**UNITED STATES OF AMERICA**
**FEDERAL TRADE COMMISSION**
**Office of Administrative Law Judges**

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| In the Matter of | ) | |
| **Evanston Northwestern Healthcare Corporation,** a corporation. | ) | Docket No. 9315 **PUBLIC VERSION** |

**COMPLAINT COUNSEL'S RESPONSE TO MOTION TO EXCLUDE TESTIMONY OF DR. KENNETH G. ELZINGA**

In a last minute motion filed in the middle of trial – ten months after the parties exchanged notices of expert witnesses; five months after Complaint Counsel produced its expert reports; and two months after the deadline for *in limine* motions – Respondent has asked the Court to exclude the testimony of one of Complaint Counsel's experts, Dr. Kenneth G. Elzinga. Respondent cannot offer any good reason for the timing of this motion. Beginning May 14, 2004, and continuing until, most recently, February 2, 2005, Complaint Counsel repeatedly notified Respondent that Dr. Elzinga,[1] one of the foremost antitrust economists in the country, would testify at trial. Further, Respondent fully understood the sensible December 17, 2004, deadline for *in limine* motions established by the Court in its Scheduling Order dated March 22,

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[1] *E.g., Complaint Counsel's Notice of Expert Witnesses,* dated May 14, 2004; *Expert Report of Dr. Kenneth Elzinga,* dated September 21, 2004; *Complaint Counsel's Final Proposed Witness List,* dated December 1, 2004; *Complaint Counsel's Revised Proposed Witness List* dated February 2, 2005. Surprisingly, Respondent attempts to justify its belated motion on the grounds that "it did not believe that Complaint Counsel would call Dr. Elzinga at trial." Memorandum In Support of Respondent's Anticipated Objections to the Testimony of Dr. Kenneth G. Elzinga and/or Motion to Preclude His Testimony, dated February 22, 2005, ("Respondent's Memorandum") at 1.

2004, as amended.[2] In this light, Respondent's tactical but tardy attempt to keep the Court from hearing Dr. Elzinga's testimony should be rejected out of hand. If the Court is inclined to rule on the merits, nevertheless, Respondent's motion should be denied.

**1. Dr. Elzinga's Testimony Is Highly Relevant to the Proper Analysis of the Competitive Effects of Hospital Mergers**

The core issue in this case is the identification of the transaction that is properly analyzed to assess the competitive effects of the merger of Respondent ENH and Highland Park Hospital. Complaint Counsel has focused on the transaction between the managed care company and the hospital. For the purpose of assessing the merger, Complaint Counsel has presented evidence, including the testimony of numerous representatives of the payers, that after the merger ENH was able to substantially increase its prices that it charged the payers and that the payers were not able to discipline ENH by refusing to do business with ENH in favor of other hospitals.

Respondent is basing its case on a different analysis – one that is based on case law that developed before the advent of managed care and selective contracting. In its expert reports, its pretrial brief, and its cross-examination of witnesses to date, Respondent has focused on the choice of hospitals by individual patients, as if the patient – rather than the managed care company – is the buyer of hospital services. This morning, for example, Respondent questioned Jeffrey Hillebrand about the ZIP codes from which ENH drew patients and the newspaper ads that ENH and other hospitals ran to attract individual patients.

Respondent is taking this antiquated approach to enable it to rely on the decisions of

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[2] Thus, Respondent filed a timely motion *in limine* to limit the testimony of another expert of Complaint Counsel. *See ENH's Motion to Strike and to Preclude Redundant Rebuttal Expert Testimony or, in the Alternative, For Leave to File Sur-rebuttal Report, dated December 17, 2004.*

courts in past hospital merger cases. Indeed, only three weeks ago in its pretrial brief, Respondent repeatedly relied on the decisions of courts that analyzed patient flow for the purposes of evaluating the hospital merger under review. *See, e.g., Pretrial Brief of Respondent Northwestern Healthcare Corporation*, at 1, 2, 11, 17, 18, 19, 42, dated January 25, 2005, *citing, e.g., FTC v. Freeman Hosp.*, 69 F.3d 260 (8th Cir. 1995); *FTC v. Butterworth Corp.*, 946 F. Supp. 1285 (W.D. Mich. 1996). Nonetheless, Respondent has filed a motion to preclude the testimony of Dr. Kenneth G. Elzinga, who, working with Dr. Thomas Hogarty, developed the methodology that these courts used for evaluating patient flow and defining the geographic market in those cases.

Respondent's motion to preclude Dr. Elzinga from testifying should be denied for two reasons. First, Dr. Elzinga will offer insightful analysis why the decisions that Respondent relies upon misused patient flow analysis in general, and the Elzinga-Hogarty test in particular. Specifically, Dr. Elzinga will testify that the use of patient flow analysis to define geographic markets is based on the erroneous premise that, if some patients are willing to commute to more distant hospitals, an even greater number of patients will commute if there are changes, such as an increase in price, at the nearby facilities. Dr. Elzinga also will explain that patient flow analysis is an inappropriate tool for defining geographic markets in hospital merger cases because of health insurance. As Dr. Elzinga will testify, due to health insurance, the choice of a hospital by an individual patient is not influenced by increases in the prices that the hospital charges for its services because the insurance company – and not the patient – pays the higher prices. As a result, as long as Respondent continues to rely on these cases, Dr Elzinga's testimony regarding the fundamental flaws in the analysis of those decisions is highly pertinent to this litigation.

Second, Dr. Elzinga's testimony is highly relevant to the substantive analysis that Complaint Counsel and Respondent will offer throughout this case. Complaint Counsel is presenting its case by focusing on the post-merger price increases that Respondent imposed on the managed care plans. Despite its recognition of the managed care plan as the buyer, however – and its apparent repudiation of the Elzinga-Hogarty test – Respondent is still insistent on resurrecting patient flow analysis for the purposes of analyzing the competitive effects of the merger challenged in this case.[3] Therefore, Dr. Elzinga's testimony goes to the heart of the basic difference between Complaint Counsel's view of this case and that of Respondent – *i.e.,* whether patient flow, and patient flow analysis, are meaningful tools to evaluate a hospital merger.

