Court previously dismissed Count II, for breach of the implied covenant of good faith and fair dealing. (*See* D.E. 69 at 2.) Defendants have filed a counterclaim that is not addressed in this opinion. (*See* D.E. 73.) Before the Court are the parties' cross-motions for summary judgment on Plaintiff's claims (D .E. 100; D.E. 111); the parties' motions to strike evidence submitted in support of summary judgment (D.E. 120; D.E, 129); and the parties' motions to strike each other's expert testimony (D.E. 121; D.E. 136; D.E. 140). For the reasons discussed below, the motions for summary judgment are denied, the motions to exclude expert testimony are granted in part and denied in part, and the motions to strike other evidence are dismissed as moot in light of the summary judgment denial, which is based on evidence either not challenged by either party, or else deemed admissible by the Court despite a party's challenge. (D.E.99, 110, 129, 135, 138.)

FACTS

The Court takes the facts from the parties' respective Rule 56.1 Statements. (*See* D.E. 101; D.E. 112; D.E. 113; D.E. 118.) Where the parties disagree over relevant facts, the Court sets forth the competing versions. In addition, the Court resolves genuine factual ambiguities in the respective nonmovant's favor.

*2 Local Rule 56.1 ("L.R.56.1") requires that statements of facts contain allegations of material fact, and the factual allegations must be supported by admissible record evidence. *See*L.R. 56.1; *Make v.*

Sanford, 191 F.R.D. 581, 583-85 (N.D.Ill.2000). The Seventh Circuit teaches that a district court has broad discretion to require strict compliance with L.R. 56.1. *See, e.g.*, *Koszola v. Ed. of Ed. of City of Chicago*, 385 F.3d 1104, 1109 (7th Cir.2004); *Curran v. Kwon*, 153 F.3d 481, 486 (7th Cir.1998) (citing *Midwest Imports, Ltd. v. Coval*, 71 F.3d 1311, 1316 (7th Cir.1995) (collecting cases)). Where a party has offered a legal conclusion or a statement of fact without offering proper evidentiary support, the Court will not consider that statement. *See, e.g.*, *Make*, 191 F.R.D. at 583 ("[A] movant's 56.1(a) statement should contain only factual allegations. It is inappropriate to allege legal conclusions."); *id.*("Factual allegations not properly supported by citation to the record are nullities."). Additionally, where a party has improperly denied a statement of fact by failing to provide adequate or proper record support for the denial, the Court deems admitted that statement of fact. *See*L.R. 56.1(a), (b)(3)(B); *see also* *Make*, 191 F.R.D. at 584.The Court disregards any additional statements of fact contained in a party's response rather than its statement of additional facts. *See* *Make*, 191 F.R.D. at 584 (stating that the L.R. 56.1(b)(3)(B) statement is the only acceptable means of presenting additional facts to the Court).

The Parties

This case is about a small company that alleges it was cut out of a deal by two larger companies, after the smaller company brought the two larger companies together to do business. The Plaintiff, Amakua Development LLC, is a Nevada limited liability company whose sole member is Michael Scofield, a Nevada resident. Amakua allegedly was formed for the purpose of "consulting, identifying, developing and transacting" in hotel properties. (D.E. 101 ¶¶ 1, 8.) However, neither Scofield nor Amakua has a real estate broker's license (D.E. 112 ¶ 9), and Amakua has never closed any real estate transaction involving a resort or hotel property-either as a broker or as a principal/equity owner (D.E. 112 ¶ 11). Moreover, Amakua has no assets or capital, and it has never received a loan from any lender. (D.E. 112 ¶ 16.)

Defendant Ty Warner, an Illinois resident, is the sole member of Defendant Warner Hotels & Resorts LLC, a Delaware limited liability company. Mr. Warner also heads Ty Inc., a Delaware corporation with its principal place of business in Illinois. (D.E. 112 at 5.) Defendant JTL is a Texas limited liability company whose only members, David Lane and Mark Sullivan, are Texas residents. (D.E. 101 ¶ 5.)

Amakua's Proposed Transaction

Through a variety of introductions, representatives of Amakua met John Hong, Ty Warner's principal adviser for business affairs, and David Lane, JTL's principal. Through these introductions, Amakua had become aware of the Warner Defendants' desire to buy a hotel, and JTL's desire to sell one. Defendant JTL was under contract to purchase a hotel in Mexico called Las Ventanas al Paraiso Hotel and Resort ("Las Ventanas") from a prominent Mexican family (the "Burillo family") for $68 million. (D.E. 101 ¶ 13.) JTL's Lane agreed to talk to Scofield after another potential buyer, Omni Hotels, decided not to pursue the deal and Omni's vice president of development, Scott Johnson, referred Lane to Scofield. (D.E. 101 ¶ 18; D.E. 112 ¶ 30.) In response to discussions with Scofield, Lane sent Scofield an offering memorandum on the property and some information about potential financing from Morgan Stanley. (D.E. 112 ¶ 33.) Scofield then "took the Las Ventanas opportunity" to Hong. (D.E. 101 ¶¶ 19-20.)

The Noncircurnvention Agreement

*3 Around September 18, 2003, Greg Blake, one of Amakua's two agents, called Hong to determine if Mr. Warner [FN1] was interested in purchasing the hotel portion of Las Ventanas. (D.E. 118 ¶ 35.) Hong expressed interest, and a day or two later Amakua faxed Hong the Noncircumvention Agreement at issue in this case, which Hong signed. The Agreement stated that Amakua would provide confidential information about the hotel property to Warner in exchange for a promise that Warner would not "circumvent" Amakua in any eventual purchase of the hotel. (*See* D.E. 75 ¶ 18; Ex. 1025 ¶ 1.) The noncircumvention provision of the Agreement stated, in its entirety: "Specifically 'Hong' agrees to refrain from circumventing 'Amakua' in any dealings either directly or indirectly."(Ex. 1025 ¶ 10.)

FN1. Throughout their L.R. 56.1 Statements, the parties disagree about whether Hong was working on behalf of Mr. Warner, in his individual capacity, or Warner Hotels & Resorts, LLC. (*See e.g.*, D.E. 113 ¶ 31.) Hong

> signed the Noncircurnvention Agreement as "Principal Advisor/Business Affairs" without stating whether he was signing on behalf of Mr, Warner or Warner Hotels. Hong stated in response to Plaintiff's interrogatories that he was acting on behalf of Warner Hotels, *see* D.E. 113 at 12 (citing Pl .'s Ex. 345 at 191), but Plaintiff has variously asserted that Hong purported to be working on behalf of Mr. Warner individually, *see, e.g.*, D.E. 118124.

Defendants argue that Hong signed the agreement because Amakua told Hong it represented the seller and that it "controlled the deal." (D.E. 112 ¶ 36.) Amakua disputes this statement as untrue. (D.E. 118 ¶ 36.) Defendants state that the parties never discussed or negotiated the Noncircurnvention Agreement or any of its provisions, and that it does not contain a compensation provision. (D.E. 112 ¶¶ 38, 39.) Defendants' chief argument against enforcement of the Noncircurnvention Agreement, however, is that it constitutes brokerage activity, which was illegal on Amakua's part because neither Amakua nor Scofield is a licensed real estate broker. (D.E. 112 ¶ 9.) Defendants also assert that a "principal," as opposed to a "broker," does not rely on noncircumvention agreements "because [a principal, unlike a broker, has] no fee or commission to protect."(D.E. 112 ¶ 13 (citing Ex. 365, Morone Expert Report at 5).) Amakua disputes this as well, stating that "[p]articipants in the acquisition of real estate are well aware that they could be circumvented by the capital-heavy entity in a transaction. Thus, it is common to require a non-circumvention promise to prevent being 'cut out of the deal.' " (D.E. 118 ¶ 13 (citing Ex. 1061, Robinson Decl., at 2, 6-7).) This assertion comes from Plaintiff's putative damages expert, Maurice Robinson. As discussed below, this opinion of Mr. Robinson's is stricken from the record because it is beyond the scope of Mr. Robinson's expertise. However, because the Court has denied the parties' cross-motions for summary judgment-based on much more than just this purported dispute of fact-this admission is not outcome determinative. The Court includes this dispute only to demonstrate how thoroughly the parties dispute the material facts of the case.

After Hong signed the Noncircumvention Agreement, Amakua provided him with the identities of JTL and David Lane, with details of a Revised Management Contract that JTL was negotiating with Rosewood Hotel Company, with two pages of historical and projected financial information about Las Ventanas, and with David Lane's private cell phone number. (D.E. 101 ¶¶ 33, 35, 37, 38.) Beyond these facts, much is disputed about the details surrounding the execution of the Noncircumvention Agreement, including whether Amakua described to Hong the nature of JTL's contract with the Burillo family or JTL's earlier failed negotiations with Omni Hotels, and whether Amakua itself created any of the financial information it provided to Hong or simply forwarded financial information it had received from JTL. (*See id.* ¶¶ 34, 36; D.E. 113 ¶¶ 34, 36; D.E. 112 ¶ 40; D.E. 118 ¶ 40.)

The Facilitation Agreement

***4** On September 23, 2003, Scofield drafted and sent to Lane a two-page Facilitation Agreement, which attempted to memorialize a deal with JTL regarding the sale of Las Ventanas in a "dual escrow" transaction for $70.25 million. (D.E. 112 ¶ 45.) The Agreement states: "Broker [Amakua] shall earn its commission, which shall be defined as the difference between the Gross Sales Price and the Client's Purchase Price. ('Client Price') This amount will include any and all cash as well as any and all real estate not included in client's asset list."(Ex. 1023 at A0144.) Further, the Agreement states:

> It is understood and agreed that Buyer [JTL] is willing to complete the transaction with what is commonly referred to as a dual escrow whereby, Buyer will be a party to two separate escrows, one for the purchase of the Property from the current owners, and one for the sale of the Property to the Client. Buyer will act as facilitator for these transactions and will have no rights to negotiate or accept any other price from Client unless receiving prior approval from Broker.

(*See id.* at A0144-A0145.)The parties disagree about whether the Facilitation Agreement established that Amakua was to be a "broker" or a "principal" in the deal, and whether the Facilitation Agreement contemplated a "flip" of the property or some other arrangement. The parties also disagree about the meaning of the terms "broker," "principal," and "flip." (D.E. 118 ¶ 46; D.E. 112 ¶ 51 (citing Ex. I, Wallace

Dep. at 190:1-191:9 (stating that agreements entitling a broker to a commission in the amount the sales price exceeds the list price is known as a "net listing agreement," not a flip)); Ex. 1023 at A0143; D.E. 112 ¶ 14; D.E. 118 ¶ 14; D.E. 118 ¶ 51 (citing Robinson Dep, 333:5-334:5 ("In most of the flips that I've heard of, the flipper really doesn't put in any significant amount of equity.")).) The deal expressed in the Facilitation Agreement is the only deal that Amakua tried to negotiate in writing with JTL. (D.E. 112 ¶ 50.) On September 24, 2003, Lane rejected the Facilitation Agreement, without knowing who Amakua's client was. (D.E. 112 ¶¶ 52, 53.)

Interactions Between the Warner Defendants and JTL

After Lane rejected the Facilitation Agreement, he stopped returning Scofield's phone calls. (D.E. 112 ¶¶ 58, 59, 61.) Meanwhile, Hong requested that Amakua set up a meeting with Lane. (D.E. 112 ¶ 60.) Because Scofield could not get Lane on the phone, Hong ultimately called Lane himself, at the cell phone number Scofield had given him. Hong arranged a meeting between Lane and Warner that took place at Las Ventanas on October 1, 2003. (D.E. 101 ¶ 39.) Following this meeting, Hong informed Scofield that the Warner Defendants were no longer interested in Las Ventanas. However, negotiations between JTL and the Warner Defendants continued, in fits and starts, throughout the rest of the year and into 2004. After many stalls in the negotiation process, Warner Hotels purchased Us Ventanas, after JTL had purchased it from the Burillo family in a joint venture with Farallon Capital. The new owners marketed the property to Warner Hotels via Secured Capital in an open auction. Defendants argue that this sale was completely separate from the deal proposed by Amakua; Amakua disagrees. The parties agree that Amakua played no part in the transaction, and received no compensation from it. (D.E. 112 ¶¶ 72, 77, 78, 79, 82, 86, 88; D.E. 101 ¶¶ 46, 47, 48, 49; Pls. Ex. 206; D.E. 101 ¶¶ 51-54, 55, 56.)

DISCUSSION

*5 The Court addresses the parties' motions to strike expert testimony first, followed by the parties' cross-motions for summary judgment. The Court has considered the parties' remaining motions to strike evidence in support of the summary judgment motions in reaching its conclusions, but does not issue separate rulings on each of those paragraph-by-paragraph disputes. Moreover, these motions/disputes are, for practical purposes, moot, inasmuch as the Court would deny the summary judgment motions based on broader evidentiary disputes. In other words, even if the Court granted the parties' motions to strike this additional evidence, the Court would still deny summary judgment based on the substantial disputes of material fact.

I. Motions to Strike Expert Testimony

A. Standards for Admitting Expert Testimony

Precedent teaches that a district court judge is to act "as a 'gatekeeper' for expert testimony, only admitting such testimony after receiving satisfactory evidence of its reliability." *Dhillon v. Crown Controls Corp.*, 269 F.3d 865, 869 (7th Cir.2001) (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)); *see also DataQuill Ltd. v. Handspring, Inc.*, No. 01 C 4635, 2003 WL 737785, at *1 (N.D.Ill. Feb.28, 2003). Admissibility of expert testimony is governed by Fed.R.Evid. 702, which provides:

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

Daubert held that Rule 702 requires the trial judge to ensure " 'that any and all scientific testimony or evidence admitted is not only relevant, but reliable.' " *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir.2000) (quoting *Daubert*, 509 U.S. at 589).

To gauge reliability, the court must determine whether the expert is qualified in the relevant field, and whether the expert's reasoning or methodology is valid. *See Richman v. Sheahan*, 415 F.Supp.2d 929, 934 (N.D.Ill.2006) (citing *Daubert*, 509 U.S. at 592-93, and *United States v. Parra*, 402 F.3d 752, 758

(7th Cir.2005)). All purported expert opinions are governed by the *Daubert* standard, whether the opinion relates to "areas of traditional scientific competence or whether it is founded on engineering principles or other technical or specialized expertise." *Smith*, 215 F.3d at 719 (citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)). An expert may be qualified by "knowledge, skill, experience, training, or education."Fed.R.Evid. 702. " '[E]xtensive academic and practical expertise' in an area is certainly sufficient to qualify a potential witness as an expert," *Smith*, 215 F.3d at 718 (quoting *Bryant v. City of Chicago*, 200 F.3d 1092, 1098 (7th Cir.2000)), and Rule 702 specifically contemplates the admission of testimony by expert witnesses who are qualified based on experience alone. *See, e.g., Kumho Tire*, 526 U.S. at 156; *Walker v. Soo Line R. Co.*, 208 F.3d 581, 591 (7th Cir.2000). Thus, a court should consider a proposed expert's full range of practical experience as well as academic or technical training when determining whether the expert is qualified to render an opinion in a given area. *See, e.g., Smith*, 215 F.3d at 718.Furthermore, an expert's "competence in the general field ... [at issue] must extend to his specific testimony on the matter" before the Court. *Ty, Inc. v. Publications Int'l, Ltd.*, No. 99 C 5565, 2004 WL 2359250, at *5 (N.D.Ill. Oct.19, 2004) (Zagel, J.); *accord, e.g., Carroll v. Otis Elevator Co.*, 896 F.2d 210, 212 (7th Cir.1990) (citing *Gladhill v. Gen'l Motors Corp.*, 743 F.2d 1049, 1052 (4th Cir.1984)). As the Seventh Circuit has explained, even "[a] supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are" well-founded and comport with the requirements of, *inter alia, Daubert, Clark v. Takata Corp.*, 192 F.3d 750, 759 n. 5 (7th Cir.1999); *accord Smith*, 215 F.3d at 718 (citing *Takata Corp., supra*).

***6** The Seventh Circuit has emphasized, however, that "the court's gatekeeping function focuses on an examination of the expert's methodology. The soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact, or, where appropriate, on summary judgment," *Smith*, 215 F.3d at 718 (citing *Daubert*, 509 U.S. at 595, and *Walker*, 208 F.3d at 587);*see also Smith*, 215 F.3d at 719 ("It is not the trial court's role to decide whether an expert's opinion is correct. The trial court is limited to determining whether expert testimony is pertinent to an issue in the case and whether the methodology underlying that testimony is sound.") (citation omitted).*Daubert* listed several factors that may illuminate the analysis of an expert's methodology, but it emphasized that they were merely guides, that they were not meant to serve as a series of prerequisites, and that their applicability depended on the particular facts of each case.[FN2]*See Daubert*, 509 U.S. at 594-95; *United States v. Cruz-Velasco*, 224 F.3d 654, 660 (7th Cir.2000) (collecting cases).

> FN2. The factors listed in *Daubert* include: (1) whether the theory or technique can be and has been verified by the scientific method through testing; (2) whether the theory or technique has been subject to peer review and publication; (3) the known or potential rate of error of the technique; and (4) whether the theory or technique has been generally accepted by the relevant scientific community. *See id.*, 509 U.S. at 590-91.

Finally, a district court must determine whether the proposed expert testimony is relevant, *i.e.*, whether it would assist the trier of fact in understanding the evidence or determining a fact in issue. *See*Fed.R.Evid. 702. Expert testimony does not assist the trier of fact when the jury is able to evaluate the same evidence and is capable of drawing its own conclusions without the introduction of a proffered expert's testimony. *See Taylor v. Illinois Cent. R.R. Co.*, 8 F.3d 584, 586 (7th Cir.1993) (citation omitted); *accord, e.g., Hoffman v. Caterpillar, Inc.*, 368 F.3d 709, 714 (7th Cir.2004) (affirming the district court's exclusion of a purported expert's opinion based upon a videotape because "the videotape could be played for the jury and entered into evidence, and consequently, jurors could make a determination for themselves.... Based upon this independent assessment .... the jury could then draw [its own] inferences .... and expert testimony would be of no help.").

Where an expert's hypothetical explanation of the possible or probable causes of an event would aid the jury in its deliberations, that testimony satisfies *Daubert'* s relevancy requirement, *See Smith*, 215 F.3d at 718-19 (citing *Walker*, 208 F.3d at 589-90). However, these hypothetical alternatives must themselves have "analytically sound bases" so that they are more than mere "speculation" by the expert. *Smith*, 215 F.3d at 719 (quoting *DePaepe v. General*

Motors Corp., 141 F.3d 715, 720 (7th Cir.1998)).

The party offering the expert's testimony must establish by a preponderance of the evidence that the expert testimony is admissible and that the expert is qualified. *See* *Daubert*, 509 U .S. at 593;*see also* *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1312 (11th Cir.1999) ("[T]he proponent of the testimony does not have the burden of proving that it is scientifically correct, but that by a preponderance of the evidence, it is reliable.") (citation omitted). However, the question of whether an expert is "credible or whether his or her theories are correct given the circumstances of a particular case is a factual one that is left for the jury to determine after opposing counsel has been provided the opportunity to cross-examine the expert regarding his conclusions and the facts on which they are based." *Smith*, 215 F.3d at 719.In this regard, "[v]igorous cross examination, presentation of contrary evidence and careful jury instructions ... are the traditional and appropriate means of attacking shaky but admissible evidence." *Richman*, 415 F.Supp.2d at 933 (citing, *inter alia*, *Daubert*, 509 U.S. at 596).

B. Clark E. Wallace

*7 Plaintiff moves to strike the expert report and opinions of Clark E, Wallace. (D.E.121.) Plaintiff argues primarily that his opinions embody legal conclusions and are therefore irrelevant to the factfinder's analysis of factual issues, but Plaintiff also argues that Mr. Wallace's report is unreliable because it is based on the *ipse dixit* of the expert instead of sound methodology. (*See* D.E. 121 at 6.) Defendants respond that Mr. Wallace's report addresses applicable professional standards and a party's performance in light of those standards, and therefore is admissible. (*See* D.E. 134 at 4.) Defendants retained Mr. Wallace to address two issues: (1) whether Amakua and its agents acted as a "broker" in the proposed deal with the Warner Defendants and JTL, and (2) whether Amakua was a putative "principal" in the deal. These questions are relevant because, as both sides acknowledge, if Amakua was acting as a broker when it brought Warner and JTL together, then the Noncircumvention Agreement is likely unenforceable due to illegality because Amakua did not have a real estate license. For the reasons discussed below, the Court grants in limited part and denies in large part Plaintiffs motion to strike Mr. Wallace's report and opinions.

1. Qualifications

The first question is whether Mr. Wallace is qualified to be an expert in this case. Mr. Wallace previously served as the Commissioner of Real Estate for the State of California (1991-94), in which position he oversaw the regulation of 375,000 real estate licensees, both brokers and salespersons. (*See* D.E. 134-2 at 6.) In that capacity, it was part of his job responsibility to interpret and apply real estate custom, practice, standards of care, and regulations to the conduct of individuals and companies involved in real estate transactions.(*Id.*) He also has worked as a real estate developer since 1969, and has been a licensed real estate broker since 1958. (*Id.*) He presently does business by providing consulting services regarding real estate acquisitions, regulation, brokerage standard of care, and matters related to the California Department of Real Estate. (*Id.*) He states in his report that he has been qualified as an expert witness in numerous cases. (*See id.*)His experience is primarily in commercial real estate development. (*See* D.E. 134-10 at 8 (Ex. C, Wallace Dep. at 92:13).) He has purchased commercial real estate as a principal "hundreds" of times. (*Id.*) Moreover, Mr. Wallace has "brokered" several commercial real estate transactions. (*See* D.E. 134-10 at 8 (Ex. C, Wallace Dep. at 91:15).) Mr. Wallace has testified before Congress; before various state legislative committees or regulatory bodies; and before various city councils, boards of supervisors, planning commissions, etc. (on hundreds of occasions) in connection with real estate matters. (D.E. 134-4 at 6.) The Court finds that Mr, Wallace's experience qualifies him to testify in this case, because his experience as a commercial real estate developer and as a residential real estate broker allows him to speak to the differences between brokers and principals in the context of real estate transactions, which is relevant to determining whether Amakua was illegally acting as a broker when it entered the Noncircumvention Agreement with the Warner Defendants.