Finally, Respondent insists that the testimony of Dr. Elzinga is inadmissible because it is not founded on or applied to the facts of this case. *See Respondent's Brief* at 9. In careful semantics, Respondent then represents to the Court that Dr. Elzinga "has not reviewed any of the depositions that were taken . . . during discovery in this proceeding." Respondent's Brief at 9. For the record, Complaint Counsel notes that Dr. Elzinga reviewed, *inter alia*, the investigational

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[3] In a triple-negative declaration hidden away in a footnote, Respondent's own economist, Dr. Monica G. Noether, "do[es] not disagree" that the Elzinga-Hogarty test "is an inappropriate tool" for defining the geographic market "in this case. Noether Report dated November 2, 2004, at 55 n.207. Nevertheless, in her report at least, Dr. Noether then immediately proceeds into a detailed examination of patient flow.

The basic differences in the analysis is also highlighted by comparison of the questions posed by Complaint Counsel and by Respondent to Respondent's own witnesses. In response to Complaint Counsel's questions, Mr. Hillebrand effectively conceded that, in the market for transactions with the managed care plans, he did not consider other hospitals as competitors since he never factored into his pricing decisions any potential pricing response of any other hospital. On the other hand, Respondent still solicits testimony from its executives to the effect that ENH competes for individual patients in a large geographic market that includes numerous hospitals.

hearing transcripts of eleven witnesses that were taken during the Part II investigation that led to the filing of the complaint in this action. *See Expert Report of Dr. Kenneth G. Elzinga, Exhibit C.* This type of review of materials in preparation of expert testimony is standard operating procedure under Rule 704 of the Federal Rules of Evidence.

In this light, Respondent's motion to strike the testimony of Dr. Elzinga should be denied.

**2. Dr. Elzinga's Testimony Is Highly Relevant to Respondent's Contention that Market Definition is Necessary Even When There is Direct Evidence of Anticompetitive Effects.**

Dr. Elzinga also will testify on an issue that the Court has asked the parties to address. Dr. Elzinga will testify that market definition is unnecessary in a case which, like this, challenges a consummated merger. Dr. Elzinga will testify that market definition and market shares are merely tools used to help predict the likely effects of a proposed merger. Dr. Elzinga also will testify that when Complaint Counsel has direct evidence of the anticompetitive effects of a proposed merger – here, the evidence that, in contrast to comparison hospitals, Respondent dramatically raised its prices for hospital services after the merger -- market definition is not a necessary component of the analysis, even if it might usefully assist in confirming the direct evidence.

Respondent clearly understands that Dr. Elzinga's testimony will be devastating for its case. Throughout its Pretrial Brief, Respondent dismisses the notion that, when an antitrust plaintiff has direct evidence of anticompetitive effects of a merger, the plaintiff need not prove the existence of a well defined product and geographic market. *See Pretrial Brief of Respondent Evanston Northwestern Healthcare Corporation* dated January 25, 2005, at 2. At various times in its brief, Respondent labels this notion as "unprecedented," *id.* at 1, "novel," *id. at 2,* "absent

the moorings of traditional product and geographic market analysis," *id.*, and "radical." *Id.* at 11. It is little surprise, therefore, that Respondent does not want the Court to hear Dr. Elzinga – a former Special Economic Advisor to the Assistant Attorney General for Antitrust in the Department of Justice – testify that market definition is unnecessary when there is direct evidence that the merger had anticompetitive effects.

That Complaint Counsel's other economist, Dr. Deborah Haas–Wilson, included in her report -- and will testify -- that she conducted her economic analysis of this merger in a manner that is consistent with Dr. Elzinga's testimony is hardly a basis for excluding Dr. Elzinga from testifying at trial. Under Rule 403 of the Federal Rules of Evidence, relevant evidence may be excluded only if "its probative value is substantially outweighed by the danger" of the needless presentation of cumulative evidence. This does not preclude the use of more than one expert regarding the same issue when each expert "has a slightly different area of expertise." *Coles v. Egan*, 34 F. Supp.2d 381, 383 (W.D. Va. 1998)(Exhibit A). Here, Dr. Elzinga will testify regarding the general approaches developed for the proper analysis of mergers. Dr. Haas-Wilson, on the other hand, will testify as to the use of those approaches to analyze the anticompetitive effects of the merger under review here. *See also Industrial Hard Chrome, Ltd. V. Hetran, Inc.*, 92 F. Supp.2d 786 (N.D. Ill. 2000)(Exhibit B) ( the testimony of two experts is appropriate if it relates "to different aspects" of an issue).

In any event, Commission Rule 3.43(b) specifies that testimony is admissible if it is "relevant, material, and reliable" *see* Commission Rule 3.43(b), but that the Court only should give "consideration" to whether the testimony would cause "undue" delay. These limitations do not give Respondent the wherewithal to structure Complaint Counsel's presentation of its case,

or to preclude Complaint Counsel from calling those experts that Respondent believes will be the most damaging to its defense.

## CONCLUSION

For the foregoing reasons, Respondent's Motion to Exclude the Testimony of Dr. Kenneth Elzinga should be denied.

Respectfully submitted,

Dated: 2/23/05

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## CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing documents were served on counsel for the Respondent by electronic mail and first class mail delivery:

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and delivery of two copies to:

The Honorable Stephen J. McGuire
Federal Trade Commission
600 Pennsylvania Avenue
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Washington, DC 20580

2/23/05
Date

Thomas H. Brock
Complaint Counsel

34 F. Supp. 2d 381, *; 1998 U.S. Dist. LEXIS 21034, **;
50 Fed. R. Evid. Serv. (Callaghan) 1440

LEXSEE 34 F. SUPP. 2D 381

**GEORGE M. COLES, JR., as Personal Representative of the Estate of DONALD E. EGAN, and EMILIE C. EGAN n1, Plaintiffs, v. WILLIAM HAROLD JENKINS, n2 TRAVEL VENTURES LTD. d/b/a VERMONT BICYCLE TOURING, Defendants.**

**n1 By oral motion of plaintiffs' counsel on 17 December 1998, and with no objection from defendant, Emilie C. Egan has withdrawn as a plaintiff in the case.n2 By this court's 4 November 1998 Order and pursuant to a stipulation of dismissal, defendant Jenkins was dismissed with prejudice as a party to this case.**

**CIVIL ACTION NO. 97-0031-C**

**UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, CHARLOTTESVILLE DIVISION**

***34 F. Supp. 2d 381; 1998 U.S. Dist. LEXIS 21034; 50 Fed. R. Evid. Serv. (Callaghan) 1440***

**December 22, 1998, Decided**
**December 22, 1998, Filed**

**LexisNexis(R) Headnotes**

**COUNSEL:** [**1] For GEORGE M. COLES, JR., plaintiff: John Randolph Parker, PARKER, MCELWAIN & JACOBS, PC, CHARLOTTESVILLE, VA.

For GEORGE M. COLES, JR., plaintiff: Richard J. Phelan, James D. Dasso, Dianne L. Hicklen, FOLEY & LARDNER, CHICAGO, IL.

For TRAVEL VENTURES, LTD., defendant: Glen Michael Robertson, Marshall Allen Winslow, Jr., PAYNE, GATES, FARTHING & RADD, P.C., NORFOLK, VA.

For TRAVEL VENTURES, LTD., defendant: Rodney E. Gould, RUBIN, HAY & GOULD, P.C., FRAMINGHAM, MA.

**JUDGES:** James H. Michael, Jr., Senior United States District Judge.

**OPINIONBY:** James H. Michael, Jr.

**OPINION:**

[*383] MEMORANDUM OPINION

Before the court are the motions *in limine* of the remaining parties in this case, plaintiff George M. Coles and defendant Travel Ventures Limited. The court will discuss plaintiff's motions in turn and then defendant's motions in turn.

**Plaintiff's Motions *in limine***

First, plaintiff seeks an order barring defendant's use of cumulative expert testimony. *Rule 403 of the Federal Rules of Evidence* ("FRE") allows the court to exclude evidence if its probative value is outweighed by dangers of, *inter alia*, "needless presentation of cumulative evidence." In addition, Rule 702 [**2] allows experts to testify only if the testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue." The court will deny the motion insofar as it seeks to prevent defendant from using three different experts to testify regarding the issue of the dangerousness of Route 231. Defendant suggests, and the qualifications and reports of these three experts indicate, that each has a slightly different area of expertise. Therefore all three will be allowed to testify at trial, but only to the extent that they provide testimony that does not duplicate that offered by the others.

Next, plaintiff moves the court to bar evidence of a prior accident involving Jenkins. For the reasons stated from the bench, and because the court granted a similar motion of defendant seeking to bar evidence of another prior accident, the court will grant the motion.

Plaintiff next asks the court to prevent defendant from introducing at trial the exculpatory agreement (or release) signed by plaintiff. n3 Although Virginia law is clear in holding that such exculpatory agreements are void as against public policy, defendant argues that such agreements may still be used at trial [**3] to support an assumption of risk defense. However, even if defendant were to use the exculpatory agreement for this limited purpose, the court must consider whether its admission would pose a danger of unfair prejudice. Rule 403 allows exclusion of evidence if its probative value is outweighed by the danger of unfair prejudice or confusion of the issues or misleading the jury. The probative value of the release to show that plaintiffs understood and assumed the risk is minimal. VBT will likely use other evidence to show that the Egans actually understood the risks of cycling. And the possibility of unfair prejudice and confusion is particularly high due to the language of the agreement. Even a well-crafted instruction to the jury would be inadequate to explain that the jury should disregard the strong wording of this exculpatory agreement and consider it only for some limited purpose, in accordance with a complex legal doctrine that the jury would have difficulty understanding. Therefore the court will grant the motion to exclude the exculpatory agreement.

n3 The court has considered both the cases disclosed by plaintiff at the pre-trial conference and the brief on those cases submitted by defendant.

[**4]

Plaintiff's fourth motion *in limine* seeks to bar any reference to Jenkins' consumption of alcohol. The court will grant the motion, finding that defendant has access to other sources of evidence which adequately demonstrate Jenkins' mental impairments at the time of the accident, which may or may not have been caused in part by Jenkins' long-term alcohol abuse. As plaintiff's counsel aptly point out, defendant can demonstrate that Jenkins suffered from dementia without getting into the causes of that dementia. All the parties agree that alcohol was not a factor in this accident, therefore Jenkins' history of alcohol abuse has no bearing on the case. However, the court cannot grant the motion insofar as it would seek to prevent even any argumentative analogizing to drunk driving cases. If counsel chooses in argument to analogize the incident to an accident involving a drunk driver, there is nothing in the Rules of Evidence that prohibits such argument so long as it is clear to the jury that it is just an analogy and just argument. The court will not circumscribe the stylistic choices of counsel in making their arguments.

Next, plaintiff moves to bar reference to the involuntary [**5] manslaughter charge against Jenkins and the determination that he was incompetent to stand trial. The court will grant the motion for the same reasons that it finds evidence of Jenkins' history of alcohol abuse to be inadmissible. Defendant has other means at its disposal to demonstrate Jenkins' impairments at the time of the accident. The fact that he was charged with involuntary manslaughter and later found incompetent to stand trial is not relevant and any probative value it may have is substantially outweighed by the dangers of unfair prejudice and confusion of the issues. In addition, defendant has done nothing to refute plaintiff's argument that evidence of the charge against Jenkins is inadmissible hearsay.

Plaintiff's final motion seeks to exclude accident statistics offered by expert David McAllister. The court will deny the motion because the concerns raised by plaintiff can adequately be brought out in cross-examination and go to the weight, not the admissibility, of these statistics. Plaintiff can effectively demonstrate on cross-examination that the accident rates used are not specific to bicycle accidents, allowing the jury to decide how indicative they are of the relative [**6] safety of a road for bicycling. Similarly, the fact that the statistics reflect overall rates for roads along their entire length can be brought out and used by the jury in determining how indicative they are of safety along a particular portion of a road. Finally, the court cannot accept plaintiff's argument that any expert witness who relies on statistics must demonstrate that he has performed regression analyses or similar tests on the statistics before he refers to them in testimony. Mr. McAllister is presumably not being offered as an expert statistician, and plaintiff can point out any reasons to question the significance of the figures he uses on cross. The accident rates he uses are those typically relied on by his former employer, the Virginia Department of Transportation. Therefore, his experience and training qualify him to use such statistics in evaluating road safety.