2. Methodology

***8** Next, the Court must determine whether Mr. Wallace's methodology is valid. Mr. Wallace's report includes four opinions:

1. Amakua, Scofield, and Amakua's agents did not perform activities as principals in these matters.

2. Amakua, Scofield, and Amakua's agents performed activities that render them brokers under California real estate industry, custom, and practice, and the California Business and Professions Code ("California B & P Code").

3. Amakua, Scofield, and Amakua's agents' activities do not satisfy industry custom and practice or the California B & P Code because: (a) Amakua and Scofield are not licensed in California; (b) Amakua, Scofield, and Amakua's agents failed to carry out duties of disclosure and fair dealing owed to the Warner Defendants; and (c) Amakua, Scofield, and Amakua's agents improperly acted as dual agents.

4. The California B & P Code provides that individuals and companies cannot be compensated where they fail to satisfy licensing requirements.

(*See* D.E. 134-2 at 5 (Wallace Report Executive Summary).) To reach these opinions, Mr. Wallace read the deposition transcripts of Amakua's agents, Doug Owen and Greg Blake, and Amakua's principal, Michael Scofield; he conducted an online license check of Amakua, Scofield, Owen, and Blake through the California Department of Real Estate; he discussed the issues with John Liberator, chief deputy of the Department of Real Estate; and he read various materials from the case that were forwarded to him by defense counsel. (*See* D.E. 134-10 at 3-6.) Mr. Wallace's report states that, "[b]ased upon my extensive knowledge and practice in the real estate industry, 1 analyzed the activities and conduct of Amakua, Scofield, and Amakua's agents in this case against the real estate industry standard of care in the State of California, including custom and practice, relevant laws and regulations, common law, and industry codes of ethics."(*See* D.E. 134-2 at 7.) He compared the standard of care for real estate licensees in California with the activities of Amakua. (*See id.*)

Plaintiff argues that Mr. Wallace used *no* methods to reach his conclusions-that his opinions "stem[ ] from the expert's simple *ipse dixit*"-because Mr. Wallace supposedly was unable, in his deposition, to say whether a broker's license would be required in certain other hypothetical situations posed by Plaintiffs counsel. (D.E. 121 at 15-16.) The Court respectfully disagrees. Mr. Wallace's deposition reveals that he did not want to give off-the-cuff answers to counsel's questions, not that he could not answer them or that he was incompetent to speak to issues within his decades of experience. (*See, e.g.*, D.E. 134-12 at 4 (Wallace Dep. at 134:21-136:9); D.E. 134-12 at 8-134-13 at 2 (Wallace Dep. at 153:11-154:19).) This does not meaningfully speak to his methods.[FN3]

> FN3. At trial, Plaintiff potentially may try to use this testimony to show a lack of broader competence and concomitant lack of credibility. In turn, Defendants will undoubtedly argue that the testimony reflects that Mr. Wallace is a careful and deliberative person who does not shoot from the hip and therefore is more credible. These sorts of credibility assessments are left to the jury, however, under *Daubert.*

Plaintiff does not otherwise challenge Mr. Wallace's methods on any of the traditional grounds for calling an expert's reliability into question. *See supra,* n. 2 (discussing *Daubert'* s four nonexhaustive factors for determining whether an expert's methods are valid). The Court independently finds that Mr. Wallace's report would survive such a challenge to his methods. Because his testimony, like that of the other three experts offered in this case, is not scientific but is based instead on his personal experience in the real estate industry, there is no reason (and perhaps no way) to verify his technique through "scientific testing ." In addition, although Mr. Wallace may not have subjected his "theory" or "technique" to peer review and publication (it is not clear from his credentials whether he publishes in his field), this would not appear to be relevant, particularly if he is simply applying standard techniques from his field that do not warrant publication. *See* Smith, 215 F.3d at 720 ("[I]f Muszar was merely applying well-established engineering techniques to the particular materials at issue in this case, then his failure to submit those techniques to peer review establishes nothing about their reliability. Similarly, if Cassassa's accident reconstruction methodology is based on his extensive practical experience in this area, rather than novel methodology subject to publication, his failure to publish does not cast doubt on the reliability of his analytical technique."). Furthermore, Mr. Wallace has qualified repeatedly as an expert witness and has

testified before city councils, boards of supervisors, and planning commissions "probably in excess of 500 times over 30-plus years."(*See* D.E. 134-4 at 6.) He was also involved in developing California's real estate licensee standard of care, and is a periodic participant on California Bar Association panels and in U.C. Berkeley-Boalt Law School real estate law classes. (*See id.*)These credentials suggest (particularly in light of the fact that they have not been challenged) that Mr. Wallace's methodologies are generally accepted in the real estate field, and that he has extensive practical experience performing those techniques. *See* Daubert, 509 U.S. at 590-91.The Court concludes that Mr. Wallace's methods are sufficiently reliable for him to testify as an expert.

3. Relevance-Legal Conclusions Are Irrelevant

***9** Plaintiffs primary objection to Mr. Wallace's opinions attacks their relevance. Plaintiff argues that Mr. Wallace's opinions consist largely of legal conclusions and therefore are irrelevant insofar as they will not help the trier of fact determine *factual* issues in the case. This objection is overstated, but it is important to delimit the boundaries by which Mr. Wallace will be allowed to testify.

To be sure, "[i]t is black-letter law that 'it is not for witnesses to instruct the jury as to applicable principles of law, but for the judge.' " *Nieves-Villanueva v. Sato-Rivera*, 133 F.3d 92, 99 (1st Cir.1997) (quoting *United States v.* Newman, 49 F.3d 1, 7 (1st Cir.1995) (internal punctuation omitted)); *see also* Naeem v. McKesson Drug Co., 444 F.3d 593, 610 (7th Cir.2006) ("[W]e previously have stated that allowing a witness to testify as to a legal conclusion may cause the jury to accord too much weight to that testimony, and may infer that the jury should look to that witness for legal guidance.") (citations omitted). "The analysis here begins with the proposition that under our system it is the responsibility-and the duty-of the court to state to the jury the meaning and applicability of the appropriate law, leaving to the jury the task of determining the facts which may or may not bring the challenged conduct within the scope of the court's instruction as to the law," *Adalman v. Baker, Watts & Co.*, 807 F.2d 359, 366 (4th Cir.1986), disapproved on other grounds, *Pinter v. Dahl*, 486 U.S. 622, 108 S.Ct. 2063, 100 L.Ed.2d 658 (1988); *see also Highland Capital Mgmt., L.P. v. Schneider*, 379 F, Supp.2d 461, 470 (S.D.N.Y.2005) (citing *Adalman* for the rule that expert's cannot testify regarding legal conclusions). Because the jury does not decide pure questions of law, expert testimony on the law is not helpful to the jury and so does not fall within the terms of Fed.R.Evid. 702, which allows expert testimony " '[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.' " *Nieves-Villanueva*, 133 F.3d at 100 (quoting Rule 702). This is because the judge's expert knowledge of the law makes any such assistance at best cumulative, and, at worst, prejudicial.. *See id.*, 133 F.3d at 100 (collecting authorities). "It is not the common knowledge of the jury which renders the witness' opinion unnecessary, but the special legal knowledge of the judge." *Id.*, 133 F.3d at 100 (citation and internal quotation marks omitted).

Fed.R.Evid. 704(a), which removes the common-law bar on "otherwise admissible" testimony that "embraces an ultimate issue to be decided by the trier of fact," is not to the contrary, Rule 704(a) allows the expert to offer *factual* conclusions to aid the jury-which can choose to accept or reject them-but Rule 704"should not, and does not, permit the expert witness to usurp the province of the judge." *Adalman*, 807 F.2d at 368.*Legal* conclusions are for the judge; they are not "to be decided by the trier of fact," and therefore do not fall under Rule 704. *See Nieves-Villanueva*, 133 F.3d at 100.

***10** Case law instructs, however, that there is a fine line between legal conclusions and factual conclusions:

> The line we draw here is narrow. We do not exclude all testimony regarding legal issues. We recognize that a witness may refer to the law in expressing an opinion without that reference rendering the testimony inadmissible. Indeed, a witness may properly be called upon to aid the jury in understanding the facts in evidence even though reference to those facts is couched in legal terms. For example, we have previously held that a court may permit an expert to testify that a certain weapon had to be registered with the Bureau of Alcohol, Tobacco, and Firearms, *United States v. Buchanan*, 787 F.2d 477, 483 (10th Cir.1986). In that case, however, the witness did not invade the court's authority by discoursing broadly over the entire range of the applicable law. Rather, the expert's opinion

focused on a specific question of fact.

Specht v. Jensen, 853 F.2d 805, 809 (10th Cir.1988) (further citations omitted).

These cases demonstrate that an expert's testimony is proper under Rule 702 if the expert does not attempt to define the legal parameters within which the jury must exercise its fact-finding function. However, when the purpose of testimony is to direct the jury's understanding of the legal standards upon which their verdict must be based, the testimony cannot be allowed. In no instance can a witness be permitted to define the law of the case.

Id. at 809-10.

Often, the same information can be elicited as a fact where it would be inadmissible in the guise of a legal conclusion. For instance, where a court excluded an expert's testimony that the plaintiff had been "discriminated against because of her national origin," the court "emphasize[d] that a more carefully phrased question could have elicited similar information and avoided the problem of testimony containing a legal conclusion. The defendants could have asked Dr. Quiroga whether she believed Torres' national origin 'motivated' the hiring decision." *Torres v. County of Oakland,* 758 F.2d 147, 151 (6th Cir.1985); *see also Marx & Co. v. The Diner's Club, Inc.,* 550 F.2d 505, 512 (2d Cir.1977) ("The expert, for example, may tell the jury whether he thinks the method of [securities] trading was normal, but not, in our view, whether it amounted to illegal manipulation under Section 9 of the Securities Exchange Act of 1934."). In *Marx,* the court excluded testimony of a securities law expert that related to the construction of a contract between the parties and the validity of certain defenses advanced by Diner's justifying its performance under the contract. *See id.,* 550 F.2d at 508-09.The court stated: "Testimony concerning the ordinary practices of those engaged in the securities business is admissible under the same theory as testimony concerning the ordinary practices of physicians or concerning other trade customs: to enable the jury to evaluate the conduct of the parties against the standards of ordinary practice in the industry."*Id.* (citations omitted)."In the case at bar, however, witness Friedman's objectionable testimony did not concern only the customary practices of a trade or business. Rather, he gave his opinion as to the legal standards which he believed to be derived from the contract and which should have governed Diners' conduct. He testified not so much as to common practice as to what was necessary 'to fulfill the covenant' [of the contract]."*Id*

***11** The advisory committee's note to Rule 704 offers similar advice:

Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, "Did T have capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed.

Fed.R.Evid. 704 advisory committee's note; *see also Burkhart v. Washington Metropolitan Area Transit Authority,* 112 F.3d 1207, 1212 (D.C.Cir.1997) (quoting same); *Hygh v. Jacobs,* 961 F.2d 359, 363-64 (2d Cir.1992) (quoting same)."In other words, an expert may offer his opinion as to facts that, if found, would support a conclusion that the legal standard at issue was satisfied, but he may not testify as to whether the legal standard has been satisfied." *Burkhart,* 112 F.3d at 1212-13.

"There is no doubt that under Rules 702 and 704 an expert may testify about applicable professional standards and the defendants' performance in light of those standards." *Richman,* 415 F.Supp.2d at 945;*see id.* at 946 & n. 16 (collecting cases)."Cases like the instant one, at first blush, seem difficult, because the relevant professional standards are drawn in part from the applicable law and the terms in which they are expressed."*Id.*

Where the testimony contains terms that have a separate, distinct, and specialized meaning in the law different from that present in the vernacular, the testimony may be deemed to constitute a legal conclusion and exclusion would not be inappropriate. However, where, as here, the word also has an

> everyday meaning, the testimony should not be excluded as constituting a legal conclusion.... Even if the everyday understanding of a term and its legal meaning are congruent, exclusion is inappropriate where the opinion will not consist of a naked conclusion (i.e., the defendant's conduct was reasonable, was negligent, etc.) but will be based on "adequately explored legal criteria." That is, they will explain the reasons underlying the ultimate conclusion. Moreover, the court will instruct the jury on the appropriate meaning of the legal standard and that the jury is free to reject the testimony of the expert. Consequently, the risk of jury confusion is not present.

Id. at 947-48.

In this case, the Court finds that some of Mr. Wallace's opinions-as written in his expert report-appear to be legal conclusions, or conclusions of mixed law and fact. These are likely problematic.[FN4]He states, for example, that particular provisions of California law state that a real estate brokerage license is required in certain defined situations, quoting directly from California Business and Professions Code Section 10130 as the basis for his conclusion. (D.E. 134-2, Ex. A at 5.) Mr. Wallace also appears to elucidate applicable legal principles by which agency is established. (*See* D.E. 134-3, Ex. A at 6 ("Ostensible or implied agency can be created from the actions and conduct of the parties/licensees.").) Mr. Wallace also states that the receipt of secret profits by a real estate broker violates Section 10176(g) of the California Business and Professions Code. (*Id.*, Ex. A at 12.) These conclusions or assertions are legal ones and therefore would be inadmissible if elicited as such by defense counsel. They are like responses to the question, "Does T have the capacity to enter a will?"*See Marx*, 550 F.2d at 508-09;Fed.R.Evid. 704 advisory committee's note. They are issues that should be addressed by jury instructions from the Court, not by an expert's testimony.

> FN4.*Daubert* motions can be helpful in broad terms to exclude patently unqualified experts, or to exclude purveyors of "junk science" who offer no credible methodology for their purportedly "expert" views. That is not the situation here, as explained above. Instead, the *Daubert* challenge to Mr. Wallace here, to the extent it has potential traction, relates to issues that need to be assessed on a question-by-question basis, with the appropriate answer turning on the precise language of the question posed and the context in which it is asked at trial. As a result, the Court cannot sensibly attempt to turn Plaintiff's *Daubert* motion into an omnibus motion in limine concerning Mr. Wallace's fourteen-page, single-spaced report. Therefore, the Court articulates only the broad principles by which Mr. Wallace's testimony will be excluded or admitted at trial.

***12** However, Mr. Wallace also offers factual conclusions that are based on legitimate foundations (if credited by the jury) and that are the product of reliable methods. The fact that those factual conclusions are structured so as to conform to applicable underlying principles of California law is not exceptional; if the factual assertions were unmoored from the underlying legal framework, they would be potentially irrelevant and/or misleading. For example, Mr. Wallace addresses the standards that govern real estate brokers in California, and what kinds of activities make someone a "broker." His opinions are based on years of experience in the real estate industry. In assessing whether Amakua and its agents were acting like real estate brokers when they entered the Noncircumvention Agreement (as well as whether Defendants were entering a "brokerage agreement"), these factual conclusions may be helpful to the trier of fact, Although Mr. Wallace may not testify to the ultimate legal conclusion that Amakua and its agents *were* illegal brokers when they entered the Noncircumvention Agreement, he may testify as to what activities, in his experience, constitute brokering, as opposed to acting as a principal, and whether Amakua's activities were more like that of a broker than of a principal. The latter is more like the answer to the fact question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" than the legal question, "Did T have capacity to make a will?"*See*Fed.R.Evid. 704 advisory committee's note. This sort of testimony is admissible.

C. Thomas F. Morone

Plaintiff also moves to strike the expert report and opinions of Thomas F. Morone. Much of the analysis

with respect to the admissibility of Mr. Wallace's expert testimony also applies to Mr. Morone. As with Mr. Wallace, Defendants retained Mr. Morone to render an opinion on whether Amakua was acting as a broker or a principal in the proposed transaction with the Warner Defendants and JTL. As with Mr. Wallace, Plaintiff moves to strike two of Mr. Morone's opinions on the basis that they offer legal conclusions. (*See* D.E. 121 at 16-18.) Plaintiff moves to strike Mr. Morone's remaining three opinions because they are "unreliable and/or irrelevant." (*See id.* at 18.)The Court respectfully grants in part and denies in part Plaintiff's motion to strike Mr. Morone's expert testimony.

1. Qualifications

Like Mr. Wallace, Mr. Morone is qualified as an expert in this case based on his experience in the real estate business. Mr. Morone is a principal in Warnick & Company, a consulting and investment banking firm that specializes in the recreational real estate and hospitality facility business. (*See* D.E. 134-6 at 5.) He has 35 years of experience in the hotel industry and a bachelor of science degree in hotel administration. (*See id.*)He has represented many types of buyers and sellers as a consultant and as a broker, including large institutions and real estate investment trusts. (*See id.* at 6.) In addition, he has experience in hospitality management and operations, as well as corporate real estate development. (*See id.*)He has testified as an expert witness (including in arbitrations) roughly half a dozen times. (*See* D.E. 134-16 at 5 (Ex. D, Morone Dep. at 12:20-12:23).) Mr. Morone has worked primarily in California (*see* D.E. 134-7 at 2-7), and his experience is sufficient to qualify him to testify about the transaction Amakua proposed to the Warner Defendants and JTL, and the nature of Amakua's role in that transaction.

2. Methodology

***13** Mr. Morone's report includes five opinions:

> 1. Based upon my experience in the hospitality real estate industry, the proposed Confidential Non-Disclosure and Non-Circumvention Agreement is missing essential terms.
>
> 2. The sale transaction through which Ty purchased Las Ventanas was a completely separate real estate transaction from the sale Amakua had proposed.
>
> 3. Amakua was acting as a real estate broker in connection with the Las Ventanas transaction.
>
> 4. The information that Amakua represented as Confidential was already in the public domain and in the possession of Ty before Amakua delivered it to Ty.
>
> 5. Amakua lacked the experience and wherewithal to consummate the transaction to acquire the Hotel.

(*See* D.E. 134-6 at 5.) Mr. Morone states in his report that he arrived at these opinions by "us[ing] my background, training and experience in the hospitality real estate industry to analyze the relationship between ... [Amakua] and ... [Warner] and ... [JTL] as described in the Facilitation Agreement and the Confidential Non-Disclosure and Non-Circumvention Agreement ... relative to the ultimate sale of the" Las Ventanas property.(*Id* .) As discussed above with respect to expert Mr. Wallace, Mr. Morone's methods are also valid. He has based his opinions on his specialized experience in a field relevant to the issues of this case, as applied to the facts of this case. This satisfies the "reliable principles and methods" requirement of Rule 702. *See Kumho Tire,* 526 U.S. at 126; *Walker,* 208 F.3d at 591.

3. Relevance

As with Mr. Wallace, Plaintiff challenges the relevance of two of Mr. Morone's opinions to the extent they offer legal conclusions (opinions 1 and 3 above). And, as with Mr. Wallace, the analysis of the admissibility of expert legal opinions applies equally to Mr. Morone. For example, he will not be allowed to testify that the Confidential Non-Disclosure and Non-Circumvention Agreement is unenforceable at law because it lacks essential terms; however, he can explain that, based on his experience, he believes that the Agreement fails to address certain issues and further explain why-again, based on his experience-those issues can be significant ones in the real estate transaction context. A jury cannot credibly be expected to intuit what other issues might be germane to transaction-participants in the commercial real estate context, nor to guess at how common such contractual terms are in the industry. Such opinion

testimony is relevant to the issues in this case, because if the jury finds that the Agreement lacks common, significant terms, then the jury itself can conclude whether or not the agreement is unenforceable.

With respect to Mr. Morone's three remaining opinions (that the ultimate sale of Las Ventanas was "completely separate" from the transaction Amakua proposed, that the information Amakua represented as confidential was already in the public domain, and that Amakua lacked the experience and wherewithal to consummate the transaction), Plaintiff argues that they are unreliable and/or irrelevant. (D.E. 121 at 18-19.) Plaintiff argues that Mr. Morone's opinion that the ultimate sale of Las Ventanas to Warner Hotels & Resorts was a separate transaction from the one Amakua proposed "is not an opinion, but a statement of fact" that Mr. Morone is unqualified to make because he does not have personal knowledge as required by Fed.R.Evid. 602. (D.E. 121 at 18.) But, as an expert, Mr. Morone is not required to have personal knowledge of the facts as a transaction participant. He can base his expert opinion on his expertise as applied to the facts (or hypothetical facts) as presented by the party who retained the expert. That is legitimate expert testimony and one of its chief distinctions from "fact" testimony. Moreover, Mr. Morone's long experience in the real estate business qualifies him to testify about whether a transaction like this one qualifies as "separate" from the one proposed by Amakua in that the ultimate transaction had nothing to do with the deal originally proposed by Amakua. Amakua is free, of course, to challenge this opinion on cross-examination.

***14** With respect to Mr. Morone's opinion that the Las Ventanas financial information Amakua provided to the Warner Defendants was already in the public domain, the Court is inclined to agree with Plaintiff that this opinion should be excluded because it does not apply Mr. Morone's expertise to the facts of the case. At least as framed in the briefs, the proposed testimony seems merely to reiterate the facts as Defendants view them. For example, Mr. Morone's report states that "[t]he Las Ventanas financial information actually provided to Ty was not confidential because virtually the same information was already in Ty's files. This is so because in April 2003-before Hong received the 'confidential' information from Amakua in September 2003-Ty had already received a copy of a comprehensive offering memorandum detailing Las Ventanas from Greg Rice, [who] himself received it from JMJ Holdings."(D.E. 134-6 at 13 (Morone Report).) Mr. Morone then states that his opinion that the financial information was not confidential is "[b]ased on my experience in working with similar agreements."(D.E. 134-6 at 14.) But this does not save this opinion, which is essentially just an assertion of fact. The jury does not need Mr, Morone's expertise to understand this bit of evidence. A layperson is quite capable of understanding-based on the testimony of proper fact witnesses or the introduction of other documentary evidence, which Defendants will be allowed to introduce-whether the Warner Defendants already possessed the financial information in question, and therefore whether that information was "confidential" when Amakua provided it to them.

As for Mr, Morone's final opinion, that Amakua did not have the experience or wherewithal to consummate the purchase of the property, the Court finds that Mr. Morone's experience in the industry qualifies him to offer an opinion on this issue. He may testify, based on his experience, about the amount of capital and experience typically required to engage in a deal like the one in question. Again, Plaintiff is free to challenge that opinion on cross-examination.

In summary, Plaintiff's motion to strike Mr. Morone's expert opinions is granted in part and denied in part. Mr. Morone may not offer bare legal conclusions, nor may he testify about whether the financial information Amakua provided was "confidential." But he may offer opinions about what sorts of activities make a person or entity a "broker," whether the sale of Las Ventanas was separate from the transaction proposed by Amakua, and whether Amakua had the experience and capital typically necessary to carry off a deal such as this one.

D. Maurice Robinson

Plaintiff retained Maurice Robinson to appraise the property involved in Amakua's proposed transaction and to render an opinion on the Plaintiff's damages due to Defendants' alleged breach of the Noncircumvention Agreement. (*See* D.E. 136-2 at 2 (Ex. A) (Robinson's report, stating that he was retained to evaluate what Amakua might have expected to earn if the proposed transaction had occurred near the end of

2003).) Mr. Robinson rendered four opinions in his expert report:

> ***15** 1. The development and subsequent sale of the 15 residential units that were entitled in the "Phase V" land at Las Ventanas could have yielded approximately $19.8 million.
>
> 2. The sale of the three unsold "Phase IV" villas could have yielded approximately $5,8 million.
>
> 3. Amakua's "position as a player" in the transaction was "a legitimate effort to fulfill a common role in such mixed-use resort projects."
>
> 4. The use of a non-circumvention promise, such as the one Amakua used, was a necessary requirement by Amakua to ensure that its interests were not circumvented by the Warner Defendants. These types of promises are used commonly by the hotel and real estate community.

(*See* D.E. 136-2 at 3.)

Defendants have moved to strike Mr. Robinson's report and to exclude him from testifying at trial, on grounds that his opinions are based on unsupported assumptions, that they are beyond the scope of his expertise, and that they are irrelevant and speculative. (*See* D.E. 136 at 4.) The Court agrees in part and disagrees in part.

1. Qualifications

Mr. Robinson has been a market and financial consultant to the hotel and real estate industries for more than 25 years. (D.E. 136-2 at 2.) He has conducted appraisals and market feasibility studies for dozens of hospitality properties, including many high-end resorts with related residential developments. (*See id.*)He is the president of Maurice Robinson & Associates, LLC, which provides advisory services to lenders, investors, public agencies, and developers in the hospitality and real estate industry. (*See id.* at 13.)Mr. Robinson has a master of public administration degree in municipal finance from the University of Southern California, a B.A. in economics from Macalester College, a professional designation in financial planning from the University of California, Los Angeles, and a California Real Estate Appraisal certificate. (*See id.*)As a principal with KPMG Peat Marwick, Mr. Robinson was the primary resource in the western United States for hotel development and financing issues, particularly full-service urban and resort properties. (*See id.* at 12.)KPMG's clients included the Four Seasons, Hilton, Hyatt, Intercontinental, and other hotel chains. (*See id.*)

Mr. Robinson is currently the financial advisor to the U.S. National Park Service on concession-related matters, and he has provided appraisal, feasibility, acquisition analysis, lease negotiation assistance and/or expert witness testimony for 35 national park concessions over the past 14 years, including those at Yosemite, Yellowstone, and the Grand Canyon. (*See id.*)He sits on the board of directors and is chairman of the professional conduct committee of the International Society of Hospitality Consultants; and he holds positions with the Counselors of Real Estate, the American Society of Appraisers, the Southern California Mediation Association, and the Forensic Expert Witness Association. (*See id.* at 13.)Since 2001, he has served as an expert witness in numerous courts, arbitral panels, mediations, and depositions. (*See id.* at 14-16.)He is a frequent lecturer at various real estate and hospitality industry-related seminars, and he has published a variety of articles in his field. (*See* D.E. 136-2 at 13.) Based on his background and experience, the Court finds that Mr. Robinson is qualified to testify as an expert in this case with respect to appraisal of the property in question.

2. Methodology

***16** Defendants argue that Mr. Robinson's opinions regarding Amakua's "project role" in the transaction and regarding the necessity of the Noncircumvention Agreement are beyond the scope of his expertise. (*See* D.E. 136 at 5-6, 7-8.) Defendants also challenge these opinions, as well as Mr. Robinson's valuation opinions, on reliability grounds. (*See* D.E. 136 at 9, 11-15.) The Court agrees with Defendants that Mr. Robinson's "project role" opinion and his opinion regarding the common use of noncircumvention agreements are beyond the scope of his expertise. The project role opinion is based on a handful of anecdotes and examples (some of which are of questionable relevance) collected for the purpose of rendering this opinion. The project role opinion is not based on Mr, Robinson's own experience in the hotel industry, and it is not established in Mr, Robinson's

report why the examples he lists suggest in any way that Amakua's proposed role in the transaction was a common one. (*See* D.E. 136-2 at 6.) Likewise, Mr. Robinson's noncircumvention agreement opinion is based on anecdotes he collected from others in the field, not his own experience. In this regard, he acknowledged in his deposition that, prior to talking to the ten people he contacted to "educate myself about non-circumvention agreements" (including Mr. Morone, one of the Defendants' experts), he did not know whether there was an industry standard noncircumvention agreement, and had never negotiated or drafted such an agreement, nor participated in a real estate transaction involving such an agreement. (D.E. 136-4 at 7-8 (Robinson Dep, at 77:10-79:25).) Moreover, noncircumvention agreements are not documents he typically uses in his business, nor does he have any opinion about what terms need to be included in a putative noncircumvention agreement. (*See id.*(Robinson Dep. at 79:6-79:25).) Under these circumstances, the Court concludes that Mr. Robinson's opinions on Amakua's project role and on the common use of noncircumvention agreements by entities such as Amakua are beyond the scope of his expertise. These two opinions are therefore excluded from his testimony. In addition, and independently, his attempt to offer "expert" testimony based on interviews of other people who actually may know something about noncircumvention agreements is not permitted. It is undisputed that these putative "interviewees" have not been tendered or qualified as experts in this case by Plaintiff, and also, it appears that none of the "interviewees" actually reviewed the alleged noncircumvention agreement at issue in this case. (*See* D.E. 136-7 at 10 (Robinson Dep. at 208:20-209:3).) A party cannot elide the prerequisites required to qualify such potential expert testimony-*i.e.*, from the interviewees themselves-through the contrivance of having a person simply call the interviewees and then relate what they have told the interviewer. *See, e.g.*, *Dura Automotive Sys. of Indiana v. CTS Corp.*, 285 F.3d 609, 613-14 (7th Cir.2002).

*17 Mr. Robinson's valuation opinions, however, appear to be within the scope of his expertise, and properly supported by reliable methodology. Defendants argue that Mr. Robinson's valuation opinions are based on the unsupported assumptions that (a) JTL and the Warner Defendants were willing to do business with Amakua and the transaction Amakua was involved in would have ultimately closed; (b) Amakua had the financial ability to develop and build the residential units that would have made up the property to be sold for the amounts projected by Mr. Robinson; (c) Amakua's closing costs would have been the same as Warner Hotels' costs; and (d) Amakua would have been able to sell the Phase IV villas in the first quarter of 2004. (*See* D.E. 136 at 12.) Defendants argue that there is no evidence in the record supporting any of these assumptions. (*See id.*)The Court respectfully disagrees. Mr, Robinson's report makes clear what record evidence he relies on and how he has calculated the valuations of the property in question. (*See, e.g.*, D.E. 136-2 at 3-5 (Robinson's report, explaining how he determined how many homes could be built on the "Phase V" land and how they should be valued, as well as how he valued the existing "Phase IV Villas").) This methodology is sufficient to support the reliability of Mr. Robinson's testimony. Again, Defendants are free to challenge his conclusions on cross-examination.

3. Relevance

Defendants challenge Mr. Robinson's reliance on case law as irrelevant to the trier of fact, both because case law is not information that he usually relies on in his field and because his analysis of legal issues is not appropriate expert testimony, inasmuch as legal questions are for the court, not the finder of fact. (*See* D.E. 136 at 7.) The Court agrees that, like Mr. Wallace and Mr. Morone, Mr. Robinson should not be allowed to testify about legal conclusions. Therefore, Defendants' motion to strike this aspect of his expert testimony is granted.[FN5]

FN5. Defendants also challenge Mr. Robinson's report and opinions because both Mr. Robinson and Plaintiff failed to produce drafts of his report and his notes, in violation of Rule 26. (*See* D.E. 136 at 16.) Plaintiffs counsel asserts that he is engaged in a "meet-and-confer" process with defense counsel to attempt to resolve this aspect of the dispute. (*See* D.E. 150 (affidavit of Pl's, counsel, Daniel Rasmussen); D.E. 151 at 15-16.) Such meet and confer sessions must be exhausted before parties may file discovery motions in this district. *See* Local Rule 37.2. Defendants are free to file a motion to compel in advance of trial, if one is appropriate, and to move to exclude Mr. Robinson at that time if they believe any alleged destruction

of evidence has been willful. At a minimum, Plaintiff's counsel certainly should produce the supposed draft copy of the Robinson expert report that they have, and Defendants are free to redepose Mr. Robinson about that draft. *See, e.g., Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 282-83, 290 (E.D.Va.2001) (discussing obligations to tender draft copies of testifying experts' reports, and discussing significance of such drafts in search for truth). In this regard, the Court notes that the parties appear to dispute whether the duty to disclose such drafts is self-executing, or whether it is triggered by a request from the other side. This debate seems, with all respect, to be misplaced: it is clear that Defendants have requested any drafts, and clear that they cannot be withheld concerning a testifying expert. *See Trigon*, 204 F.R.D. at 282-83;*accord, e .g., W.R. Grace & Co. v. Zotos Int'l, Inc.*, No. 98-CV-838S(F), at *10 (W.D.N.Y. Nov. 2, 2000) (collecting cases). Defendants state that they never received any of the exhibits attached to the Rasmussen Declaration (*See* D.E. 150, Exs. A, I-L) prior to the filing of that Declaration, and that these exhibits should be stricken to the extent Mr. Robinson intends to rely on them. Plaintiff states that these exhibits were not offered in support of Mr, Robinson's opinions, but only in response to Defendants' motion regarding Mr. Robinson's draft report. That being the case, the Court finds that Mr. Robinson may not rely on these exhibits as forming bases for his opinions, as they were filed roughly eighteen months after the discovery cutoff.

E. Russell W. Mangum

Defendants have also moved to strike the expert report and testimony of Russell W. Mangum, also hired to offer damages opinions for Plaintiff, because his opinions are outside the scope of his expertise, are based on speculation and assumptions, are irrelevant, and otherwise threaten to confuse the issues and mislead the jury. (*See* D.E, 140 at 4.) At the outset, Defendants challenge parts V and VI(A) of Mr. Mangum's expert report because they consist of "an extensive, multi-page summary of the negotiations between Plaintiff, the Warner Defendants and JTL regarding Las Ventanas," which Defendants argue is "a blatant attempt to bolster Plaintiff's ... preferred version of the facts."(D.E. 140 at 7.) The Court agrees that the summary of the case included in Mr. Mangum's report is lengthy, and that Plaintiff should not expect to question Mr. Mangum at length at trial in a manner that would suggest that Mr. Mangum has any direct knowledge of the underlying disputed facts.[FN6]However, Plaintiff may elicit from Mr, Mangum his general understanding of the facts, in the context of determining what materials he reviewed to render his opinion and in the context of demonstrating the factual predicates upon which his conclusions rest. (Defendants are also free to question Mr. Mangum about those factual predicates; such questioning is common, because a litigant typically wants the jury to appreciate that if the factual bases for the opposing expert's conclusions are not accepted by the jury within the universe of disputed factual contentions, then the expert's conclusions similarly are eroded.) Likewise, to the extent that parts of Mr. Mangum's opinion offer legal conclusions or interpretations of the Noncircumvention Agreement, he will not be allowed to testify to those conclusions or interpretations.

FN6. This factual recitation also may not be introduced as an exhibit. *Accord, e.g., Highland Capital Mgmt., LP. v. Schneider*, 379 F.Supp.2d 461, 468-69 (S.D.N.Y.2005) (collecting cases).

1. Qualifications

***18** Mr. Mangum is an economist who holds a Ph.D. and an M.S. in economics from the University of Southern California, as well as a B .A. in economics, with honors, from California State University, Fullerton. (*See* D.E. 141-2 at 2.) He is a vice president of Analysis Group, Inc., an economic, financial, and strategic consulting firm. (*See id.*)He is a member of several professional associations, including the American Economic Association, the Intellectual Property Law Association, and the American Bar Association. (*See id.*)Prior to joining Analysis Group, Inc., he was an economist at the U.S. Federal Trade Commission, Bureau of Economics, Antitrust Division. (*See id.*)His professional experience includes estimating damages in a variety of areas, including royalty damages related to alleged patent infringement; anticompetitive effects, and estimated damages

related to alleged monopolization in the market for acute care hospital and physician services in East Texas; and lost recreational value related to proposed construction of a coastal bluff seawall. (*See* D.E. 141-3 at 6-8.) In addition, he has testified as an expert witness on damages on numerous occasions (*see* D.E. 141-3 at 3-5), and he has published in his field (*see* D.E. 141-3 at 9-10). The Court finds that Mr. Mangum is qualified to testify as a damages expert in this case.

2. Methodology

Like the other experts in this case, Mr. Mangum's methodology consists of reviewing the documents in the case and applying his experience to the facts as they are presented to him by those documents. This is unobjectionable. Defendants challenge Mr. Mangum's opinions as too speculative, arguing that they are based on improper factual underpinnings. (*See* D.E. 140 at 9-10.) Defendants argue that there is no evidence in the record supporting the numbers Mr. Mangum uses in his expert report. (*See id.*)As discussed below, the Court respectfully disagrees.

Mr. Mangum offers two opinions in this case, premised on the idea that Amakua had identified an "arbitrage position," or "imbalance between the amount JTL was willing to accept for Las Ventanas and the amount Warner was willing to pay for a portion of the property (the hotel only)." (D.E. 141-2 at 3.) First, Mr. Mangum opines that the value of the financial benefits to Amakua was approximately $33,130,000, in the form of cash and property, that the portion of these benefits in cash was approximately $10,198,000, and that the portion of these financial benefits in property was approximately $22,932,000. (*See id.*)Mr. Mangum states that his estimates of property value are based on analysis and opinions rendered by Maurice Robinson, Plaintiff's other expert witness. (*See id.*)Second, Mr, Mangum offers an opinion based on a hypothetical negotiation between Amakua and the defendants, through which Amakua would release the Defendants from any and all obligations owed to Amakua with respect to Las Ventanas. Mr. Mangum concludes that Amakua would have agreed with Defendants to release its rights for approximately half of the value of the market imbalance identified above, or $16,565,000. (*See id.* at 3-4.)

***19** Defendants challenge the factual underpinnings of Mr. Mangum's opinions, arguing that there is no support for them in the record. Mr. Mangum posits that JTL would have sold Las Ventanas to Amakua for $70,250,000, and that Warner would have bought the hotel portion of the property from Amakua for $76,000,000, leaving Amakua with $5,800,000 in cash and the remaining land and residential units on the property. (*See* D.E. 141-2 at 12.) Though it is not pellucid from Mr. Mangum's report, there appears to be adequate support for this calculation in the record, at least if the jury were to credit all the evidence in Amakua's favor. The Facilitation Agreement Amakua proposed to JTL included the price of $70,250,000 (*see* Ex. 1023), and Scofield states that JTL's David Lane agreed that was the price for which he would sell Las Ventanas (Scofield Decl. at 7). Likewise, Scofield states that John Hong agreed that Warner would purchase the hotel portion of the property for $76,000,000. (Scofield Decl. at 8.)

Furthermore, none of Defendants' record citations supports their assertion that "[b]oth Michael Scofield, Amakua's principal, and Greg Blake, Amakua's agent, stated in their depositions that they had not reached any agreement that Warner Hotels would buy the hotel for $76 million."(D.E. 140 at 10.) The record citations do not support or require such a conclusion; for the most part, they do not address the potential for a $76 million purchase by the Warner Defendants; in one instance among these citations where that number *is* addressed, it is by Scofield, and his testimony (while a bit opaque) appears to be susceptible to the interpretation that Ty had agreed to pay that amount for the hotel. (*See* D.E. 141-21 at 8 (Ex. F, Scofield Dep. at 142:13).)

The evidence relied on by Mr. Mangum may not be the strongest evidence for calculating damages, but it is admissible evidence and its persuasiveness is properly evaluated by the jury. "Vigorous cross examination, presentation of contrary evidence and careful jury instructions, the [*Daubert*] Court said, are the traditional and appropriate means of attacking shaky but admissible evidence." *Richman*, 415 F.Supp.2d at 933 (citing *Daubert*, 509 U.S. at 596). It appears that Defendants are really challenging Mr. Mangum's conclusions, as opposed to his methods, which is not an appropriate basis to exclude an expert witness. Assessment of an expert's conclusions is for the finder of fact, not the Court in advance of trial. De-

fendants' motion to strike Mr. Mangum's opinions on this basis is therefore denied.

Defendants also challenge Mr. Mangum's methods because he relied on Mr. Robinson's property analysis in calculating his damages estimates with respect to the property values. Defendants argue that Mr. Mangum should not be allowed to be a mouthpiece for another expert. But that is not what Mr. Mangum is doing-and to the extent it is, such testimony will be excluded as cumulative at trial. As things appear from the briefs, Mr. Mangum is taking another expert's opinion on the value of the property in question and incorporating that value into his overall damages calculation. He is not stating that he has appraised the property at the same value given by Mr. Robinson; he is clearly stating that he is not an appraiser, and so he has relied on another expert's appraisal in reaching his conclusions. The trier of fact may credit his conclusions or not, but that decision is for the trier of fact, not the Court. The trier of fact also may assess whether Mr. Robinson's underlying valuation is credible when Mr, Robinson testifies. There is no need to preclude Mr. Mangum's testimony so as to prevent Plaintiff from protecting discrete expert testimony, outside Mr. Mangum's area of competence, from adversarial testing through cross-examination.

***20** Finally, Defendants challenge the reliability of Mr. Mangum's hypothetical negotiation opinion. (D.E. 140 at 12.) Defendants' challenge to the hypothetical is, in part, derivative of its challenge to Mr. Mangum's damages calculation: Defendants argue that the hypothetical is faulty because it is based on that damages calculation. In particular, Mr. Mangum opines that if the parties had negotiated a settlement, they would have settled for half of what the transaction was worth to Amakua, or $ 16,565,000 (half of the damages calculation of $33,130,000). Inasmuch as the Court has deemed the damages calculation admissible, this challenge to the hypothetical negotiation opinion fails.

Defendants also challenge Mr. Mangum's hypothetical on the basis that Mr, Mangum's conclusion that the parties would have evenly split the "surplus" identified by Amakua is "entirely based on Mr. Mangum's unsubstantiated and unreasoned speculation."(D.E. 140 at 13.) Again, the Court respectfully disagrees. Mr, Mangum explains in his report that this conclusion is based on bargaining theory consistent with a "Nash Equilibrium" outcome among parties with equal negotiating power, so called for Nobel-prize-winning economist John Nash. (*See* D.E. 141-2 at 15 n. 58 (citing John F. Nash, "The Bargaining Problem," Econometrica (April 1950)).) Defendants have not challenged the reliability of Nash's theories, and the assessment of whether the theory persuasively can be applied in the context of this case is for the jury. Again, the Court finds that the proper method of challenging this testimony is on cross-examination. Defendants' motion to strike Mr. Mangum's testimony on this basis is denied.

3. Relevance

Finally, Defendants challenge Mr. Mangum's opinion that Amakua identified a financial "arbitrage" opportunity as irrelevant. (*See* D.E. 140 at 8-9.) The Court disagrees. Mr. Mangum's opinion regarding the "market imbalance" or "arbitrage" position Amakua identified may assist the trier of fact in assessing Amakua's role in the proposed transaction. Determining whether Amakua was acting as a broker or as a principal is a critical issue in this case. Thus expert opinions that would assist the jury in assessing Amakua's role are relevant. The Court will not exclude Mr. Mangum's "arbitrage" opinion on this basis.

II. Cross-Motions for Summary Judgment

Plaintiff seeks summary judgment with respect to the breach of contract claim against the Warner Defendants (Count I) and the interference with contract claim against JTL (Count V), and requests that only damages be resolved by jury trial. (*See* D.E. 100 at 2 .) Plaintiff argues that the Noncircumvention Agreement is enforceable, that the Warner Defendants breached that agreement by dealing directly with JTL (and that JTL interfered with the agreement), and that the breach caused Plaintiff $30 million in damages. (*Id.* at 10, 12-13; D.E. 64 at 9.) Defendants' cross-motion for summary judgment seeks judgment on Counts I, III, IV, and V, arguing that the Noncircumvention Agreement between Plaintiff and the Warner Defendants is unenforceable because it is a contract for illegal brokerage activity; it is an illegal restraint on competition; there was no meeting of the minds regarding the meaning of the noncircumvention provision; and Amakua's damages are too speculative to be proven. (*See* D.E. 111 at 11.)