**Defendant's Motions *in limine***

Defendant moves to exclude evidence of statements made by Jenkins contained in (1) the Albemarle County

Police Report prepared by Officer Peter J. Mainzer, Jr. and (2) defendant's own Incident Report. The court will deny the motion at to Officer Mainzer's report [**7] because the report overall is reliable and trustworthy and therefore fits under the hearsay exception for public records and reports at *FRE 803(8)*. As to VBT's own Incident Report, the court finds that this report fits squarely within the definition of admissions by party-opponents, the Rule 801(d)(2) exception to the hearsay rule, and will therefore be admitted.

Defendant's next remaining n3 motion *in limine* seeks to exclude evidence of a bicycle accident which occurred in 1991 on a VBT tour in Nova Scotia, pursuant to *FRE 402* and *403*. The court will grant the motion in keeping with law in the Fourth Circuit requiring that evidence of prior incidents may only be admitted if the other incidents were "substantially similar" to the accident at issue. *Ridge v. Cessna Aircraft Co., 117 F.3d 126, 130 (4th Cir. 1997)*. In a case in which the nature of a particular road is a key issue, the court finds that a previous accident which occurred on another road altogether, and not even in the same country as the accident at issue, does not bear the requisite similarity.

n3 Defendant filed several motions *in limine* which became moot after Emilie Egan withdrew as a plaintiff in this case. Namely, defendant's motions to exclude medical bills of Emilie Egan, to exclude testimony of Gregory Ewert and Jeffrey Young, and to exclude evidence of medical expenses exceeding amounts actually paid or payable by Emilie Egan or her insurance company. In addition, defendant withdrew its motion to exclude plaintiff's expert witness Mike Arnette at the 17 December 1998 motions hearing.

[**8]

The court will also grant defendant's motion to exclude guest evaluations, including those completed by guests on the September 1996 Virginia horse and wine country bike tour, the last such tour conducted before the tour in which the Egans participated. The court could find no reference to any particular roads on the tour in any of the completed evaluations, which have just one relevant section, entitled "quality of cycling," where "traffic" and "road conditions" are listed among the seven aspects included in that heading. Therefore, the evaluations are, at most, minimally probative. As to the evaluations of the tour which ended just two days before the Egans' tour began, VBT has the more believable argument when it comes to notice: it is very unlikely that any of the evaluations from the tour that ended on October 4 were received by VBT before October 6. However, the court will allow plaintiff to introduce a copy of a blank evaluation form to demonstrate that defendant had some means of receiving guests' opinions concerning safety.

Defendant's motion to exclude evidence that it changed its tour route after the Egans' accident is based on Rule 407. Rule 407 allows evidence of subsequent [**9] remedial measures to be admitted only for purposes other than proving negligence, such as "proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment." At this stage, it would be premature for the court to rule that such evidence could never be admitted at trial. But the court will not allow such evidence to be introduced until other testimony opens the door for impeachment or puts in controversy the feasibility of precautionary measures.

Defendant next moves to exclude the testimony of Dr. Marcus Gottlieb, one of the participants in the last Virginia Horse and Wine Country bike tour conducted prior to the one in which the Egans participated. The court will grant the motion to exclude Dr. Gottlieb's testimony for the same reasons it will exclude guest evaluations completed by others on the tour with Dr. Gottlieb. Dr. Gottlieb's evaluation could not have been received by VBT in time to put it on notice. Furthermore, the evaluation makes no mention of Route 231, nor could Dr. Gottlieb definitively state at his deposition which road had made him uncomfortable while participating on the tour. Therefore, his testimony is not relevant.

Defendant [**10] VBT moves to exclude Jake Joseph's testimony on the grounds that his testimony is irrelevant and prejudicial. The court will deny the motion because the testimony is sufficiently relevant and its weaknesses can be adequately demonstrated on cross-examination. Jake Joseph was driving on Route 231 on the day of the accident and apparently had to swerve to avoid hitting some cyclists on some portion of that road. Although it cannot be determined definitively whether the cyclists Mr. Joseph saw were the Egans, there are enough identifying features to allow the jury to make the determination. His observations of bicyclists on the road where the accident occurred on the day it occurred are sufficiently relevant to offer to the jury to let them weigh his testimony.

Defendant next argues that the other guests on the VBT tour with the Egans should not be allowed to testify as to their opinion of the dangerousness of Route 231 for bicyclists. The court will deny the motion because Rule 701 clearly allows lay witnesses to offer opinion testimony if it is based on their perceptions and helpful to

the determination of a fact in issue. It would be difficult to think of witnesses in this case who [**11] better fit the bill. These fellow guests with the Egans can testify, based on their perceptions, as to the apparent safety of Route 231 for ordinary bicyclists like the Egans. Their testimony is, if anything, more helpful because they are not experts. The court reserves the right to rule at trial to exclude some of these witnesses if testimony becomes overly repetitive.

Defendant has filed two related motions at different times: one seeking to prohibit testimony from plaintiff's counsel at trial and a related motion filed later seeking to exclude any testimony concerning the presence of plaintiffs' counsel *or his wife* on the tour. Plaintiff's counsel has assured the court that he will not testify at trial, nor will any reference be made to his presence on the tour. However, plaintiff's wife will testify and her testimony is uniquely relevant. The court finds no basis in the Virginia Code of Professional Responsibility for defendant's suggestion that allowing counsel's wife to testify would constitute a breach even of the spirit of the rules of professional responsibility. Therefore, the court will deny the motion insofar as it has not been rendered moot by plaintiff's counsel's [**12] assurances.