A. Summary Judgment Standard

*21 Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."Fed.R.Civ.P. 56(c). In determining whether there is a genuine issue of fact, the court "must construe the facts and draw all reasonable inferences in the light most favorable to the nonmoving party." *Foley v. City of Lafayette*, 359 F.3d 925, 928 (7th Cir.2004) (citation omitted). To avoid summary judgment, the opposing party must go beyond the pleadings and "set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Summary judgment is proper against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp., v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)."The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movamt]." *Anderson*, 477 U.S. at 252.

Courts in this district have recognized that where, as here, parties have filed cross-motions for summary judgment, the analysis requires consideration of any legitimate factual disputes or gaps in the record in the light most favorable to each of the two competing parties. *See, e.g., Northern Contracting, Inc. v. State of Illinois*, No. 00 C 4515, 2004 WL 422704, at *46 (N.D.Ill. Mar.3, 2004) (Pallmeyer, J.) ("In cases such as this involving cross-motions for summary judgment, 'the court must extend to each party the benefit of any factual doubt when considering the other's motion-a Janus-like perspective that sometimes forces the denial of both motions.'") (quoting *Buttitta v. City of Chicago*, 803 F.Supp. 213, 217 (N.D.Ill.1992)). The Seventh Circuit instructs that "[w]e are particularly leery of resolving issues involving a state of mind on summary judgment."*Ashman v. Barrows*, 438 F,3d 781, 784 (7th Cir.2006) (citing *Alexander v. Wisconsin Dept. of Health & Family Servs.*, 263 F.3d 673 (7th Cir.2001)). In fact, "[s]ummary judgment is notoriously inappropriate for determination of claims in which issues of intent, good faith and other subjective feelings play dominant roles."*Ashman*, 438 F.3d at 784 (internal quotation marks and citations omitted).

B. Summary Judgment Is Inappropriate in This Case

In this case, summary judgment is inappropriate. The parties disagree about most of the relevant issues, and their disagreements encompass numerous material factual issues. The Court will not extend the length of this opinion even further by setting forth all of the factual disputes, but the Court notes, by way of example, that the parties disagree about what information Amakua provided to the Warner Defendants after John Hong signed the Noncircumvention Agreement, and whether that information complied with the terms of the Agreement. (*See, e.g.*, D.E. 113 ¶¶ 34, 35, 36.) They disagree factually about what role Amakua was to perform in the transaction between JTL and the Warner Defendants, and, in particular, whether Amakua was acting-or would act, assuming the transaction proceededas a real estate broker or as a principal. These disputes relatedly implicate a factual dispute about whether the Noncircumvention Agreement is unenforceable inasmuch as it contemplates an illegal contract for brokerage services. The parties disagree about whether, in general, principals use noncircumvention agreements; whether Amakua had the financial wherewithal to engage in the contemplated transaction; and whether it was even necessary for Amakua to contribute its own capital in order to participate in the transaction. They have factual disputes about whether the transaction, as contemplated when Amakua was involved, was to consummate in a "flip" of the hotel property, about the prevalence of flipping property in the resort hotel industry, and even about what it means to "flip" property. Moreover, the record is replete with incidents that are open to interpretation and inference, *see Ashman*, 438 F.3d at 784, and the parties disagree about their intentions, beliefs, and knowledge regarding the transaction and Amakua's role in it, and about whether Amakua misled the Defendants about its proposed role.

***22** In sum, there are numerous disputed issues of material fact, as well as matters from which competing inferences could legitimately be drawn in different directions by a reasonable factfinder. As a result, the parties' cross-motions for summary judgment are respectfully denied.

CONCLUSION

For the reasons given above, the parties' cross-motions for summary judgment are denied, and their respective motions to strike expert testimony are granted in part and denied in part. (D.E.99, 110, 129, 135, 138.)

So ordered.

N.D.Ill.,2007.
Amakua Development LLC v. Warner
Not Reported in F.Supp.2d, 2007 WL 2028186 (N.D.Ill.)

END OF DOCUMENT

TAB B

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

Edwin R. BAKER, individually, and as father and next of friend of Howard Ross Baker, a minor, Plaintiffs,

v.

INDIAN PRAIRIE COMMUNITY UNIT, SCHOOL DISTRICT NO. 204, et al., Defendants.

No. 96 C 3927.

Oct. 27, 1999.

MEMORANDUM OPINION AND ORDER

NOLAN, Magistrate J.

I. INTRODUCTION

*1 This case arises from injuries Howard Ross Baker sustained to his right hip and femur when he was twelve years old and involved in a sledding accident at May Watts School, which is located in Naperville, Illinois and is part of Indian Prairie Community Unit School District No. 204. Howard Ross Baker, and his father, Edwin Baker, now allege negligence and wilful and wanton conduct against Indian Prairie Community Unit School District No. 204 and numerous other defendants and seek to recover damages and medical expenses attributable to minor Baker's injuries. Defendants maintain that they owed no duty to minor Baker because the dangers associated with his sled run were "open and obvious." All Defendants have moved summary judgment on the issue of whether the conditions encountered by minor Baker were "open and obvious."

After the Bakers responded to Defendants' motions for summary judgment, Defendants ServiceMaster Management Services Limited Partnership and the ServiceMaster Company ("ServiceMaster") and Peter Vlamis moved to strike the affidavits of the Bakers' experts and of minor Baker. Defendants Indian Prairie Community Unit School District No. 204, Naperville Park District, W.E. Mundy Landscaping & Garden Center, Inc., Intech Consultants, Inc., Naperville Excavating, Inc., L.J. Dodd Construction, Inc., and Phillips Swager Associates, Inc. join ServiceMaster and Vlamis' Motion to Strike. The Court stayed the filing of Defendants' reply briefs in support of summary judgment pending a ruling on the current Motion to Strike. The Motion to Strike is now ripe for determination. For the reasons set forth below, ServiceMaster and Vlamis' Motion to Strike (# 222) is GRANTED IN PART and DENIED IN PART.

II. DISCUSSION

ServiceMaster and Vlamis request that the Court strike the affidavits of the Bakers' experts, Harold Wakeley and Eugene Holland, because, among other reasons, certain of Wakeley's and Holland's opinions are new and rendered after the expert disclosure deadline. The Court agrees and will address the timeliness of the expert opinions first and then the remaining arguments related to each affidavit in turn.

A. *Timeliness of Expert Witness Disclosures*

ServiceMaster and Vlamis contend that numerous opinions and data contained in Wakeley's and Holland's affidavits are untimely and should be stricken. Rule 26(a)(2)(B) requires expert witnesses to prepare a written report containing a complete statement of all opinions to be expressed, the basis and reasons therefore, and the data or other information considered by the expert in forming the opinions as well as a list of exhibits to be used, the expert's qualifications, the expert's compensation, and a list of other cases in which the expert testified in the last four years. A party's failure to comply with Rule 26(a) results in an "automatic and mandatory" exclusion of expert testimony "unless the party to be sanctioned can show that its violation of Rule 26(a) was either justified or harmless." *Finley v. Marathon Oil Co.*, 75 F.3d 1225, 1230 (7th Cir.1996); Fed.R.Civ.P. 37(c)(1). A district court's decision to exclude evidence under Rule 37 is reviewed for abuse of discretion. *Doe, By and Through G.S. v. Johnson*, 52 F.2d 1448, 1446 (7th Cir.1995). The Bakers have not shown that their failure to timely disclose all of Wakeley's and Holland's opinions was either justified or harmless, and the arguments raised by the Bakers in response to the timeliness issue are without merit.

*2 The Bakers first claim, without any citation to authority, that it is "patently unfair and prejudicial to the plaintiff to prevent him from consulting with his experts and obtaining from them updated, modified or even new opinions and data in response to Motions for Summary Judgment filed after the expert disclosure date."The Bakers' Response, pp. 4-5. The expert disclosure deadlines do not prohibit the Bakers from thereafter consulting with their experts but do establish firm dates for disclosure of experts and expert opinions. The Bakers' assertion that expert disclosure deadlines do not prevent them from later offering new expert opinions is frivolous. Deadlines play an important role in the Court's ability to manage and control its docket, and the Court has the ability to establish and enforce its deadlines. *Parker v. Freightliner Corp.*, 940 F.2d 1019, 1024-1025 (7th Cir.1991) (holding courts have the power to establish and enforce deadlines concerning expert testimony and are not required to fire a warning shot prior to imposing sanctions).

The Bakers also maintain that the affidavits of Wakeley and Holland merely supplement their prior reports. Although Rule 26(e) provides that a party has a duty to "supplement or correct" its prior disclosures if it learns that the prior information "is incomplete or incorrect," the statements at issue are new conclusions which do not merely correct or complete prior opinions of Wakeley or Holland. For example, Wakeley's report contained one opinion: minor Baker demonstrated a level of hazard perception and risk awareness entirely consistent with his age and level of development. In his affidavit, Wakeley concludes not only that Baker acted reasonably and rationally for his age but also that the dangers associated with sledding down the hill and over the snow pile were not obvious to a twelve year old boy and that the risk involved is not similar to the risk involved in a fall. Wakeley's opinions concerning the obviousness of the risk and whether the risk encountered by minor Baker were similar to a fall are new and offered for the first time after Defendants' summary judgment arguments on the exact same issues.

Finally, the Bakers contend that Defendants cannot show any prejudice as a result of the new expert opinions because: (1) "[t]his is a summary judgment proceeding;" (2) if summary judgment is denied, Defendants "will have ample opportunity to obtain appropriate expert opinions;" and (3) Defendants chose not to take depositions of the Bakers' experts. The Bakers appear to misunderstand the Federal Rules of Civil Procedure and the role of expert reports.

The sanction of exclusion applies at summary judgment as well as at trial.Rule 37(c)(1) explicitly provides that untimely disclosures may not be used "at a trial, at a hearing, *or on a motion.*"Moreover, Defendants need not wait until after a ruling on summary judgment to discover all of Wakeley's and Holland's opinions and data where the Court set an expert opinion disclosure deadline prior to the dispositive motion deadline. Rule 26(a) requires expert reports to be "detailed and complete" and "not sketchy, vague or preliminary in nature." *Salgado By Salgado v. General Motors Corp.*, 150 F.3d 735, 741 n. 6 (7th Cir.1998) (citing Fed.R.Civ.P. 26 Advisory Committee's note). A complete expert report includes "the substance of the testimony which an expert is expected to give on direct examination together with the reasons therefor."*Id.* The requirement of a complete expert report minimizes the need for expert depositions. "The report must be complete such that opposing counsel is not forced to depose an expert in order to avoid ambush at trial; and moreover the report must be sufficiently complete so as to shorten or decrease the need for expert depositions and thus to conserve resources."*Id.*

*3 Although correct, the Bakers' argument that Defendants chose to stay expert depositions until after the Court rules on summary judgment misses the point. Defendants did not move to stay expert depositions until after the Bakers' expert opinion disclosure deadline. After reviewing Wakeley's and Holland's reports, Defendants concluded it was unnecessary to engage in expensive expert depositions prior to moving for summary judgment on certain issues, including the issue of whether the risks encountered by minor Baker were "open and obvious." Defendants were entitled to assume that Wakeley's and Holland's reports were complete. Defendants are now unfairly prejudiced by the Bakers' reliance on new and untimely expert opinions in response to summary judgment. The Bakers' failure to inform Defendants of their experts' latest opinions denied Defendants the opportunity to depose Wakeley and Holland prior to moving for summary judgment. One of the primary goals of the federal civil discovery rules and Rule 26(a) is to "eliminate surprise." The Court will not

allow the Bakers to ambush Defendants with new expert opinions after the expert opinion disclosure deadline and after they filed for summary judgment. *Salgado*, 150 F.3d at 742 n. 6.[FN1]

> FN1. The Court additionally notes that it granted the Bakers numerous extensions in this matter, including extensions of the discovery deadlines. If the Bakers needed more time to work with their experts and obtain expert opinions, they should have filed an appropriate motion before the expert opinion disclosure deadline rather than wait until after Defendants filed for summary judgment to come forward with new opinions in their experts' affidavits.

The following untimely expert opinions and data are stricken from the Bakers' experts' affidavits: (1) Harold Wakeley's Affidavit-paragraphs 6(b), 6(c), and subparts (b) and (c) in the sentence below 6(c) and (2) Eugene Holland's Affidavit-paragraphs 4-27, first paragraph and last sentence in 29, and paragraph 35. While ServiceMaster and Vlamis have moved to strike the entire affidavits of Wakeley and Holland, the Court believes it more appropriate to strike only the untimely portions of the affidavits. *Prudential Ins. Co. of America v. Curt Bullock Builders, Inc.*, 626 F.Supp. 159, 164 (N.D.Ill.1985) (stating "[w]hen admissible facts and inadmissible statements occur in the same affidavit, the court need not strike the entire affidavit but rather may rely on the facts and disregard the rest.").

B. *Harold Wakeley's Affidavit*

ServiceMaster and Vlamis also request that the Court strike Wakeley's remaining opinion that Baker acted reasonably and rationally for his age because it is a legal conclusion contrary to Illinois law, does not assist the trier of fact, and is not "scientifically valid" under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The Court finds that the Bakers have not made a sufficient showing that Wakeley's testimony meets the criteria of *Daubert*.

To be considered on a motion for summary judgment, expert testimony must be admissible. *See*Fed.R.Civ.P. 56(e) (stating "Supporting and opposing affidavits shall ... set forth such facts as would be admissible in evidence and show affirmatively that the affiant is competent to testify to the matters stated therein.").*Daubert* held that under Federal Rule of Evidence 702, trial courts must ensure that expert testimony "rests on a reliable foundation and is relevant to the task at hand." *Daubert*, 509 U .S. at 597. When considering the admissibility of expert testimony, trial courts may consider the following factors: (1) whether theories or techniques can and have been tested; (2) whether it is generally accepted by the scientific community; (3) whether it has been the subject of publication or peer review; and (4) whether it has an acceptable known or potential error rate. *Id.* at 592-594.The inquiry is "flexible" and should be based "solely on principles and methodology, not on the conclusions that they generate."*Id.* at 594-595. *Daubert* applies to all expert testimony. *Kumho v. Tire Co., Ltd. v. Carmichael*, 119 S.Ct. 1167, 1174 (1999).

***4** Trial courts must employ a two-step analysis when determining the admissibility of expert testimony. *Cummins v. Lyle Industries*, 93 F.3d 362, 367 (7th Cir.1996). First, the court must determine whether the expert's testimony is reliable. *Id.* Conclusions in expert reports must be based on scientific methods and procedures, rather than subjective belief and unsupported speculation. *Daubert*, 509 U.S. at 590. Second, the court must decide "whether evidence or testimony assists the trier of fact in understanding the evidence or in determining a fact in issue." *Cummins*, 93 F.3d at 368. "An expert's affidavit must be sufficiently complete to satisfy the criteria of the *Daubert* decision...." *Navarro v. Fuji Heavy Industries, Ltd.*, 117 F.3d 1027, 1032 (7th Cir.1997), *cert. denied*, 118 S.Ct. 600 (1997)."[T]here is no duty to cross-examine or depose your opponent's witnesses so that they can supplement the testimony they failed to give on direct examination or in their affidavit."*Id.* The proponent of expert testimony bears the burden of establishing its admissibility. *Bradley v. Brown*, 852 F.Supp. 690, 697 (N.D.Ind.), *aff'd*, 42 F.3d 434 (7th Cir.1994).

The Court has reviewed Wakeley's report and affidavit. Wakeley is an engineering psychologist with M.S. and Ph.D. degrees in experimental psychology. Since 1990, he has been employed by the Human Factors Research Group as a Human Factors Scientist/Engineer. Between 1955 and 1990, he worked as a scientist/engineer at Illinois Institute of Technology (IIT) Research Institute. Wakeley also served as ad-

junct associate professor of engineering psychology at IIT between 1970 and 1985. Wakeley describes his professional experience as involving the determination of:

[T]he range and limits of human performance. The objective of these studies is to produce machines and systems that are cost-effective, productive, and safe in operation without endangering life and the environment. The approach used is the application of engineering and scientific knowledge about materials and human behavior to the design of things people use, methods for their use, and the environment in which people function.

Wakeley Aff. ¶ 4. With respect to the present case, Wakeley opines that "Howard Ross Baker demonstrated a level of hazard perception and risk awareness entirely consistent with his age and level of development" because Baker was taken to an area specially prepared to be used by children for sledding purposes, the area showed evidence that others had recently used it, he observed a peer using the area, there was no information to indicate that the contemplated slide was hazardous, and there was no barrier to use of the slide area. *Id.* ¶ 6(a). Wakeley states that the bases for his opinion is as follows:
People can perceive physical "hazards" but recognizing and accepting or rejecting a "risk" depends upon the subjects use of relevant skills, rules, and knowledge to predict whether an action will have a safe outcome. Children, including 12 year olds, because they lack skills, familiarity with rules, and specialized knowledge, are far less able to reliably discern dangerous situations.

*5 Wakeley Aff. ¶ 7.

Wakeley's affidavit fails to specifically explain how he arrived at his conclusion that minor Baker "demonstrated a level of hazard perception and risk awareness entirely consistent with his age and level of development."What level of hazard perception and risk awareness does a twelve year old boy possess? How does Wakeley know what level of hazard perception and risk awareness a twelve year old boy possesses? What particular skills, experience, and capabilities possessed by minor Baker made his behavior reasonable for a twelve year old boy and made him not able to successfully predict whether the sled run would have a safe outcome? What is the reasoning behind Wakeley's conclusion? Did he recreate the accident or do any testing to support his opinion?[FN2] These questions remain unanswered by Wakeley's affidavit.

> FN2. The Court is not holding that a finding of reliability necessarily requires that Wakeley recreate the accident or do any other testing. Wakeley need only show that his testimony is consistent with the "same standards of intellectual rigor that are demanded in [his] professional work." *Cummins*, 93 F.3d at 369. Wakeley's affidavit does not specifically explain how experts in the field of human factors investigate and analyze accidents. Thus, the Court is unable to determine whether the methodology used by Wakeley to reach his conclusion in this case meets the standards of his profession.

Wakeley claims that in his research he applies "engineering and scientific knowledge" to human behavior, materials, and the environment. How did Wakeley apply "engineering and scientific knowledge" to Baker's accident? Wakeley also states in his affidavit that he "reviewed the human factors aspects of children's recreational behavior, in particular risk perception and cognition/decision-making of children, both as to minor Baker and as to 12-year-olds generally."Wakeley Aff.¶ 5. What are the "human factors aspects of children's recreational behavior" and how is Wakeley an expert in the area of child perception and cognition/decision-making? The generalized and unsupported nature of Wakeley's conclusion makes its difficult tell what analyses and methodology he used to reach his conclusion. Moreover, although Wakeley has impressive credentials, it is not evident from his curriculum vitae that he has any particular expertise in children's recreational behavior.

Rather than provide the Court with any indicia of reliability for Wakeley's conclusion, the Bakers' Response states only the following regarding Wakeley's qualifications as an expert and the admissibility of his opinion: "Dr. Wakeley is an expert on human factors. His qualifications are as disclosed in his curriculum vitae attached to his Affidavit. By virtue of his education, training and experience, he possesses knowledge that would be helpful to the trier of fact in understanding the various factors that go into perception and recognition of the conditions involved in this

case from the point of view of a 12 year old, as the law requires."Bakers' Resp., pp. 5-6. Impressive credentials do not guarantee the admissibility of expert testimony.

Wakeley's opinion provides nothing more than a "bottom line" conclusion and fails to demonstrate that it is supported by scientific rigor. *McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 658 (7th Cir.1998) (stating "[a]n expert who supplies nothing but a bottom line supplies nothing of value to the judicial process.") (quoting *Mid-State Fertilizer Co. v. Exchange National Bank*, 877 F.2d 1333, 1339 (7th Cir.1989)); *Navarro*, 117 F.3d at 1031 (holding expert's affidavit contained no support for conclusion and "a conclusion without any support is not one based on expert knowledge and entitled to the dignity of evidence."). As the Seventh Circuit explained in *Navarro*, an expert must explain how his conclusion is based on expert analysis:

***6** An expert's affidavit must be sufficiently complete to satisfy the criteria of the Daubert decision, and one of those criteria, as we have been at pains to emphasize, is that the expert show how his conclusion ... is grounded in-follows from-an expert study of the problem.

Navarro, 117 F.3d at 1032.

The Bakers have also failed to provide the Court with any information concerning the four indices of reliability identified by the Supreme Court in *Daubert.Daubert*, 590 U.S. at 592-594. The Court recognizes that those factors are "flexible" and "neither necessarily nor exclusively appl[y] to all experts or in every case." *Kumho Tire Co.*, 119 S.Ct. at 1171. Because the Bakers failed to address *Daubert*, the Court is unable to evaluate whether the four *Daubert* factors are relevant to determining the admissibility of a human factors expert's testimony. The absence of evidence supporting the four *Daubert* factors does not automatically foreclose a finding of reliability, but the Bakers must provide some basis for a finding of reliability. This record fails to disclose Wakeley's methodology and reasoning, and the Court cannot evaluate the reliability of an undisclosed methodology. Thus, given the current record, Wakeley's affidavit is inadmissible under *Daubert*.

The Court grants ServiceMaster and Vlamis' Motion to Strike the remaining conclusion of Harold Wakeley for purposes of ruling on summary judgment. The Court expresses no opinion on whether Wakeley can demonstrate the necessary reliability for trial, if the Bakers' claims survive summary judgment. Having found that Wakeley's opinion fails to meet the *Daubert* criteria, the Court need not address the remainder of ServiceMaster and Vlamis' arguments regarding Wakeley's affidavit.

C. *Eugene P. Holland's Affidavit*

Defendants additionally argue that the remaining portions of Eugene Holland's affidavit should be stricken because many of Holland's opinions are legal conclusions contrary to Illinois law on the issue of an "open and obvious" condition and do not assist the trier of fact.