VBT moves to exclude opinions of Dr. Cook, the chair of the Economics Department at the University of Richmond, who would testify as to lost wages due to Mr. Egan's death. Such testimony is necessarily predicated on some assumptions, because the questions of how long Mr. Egan would have lived and continued working cannot be definitively answered. Dr. Cook's working assumptions were that Mr. Egan would work full-time as an attorney until age 65 and thereafter have his income reduced by ten (10) percent per year. Defendant VBT specifically faults Dr. Cook for using this ten percent figure, characterizing it as too speculative to be admitted. n4 Defendant's concern about the ten percent figure would better be addressed by allowing cross-examination on the subject. A plaintiff need not prove damages with absolute certainty and its expert may rely on reasonable assumptions as to future earnings. *See Thompson v. Brotherhood of Sleeping Car Porters, 367 F.2d 489 (4th Cir. 1996).* Plaintiff should be allowed to present evidence on damages due to lost earnings. Plaintiff's expert on this subject appears qualified to so testify. Therefore the court will deny the motion.

n4 The ten percent per year reduction was assumed by Dr. Cook because plaintiffs' counsel directed him to make that assumption when they requested his opinion as an expert.

[**13]

An appropriate Order summarizing the court's rulings on each of these motions this day shall issue.

ENTERED: James H. Michael, Jr.

Senior United States District Judge

12/22/98

Date

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED AND ORDERED

as follows

1. The court shall, and hereby does, DENY plaintiff's motion to bar cumulative expert testimony;

2. The court shall, and hereby does, GRANT plaintiff's motion to bar evidence of a prior accident;

3. The court shall, and hereby does, GRANT plaintiff's motion to bar introduction of the exculpatory agreement;

4. The court shall, and hereby does, GRANT plaintiff's motion to bar any reference to Jenkins' consumption of alcohol;

5. The court shall, and hereby does, GRANT plaintiff's motion to bar reference to the involuntary manslaughter charge against Jenkins and determination of competency;

6. The court shall, and hereby does, DENY plaintiff's motion to exclude accident statistics;

7. The court shall, and hereby does, DENY defendant's motion to exclude evidence of statements by Jenkins;

8. The court shall, and hereby does, DISMISS AS MOOT [**14] defendant's motions to exclude medical bills of Emilie Egan, to exclude testimony of Gregory Ewert and Jeffrey Young, to exclude

evidence of medical expenses exceeding amounts actually paid or payable by Emilie Egan, and to exclude plaintiff's expert witness Mike Arnette;

9. The court shall, and hereby does, GRANT defendant's motion to exclude evidence of a previous bicycle accident in Nova Scotia;

10. The court shall, and hereby does, GRANT defendant's motion to exclude guest evaluations, except that it will allow introduction of a blank evaluation form;

11. The court shall, and hereby does, GRANT defendant's motion to exclude evidence of subsequent remedial measures until such time as such evidence becomes admissible for impeachment or because feasibility is controverted by defendant pursuant to *Fed. R. Ev. 407*;

12. The court shall, and hereby does, GRANT defendant's motion to exclude the testimony of Dr. Marcus Gottlieb;

13. The court shall, and hereby does, DENY defendant's motion to exclude the testimony of Jake Joseph;

14. The court shall, and hereby does, DENY defendant's motion to exclude opinion testimony from lay witnesses;

15. The court [**15] shall, and hereby does, DISMISS AS MOOT defendant's motion to prohibit testimony from plaintiff's counsel at trial;

16. The court shall, and hereby does, DENY defendant's motion to exclude any testimony concerning the presence of plaintiff's counsel's wife on the tour;

17. The court shall, and hereby does, DENY defendant's motion to exclude the testimony of Dr. Cook.

The Clerk of the Court hereby is directed to send a certified copy of this Order and the accompanying Memorandum Opinion to all counsel of record.

ENTERED: James H. Michael, Jr.

Senior United States District Judge

12/22/98

Date

LEXSEE 92 F.SUPP.2D 786

**INDUSTRIAL HARD CHROME, LTD., IHC LIMITED PARTNERSHIP, and BAR TECHNOLOGIES, L.L.C., Plaintiffs/Counter-Defendants, v. HETRAN, INC., and GLOBAL TECHNOLOGY, INC., Defendants/Counter-Plaintiffs.**

**Case No. 99 C 1716**

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

***92 F. Supp. 2d 786; 2000 U.S. Dist. LEXIS 5224***

**April 18, 2000, Decided**
**April 18, 2000, Opinion Filed**

**DISPOSITION:** [**1] Plaintiffs' motions granted in part and denied in part. Defendants' motions granted in part and denied in part.

**LexisNexis(R) Headnotes**

**COUNSEL:** John J. O'Malley, Michael D. Wexler, Daniel F. Lanciloti, Charles Chejfic, Seyfarth, Shaw, Fairweather & Geraldson Chicago, Illinois, For Plaintiff.

George W. Spellmire, Debra A. Winiarski, Jeffrey H. Bergman, Daniel C. Curth, H. Hollister Bundy, D'Ancona & Pflaum, Robert P. Cummins, Thomas C. Cronin, Cummins & Cronin, L.L.C., Chicago, Illinois, For Defendants.

Luanne R. Sacks, Michele D. Floyd, Crosby, Heafey, Roach & May, San Francisco, California, For Defendant.

**JUDGES:** James H. Alesia, United States District Judge.

**OPINIONBY:** James H. Alesia

**OPINION:** [*788]

**ORDER**

Before the court are (1) thirteen motions *in limine* brought by plaintiffs Industrial Hard Chrome, Ltd. ("IHC") and Bar Technologies, L.L.C. ("Bar") (collectively "plaintiffs") and (2) five motions *in limine* brought by defendants Hetran, Inc. ("Hetran") and Global Technology, Inc. ("Global") (collectively "defendants"). n1 The court addresses each motion in turn.

n1 On April 13, 2000, defendants filed their amended responses to plaintiffs' motions *in limine*. While the court had directed defendants to file page 2 of response 9 which was missing in defendants' original responses, the court did not give leave to file amended responses. In fact, the court gave defendants leave to file the side-bound version of their responses. *See* Court Order dated April 13, 2000. Because defendants were not given leave to substantively amend their responses, the court has relied upon the original responses.

[**2]
[*789]
**A. Plaintiffs' Motions *in Limine***

**1. Evidence of Wolfgang Salinger's arrest or detention in Korea and Hetran's lawsuit against Wolfgang Salinger**

Wolfgang Salinger ("Salinger") is a former employee of Hetran. Based upon plaintiffs' motion *in limine*, it appears that plaintiffs intend to call Salinger as a witness at trial. In 1996, Salinger was arrested in Korea for what plaintiffs refer to as a "private matter" (based upon defendants' motion, the arrest was not related to a matter relating to truth or veracity). Also, in January, 2000, Hetran filed a lawsuit against Salinger for, among other claims, misappropriation of trade secrets and conversion (for the theft of Hetran's confidential

documents).

First, plaintiffs' motion *in limine* to exclude any evidence or reference to Salinger's arrest is granted. Evidence of his arrest does not go towards Salinger's credibility but is, in fact, inadmissible character evidence. *See FED. R. EVID. 404, 608*. Further, the court finds that such evidence would be highly prejudicial and, therefore, is also inadmissible under *Federal Rule of Evidence 403*. Thus, evidence and/or references to Salinger's arrest is barred. [**3] Accordingly, the court grants, in part, plaintiffs' motion *in limine* # 1.

Second, to the extent that plaintiffs' motion *in limine* # 1 seeks to exclude evidence regarding the lawsuit filed by Hetran against Salinger, that motion is granted insofar as any use of the evidence of the lawsuit other than for impeachment purposes, to challenge Salinger's credibility or truthfulness, or to show bias is barred. *See FED. R. EVID. 404(a)(3), 608*.

**2. Evidence referring to the book value of IHC stock, the transfer of ownership interest in IHC, and the wages and salaries of IHC employees**

Plaintiffs' second motion *in limine* seeks to exclude any evidence or reference to three separate issues: (1) the book value of IHC stock; (2) the transfer of ownership interest in IHC; and (3) the wages and salaries of IHC employees. The motion is granted in part and denied in part; the court discusses each in turn.

**(a) Book value of IHC stock**

Plaintiffs claim that evidence referring to the value of IHC stock is irrelevant and prejudicial. The court disagrees. In their claim for damages, plaintiffs seek lost profits and a variety of other damages. Thus, plaintiffs have opened [**4] the door to their own profitability. Further, plaintiffs have failed to show how such information would be prejudicial. Thus, to the extent that the value of IHC stock is relevant to establishing or discrediting the amount of damages suffered by plaintiffs, the evidence is admissible.

**(b) Transfer of ownership interest**

Plaintiffs seeks to exclude -- on the basis of irrelevancy -- any evidence relating to the transfer of ownership interest from C.G. Therkildsen ("Therkildsen"), the president of IHC and Bar, to his daughters. Defendants argue that this evidence is relevant to show the companies' profitability. The court finds that such evidence is wholly irrelevant in establishing the profitability of IHC or Bar. Moreover, to the extent that defendants would try to use the evidence in that fashion, its probative value would be greatly outweighed by the prejudicial nature of the evidence given the speculative and tenuous nature of such a connection. Thus, the evidence is [*790] inadmissible under *Federal Rules of Evidence 401* and *403*. However, in the event that Therkildsen takes the stand and testifies regarding the ownership of IHC and Hetran, evidence of a transfer of interest may [**5] be used for the sole purpose of clarifying ownership.

**(c) Wages and salaries of IHC and Bar employees**

Plaintiffs seek to exclude any evidence relating to the wages and salaries earned by IHC and Bar employees as both irrelevant and prejudicial. Defendants claim this evidence is relevant to show that IHC and Bar's employees are incompetent, unqualified, and incapable of properly operating the Cell. The court finds that defendants argument lacks any merit. Evidence regarding wages and salaries earned by IHC and Bar employees is completely irrelevant in determining whether such employees are qualified or capable. Any inference made by defendants that wages or salaries do impact the employees' capabilities would be highly prejudicial. Thus, evidence referring to the wages and salaries of IHC and Bar employees is inadmissible. *See FED. R. EVID. 401, 403*.

In conclusion, the court grants plaintiffs' motion *in limine* # 2 to the extent that it seeks to exclude evidence referring to the transfer of ownership interest in IHC and the wages and salaries earned by IHC and Bar employees. However, the court denies plaintiffs' motion *in limine* # 2 with respect to evidence referring [**6] to the book value of IHC stock to the extent that such evidence may be relevant to the issue of damages.

**3. Evidence referring to the INS visit to IHC**

In their motion *in limine* # 3, plaintiffs seek to exclude evidence referring to an Immigration and Naturalization Service ("INS") visit to IHC in 1995. Defendants claim that the INS visit, resulting in a loss of 80 percent of IHC's labor force, is relevant to show either (1) IHC could not hire legal, and thus competent, workers, or (2) IHC lost its competent workers after the INS visit. It appears that what the defendants are arguing is that a person's status as a legal or illegal alien has a direct correlation to an employee's competency and ability. The defendants provide absolutely no foundation for these claims. The court finds that the INS visit to IHC has no relevancy to the present case: it does not have any bearing on the abilities of Bar's employees. Such evidence would only confuse a jury and prove prejudicial to the plaintiffs. Thus, the evidence referring to an INS visit is inadmissible. *See FED. R. EVID. 401, 403*. Accordingly, plaintiffs' motion *in limine* # 3 is granted.

**4. Evidence referring [**7] to the death of Bar**

**employee David House**

David House was an employee of Bar. He died while operating a loading crane during his training period at Bar. House's death is not relevant to any Bar employee's ability to operate the Cell: House was not operating the Cell and he was in his training period. This evidence's relevance is tenuous at best. Further, the prejudicial nature of this evidence is outweighed by any probative value it may have. *See FED. R. EVID. 403.* Thus, the evidence is inadmissible. Accordingly, the court grants plaintiffs' motion *in limine* # 4 to exclude any evidence referring to House's death.

**5. Expert or opinion testimony from Gerhard Wechtel**

Plaintiffs' motion *in limine* # 5 to exclude Gerhard Wechtel ("Wechtel") as an expert witness is granted. Defendants did not disclose Wechtel as an expert and did not file an expert report. Thus, under *Federal Rules of Civil Procedure 26(a)(2)* and *37(c)*, Wechtel is excluded as an expert. *See FED. R. CIV. P. 26(a)(2), 37(c).* n2

> n2 Defendants claim that they have no intention of calling Wechtel as an expert but do intend to have him offer opinion testimony under *Federal Rule of Evidence 701*, which allows a lay witness to testify as to his opinions. *FED. R. EVID. 701.* The court will address this issue under section A(8), addressing plaintiffs' motion *in limine* # 8.