ServiceMaster and Vlamis contend that the following opinions by Holland are inadmissible legal conclusions contrary to Illinois law: (1) a dangerous condition existed; (2) certain of Defendants' actions constituted negligence; and (3) Defendants knew or should have known that the sledders would use the snow pile. According to ServiceMaster and Vlamis, Illinois law dictates that Baker was expected to appreciate and avoid the obvious risk inherent in his sled down the hill and over the snow pile. Whether the risks associated with the sledding jump were "open and obvious" is the ultimate issue to be decided on summary judgment. The Court declines to rule on the merits of the open and obvious issue until the motion for summary judgment is fully briefed and thus, refuses to strike Holland's opinions on this ground.

Defendants correctly contend that Holland's opinion in paragraph 32(a) of his affidavit that the contract between District No. 204 and ServiceMaster required ServiceMaster to supervise the snow removal work of Mundy usurps the Court's role as the interpreter of the contract between ServiceMaster and the School District. An expert may not ordinarily interpret the meaning of a contract. *Delta Mining Corp. v. Big Rivers Electric Corp.*, 18 F.3d 1398, 1402 (7th Cir.1994) (stating "[a]bsent any need to clarify or define terms of art, science or trade, expert opinion testimony to interpret contract language is inadmissible."). The Court strikes that portion of paragraph 32(a) of Holland's affidavit.[FN3]

FN3. In their reply brief, ServiceMaster/Vlamis, W.E. Mundy Landscaping, and Indian Prairie Community School District # 204 request that the Court strike paragraphs 24, 25, 26, 31, 32, and 34 of Holland's affidavit. Intech Consultants and Phillips Swager Associates contend that Holland is not qualified to opine as to the standard of care applicable to civil engineers or architects and that Holland's opinions fail to establish with appropriate foundation what the standard of care is or the manner in which it may have been breached. The Court has previously stricken paragraphs 24-26 as untimely. The Court is unwilling to strike paragraphs 31, 32, and 34 of Holland's affidavit or his opinions regarding Intech Consultants and Phillips Swager Associates where Defendants' arguments regarding these matters were first raised in their reply brief and the Bakers have not had an opportunity to respond. The Court denies Defendants request to strike these matters from Holland's affidavit without prejudice. If Defendants wish to pursue these arguments for purposes of summary judgment, they may file an additional motion to strike containing these arguments at the same time they file their reply briefs in support of summary judgment. The Bakers' response to an additional motion to strike is due within seven days thereafter. Defendants may file a reply within seven days after the Bakers' response.

D. *Harold Ross Baker's Affidavit*

*7 ServiceMaster and Vlamis lastly contend that minor Baker's affidavit should be stricken because it conflicts with his prior deposition testimony. Specifically, ServiceMaster and Vlamis argue that through his affidavit, minor Baker improperly implies that he was not aware that he would land on pavement after his sled run. "[A] plaintiff cannot create an issue of material fact merely by manufacturing a conflict in his own testimony by submitting an affidavit that contradicts an earlier deposition and, in turn, defeat a defendant's motion for summary judgment." *Ernst & Young, L.L.P.*, 171 F.3d 527, 532 (7th Cir.1999) (internal citations omitted)."[W]hen a conflict arises between a plaintiff's own sworn deposition and his sworn affidavit, the deposition testimony overrides statements made in the affidavit."*Id.*

At his deposition, Baker testified as follows:

Q: So the parking lot on the day of the accident is or was similar to that depicted in photograph 7-1; is that right?

A: Correct.

Q: So there's some icy patches but, most of it you could see the paved surface below it?

A: Yes.

Baker dep., p. 47.
Q: And whereabouts where you when you saw him coming down the hill? Were you on the hill? In the parking lot?

A: I believe I was standing on the concrete just going up-beginning up the hill when I saw him go over the bottom.

Baker dep., p. 51.
Q: And [Jasper] landed in the parking lot?

A: Yes.

Baker dep., p. 54.
Q: I'm sorry, I though you told me-

A. I don't remember exactly in relation to where I had landed Tim had landed. I knew he had landed on the concrete in that general vicinity, but I don't know in relation to where I landed he did.

Q: Did you land approximately on the same area of pavement, approximately five feet from the-

A: I think I was a little farther, but I don't know for sure because I was rolling after I hit the ground.

Q: Okay. Same area on the concrete, but might have rolled a little bit so it's hard to determine exactly how you landed?

A: Yes.

Baker dep., p. 64.
Q: You eventually slid over a mound at the base of the hill; is that right?

A: After I went down and got to the base?

Q: Yes.

A. Yes.

Baker dep., p. 49.
Q: You were the next person to go down the hill after Tim Jasper; is that correct?

A: I believe so.

Q: And Tim landed in the parking lot also, correct, on his feet?

A: Yes.

Q: So you knew that you were going to end up in the parking lot on a harder surface; correct?

A: Yes.

Baker dep., 142.

In his affidavit filed in opposition to summary judgment, minor Baker states in part:

On that date, I could not tell where the pavement of the parking lot began and the sled hill ended because of the piled snow. There were patches of ice and/or snow covering the asphalt surface of the parking lot in the area to the north of the snow pile. The path that I saw Tim Jasper take down the sled hill to the snow pile was continuos snow or ice covered, with no bar spots. The snow pile at the base of the hill was pushed to the pile so the pile began before the hill ended. There was no flat area between the sled hill and the snow pile involved. The sled hill dropped until it met the snow pile which then began to rise. The snow pile appeared to be part of the sledding experience existing at May Watts Park/School at the time.

*8 Ross' Affidavit, ¶¶ 2-6, 9.

Taken individually, the statements in minor Baker's affidavit do not necessarily contradict the assertions made in his deposition concerning his knowledge of whether he would land on concrete. On the other hand, when considered together, it may reasonably be inferred from Baker's affidavit statements that he was not aware that he would land on concrete. Such an inference would contradict his above-quoted deposition testimony. Because the Court does not know at this stage of the proceedings whether minor Baker's affidavit may be used for other permissible purposes in response to summary judgment, the Court declines to strike his affidavit. However, when ruling on summary judgment, the Court will not consider minor Baker's affidavit statements for the proposition that he did not understand he would land on pavement after his sled run.[FN4]

FN4. Defendants request for the first time in their reply that they be allowed to redepose minor Baker if his affidavit is allowed to stand. Defendants' request is denied.

III. CONCLUSION

For the reasons explained above, Defendants ServiceMaster and Vlamis' Motion to Strike Affidavits of Plaintiff and Plaintiff's Experts is GRANTED IN PART and DENIED IN PART. Defendants' reply briefs in support of summary judgment are due by November 9, 1999.

N.D.Ill.,1999.
Baker v. Indian Prairie Community Unit, School Dist. 204
Not Reported in F.Supp.2d, 1999 WL 988799 (N.D.Ill.)

END OF DOCUMENT

TAB C

17 Fed.Appx. 433, 2001 WL 950885 (C.A.7 (Ind.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 17 Fed.Appx. 433, 2001 WL 950885 (C.A.7 (Ind.)))

This case was not selected for publication in the Federal Reporter.

NONPRECEDENTIAL DISPOSITION To be cited only in accordance with Fed.R.App.P. 32.1.

United States Court of Appeals, Seventh Circuit.

Geraldine BARBER, Plaintiff-Appellant,

v.

UNITED AIRLINES, INC. Defendant-Appellee.

No. 00-3546.

Argued May 15, 2001.
Decided Aug. 16, 2001.

Passenger brought action against airline to recover for injuries sustained when plane encountered turbulence. The United States District Court for the Northern District of Indiana, Andrew Rodovich, United States Magistrate Judge, entered judgment as matter of law in favor of airline, and passenger appealed. The Court of Appeals held that: (1) aviation expert was properly excluded from testifying; (2) refusal to grant continuance was not abuse of discretion; and (3) passenger's unsubstantiated testimony was insufficient to create fact issue.

Affirmed.

West Headnotes

[1] Evidence 157 ⚿555.2

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.2 k. Necessity and Sufficiency. Most Cited Cases
Trial judge must determine whether expert's opinion is grounded in methods and procedures of science, and whether opinion has sufficient factual underpinnings. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[2] Evidence 157 ⚿555.7

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.7 k. Due Care and Proper Conduct. Most Cited Cases
Aviation expert's failure to explain why he ignored weather data and testimony given by pilots to extent that those facts conflicted with his opinion that pilots were negligent for failing to properly use radar while flying through area where thunderstorms were predicted precluded expert from testifying in passenger's negligence action against airline; expert did not give any additional data or information that he relied upon. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[3] Federal Courts 170B ⚿823

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk823 k. Reception of Evidence. Most Cited Cases
Court of Appeals reviews district court's decision to exclude expert testimony for abuse of discretion. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[4] Evidence 157 ⚿514(1)

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of Expert Testimony
157k514 Management and Operation of Vehicles, Machinery, and Appliances
157k514(1) k. In General. Most Cited Cases
District court's refusal to permit aviation expert to testify in passenger's negligence action against airline as to fact that thunderstorms could create severe turbulence was not abuse of discretion, where airline's pilots admitted that thunderstorms were known to cause severe turbulence, but undisputed evidence indicated that turbulence that plane struck was clear-air turbulence, not thunderstorm-related turbulence. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[5] Federal Civil Procedure 170A ⚿1852

170A Federal Civil Procedure
170AXII Continuance
170Ak1852 k. Discretion of Court. Most Cited Cases
District court has broad discretion in determining whether to grant continuance.

[6] Federal Civil Procedure 170A 1856

170A Federal Civil Procedure
170AXII Continuance
170Ak1855 Grounds
170Ak1856 k. Absence of Witness or Evidence in General. Most Cited Cases
District court's refusal to grant continuance in passenger's negligence action against airline in order to give passenger more time to retain aviation expert after her expert was rejected was not abuse of discretion, where case was almost two and a half years old, it had already been continued and delayed so as to allow passenger opportunity to obtain expert witnesses, passenger had plenty of time to evaluate proffered expert's report and deposition, and airline had filed motion in limine within time established by court.

[7] Federal Courts 170B 776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases
Court of Appeals reviews district court's grant of judgment as matter of law de novo. Fed.Rules Civ.Proc.Rule 50, 28 U.S.C.A.

[8] Federal Civil Procedure 170A 2515

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2515 k. Tort Cases in General. Most Cited Cases
Passenger's unsubstantiated testimony that pilot told her immediately after flight that they had flown through thunderstorm was insufficient to create fact issue in passenger's action to recover for injuries sustained when plane encountered turbulence as to whether pilot had duty to warn of possible turbulence, where undisputed testimony indicated that turbulence was clear-air turbulence, not thunderstorm-related turbulence, passenger did not make claim until she took stand at trial, claim contradicted passenger's deposition testimony, pilot's testimony, and testimony of all other witnesses, and passenger submitted no weather reports confirming thunderstorms at that time and in that location.

[9] Carriers 70 295.1

70 Carriers
70IV Carriage of Passengers
70IV(D) Personal Injuries
70k294 Management of Conveyances
70k295.1 k. Air Carriers. Most Cited Cases
Pilot had no duty to warn passengers to fasten their seatbelts when he saw clouds and haze in front of him, and thus airline was not liable for injuries sustained by passenger when plane struck turbulence, where cirrus clouds observed by pilot were not capable of causing type of turbulence they experienced.

[10] Carriers 70 305(4)

70 Carriers
70IV Carriage of Passengers
70IV(D) Personal Injuries
70k305 Proximate Cause of Injury
70k305(4) k. Management of Conveyances. Most Cited Cases
Pilot's alleged failure to properly use plane's radar during flight was not proximate cause of injuries sustained by passenger when plane encountered turbulence, where clear-air turbulence that caused passenger's injuries could not have been detected by radar.

[11] Evidence 157 78

157 Evidence
157II Presumptions
157k74 Evidence Withheld or Falsified
157k78 k. Suppression or Spoliation of Evidence. Most Cited Cases
Airline's destruction of documents pertaining to weather at time of flight did not give rise to inference

that missing evidence was favorable to passenger seeking to recover for injuries sustained when plane encountered turbulence, where documents were destroyed in ordinary course of business, and passenger obtained independent reports as to actual conditions that day.

***435** Appeal from the United States District Court for the Northern District of Indiana, Hammond Division. No. 98 C 119. Andrew Rodovich, Magistrate Judge.

Before RIPPLE, MANION, DIANE P. WOOD, Circuit Judges.

ORDER

****1** United Airlines Flight 516 from New Orleans to Chicago encountered turbulence on May 3, 1996. One of the passengers on board, Geraldine Barber, was injured, and she sued United Airlines for negligence. Prior to trial, the district court granted United Airlines' motion in limine, barring Barber's proffered aviation expert, Dr. Michael Hynes. The trial proceeded, but at the close of evidence the district court granted United Airlines judgment as a matter of law. Barber appeals, and we affirm.

I. Background

On May 3, 1996, Geraldine Barber was returning to the Chicago area aboard United Airlines Flight 516 from an educational conference held in New Orleans. Flight 516 was in Captain James Kainer's charge, and First Officer James O'Neal was second in command. The initial leg of the flight was smooth, but about forty miles south of St. Louis the plane encountered moderate to severe turbulence, which caused the plane to suddenly pitch up severely and then level off.

The incident lasted only a few moments, and the remainder of the flight was uneventful, but at the time the plane struck the turbulence, the "fasten seatbelt" sign was off and Geraldine Barber, whose seatbelt was loosely fastened, was thrown forward. She struck her head and shoulders against the seat in front of her. Barber claims that as a result she suffered shock, fright, and severe pain, and that the accident tore her rotator cuff, which required surgery. Barber also claims that while at work the following year, she fell after having tried to lift herself up using her injured shoulder. As a result, Barber claims that she suffered severe damage to her knee which also required surgery. Barber further contends that her injuries eventually caused her to take early retirement from her job as a school administrator.

Almost two years after the incident, Barber sued United Airlines alleging that United Airlines was negligent because it flew through an area where thunderstorms were predicted, because the pilot failed to properly use the radar, and because the pilots failed to avoid the weather system which caused the turbulence. To support ***436** her case, Barber retained Dr. Michael Hynes as an aviation expert, but prior to trial, on United Airlines' Motion in Limine, the district court [FN1] barred Hynes's testimony, concluding that Hynes's methodology was flawed because he ignored weather data and testimony given by the pilots to the extent that those facts conflicted with his opinion.

> FN1. The parties consented to trial by a magistrate judge pursuant to 28 U.S.C. § 636(c)(1). For simplicity, we refer to the trial court as the district court.

Barber then presented her case to the jury without Dr. Hynes's testimony. At trial, Captain James Kainer testified that from the moment of takeoff in New Orleans to approximately 100 miles south of St. Louis, the flight "was smooth, visibility was good, the seatbelt sign was off, it was a routine flight." He further testified that about forty miles outside of St. Louis, he turned on the plane's radar.[FN2] Captain Kainer explained that it takes about ten seconds for the radar to warm up, and that after he had turned it on and it had warmed up, he had a clear picture which showed no "convective or precipitative activity." However, a few minutes later, as Captain Kainer was tweaking the radar,[FN3] the aircraft struck clear air turbulence, pitching up. Captain Kainer explained that clear air turbulence cannot be seen either visually or on radar. He further testified that he had flown the same route earlier in the day and had not experienced any turbulence, nor did any other pilots report incidents of clear air turbulence along that route. Additionally, Captain Kainer stated that while thunderstorms were predicted in the area for later in the day, at the time that the plane struck the turbulence there were no

thunderstorms.

FN2. Captain Kainer explained that a plane's radar is not always kept on; rather, pilots switch the radar on only when they believe there is a need for it. Captain Kainer explained that he turned the radar on because he knew that storms were predicted for later in the evening and he wanted to see what the weather would be like on his drive home from the Chicago airport, and to get an overview of the weather coming into Illinois.

FN3. Captain Kainer also explained that the radar picture must be continuously "tweaked," i.e., adjusted for distance and/or intensity.

**2 Geraldine Barber then took the stand. She testified that after the plane landed, while she was waiting inside the Chicago airport to go home, Captain Kainer approached her, telling her that he had flown through a thunderstorm and that he did not have his radar on. This was the first time that Barber made such a claim; she did not mention these statements in either her deposition or in a diary that she kept following the incident. Barber claimed that she remembered Captain Kainer's remarks after having seen him testify the previous day, which according to Barber jogged her memory.

Following the close of Barber's case, United Airlines moved for Judgment as a Matter of Law, arguing that Barber failed to present any evidence that United Airlines was negligent. Specifically, United Airlines asserted that because the undisputed evidence established that the turbulence was "clear air" turbulence which cannot be seen, and was not turbulence associated with thunderstorms, United Airlines was not liable for Barber's injuries. The district court agreed, granting United Airlines' Motion for Judgment as a Matter of Law. Barber appeals.

II. Analysis

A. Motion in Limine

On appeal, Barber initially argues that the district court erred in barring Dr. *437 Hynes's expert testimony. Federal Rule of Evidence 702 provides that

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

[1] In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the Supreme Court held that Rule 702"imposes on the trial court the obligation, when dealing with expert witnesses, to ensure that scientific testimony is 'not only relevant but reliable." ' *Goodwin v. MTD Products, Inc.*, 232 F.3d 600, 608 (7th Cir.2000) (quoting *Daubert*, 509 U.S. at 589, 113 S.Ct. 2786). This requires a trial judge to determine whether an expert's opinion was grounded in the methods and procedures of science, and whether the opinion had sufficient factual underpinnings. *Id.*

[2] A review of Dr. Hynes's proffered expert opinion, his deposition testimony, and the overall record confirms the district court's conclusion that in formulating his opinion, "Dr. Hynes relied on weather data, but he rejected some weather data that contradicted his opinion." The district court also accurately noted that Dr. Hynes "rejected the testimony of the pilot and the copilot, which contradicted his opinion, [and][i]n formulating his opinion, Dr. Hynes did not give any additional data or information that he relied upon, which formed the basis of rejecting some of the weather data and the opinions of the copilots." Dr. Hynes also did not adequately explain why he ignored certain facts and data, while accepting others. Nor did Dr. Hynes present any other data which supported his opinion-he merely accepted some of the testimony and weather data that suited his theory and ignored other portions of it that did not. Because in formulating his opinion Dr. Hynes cherry-picked the facts he considered to render an expert opinion, the district court correctly barred his testimony because such a selective use of facts fails to satisfy the scientific method and *Daubert*, and it thus fails to "assist the trier of fact." Fed.R.Civ.Proc. 702.

**3 [3] On appeal, Barber does not challenge the district court's reasoning that Dr. Hynes's proffered expert opinion failed to satisfy *Daubert* because of his selective use of data. Rather, she argues that in-

stead of prohibiting Dr. Hynes from testifying entirely, he should have been allowed to testify about the effect of thunderstorms, namely that they are known to cause severe turbulence. She also believes that the district court should have allowed him to testify concerning the steps that United Airlines could have taken to avoid the turbulence or to warn passengers. We review the district court's decision to exclude expert testimony for an abuse of discretion. *United States v. Crotteau*, 218 F.3d 826, 831 (7th Cir.2000).

[4] Barber's argument ignores the fact that the pilots themselves admitted the obvious-that thunderstorms are known to cause turbulence, including severe turbulence, and that company policy is to re-route flights to avoid thunderstorms and to warn passengers to fasten their seatbelts. Because these points were already established-and by the defendants' own employees-we do not believe the district court abused its discretion by failing to allow Dr. Hynes to likewise opine on the effects of thunderstorms. Moreover, the real question was not whether thunderstorms cause turbulence or whether United Airlines could have rerouted the flight, but whether the turbulence which Flight 516 struck was clear air turbulence or thunderstorm-related turbulence. As explained***438** below, the evidence presented during trial established that the turbulence was clear air turbulence. Therefore, even had Dr. Hynes been allowed to testify on more limited grounds, he would have added nothing new and United Airlines would still have been entitled to judgment as a matter of law.[FN4]

> FN4. Barber also argues that the district court should have held an evidentiary hearing to determine whether Dr. Hynes was qualified to testify on a more limited basis. There was no need for an evidentiary hearing, however, given the extensive briefing on the issue and the district court's more than thorough review of Dr. Hynes's proffered expert opinion and deposition testimony. Also, as just noted, even if Dr. Hynes were allowed to testify on more limited grounds, that would not have altered the outcome of this case, and therefore we find no abuse of discretion in the district court's decision not to hold an evidentiary hearing.

[5][6] Barber also argues that the district court should have granted her a continuance so as to allow her more time to retain another expert witness. A district court has broad discretion in determining whether to grant a continuance. *Brooks v. United States*, 64 F.3d 251, 256 (7th Cir.1995). In this case, the district court refused to grant a continuance, noting that the case was almost two and a half years old and that it had already been continued and delayed so as to allow the plaintiff the opportunity to obtain expert witnesses. The district court also noted that the plaintiff had plenty of time to evaluate Dr. Hynes's report and deposition and that the defendant had filed the motion in limine within the time established by the court. Under these circumstances, the district court did not abuse its broad discretion in denying Barber's request for a continuance.

B. Judgment as a Matter of Law

Following the close of Barber's case, United Airlines moved for Judgment as a Matter of Law pursuant to Federal Rule of Civil Procedure 50, arguing that Barber had failed to present sufficient evidence to support her theory of negligence. Specifically, United Airlines asserted that while thunderstorms may cause turbulence, and while thunderstorms were predicted in the area of the flight for later in the day, there was no evidence that the turbulence which Flight 516 encountered was caused by thunderstorms. Rather, the only evidence presented during Barber's case-in-chief established that the turbulence which caused Barber's alleged injuries was clear air turbulence, which cannot be seen visually or by radar. Thus, United Airlines could not have avoided the turbulence or warned the passengers to fasten their seatbelts. The district court agreed with United Airlines and granted it judgment as a matter of law.