[**8] [*791]

**6. Document labeled "Hetran 12180"**

Plaintiffs' motion *in limine* to exclude the document labeled "Hetran 12180" is denied. This document appears to be a warranty disclaimer. Plaintiffs claim that this document is not part of the contract entered into between IHC and Hetran and, therefore, cannot be introduced into evidence. Defendants, on the other hand, claim that the warranty was part of the agreement or mutual understanding between IHC and Hetran. The court cannot determine, in the abstract, whether this document was part of the agreement between IHC and Hetran. Thus, such a ruling must wait until the court hears the evidence at trial.

**7. Exclusion of the expert testimony of either Samuel Bonnano or Marvin Devries**

Plaintiffs motion *in limine* # 7 to exclude the testimony of either Samuel Bonnano or Marvin Devries as an expert witness is denied. The court rejects plaintiffs' argument that their testimony would be cumulative. As indicated in their respective expert reports, Bonnano and Devries will offer testimony on different aspects of the Cell: Bonnano will testify to the design and manufacture of the Cell, while Devries will testify about the Cell's [**9] operation. These are two different areas and relate to separate issues which plaintiffs themselves have raised in their complaint.

**8. Exclusion of Gerhard Wechtel as a witness**

Plaintiffs' motion *in limine* to exclude Mr. Wechtel as a witness is denied. While it appears from the parties' filings that the defendants have not been very helpful or forth-coming with plaintiffs concerning Mr. Wechtel, it was not impossible for plaintiffs to depose Mr. Wechtel previously. Further, the court has already issued an order allowing plaintiffs to depose Mr. Wechtel in Germany; plaintiffs have the right to depose Mr. Wechtel, now it is their responsibility to do so. Thus, Mr. Wechtel will be allowed to testify but only as a lay witness.

Defendants have stated in their response to plaintiffs' motions *in limine* # 5 and # 8 that they do intend to have Mr. Wechtel testify as to his opinions as a lay person. It is the understanding of the court that Mr. Wechtel is the designer of the Cell which is the focus of this litigation. The court has already ruled that Mr. Wechtel is not allowed to offer expert testimony. Thus, while he may be able to testify under Rule 701, the court will [**10] not allow the defendants to back-door expert testimony from a lay witness. The court cautions defendants that, "where, in order to express an opinion, the witness must possess some experience or expertise beyond that of the average, randomly selected adult, it is a Rule 702 [expert] opinion and not a rule 701 lay opinion." CHARLES E. WAGNER, FEDERAL RULE OF EVIDENCE CASE LAW COMMENTARY 733 (1999).

**9. Evidence which contradicts testimony given during defendants' 30(b)(6) deposition**

Plaintiffs' motion *in limine* # 9 to exclude evidence which contradicts testimony given during defendants' Rule 30(b)(6) deposition is denied. While Hetran and Global are bound by the testimony given by their designated representative during the Rule 30(b)(6) deposition, such testimony is not a judicial admission that ultimately decides an issue. The testimony given at a Rule 30(b)(6) deposition is evidence which, like any other deposition testimony, can be contradicted and used for impeachment purposes. *See W.R. Grace & Co. v. Viskase Corp., 1991 U.S. Dist. LEXIS 14651,* No. 990 C 5383, *1991 WL 211647,* at *2 (N.D. Ill. Oct. 15, 1991).

**10. Evidence referring or relating to defendants' unjust enrichment [**11] counter-claim**

At this time, plaintiffs' motion *in limine* # 9 is denied. Defendants are allowed to [*792] offer evidence which supports their claim. However, because it is not clear what evidence the defendants will seek to present, at this point the court cannot determine whether such evidence violates *Federal Rule of Evidence 408*. If, during the course of trial, defendants seek to introduce specific evidence which may be properly excluded under the Federal Rules of Evidence, plaintiffs are not barred from objecting at that time.

**11. Evidence referring to plaintiffs' corporate structure**

In their motion *in limine* # 11, plaintiffs seek to exclude evidence relating to their corporate structure. Plaintiffs claim that the defendants will use this evidence to imply that plaintiffs' corporate structure is improper. Thus, plaintiffs allege that this evidence is highly prejudicial. Defendants, on the other hand, claim that this evidence is relevant to the issue of damages. Despite these assertions, the court cannot determine from the parties' submissions how this evidence would be either relevant or prejudicial. Thus, the court denies this motion at this time. Such a ruling [**12] must wait until the court hears the evidence at trial.

**12. Evidence and arguments regarding punitive damages and the net worth of plaintiffs**

In their motion *in limine* # 12, plaintiffs seek to exclude evidence and argument regarding (1) punitive damages and (2) plaintiffs' net worth. First, with respect to punitive damages, the court grants plaintiffs' motion *in limine* # 12. In their counterclaim, defendants sought punitive damages only in Count II (Breach of Fiduciary Duties) and Count IV (Conversion). In a previous ruling, the court dismissed both Counts II and IV of defendants' counterclaim. *Industrial Hard Chrome, Inc., et al v. Hetran, Inc., et al, 90 F. Supp. 2d 952, 2000 WL 306874 (N.D. Ill. 2000)*. Because defendants do not seek punitive damages in any remaining count of their counterclaim, evidence or argument regarding punitive damages is irrelevant. Thus, evidence or argument regarding punitive damages is inadmissible. *See FED. R. EVID. 403*. Accordingly, the court grants in part plaintiffs' motion *in limine* # 12.

To the extent that plaintiffs' motion *in limine* # 12 seeks to exclude evidence [**13] regarding the net worth of plaintiffs, the motion is denied. In their motion *in limine*, plaintiffs do not address this issue beyond seeking to have such evidence excluded. There is no evidence that such information would be prejudicial to plaintiffs. However, if at trial plaintiffs seek to establish that this evidence is prejudicial, the court will revisit the ruling.

**13. Evidence referring to insurance coverage**

Plaintiffs' motion *in limine* # 13 to exclude any evidence or argument regarding insurance coverage is granted by agreement. The court further finds that neither party will be permitted to present evidence regarding insurance coverage. *See FED. R. EVID. 411*.