****4** [7] We review a district court's grant of judgment as a matter of law *de novo*,"asking whether the evidence presented, combined with all the reasonable inferences permissibly drawn therefrom, is sufficient to support the verdict when viewed in the light most favorable to the party against whom the motion is directed." *Lane v. Hardee's Food Systems, Inc.*, 184 F.3d 705, 707 (7th Cir.1999).

In this case, Barber did not introduce enough evidence to support her claim. Specifically, she failed to introduce any evidence demonstrating that United Airlines could have predicted (and thus either have

avoided or warned passengers about) the turbulence which caused her alleged injuries. Rather, the undisputed evidence established that the turbulence which Flight 516 struck was what is called "clear air turbulence." Clear air turbulence cannot be seen either visually or by radar. Additionally, the evidence established that United Airlines had no other warning of ***439** the clear air turbulence, as Captain Kainer had flown the same route earlier in the day and had not experienced any clear air turbulence, and no other pilots who had flown that same route had called in reports of turbulence. Because there was no way that United Airlines could have known of the presence of clear air turbulence, it could not have avoided the turbulence or warned Barber of its presence.

[8] Barber responds by arguing that she was entitled to get to the jury because she presented evidence that Captain Kainer had flown through a thunderstorm. The evidence she refers to is her own trial testimony; Barber testified that after the incident while she was waiting inside the airport to return home, Captain Kainer came up to her and told her that he had flown through a thunderstorm. This (i.e. at trial) was the first time that she made such a claim, having never mentioned this alleged statement in the pleadings or during discovery. In fact, she was thoroughly questioned in her pre-trial deposition about her conversation with the pilots immediately after the flight. She then said that one pilot told her they had no prior warning of bad weather. He thought it was fog. She said nothing about the pilot telling her they flew through a thunderstorm. Barber claims that she only remembered this statement after she saw Captain Kainer testifying at trial.

Initially, we note that no other witnesses claimed that the plane flew through a thunderstorm. In fact, several of Barber's coworkers (including her sister) testified that the day was sunny and beautiful, and they mentioned nothing about a storm. Nor were there any weather reports confirming thunderstorms at that time and in that location. In fact, the weather reports for that day in St. Louis, Missouri showed only a trace of water at 3:00 p.m., and by 4:00 p.m. there was only 1/100 of an inch of rain, and by that time Flight 516 had passed through St. Louis and had landed at O'Hare. Both pilots also testified as to the weather conditions, and stated specifically that they did not fly through a thunderstorm. Captain Kainer also testified that the weather information he had received prior to leaving New Orleans was that "there was some activity that was developing that was supposed to come into the Midwest maybe at the end of the evening, into that night," but the flight took place in the early-to-mid afternoon. Thus, Barber's last-minute recollection contradicts all of the other evidence, including her own deposition. And while we must be careful to avoid "supplanting our view of the credibility or the weight of the evidence for that of the jury," to avoid judgment as a matter of law a party must present "more than a mere scintilla of evidence." *Lane*, 184 F.3d at 706 (internal quotation omitted). In light of the entire record and the overwhelming contradictory evidence, Barber's self-serving statement that Captain Kainer had told her that he had flown through a thunderstorm constitutes, at best, a mere scintilla of evidence, and thus is insufficient to support her claim of negligence.[FN5]

> FN5. This statement also does not contradict the other trial evidence which established that the turbulence was clear air turbulence, as opposed to thunderstorm-related turbulence. Thus, even considering this statement, Barber still has not presented any evidence that thunderstorms in the area caused the turbulence which led to her alleged injuries.

****5** [9] Next, Barber argues that the evidence supports her theory that United Airlines was negligent in failing to warn the passengers that it was approaching a weather system and that turbulence was possible. In support of this theory, Barber points to Captain Kainer's testimony that prior to striking the turbulence, he saw clouds and haze in front of him. Accordingly,***440** even if there were no thunderstorms in the vicinity, Barber asserts that because Captain Kainer saw clouds and a haze before experiencing the turbulence, he could have warned the passengers to fasten their seatbelts. While it is true that Captain Kainer stated that he saw clouds prior to striking the turbulence, he explained that they were "little cirrus type clouds, just-it might have been a haze layer," and that such clouds cannot cause the type of turbulence they experienced. Barber did not presented any evidence to the contrary. Moreover, she had the opportunity to cross-examine Captain Kainer and to ask whether it were possible that the clouds were something else or could have caused the turbulence. Yet that was not the testimony; rather, Captain Kainer explained that the clouds were unrelated to a weather

system and could not have caused the turbulence they experienced. Therefore, there is insufficient evidence to support this theory as well.

[10] Barber further contends that the evidence created a reasonable inference that Captain Kainer failed to properly use the plane's radar, having turned it on only seconds before the incident. She argues that this constituted negligence. Initially, we note our skepticism of Barber's portrayal of the evidence. While Captain Kainer did note that he had turned on the radar only a few minutes before the plane pitched up, he definitively stated that the radar was on, warmed up, and that he had a clear picture of the flight path prior to encountering any turbulence. Barber challenges this evidence with her own last-minute recollection that Captain Kainer had told her that he did not have the radar on at all. This testimony contradicted her own diary in which she stated that Captain Kainer had told her that he got no warning from the radar. In any event, even if Captain Kainer failed to properly use the radar during the flight, Barber still could not succeed on her negligence theory because the evidence established that the turbulence which caused her alleged injuries was clear air turbulence, and that clear air turbulence can not be detected by radar. Therefore, any alleged negligence did not cause Barber's alleged injuries.

C. Standard of Care

On appeal, Barber also argues that the district court improperly determined the appropriate standard of care. Prior to trial, the district court concluded that 14 C.F.R. § 91.13(a) establishes the standard of care at issue: "No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another." Barber asserts that the appropriate standard is set forth in 49 U.S.C. § 44701(1)(A), which provides "the duty of an air carrier [is] to provide service with the highest possible degree of safety in the public interest." Barber also cites the standard of care section in Section 44702 which recognizes "the duty of an air carrier to provide service with the highest possible degree of safety in the public interest." 49 U.S.C. § 44702. Thus, according to Barber, United Airlines owed her a duty of the "highest possible" care. We need not decide this issue today, however, because no matter how high the standard of care, as discussed above, Barber has failed to present sufficient evidence to support her claim against United Airlines under any standard of care because there is no evidence from which a reasonable jury could conclude that United Airlines could have foreseen (and thus warned about or avoided) the turbulence.

D. Missing Evidence Instruction

**6 [11] Finally, Barber argues that the district court erred in concluding that she was not entitled to a missing evidence instruction. Specifically, Barber contends that United Airline's failure to present certain*441 documents pertaining to the weather at the time of the flight justifies giving a missing evidence instruction. In support of her position, she cites *Niehus v. Liberio*, 973 F.2d 526, 530 (7th Cir.1992), wherein this court explained that such an instruction may be appropriate if "there is evidence that a party would surely have introduced it had it been helpful, permitting an inference that the evidence would instead have helped his opponent." First, since this case never got to the jury, any issue of jury instructions is moot. Second, to the extent that Barber is really arguing that in considering the motion for judgment as a matter of law the district court should have inferred that the weather data destroyed by United Airlines favored Barber's case, no such inference is appropriate here because the evidence established that the records were destroyed in the ordinary course of business. Moreover, the records Barber complains were destroyed consisted merely of the weather forecast provided to the pilots prior to the flight, and since Barber obtained independent reports as to the actual conditions that day, the missing reports would still be insufficient to create an issue of fact for the jury because those reports merely predicted weather conditions. The evidence established the actual conditions the plane encountered, namely, clear air turbulence which cannot be seen and thus cannot be avoided or warned against.

III. Conclusion

While there is no dispute that United Airlines Flight 516 struck turbulence en route from New Orleans to Chicago and that the plaintiff Geraldine Barber was injured, Barber has failed to present sufficient evidence to establish negligence on United Airlines' part, no matter how high the standard of care, because the undisputed evidence establishes that the turbulence was clear air turbulence which could not

have been predicted. The district court also did not abuse its discretion in barring Barber's proffered expert because in formulating his opinion Dr. Hynes selectively considered the pilots' testimony and the weather reports and thus his opinion lacked a scientific basis. For these and the foregoing reasons WE AFFIRM.

RIPPLE, Circuit Judge. I concur in the result.
C.A.7 (Ind.),2001.
Barber v. United Airlines, Inc.
17 Fed.Appx. 433, 2001 WL 950885 (C.A.7 (Ind.))

END OF DOCUMENT

TAB D

LEXSEE 1992 US DIST LEXIS 13676

BASF CORPORATION, Plaintiff, v. THE OLD WORLD TRADING COMPANY, INC., Defendant.

CASE NO. 86 C 5602

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1992 U.S. Dist. LEXIS 13676

September 8, 1992, Decided
September 8, 1992, Filed; September 9, 1992, Docketed

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

JUDGES: LEINENWEBER

OPINION BY: HARRY D. LEINENWEBER

OPINION

JUDGE LEINENWEBER

MEMORANDUM OPINION AND ORDER

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

Rule 59(e) Motion

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

"The court has previously granted Old World's motion for summary judgment on Count II. The court reserves jurisdiction [*2] over the award of costs, attorney's fees, and prejudgment interest."

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

The basis for the court's Finding of Fact was the testimony of George Beck ("Beck") and other witnesses called by BASF, and the absence of any direct evidence of sales of the Dearborn formula to Old World customers in 1988, even though there [*3] was some evidence that Old World continued to blend the Dearborn formula at some of its blending stations.

Specifically, Beck, a salesman for Dearborn in charge of the Old World account, testified that Dearborn lost the Old World account for the 1988 season, when Old World went exclusively with the Peak formula and gave Dearborn no more orders (Tr. 1225-1226). Richard

Tumm, Dearborn's director of sales, testified in a similar vein (Tr. 444 and 458- 459). John Hurvis, Old World's chairman, testified that the relationship with Dearborn ended on or about that date (Tr. 612 and 632-633). The evidence to the contrary consisted of blending records which indicate some blending may have occurred after April 1, 1987 (presumably with leftover Dearborn inhibitors in stock). There was also testimony of Larry Birch ("Birch") of Citgo attempting to interpret a reference in a memorandum to the effect that Old World was holding 90,000 gallons of the Dearborn formula for sale by Citgo. However, in the same memo, Birch is advised of the BASF lawsuit against Old World based on the formula failing to met Ford's specifications. There was no evidence that Citgo ever sold or even took possession of this [*4] product.

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

3. BASF also claims that the court's market share analysis improperly used the entire antifreeze market instead of just the private label market. It contends that its share of the non-Old World private label market was 28 percent in 1985 and rose to 34 percent in 1988, instead of the 15.6 percent to 21.2 percent [*5] of the total antifreeze market utilized by the court in its damage calculations. However, BASF did not introduce evidence of the respective market shares in the private label market.

BASF in its reply brief explained how it computed its percentage of the private label market. It deducted the market share percentage of Union Carbide, manufacturer of Prestone, from the total market and computed BASF's percentage share of that remaining on the theory that all of Union Carbide's market share was in the branded market. However, the evidence disclosed that Union Carbide was a strong player in the private label market and did not exit this portion of the antifreeze market until near the end of the 1987 antifreeze year [1] (Finding of Fact No. 20). Thus, during the damage period as established by the Findings of Fact, Union Carbide was a strong competitor of BASF in the private label market. *See* Defendant's ex.D. It may well have been the competition provided by Old World that led Union Carbide to the decision to get out of the private label market, which, of course, greatly benefited those that remained in it, such as BASF and old World. Therefore, in the absence of direct testimony [*6] on the subject, to conclude what the respective market shares are of the private label market would require the court to undergo a great deal of speculation, which the court is unwilling to do.

1 It should be recalled that the antifreeze year runs from April 1 of the previous year to March 31 of the year in question. *See* Findings of Fact and Conclusions of Law, p.4 n.1.

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

It was clear from the testimony of representatives of each of the customers in question who were called to testify by BASF and Old World, that each was angered at BASF because of perceived price inflexibility, that each had a relationship with one or more of BASF's other private label competitors before it purchased from Old World, that each considered others at the time it was considering purchasing from Old World, and that some of them did purchase a portion of their requirements from others besides Old World. In fact, both Citgo and Phillips had actually terminated BASF as a supplier before awarding the business to Old World. Phillips said it would not have purchased from BASF under any circumstances. Findings of Fact Nos. 50 and 51. The court rejected Old World's argument that it should award BASF nothing for these accounts [*8] (and the five others to which there was no testimony) because it was possible in a market where Old World was not making misrepresentations that BASF might well have been more competitive (Finding of Fact No.54). However, being competitive is not the same as getting orders. It is not

enough to say that the accounts had they not gone to Old World would have gone (or remained) with BASF. *"Post hoc ergo propter hoc* will not do. . . ." *Schiller & Schmidt, Inc. v. Nordisco Corporation,* Nos. 91-2195, 91-2781, slip op. 10-11 (7th Cir. July 23, 1992). The short of the matter is that BASF presented damage opinion evidence that gave the court no alternative short of total victory, to which it was clearly not entitled. The court attempted to fashion as fair an award as possible under the circumstances and the evidence. This is all it was required to do. *Otis Clapp, at 744.* The court declines to alter the award of damages or the Findings of Fact in support of them.

4. BASF complains next about the court's failure to order disparagement of profits, enhancement, or punitive damages. Under the Lanham Act, an award is governed by equitable principles. The court exercised its discretion [*9] in declining to apply any of these three elements to the award. The court sees no reason to alter these portions of the court's Conclusions.

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

Old World's Counterclaim

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

Rule 52(b) Motion

Request to Amend Findings

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

Finding No. 37

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

Finding No. 33

The court found that Old World had misrepresented its product by claiming that it met certain specifications for which it had not [*10] tested. The purpose of quality control it to insure that a product is within certain specifications. Since the Old World product was not within specifications, quality control is irrelevant, unless it claimed that it performed to a certain quality control level, which Old World did not.

Finding No. 17

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

Finding No. 34

The court found that the Old World product met the Cummins' specification. By that, the court [*11] meant to find that the Old World product met the Cummins' low silicate level. Accordingly, the court will amend the last sentence of Finding No. 34 to read as follows:

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

Finding Nos. 37 and 38

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

CONCLUSION

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

IT IS SO ORDERED.

HARRY D. LEINENWEBER, Judge

United States District Court

DATED:*SEP 8 1992*

TAB E

HOnly the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.
Carolyn H. BROWN, Plaintiff,
v.
PRIMERICA LIFE INSURANCE COMPANY, d/b/a Primerica, a corporation, Defendant.
No. 02 C 8175.

April 29, 2006.

Benjamin Obi Nwoye, Mendoza & Nwoye, P.C., Chicago, IL, for Plaintiff.
Daniel J. Zollner, Ross Dixon & Bell, LLP, Chicago, IL, for Defendant.

MEMORANDUM OPINION

CHARLES P. KOCORAS, Chief District Judge.
*1 This matter comes before the court on the motion of Defendant Primerica Life Insurance Company ("Primerica") to strike the supplemental affidavit and to exclude any testimony of putative handwriting expert Curtis Baggett. For the reasons set forth herein, the motion is granted.

BACKGROUND

Plaintiff Carolyn Brown ("Carolyn") is the widow of Terrance Brown ("Terrance"), son of Alberta Brown ("Alberta"). Before Carolyn and Terrance were married, Terrance purchased a life insurance policy from Primerica. Initially, Alberta was the named beneficiary of the policy. In 2000, after the couple married, Terrance substituted Carolyn as the beneficiary. Approximately two years later, Terrance and Carolyn separated, and Terrance moved into his mother's home.

On August 23, 2002, a man identifying himself as Terrance Brown entered a Primerica office in Chicago. He informed the agent, Francis Giroux, that he wished to change the beneficiary of his life insurance policy from Carolyn back to Alberta. He also stated that he wanted to make his premium payment. Giroux elicited the necessary biographical information to complete the form, which was then signed. He did not request that the man produce any form of identification. A premium payment was also made via Western Union money order.

About two weeks later, Terrance drowned off the coast of Massachusetts.

According to the terms of the policy, a change of beneficiary is effective on the date that Primerica receives written notice from the insured that the change is desired. Based on the form Giroux submitted as well as an informal internal investigation, Primerica determined that a change of beneficiary had been effected on August 23 and that Alberta was the beneficiary of the policy at the time of Terrance's death. Accordingly, the proceeds of the policy were paid to Alberta.

Carolyn disputes the validity of the August 23 change of beneficiary. She contends that the man at Giroux's office was not Terrance and thus that the form he executed has no legal effect on the terms of the policy. According to Carolyn, the operative document is the 2000 change of beneficiary, which names her, not Alberta, as the designated recipient of the policy proceeds. After various unfruitful conversations with Primerica in which she advanced the theory that the August 23 form was a forgery, Carolyn filed the instant suit, alleging that Primerica breached its contractual obligations under the policy by paying to Alberta rather than her.

Discovery was initially set to close on July 11, 2003. It was extended three times, to September 15, then November 17, and finally to December 1. On December 8, 2003, Primerica moved for summary judgment, and Carolyn followed suit at the end of the following February. In support of her motion, Carolyn supplied a four-paragraph affidavit from Baggett wherein he conclusorily opined that the August 23 signature was in fact a forgery. Primerica moved to strike the affidavit on the grounds that it was insufficient to satisfy Fed.R.Evid. 702. In conjunction with the reply for her motion for summary judgment, Carolyn filed a "supplemental" affidavit from Baggett, which set forth the same opinion embodied in the prior affidavit and provided some indication of the methods Baggett used to come to his conclusions.

We ordered that Carolyn produce Baggett for a voir dire hearing to allow us to determine if Baggett was qualified to provide expert testimony. The hearing was postponed a number of times and as yet has not taken place.

*2 Primerica filed the instant motion attacking the admissibility of Baggett's second affidavit for two reasons.[FN1] First, it argues that the opinion was not submitted in a timely fashion, making its exclusion mandatory under Fed.R.Civ.P. 37(c)(1). Second, it continues to press arguments with respect to the sufficiency of Baggett's qualifications and his proffered opinion.

> FN1. Primerica requested that the affidavit be stricken in the reply it filed in support of the motion to strike the original affidavit. Because Carolyn had no opportunity to respond to the arguments in the course of that briefing, we were unwilling to address the issue at that time. Thus, this is the first time that the request to strike is properly before us in a posture suitable for adjudication.

LEGAL STANDARDS

Rule 26(a)(2)(B) provides that expert witnesses must prepare and sign a written report containing a complete statement of all opinions to be expressed. The statement must provide the basis and reasons for the opinions, the data the expert considered in reaching the opinion, the witness's qualifications, and other specified information. Rule 26(e)(1) provides that if any correction or addition is necessary to provide complete disclosure of an expert opinion, that process must take place before the time for disclosure has expired under Rule 26(a)(3). The sanction for failure to abide by these rules can be substantial; Rule 37(c)(1) states that "[a] party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) ... is not, unless such failure is harmless, permitted to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed."

Admissibility of expert testimony is governed by Fed.R.Evid. 702. The rule provides that if "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case," the expert will be allowed to offer testimony regarding his or her opinion. When expert scientific testimony is proffered, the court must serve as a gatekeeper and exclude the testimony unless the expert's testimony is based on scientific knowledge rather than speculation, and the testimony will assist the trier of fact in determining a factual issue in the case. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591 (1993); *Chapman v. Maytag Corp.*, 297 F.3d 682, 686 (7th Cir.2002). Professed scientific knowledge will not be acceptable unless the expert employs the scientific method and supports the outcome with appropriate validation. *Daubert*, 509 U.S. at 590. The term "scientific" indicates "a grounding in the methods and procedures of science" and the term "knowledge" indicates "more than subjective belief or unsupported speculation." *Porter v. Whitehall Laboratories, Inc.*, 9 F.3d 607, 613 (7th Cir.1993). In determining whether testimony is based upon scientific knowledge and thus is reliable, the court should consider whether the hypothesis can and has been tested, whether the hypothesis has been the subject of peer review and publication, the "known or potential rate of error" for the method or theory, and whether the scientific community generally accepts the hypothesis as true. *Daubert*, 509 U.S. at 594.

*3 With these principles in mind, we turn to the motion at hand.

DISCUSSION

According to Primerica, the information contained in Baggett's supplemental affidavit was not disclosed to it until the affidavit was filed in conjunction with Carolyn's response to the motion to strike the initial affidavit. Carolyn does not dispute this contention; her only response is that the affidavit supplemented her prior disclosure and thus was proper under the rules. She relies upon the first sentence of Rule 26(e)(1), which states that "[a] party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing."

Carolyn's argument fails for two independent reasons.

First, as described above, Rule 26(a)(2) requires that experts provide a report containing a complete statement of the opinion to be proffered and the informational and methodological components that led to the ultimate opinion. Under Carolyn's formulation of the process, rather than abiding by this rule in the first instance, a party can supply a vague and conclusory expert statement and wait to comply with this provision until a report is challenged in a motion to strike. This completely defeats the purpose of the disclosure process, making it possible to delay full disclosure until after the time for discovery has elapsed. As Primerica notes, this scenario is precisely what took place in this case, and it is foreclosed both from deposing Baggett or supplying its own expert to counter his conclusions. The prejudicial effect to Primerica of allowing Carolyn to benefit from this course of action is clear.

Second, as also described above, the second sentence of Rule 26(e)(1) specifically refers to the manner in which expert testimony is to be supplemented. It unequivocally states that any supplementation must be done within the time that disclosures are due under Rule 26(a)(3). Our direction to the parties was to complete all discovery, including anything pertaining to experts, by November 17, 2003. The supplemental affidavit, filed April 27, 2004, is not timely. Rule 37(c)(1) addresses the consequences of untimely disclosure. Unless the party proffering the information has a substantial justification for the failure to provide it in a timely manner or the failure is harmless, it may not be used as evidence. Carolyn has provided no justification for her failure, and Primerica's inability to explore Baggett's assertions or counter them precludes any possibility that the failure could be deemed harmless. Accordingly, the supplemental affidavit will be stricken.

Without the supplemental affidavit, the only testimony Baggett could give in this case would be limited to that advanced in the initial affidavit. In its entirety, Baggett's affidavit states the following:

***4** I have examined four documents purported to have been written and signed by Terrance Brown. For the purpose of this examination, I have labeled these exhibits "K1" [sic], "K2", "K3", and "K4". Today, I have compared the known signatures and handwriting of Terrance Brown on the "K" exhibits to a questioned document identified herein as "Q 1", to determine if the same author signed Terrance Brown's name to the questioned document. It is my professional expert opinion that a different person authored the questioned document "Q1". Someone indeed forged Terrance Brown's name on the insurance agreement and authorization section on the "Q1" document. I am willing to testify to this fact in a court of law and I will prove to the court that my opinion is correct.

This affidavit is unquestionably inadequate to underlie expert testimony. First, it offers no hint of what comprised Baggett's comparison of the two documents; we have no information that would allow a determination of whether he employed any methodology at all, let alone whether it could be separated from "subjective belief or unsupported speculation." *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590, 113 S.Ct. 2786 (1993). Second, he gives no explanation of the basis for or reasons behind his opinion that document Q1, the August 23 beneficiary change form, was forged. Baggett has provided no information whatsoever to enable this court to assess whether it satisfies any of the criteria listed in Rule 702. "An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process." *Mid-State Fertilizer Co. v. Exchange Nat'l. Bank of Chicago*, 877 F.2d 1333, 1339 (7th Cir.1989); *see also McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 657-58 (7th Cir.1998).

Based on the materials provided by Baggett, we are simply to take his word blindly, which is not a course that we can or will follow. *See Minasian v. Standard Chartered Bank*, 109 F.3d 1212, 1216 (7th Cir.1997). Even assuming that Baggett is qualified to render the opinion he states, a point on which we make no comment,[FN2] there is no indication that he applied any specialized knowledge or skills to the task he was asked to perform. *See Huey v. United Parcel Serv., Inc.*, 165 F.3d 1084, 1087 (7th Cir.1999). As the court in *Minasian* said, "an expert's report that does nothing to substantiate this opinion is worthless, and therefore inadmissible."*Id.* Thus, Baggett cannot offer any knowledge that would assist a jury in understanding the evidence or determining any facts in issue in this case, his testimony is not admissible under Rule 702.

FN2. Because we cannot analyze the viability of Baggett's methodology as required by

Daubert and its progeny, no purpose is served by examining whether his credentials would permit him to offer expert testimony.

CONCLUSION

Based on the foregoing discussion, the motion to strike the supplemental affidavit of Curtis Baggett and to exclude him as an expert witness is granted.

N.D.Ill.,2006.
Brown v. Primerica Life Ins. Co.
Not Reported in F.Supp.2d, 2006 WL 1155878 (N.D.Ill.)

END OF DOCUMENT

TAB F

Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.
Jane DOE, a Minor, By and Through her Guardians and Next Friends, G.S. and M.S., Plaintiffs,
v.
TAG, INC., n/k/a Childserv, Susan Clement, and Robin and David Swaziek, Defendants.
No. 92 C 7661.

Dec. 14, 1993.

MEMORANDUM OPINION AND ORDER

CONLON, District Judge.

*1 Jane Doe, through her guardians and next friends G.S. and M.S. (collectively "the plaintiffs"), sues Tag/ChildServ ("Tag"), Susan Clement ("Clement"), a Tag supervisor, and Robin and David Swaziek, Doe's former foster parents ("the Swazieks"), for placing and keeping Doe in a foster home in which she allegedly suffered severe physical and psychological abuse.[FN1] The plaintiffs and defendants moved *in limine* to exclude evidence. Tag and Clement move for reconsideration of some of the court's rulings.

DISCUSSION

1. Motion For Reconsideration

A motion for reconsideration serves a limited purpose. The court's rulings "are not intended as first drafts, subject to revision and reconsideration at a litigant's pleasure." *Quaker Alloy Casting v. Gulfco Industries, Inc.,* 123 F.R.D. 282, 288 (N.D.Ill.1988). Nevertheless, a motion for reconsideration may be proper to correct manifest errors of law or to present newly discovered evidence. *See Publishers Resource, Inc. v. Walker-Davis Publications, Inc.,* 762 F.2d 557, 561 (7th Cir.1985); *Lewis v. Hermann,* 783 F.Supp. 1131, 1132 (N.D.Ill.1991). Although a motion for reconsideration is not a vehicle for introducing new evidence or legal theories that could have been introduced prior to the earlier ruling, it may be appropriate when "the Court has patently misunderstood a party ... or has made an error not of reasoning but of apprehension." *Bank of Waunakee v. Rochester Cheese Sales, Inc.,* 906 F.2d 1185, 1191 (7th Cir.1990).

2. Evidence Regarding James C.

Tag moved to exclude evidence regarding James C., another foster child who was placed in the Swazieks' home. In denying Tag's motion *in limine,* the court found that evidence regarding James C. was relevant to this case and was not "substantially outweighed by the danger of unfair prejudice" to the defendants. *See*Fed.R.Evid. 403; Memorandum Opinion and Order, No. 92 C 7661 (N.D.Ill. Nov. 16, 1993) at 7-8.[FN2]

The court noted that evidence is excluded on a motion *in limine* only if it clearly is not admissible for any purpose. *See Hawthorne Partners v. AT & T Technologies, Inc.,* 831 F.Supp. 1398, 1400 (N.D.Ill.1993). The court recognized one possible purpose for introducing evidence regarding James C.-proving Tag's negligence in placing Doe with the Swazieks.

On reconsideration, Tag contends that the court's reasoning was exclusive. Tag understands the court's ruling to mean that evidence regarding James C. may be introduced only for the limited purpose of proving Tag's negligence in placing Doe with the Swazieks. Tag argues that because Doe was placed with the Swazieks prior to James C.'s placement,[FN3] evidence regarding James C. is irrelevant and must be excluded.

Tag misconstrues the court's ruling, as well as the purpose of a motion *in limine.* By recognizing one possible purpose for introducing evidence regarding James C., the court was not limiting the introduction of the evidence to one purpose, but was demonstrating that the evidence is not clearly inadmissible. After noting that there is at least one legitimate purpose for the introduction of evidence regarding James C., the court deferred ruling until trial-where questions of foundation, relevancy, and potential prejudice can be resolved in their proper context. *See The Middleby Corp. v. Hussman Corp.,* 1993 WL 15129 *1 (N.D.Ill. May 5, 1993). Although James C. was placed with the Swazieks after Doe, it still may be possible to establish Tag's negligence for not remov-

ing Doe from the Swazieks' earlier. Because the evidence is not clearly inadmissible, the court's earlier ruling will not be disturbed on reconsideration.

3. Expert Testimony

*2 Clement moved to exclude expert testimony concerning Doe's current medical condition and future mental state. In denying Clement's motion, the court noted that the plaintiffs had informed the defendants that their experts would testify about Doe's current and future medical condition. The court also rejected Clement's contention that the plaintiffs' experts would be testifying on mere surmise or conjecture. *See* Memorandum Opinion and Order, No. 92 C 7661 (N.D.Ill. Nov. 16, 1993) at 2-4. In moving to exclude the expert testimony, Clement contended that the plaintiffs never disclosed that their experts would testify concerning Doe's current or future medical needs. On reconsideration, Clement concedes that the plaintiffs did notify the defendants of the content of their expert testimony, but argues that the notice was late. After contending in her motion *in limine* that the plaintiffs never disclosed the content of their expert testimony, Clement cannot raise on reconsideration the new argument that the disclosure came after the discovery cutoff date. *See Lewis v. Hermann,* 783 F.Supp. 1131, 1132 (N.D.Ill.1991) (party may not raise new argument on reconsideration that could have been raised in earlier proceeding).[FN4]

Clement contends that the plaintiffs' experts are not qualified to render expert opinions. The court has ruled that the experts are qualified to offer expert opinions "based on their clinical experience in addition to their work with Doe." Memorandum Opinion and Order, No. 92 C. 7661 (N.D.Ill. Nov. 16, 1993) at 3. On reconsideration, Clement cites apparent admissions that the experts are not qualified, and asserts that the plaintiffs' experts have no basis upon which to render expert opinions regarding Doe's current or future condition. However, Clement fails to note that the quoted statements were made in June and July. In the past four months the experts have been able to acquaint themselves with the case more fully through a review of Doe's files. There is no question that the experts are qualified to testify on Doe's current or future condition based on their clinical experience. The court's ruling that the plaintiffs' experts are qualified is sound, and will not be disturbed.

4. Prior Abuse In The Swaziek Household

Clement moved to exclude evidence that Robin Swaziek and Christie Stimpson were abused by a family member who did not live with the Swazieks. The court denied Clement's motion *in limine* because her arguments were conclusory, and she failed to meet the burden of showing that the evidence was inadmissible for any purpose. Memorandum Opinion and Order, No. 92 C 7661 (N.D.Ill. Nov. 16, 1993) at 4-5. The court noted that "it is not clear exactly what evidence Clement seeks to exclude." *Id.* at 5 n. 4.

Clement seeks a modification of the court's ruling so as to prohibit the plaintiffs from alluding to alleged abuse sustained by Robin Swaziek and Christie Stimpson in their opening statement. Clement is concerned that any allusion to other abuse in the Swaziek home "without a proper foundation risks poisoning the jury with potentially irrelevant, inflammatory and prejudicial comments." Motion at 2. Clement's motion is identical to her motion *in limine.* Clement once again makes conclusory statements without identifying the evidence she wishes to exclude. She fails to demonstrate why evidence of other abuse is unfairly prejudicial or even what that evidence is. Nevertheless, Clement correctly notes that such unproven allegations may be highly inflammatory, and may prejudice the jury if they are presented in the opening statement. Clement's motion for modification is granted. The plaintiffs may not allude to other alleged abuse in the Swaziek household in their opening statement.

CONCLUSION

*3 Defendant Tag/ChildServ's motion for reconsideration and defendant Susan Clement's motion for reconsideration are denied; defendant Susan Clement's motion for modification is granted.

FN1. The complaint named the Illinois Department of Child and Family Services ("DCFS"), and caseworkers and administrators of the DCFS. These defendants have been dismissed from this action. *See* Memorandum Opinion and Order, No. 92 C 7661 (N.D.Ill. Feb. 23, 1993); Memorandum Opinion and Order, No. 92 C 7661 (N.D.Ill. Oct. 18, 1993).

FN2. It is worth noting that Tag, the moving party, is not the defendant in danger of being unfairly prejudiced by the introduction of the evidence regarding James C.

FN3. The court was led to understand that James C. had been placed with the Swazieks before Doe because the sequence of events was not well-delineated in Tag's motion.

FN4. Clement's position is further undermined by the fact that the plaintiffs disclosed the content of their experts' testimony of August 16, yet the defendants never moved to reopen discovery.

N.D.Ill.,1993.
Doe By and Through G.S. v. Tag, Inc.
Not Reported in F.Supp., 1993 WL 524773 (N.D.Ill.)

END OF DOCUMENT

TAB G

Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.
Marie HEFLIN, Plaintiff,
v.
CITY OF CHICAGO, a municipal corporation, Officer Lester Smith (#146870), and Officer Tasha C. Bush (#11224), Defendants.
No. 95 C 1990.

Jan. 22, 1996.

MEMORANDUM OPINION AND ORDER

CONLON, District Judge.

***1** Plaintiff Marie Heflin sues the City of Chicago ("the city") and police officers Lester Smith and Tasha C. Bush (collectively "defendants") for unlawful seizure and malicious prosecution under the fourth and fourteenth amendments to the United States Constitution and pursuant to 42 U.S.C. § 1983, and for false arrest and malicious prosecution under Illinois common law. Jury trial begins on February 5, 1996. The parties move *in limine* to exclude evidence from trial.

BACKGROUND

Heflin taught school for 19 years at Dyett School in Chicago. On May 18, 1994, police went to Dyett school to arrest another teacher, Gloria Hudson. In the process of arresting Hudson, Smith arrested Heflin and charged her with disorderly conduct; the charge was dismissed on July 5, 1994. Heflin did not finish the 1993-1994 school year after her arrest; she returned in September 1994 for the 1994-1995 school year. Heflin allegedly experienced a stressful 1994-1995 school year and retired at its conclusion at the age of 55.

DISCUSSION

I. *MOTION IN LIMINE STANDARDS*

Motions *in limine* are disfavored. *Hawthorne Partners v. AT&T Technologies, Inc.,* 831 F. Supp. 1398, 1400 (N.D. Ill. 1993). An order *in limine* excludes clearly inadmissible evidence. Evidence should not be excluded before trial unless it is clearly inadmissible on all potential grounds. Evidentiary rulings should be deferred until trial so questions of foundation, competency, relevancy and potential prejudice may be resolved in proper context.*Middleby Corp. v. Hussmann Corp.,* No. 90 C 2744, 1993 WL 151290, at *1 (N.D. Ill. May 7, 1993); *General Electric Capital Corp. v. Munson Marine, Inc.,* No. 91 C 5090, 1992 WL 166963, at *1 (N.D. Ill. July 8, 1992).*See generally*21 Charles A. Wright, Kenneth W. Graham, Jr., Federal Practice and Procedure §§ 5037, 5042 (1977 & Supp. 1993).

Denial of a motion *in limine* does not mean all evidence contemplated by the motion will be admitted at trial. Rather, denial means the court cannot determine whether the evidence should be excluded outside the trial context. The court will consider objections on individual proffers as they arise even though the proffer falls within the scope of a denied motion *in limine. See United States v. Connelly,* 874 F.2d 412, 416 (7th Cir. 1989) (citing *Luce v. United States,* 469 U.S. 38, 41 n.4 (1984)).

II. *MOTIONS IN LIMINE*

A. *Defendants' Joint Motions In Limine*

Defendants seek to exclude evidence or reference to ten different items. Heflin only responds to two of the ten items. The court addresses each motion individually.

1. *Motion to exclude evidence relating to other internal complaints filed against defendants*

Defendants seek to exclude evidence relating to complaints not at issue in this case filed against Smith and Bush with the office of professional standards or the Chicago Police Department arising out of Smith and Bush's employment. Defendants claim evidence of other complaints is inadmissible under Fed. R. Evid. 404 as propensity evidence relating to Smith and Bush's character. Defendants assert Heflin cannot meet her burden of proving the evidence is directed toward establishing a matter in issue other than Smith

and Bush's propensity to act unlawfully. Heflin fails to respond.

*2 In the Seventh Circuit, courts employ a four-pronged test to evaluate whether in their discretion evidence of prior acts should be admitted at trial. *See United States v. Zapata,* 871 F.2d 616 (7th Cir. 1989). The court must determine whether:

(1) the evidence is directed towards establishing a matter in issue other than the defendant's propensity to commit the crime charged; (2) the evidence shows that the other act is similar enough to and close enough in time to be relevant to the matter in issue; (3) the evidence is sufficient to support a jury finding that the defendants committed the similar act; and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

Id. at 620.Defendants argue that prior complaints against Smith and Bush are not probative of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Fed. R. Evid. 404(b).

The minimal probative value the evidence may have is substantially outweighed by the danger of unfair prejudice and confusion of the issues. *See*Fed. R. Evid. 403. Defendants maintain they will need to present evidence to rebut any prior complaints. This will necessitate a "trial within a trial" concerning Smith and Bush's prior conduct, consuming a great deal of trial time and confusing the jury on issues of slight probative value. *Jones v. Hamelman,* 869 F.2d 1023, 1027 (7th Cir. 1989). Accordingly, defendants' motion to exclude evidence of prior internal complaints against Smith and Bush must be granted.

2. *Motion to exclude Heflin's police department complaint unless the entire file is admitted into evidence*

Heflin filed a complaint against Smith and Bush with the police department alleging misconduct related to her arrest. The office of professional standards initiated a complaint register investigation against Smith and Bush. The complaint was not sustained. Defendants seek to exclude evidence relating to Heflin's complaint unless the entire file is admitted into evidence. They argue it would be unfair and prejudicial for jurors to know Smith and Bush were investigated without knowing the complaint was dismissed. Fed. R. Evid. 403. Heflin fails to respond.

The unopposed motion will be granted because the probative value of Heflin's complaint against Smith and Bush is substantially outweighed by the danger of unfair prejudice or misleading the jury if the outcome of the internal investigation is not presented into evidence.

3. *Motion to exclude evidence Smith and Bush violated police regulations, orders or training*

Defendants move to exclude evidence Smith and Bush violated police regulations, orders or training. Defendants argue violations of department rules and regulations do not necessarily violate the United States Constitution. *See Walker v. City of Chicago,* 91 C 3669, 1992 WL 317188, at *4 (N.D. Ill. Oct. 27, 1992). Neither can violations of department rules and regulations be used to prove defendants' negligence because Smith and Bush are immune to negligence claims as municipal employees acting in the execution or enforcement of the law. 745 ILCS 10/2-202. Heflin fails to respond.

*3 Violations of state ordinances and regulations do not give rise to a section 1983 action unless the ordinances and regulations govern rights guaranteed under the United States Constitution. *Walker,* 1992 WL 317188, at *4 (citing *Moore v. Marketplace Restaurant, Inc.,* 754 F.2d 1336 (7th Cir. 1985)).*Walker* excluded evidence regarding the violation of police department regulations because the jury might otherwise improperly assume a constitutional violation occurred. *Id.* However, *Walker* did not address a complaint alleging willful and wanton misconduct under Illinois law. Heflin alleges Smith and Bush acted willfully and wantonly. Defendants do not argue evidence of police regulation violations is inadmissible to prove willful and wanton misconduct. Evidence of police regulation violations is not clearly inadmissible if it may be introduced to show defendants' wilful and wanton misconduct. Accordingly, defendants' motion to exclude evidence of police department regulation violations must be denied.

4. *Motion to exclude evidence that the city indemnifies Smith and Bush for compensatory damage liability*

Defendants move to exclude evidence suggesting the

city indemnifies Smith and Bush for compensatory damage liability. Defendants argue indemnity is akin to insurance, reference to which is precluded by Fed. R. Evid. 411 to prove wrongful acts. Defendants claim the indemnity is irrelevant to the officers' individual liability and the city's *respondeat superior* liability. Defendants further contend references to the city's deep pockets is highly prejudicial. *See Walker,* 1992 WL 317188, at *3. This unopposed motion is granted.

5. *Motion to exclude reference to defense attorneys as assistant corporation counsel or employees of the city*

Defendants move to exclude Heflin's attorneys from referring to defense attorneys as assistant corporation counsel or employees of the city; such references are unduly prejudicial. *See Walker,* 1992 WL 317188, at *4. The motion is denied as overbroad. The court must identify counsel during jury selection to determine whether the *venire* has any knowledge of or relationship with counsel or their office. However, Heflin shall not refer to defense counsel as "Assistant Corporation Counsel" or "employees of the City of Chicago."

6. *Motion to exclude Heflin from raising recent events concerning police misconduct not at issue in the trial*

Defendants seek to exclude Heflin from referring to other police misconduct not at issue in the trial -- *i.e.,* the police involved with the O.J. Simpson and Rodney King cases -- as irrelevant and highly prejudicial. The unopposed motion is granted.

7. *Motion to exclude evidence relating to a disclaimer appearing on Smith and Bush's statements and reports*

Defendants argue police officers are required under threat of termination to answer and report all facts regarding incidents or alleged misconduct regardless of whether those statements may violate the officer's constitutional right against self-incrimination. Accordingly, allegedly at the behest of their union, police officers include a disclaimer in their report that their statement was given to the police department involuntarily and under duress. Defendants move to bar reference to the officer's disclaimers. Heflin does not respond.

*4 Defendants contend reference to the disclaimer will necessitate introduction of witnesses and documents from the police officers' union to explain the disclaimers -- unhelpful, collateral litigation. Defendants also make the ambiguous statement, "admission and comment on the disclaimer would compromise officers rights not to have statements effectively coerced from them."Memorandum at 13.

Defendants arguments are unpersuasive and not clearly articulated. Defendants fail to submit copies of the disclaimers and the officers' reports or statements. The court defers the requested evidentiary rulings until trial so defendants' questions of relevancy and potential prejudice may be resolved in proper context. Accordingly, defendants' motion to exclude reference to officers' disclaimers must be denied.

8. *Motion to exclude evidence that police officers cover-up or lie for their colleagues*

Defendants seek to exclude evidence that police generally protect or cover-up other officers' misconduct. *Sanders v. City of Indianapolis,* 837 F. Supp. 959, 963 (S.D. Ind. 1992). Defendants argue general allegations are irrelevant to defendants in this case. Fed. R. Evid. 401. They contend any probative value is substantially outweighed by the prejudicial effect on the jury.Fed. R. Evid. 403. The unopposed motion is granted.

9. *Motion to exclude evidence relating to Heflin's loss of future income*

Defendants seek to exclude evidence of Heflin's loss of future income due to her retirement at the end of the 1994-1995 school year. Defendants claim Heflin's evidence is speculative, misleading and unduly prejudicial. Defendants assert Heflin will be overcompensated for damages unrelated to her arrest. Heflin responds she was treated differently by her principal after the arrest by assignment to a more difficult classroom. Her physical and emotional state suffered following the arrest, eventually causing her to retire.

Heflin retired in June 1995 "because of the stress of

this incident."Deposition of Marie Heflin ("Heflin Dep.") at 20. Heflin explained, "There were so many stressful incidents and circumstances surrounding this.... [P]rimarily the working conditions and my physical and emotional state.... [M]y health and a difficult classroom assignment ... and diminishing ability to function as a whole person in relationship to my family and friends."*Id.* at 20-21.

Heflin explained she was assigned a particularly difficult classroom for the 1994-1995 school year; most of the children had short attention spans and low achievement scores. *Id.* at 52.She stated the assistant vice principal, Ronald Warren, had problems with Hudson and gave Heflin the difficult assignment to be vindictive and as punishment for befriending Hudson. *Id.* Heflin thought Warren became angry with her the day she was arrested. *Id.* at 62.She bases her opinion on Warren's facial expressions, demeanor and because he did not speak to her. *Id.*

***5** Heflin surmised her difficult assignment was punishment because the school counselor told her she "had a very good class and he had never done that before."*Id.* at 56.Heflin thinks the counselor was deceiving her because the children who tested well were removed from her class and placed in a gifted program, leaving her with the slower children. *Id.* at 58-59.The classroom was not labelled as abnormal; it was a "regular class." *Id.* at 53.

Heflin took an early retirement at age 55 in June 1995. *Id.* at 206.Heflin thinks her arrest caused her to retire early because she could not handle her classroom after the arrest. *Id.* at 209.However, she agreed the basic reason she retired was because of Warren's vindictiveness in giving her a difficult classroom. *Id.* at 210.She blames Warren's vindictiveness on befriending Hudson the day of her arrest. *Id.*

Heflin's annual pension benefit on early retirement was approximately $16,000. *Id.* at 206.However, she paid $14,088 to receive an annual benefit of $20,000. *Id.*

A section 1983 defendant can only be held liable for what he or she did personally, not for the actions of others. *Eades v. Thompson,* 823 F.2d 1055, 1063 (7th Cir. 1987); *Walker,* 1992 WL 317188, at *2. Recovery of lost wages cannot be based on speculative, remote or uncertain testimony. *Turner v. Chicago Transit Authority,* 461 N.E.2d 551, 558 (Ill. App. Ct. 1984). Heflin argues her arrest was one of the proximate causes of her early retirement. Had she not been arrested, she claims the assistant vice principal would not have punished her by giving her a difficult classroom.

In *Walker,* the court granted the defense's motion *in limine* to exclude evidence of damage resulting from the towing of plaintiff's car following his arrest. *Walker,* 1992 WL 317188, at *2. Relying on *Eades,* the court reasoned while the officer may have had the plaintiff's car towed after his arrest,

plaintiff has not adequately demonstrated that [the officer] ordered plaintiff's car crushed after plaintiff failed to retrieve it from the auto pound. Since, introduction of this evidence may cause the jury to improperly ascribe the conduct of others to defendants, this court finds that evidence regarding damages to plaintiff's car is not admissible.

Id.

Walker is directly applicable here. Heflin does not proffer evidence that defendants played any role in her classroom assignment. She retired a year after she was arrested because she could not handle a difficult classroom; in her opinion she received the assignment as punishment for befriending Hudson the day Hudson was arrested. Heflin's evidence is even more tenuous than in *Walker.*In *Walker,* the only reason the car was at the auto pound was because the defendant officer had it towed there. In this case, Heflin relies solely on her intuition to surmise the assistant vice principal's motives, which she relates to defendants' conduct. Heflin seeks to improperly ascribe the conduct of the assistant vice principal to Smith and Bush. Accordingly, defendants' motion to exclude Heflin's evidence of loss of future income due to early retirement must be granted.

10. *Motion to exclude evidence that the complaint against Gloria Hudson was blank when signed*

***6** Hudson was charged with battery of Monique McClellan on the signed complaint of Jeanetta McClellan. Defendants concede Jeanetta McClellan may have signed a blank complaint against Hudson. Heflin was arrested for allegedly obstructing or interfering with defendants' arrest of Hudson. Heflin was

charged with disorderly conduct on the signed complaint of defendant Smith, the arresting officer.

Defendants seek to exclude evidence that the complaint against Gloria Hudson was blank when signed. Defendants contend Heflin was not charged based on Hudson's complaint; Heflin was charged with disorderly conduct on the complaint Smith signed. Defendants maintain Hudson's complaint is irrelevant to any issue at trial. They further assert evidence relating to Hudson's complaint is improper propensity evidence excludable under Fed. R. Evid. 404.

Heflin responds the complaint goes to Smith's credibility. Hudson's arrest report, which Smith signed, allegedly states, "[t]he above arrested upon signed complaints made by Monique McClellan (victim) and Jeannett [sic] McClellan (victim's mother)." Plaintiff's Response at 4. Heflin contends Monique never signed a complaint and Jeanetta signed the complaint in blank. Heflin asserts Hudson's arrest report and evidence relating to Hudson's complaint go to Smith's credibility; Smith allegedly lied in the arrest report.

Under Fed. R. Evid. 608(b), specific instances of a witness' conduct may be inquired into on cross-examination of the witness for the purpose of attacking credibility. Specific instances may not be proven by extrinsic evidence. *Id.* The probative value of a line of questioning relating to the Hudson complaint to impeach Smith is not substantially outweighed by the danger of unfair prejudice or undue delay. However, the Hudson complaint may not be admitted as evidence to prove Smith's untruthfulness. *See E.E.O.C. v. Learonal, Inc.*, No. 93 C 2950, 1994 WL 530711, at ** 6-7 (N.D. Ill. Sept. 29, 1994) (citing Fed. R. Evid. 608(b)). Accordingly, defendants' motion to exclude evidence relating to Hudson's complaint must be granted in part and denied in part. Heflin may inquire into the Hudson complaint on Smith's cross-examination, but may not introduce the complaint into evidence.

B. *Heflin's Motions In Limine*

1. *Motion to exclude defendants' expert witness*

Heflin seeks to exclude defendants' expert witness, Dr. Richard J. Goldberg. Dr. Goldberg is an emergency room doctor defendants proffer to provide expert testimony on the reasons for Heflin's hospitalization two days after her arrest. Heflin argues Dr. Goldberg was not identified until the last day of discovery and his opinion was not disclosed until a week after discovery closed. Heflin further contends Dr. Goldberg is not qualified to testify about Heflin's inpatient cardiac and gastrointestinal treatment. Defendants respond they offered on December 15, 1995, to make Dr. Goldberg available for a deposition before trial; Heflin declined because of the pending motion *in limine* to exclude Dr. Goldberg's testimony.

*7 Rule 26(a)(2) requires parties to disclose the identity of any person who may be used at trial as an expert witness. Fed. R. Civ. P. 26(a)(2)(A).Rule 26(a)(2) further provides that disclosure shall "be accompanied by a written report prepared and signed by the witness."Fed. R. Civ. P. 26(a)(2)(B). Parties must provide a signed, written statement of all opinions to be expressed and the basis for the opinions; the data used in forming the opinion; any exhibits to be used in support of the opinions; the witness' qualifications and compensation; and any other cases in which the witness has testified as an expert in the preceding four years. *See*Fed. R. Civ. P. 26(a)(2)(B). The rule states, "these disclosures shall be made at the times and in the sequence directed by the court."Fed. R. Civ. P. 26(a)(2)(C). In the absence of the court's specific direction, the disclosures "shall be made at least 90 days before the trial date or the date the case is to be ready for trial ...."*Id.*

Failure to comply with Rule 26(a)(2) precludes a party from using at trial expert testimony not timely nor fully disclosed. *See*Fed. R. Civ. P. 37; *Harlow v. Eli Lilly & Co.*, No. 94 C 4840, 1995 WL 319728, at *1 (N.D. Ill. May 25, 1995); Standing Order On Procedures To Be Followed In Cases Assigned To Judge Suzanne B. Conlon at 3. Rule 37(c)(1) provides that absent substantial justification and unless a failure to disclose is harmless, a party failing to disclose information shall not be permitted to use the witness at trial.Fed. R. Civ. P. 37(c)(1).Rule 37's sanction is designed to provide a strong inducement for disclosure of Rule 26(a) material. *See*Rule 37(c), advisory committee's note (1993).

The court initially ordered all discovery to be completed by September 25, 1995. *See* Order, No. 95 C 1990 (N.D. Ill. May 24, 1995). Subsequently, the court granted the parties' joint motion to extend discovery; all discovery was to be completed by No-

vember 27, 1995. The joint pretrial order was to be filed December 11, 1995, and the case was placed on the January 1996 trial calendar. *See* Order, No. 95 C 1990 (N.D. Ill. Sept. 11, 1995).

Defendants did not identify Dr. Goldberg until November 27, 1995 -- the last day of discovery and two weeks before the pretrial order was to be filed. *See* Pl. Ex. A. Defendants did not submit Dr. Goldberg's 26(a)(2)(B) report until December 4, 1995. On December 15, 1995, after the joint pretrial order was filed, defendants offered to make Dr. Goldberg available for a deposition. *See* Def. Ex. F.

Heflin's motion is persuasive. Under Rule 26(a)(2)(C), defendants were to disclose Dr. Goldberg at least 90 days prior to the pretrial submissions or at the latest 90 days prior to trial. Thus, the expert disclosure should have taken place in September or October, which would have allowed sufficient time for Heflin's discovery. Instead, defendants waited until the last day of discovery to identify Dr. Goldberg. Defendants also violated Rule 26(a)(2) by not disclosing Dr. Goldberg's written report until a week after discovery closed.

***8** Defendants argue they could not disclose Dr. Goldberg earlier because Heflin's doctor's records were not timely disclosed. On July 11, 1995, Heflin disclosed the medical records from the Little Company of Mary Hospital. *See* Def. Ex. A. On August 12, 1995, defendants served a subpoena for records only upon Heflin's doctor. *See* Def. Ex. B. The subpoena was to be complied with on August 25, 1995 -- more than three months before defendants identified Dr. Goldberg. *Id.* Defendants fail to persuade the court they could not comply with Rule 26(a)(2)'s disclosure requirements. Defendants' argument that there is still time to take Dr. Goldberg's deposition before trial is unavailing. The court will not circumvent Rule 37's inducement for full compliance with Rule 26(a)(2) and disrupt Heflin's trial preparation without substantial justification. Defendants fail to substantially justify their failure to comply with Rule 26(a)(2). Accordingly, Heflin's motion to exclude Dr. Goldberg from testifying at trial must be granted.

2. *Motion to exclude evidence regarding conduct for which Heflin was not charged*

Heflin seeks to exclude evidence she obstructed the defendant officers' arrest of Hudson. Heflin argues her arrest report includes a charge of obstructing a peace officer, but was crossed out; she was never charged with obstructing a peace officer. Nevertheless, she claims several witnesses stated or implied in depositions that Heflin obstructed Smith either verbally or physically. Heflin claims evidence relating to the obstruction charge is irrelevant and unfairly prejudicial. Defendants respond their probable cause to arrest Heflin is critical, even if Heflin was not eventually charged with an offense. Smith contends he was advised by his sergeant to only charge Heflin with the less-serious offense of disorderly conduct.[FN1]

Heflin's arguments are unpersuasive. Simply because she was not charged with obstructing a peace officer does not make the officers' alleged probable cause for arrest irrelevant. Officer Smith stated at his deposition that Heflin rushed to him as he was arresting Hudson and said he could not arrest Hudson. Deposition of Lester Smith ("Smith Dep.") at 105; Def. Ex. H. Smith told Heflin she was interfering with the police and said he was arresting her for interfering with the police. *Id.* Smith purportedly reduced the charge to disorderly conduct on the advice of his sergeant. *Id.* at 139-40.The arrest report reflects the charge of obstructing an officer was crossed out and changed to disorderly conduct. *See* Def. Ex. I. The arrest report narrative indicates Heflin was told to "not interfere in police business," but she refused to stop interfering. *Id.* The sergeant's statement to his supervisor indicated Heflin's arrest, "in reality should have been obstruction of a police officer. The lessor charge was chosen so as not to blow this situation out of proportion."Def. Ex. J. Finally, Jeanetta McClellan witnessed the arrest and observed Smith telling Heflin she was interfering with the arrest. Deposition of Jeanetta McClellan at 94-95; Def. Ex. K.

***9** The defendant officers' probable cause to arrest Heflin is a material issue in this case. "At the time of the arrest police officers need probable cause that *a* crime has been committed, not that the criminal defendant committed all the crimes for which he or she is later charged."*Calusinki v. Kruger,* 24 F.3d 931, 935 (7th Cir. 1994) (emphasis in original). Evidence relating to defendants' probable cause to arrest Heflin, and Heflin's alleged interference with Hudson's arrest, are material to the defense. Moreover, it is not clear the evidence relating to Heflin's alleged disorderly conduct is totally distinct from evidence relat-

ing to her alleged interference with Smith. Thus, Heflin fails to clearly establish prejudice substantially outweighs the probative value of evidence relating to her alleged interference with a peace officer. Accordingly, Heflin's motion to exclude evidence relating to conduct for which she was not charged must be denied.

C. *Motion to exclude evidence relating to Hudson's arrest not concerning Heflin*

Heflin moves to exclude evidence relating to Hudson's arrest not involving Heflin. Hudson was arrested for allegedly battering a student. Heflin contends evidence concerning Hudson's arrest before Heflin became involved is irrelevant to her claims and is unfairly prejudicial.

Defendants respond the totality of circumstances must be evaluated to determine an officer's probable cause for arrest. They assert the circumstances include the reason why Smith was at Dyett school to arrest Hudson. Defendants contend Smith was attempting to resolve negotiations among Hudson, Assistant Vice Principal Warren and the allegedly abused student's mother when Heflin allegedly began physically interfering, shouting and telling Smith he could not arrest Hudson.

Heflin's concern is justified. She is not on trial for battering a student; reference to the reason for Hudson's arrest may be unfairly prejudicial. However, evidence relating to events preceding Heflin's involvement may be probative and material to the defense. Explaining the events preceding Heflin's involvement may be admissible to determine Smith's probable cause for arresting Heflin. Heflin was not arrested in a vacuum -- the allegedly abused student's mother was present and involved in Hudson's arrest and the assistant vice principal was attempting to resolve an apparently difficult situation. Moreover, the student's mother witnessed Heflin's alleged interference and will testify. *See* Final Pretrial Order at Ex. D. The reasons for her presence at the school may be admissible for foundation purposes. The extent and limited purposes for which evidence relating to Hudson's arrest may be admissible are best resolved at trial. Accordingly, Heflin's motion to exclude evidence relating to Hudson's arrest not involving Heflin must be denied.

CONCLUSION

Motions *in limine* of the defendants and plaintiff are granted in part and denied in part.

FN1. Disorderly conduct is a municipal offense punishable by a fine of up to $500, Chicago Municipal Code § 8-4-010, while obstructing a peace officer carries a potential term of one year imprisonment. 720 ILCS 5/31-1; 730 ILCS 5/5-8-3. *See* Def. Ex. G.

N.D.Ill.,1996.
Heflin v. City of Chicago
Not Reported in F.Supp., 1996 WL 28238 (N.D.Ill.)

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TAB H

HOnly the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.
HOLDEN METAL & ALUMINUM WORKS, LTD., d/b/a "Holden Seamless Gutters," a business organized under the laws of the Republic of Ireland, Plaintiff,
v.
WISMARQ CORPORATION, et al., Defendants.
No. 00 C 0191.

April 3, 2003.

MEMORANDUM OPINION AND ORDER

ZAGEL, J.

***1** This dispute stems from Holden Metal & Aluminum Works' hiring of Morton International to identify a high quality weather-resistant protective color coating for use on the aluminum sheeting used in its gutters. Morton recommended its "Polyceram 340" two-coat system-consisting of its "Primer 45Y6" and Polyceran340 polyester resin-based top coating. Holden subsequently engaged Wismarq Corporation to provide and apply the protective coating to the coils of its aluminum sheeting. Subsequently, Holden discovered that the coating was chipping and flaking off the gutters made from the aluminum coils. As a result, Holden filed suit against Wismarq and Morton alleging breach of implied warranty, breach of contract, and breach of express warranty.

Wismarq has now moved to bar the testimony of Holden's purported expert, Kenneth Brown. Brown's opinion is that five purported reasons caused the failure of the coating: (1) variations in thickness of the primer and the topcoat; (2) variations in the time and temperature during the cure (drying) process; (3) variations in the peak metal temperature of the aluminum substrate during the process of coating and curing the coated aluminum sheet metal; (4) variations in the amount of pretreatment applied to the substrate; and (5) random and intermittent grease or oil on the aluminum substrate. Defendants claim that Brown's opinion fails to meet the standard for admissibility of scientific or technical expert testimony under Federal Rule of Evidence 702.

Rule 702 demands that expert testimony relate to scientific, technical knowledge, which does not include unsubstantiated speculation and subjective beliefs. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Initially, I must determine whether Brown's testimony is reliable, that is, whether it is based on reliable methodology. *Cummins v. Lyle Industries*, 93 F.3d 362, 368 (7th Cir.1996). Second, I must decide "whether evidence or testimony assists the trier of fact in understanding the evidence or in determining a fact in issue."*Id.; see also Masters v. Hesston Corp.*, 291 F.3d 985, 991 (7th Cir.2002). The law is clear that an expert must substantiate his opinion and that providing only an ultimate conclusion with no analysis is meaningless. *Clark v. Takata Corp.*, 192 F.3d 750, 757 (7th Cir.1999). A liability expert is only helpful to the fact finder if he is able to establish such an element of the claim through visual inspection, independent research, testing and knowledge. *Id.* Indeed, in *Clark*, the court noted:

> In determining whether an expert's testimony is reliable, the *Daubert* factors are applicable in cases where an expert eschews reliance on any rigorous methodology and instead purports to base his opinion on merely "experience" or "training." [citation omitted] "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert."[Citing *General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997)] Either "hands on testing" or "review of experimental, statistical, or other scientific data generated by others in the field" may suffice as a reasonable methodology upon which to base an opinion. [Citation omitted.]

***2** *Id.*

By his own admission, Brown's opinions are based on visual inspection of a lone piece of gutter, numerous testing reports and data, and his own "experience." There are problems with each of these bases. First,

Brown visually examined only one piece of failed gutter but performed no scientific testing or analysis on it or any other piece. He never asked to look at a piece of non-failed coil to compare it to the failed coil sample despite the fact that such samples were available. When asked why he did not conduct any analysis of his own, Brown responded that his assignment was to offer an opinion based only on the information samples that were made available to him. Under similar circumstances as above, the Seventh Circuit affirmed a district court's order barring an expert from testifying because "his opinion [was] based solely on his belief and assumption without any scientific testing data or supporting research material in the record." *Clark*, 192 F.3d at 758.The Court noted that the expert could have conducted testing, like that of the defense experts, but did not, instead offering nothing more than a "bottom line" conclusion that did not assist the trier of fact. *Id.* at 759.

Another problem is that Brown has failed to familiarize himself with existing data and research from prior tests regarding paint failure and to account for conclusions in such reports opposite to his own. After identifying numerous testing reports and data as "Documents and Information Considered" in his Rule 26 disclosures, Brown could not point to one single test conducted by anyone else in support of his theories. In contrast, many of the tests did not involve the coil at issue or that the conclusions reached by those conducting the tests were the opposite of his own. Brown attempts to dismiss these inconsistencies by saying that none of the reports he reviewed in this case were critical to his opinions and that he could have made his conclusions had he not read them. Under similar circumstances, the Seventh Circuit affirmed a district court's order barring an expert from testifying because the proffered expert did not adequately explain why he ignored certain facts and data while accepting others and failed to present any other data that supported his opinion. *Barber v. United Airlines, Inc.*, 17 Fed.Appx. 433, 437 (7th Cir.2001). Essentially, the expert "cherry-picked" the facts he considered to render his opinion, and such selective use of facts failed to satisfy the scientific method and *Daubert*. *Id.*

Putting aside Brown's other purported bases for his opinion, I am left with his final source-his own "experience." The initial problem with this basis is that although claiming to have some experience in designing tests for paint failure analysis, as well as in interpreting those tests, Brown cannot cite any specifics with regard to the kinds of tests or failure that were involved. This ignorance is inexcusable for a purported expert. In addition to this underwhelming experience in failure analysis, Brown fails to "explain how [his] experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." *Indiana Ins. Co. v. Valmont Electric Inc.*, No. TH97-0009-C-T/F, 2001 WL 1823587 (S.D.Ind. Dec.27, 2001). Simply put, he fails to adequately explain his reasoning and methodology for arriving at his opinions. In *Indiana Insurance Co.*, the Southern District of Indiana faced a similar situation. In that case, the Court held that the expert's purported testimony-essentially "I have seen a lot of fires and if the capacitor explodes it is always caused by an internal, as opposed to external fire"-was insufficient to satisfy the *Daubert* standards. *Id.* The court explained:

> ***3** Given the absences of a stated reasoning or methodology, the court is unable to consider the error rate of the scientific technique, if any used by [the expert] in formulating his opinions. Similarly, the court is unable to determine on the basis of the record before that his theory or methods are consistent with the generally accepted method for gathering and evaluating evidence in the field of electrical engineering as applied to capacitor and ballast fires. Finally, it appears that [the expert's] work suffers from several of the concerns of other circuits, including a lack of accounting for other explanations.

Id. at 6.

In summary, Brown's failure to conduct actual tests, to employ any identifiable methodology, and to sufficiently take into account existing data and research are not surprisingly revealed by his inability to state to a reasonable degree of scientific certainty which of his five possible failure theories alone or in combination are the reason for the alleged failure of the coating. Just like the proffered experts in these cases, Brown's testimony is so unreliable that it fails to pass muster under *Daubert* and *Kumho*.

For the aforementioned reasons, Wismarq's Motion to Bar the Testimony of Kenneth R. Brown is

GRANTED.

N.D.Ill.,2003.
Holden Metal & Aluminum Works, Ltd. v. Wismarq Corp.
Not Reported in F.Supp.2d, 2003 WL 1797844 (N.D.Ill.)

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