**B. Defendants' Motions *in Limine***

**1. Evidence referring to paragraph 19 of the contract**

Defendants' motion *in limine* # 1 to exclude evidence or reference to paragraph 19 of the contract is denied. It is unclear to the court how defendants can claim that a paragraph included in the actual written contract is not a part of the agreement between the parties. Defendants do not argue, nor can the court find, that there are any ambiguities on the face of the contract. The court [**14] will not look to letters and communications between the parties to determine whether an *explicit* portion of the contract was part of the actual agreement. Further, if defendants did not believe that paragraph 19 of the sale contract was a part of the agreement between the parties, such an issue should have been raised during contract formation, in response to the plaintiffs' complaint, or in one of the myriad motions to [*793] dismiss filed by defendants (as it is the basis for Count III of plaintiffs' fourth amended complaint).

**2. Exclusion of witness John Szobocsan**

Defendants' motion *in limine* # 2 to exclude the testimony of John Szobocsan ("Szobocsan") is denied. Plaintiffs may call Mr. Szobocsan to testify as a lay witness. *See FED. R. EVID. 701*. However, while he may be able to testify under Rule 701, the court will not allow the plaintiffs to back-door expert testimony from a lay witness such as Mr. Szobocsan.

**3. Trial and demonstrative exhibits regarding undisclosed evidence**

Defendants seek to exclude the admission of plaintiffs' trial exhibits, which defendants claim are based upon undisclosed evidence. From defendants' motion *in limine*, it [**15] is unclear to the court exactly which exhibits defendants seek to exclude. In reviewing the Parties Final Pre-Trial Order on Plaintiffs' Claims, defendants claim to object to Exhibits 241-54 through a motions *in limine*. However, in the introductory and conclusory paragraphs of this motion *in limine*, defendants' claim that they seek to exclude Plaintiffs' Exhibits 237-51. Then, in the body of the same motion *in limine*, defendants address the exclusion of only Exhibits 241-47. (Defs. Mot. P 2), 255-63 (*Id.* P 10), 288-89 (*Id.*

P 11). The court will only address the admissibility of those exhibits which defendants specifically address in the present motion *in limine*; the remaining exhibits are admissible. Thus, because defendants have offered no basis for the exclusion of Plaintiffs' Exhibits 237-40, those exhibits are admissible. Further, while defendants address Exhibits 255-63, (Defs. Mot. P 10) they do not provide a specific basis for exclusion. Thus, those exhibits are admissible.

First, the court denies defendants' motion *in limine* to the extent that it seeks to exclude Plaintiffs' Exhibits 241-47. In their motion *in limine*, defendants argue that Exhibits [**16] 241-47 contain undisclosed evidence in the form of summaries and charts. Plaintiffs, on the other hand, claim that those exhibits were made for the purpose of trial and are based on summaries of information obtained from disclosed evidence. In support of this argument, plaintiffs provide specific cites to the record indicating the source of the information summarized on the exhibits. While the court finds this argument to be credible, it cannot determine, without viewing the exhibits, whether these exhibits contain evidence which was discoverable yet undisclosed or whether they reflect a summary of disclosed evidence. Thus, such a ruling must wait until the court has an opportunity to examine the evidence at trial.

Finally, to the extent that defendants' seek to exclude any of the listed exhibits based upon the argument that the exhibits are not reliable or authenticated, the court defers the ruling until it can hear evidence at trial which may authenticate such exhibits.

**4. Evidence and argument regarding lost profits**

Defendants seek to exclude any evidence regarding lost profits. Specifically, defendants seek to exclude any evidence of those lost profits referred to [**17] by plaintiffs in their response to interrogatories and in Plaintiffs' Statement of Uncontested Facts (as submitted with the Parties' Final Pre-Trial Order). In their response, plaintiffs claim that they are seeking actual -- versus future -- lost profits, which they claim is addressed in the expert report submitted by Thomas Kabler.

Under Illinois law, plaintiffs are not entitled to future lost profits. *See Alexander Binzel Corp. v. Nu-Tecsys Corp., 2000 U.S. Dist. LEXIS 5238,* No. 91 V 2092, *2000 WL 310304,* at *13 (N.D. Ill. March 23, 2000); *Stuart Park Assoc. Ltd. Partnership v. Ameritech Pension Trust, 51 F.3d 1319 (7th Cir. 1994)* (finding that Illinois law does not permit a new business to recover lost profits). Thus, to the extent that defendants' motion *in limine* seeks to exclude evidence [*794] relating to future lost profits, the motion is granted. However, plaintiffs claim that they are not seeking future lost profits but are only seeking actual lost profits.

Under Illinois law lost profits must be proven with reasonable certainty. *F.E. Holmes & Son Constr. V. Gualdoni Elec. Serv., Inc., 105 Ill. App. 3d 1135, 435 N.E.2d 724, 728, 61 Ill. Dec. 883 (Ill. App. 1982).* [**18] In their response to this motion *in limine*, Plaintiffs have offered no evidence as to the amount of lost profits, how lost profits were calculated or foreseeable, or how defendants have caused this loss. However, plaintiffs do argue that their expert, Thomas Kabler, addressed the issue of actual lost profits in his expert report. Specifically, plaintiffs claim that Kabler's determination of "cost inefficiencies" is considered to be a determination of actual lost profits. To the extent that plaintiffs' expert can reliably calculate the amount of cost inefficiencies, the plaintiffs are permitted to present such evidence. *See Mi-Jack Prod. v. Internat'l Union of Operating Eng'rs, 1995 U.S. Dist. LEXIS 16930,* No. 94 C 6676, *1995 WL 680214,* at *11 (N.D. Ill. Nov. 14, 1995); *see also infra* Sect. II.B.5.

**5. Exclusion of testimony of Thomas Kabler under *Daubert***

Defendants seek to exclude the testimony of plaintiffs' expert Thomas Kabler ("Kabler"). Based upon his expert report, Kabler will testify to the amount of damages which plaintiffs have suffered as a result of defendants' alleged breach of contract. Defendants challenge both the methodology used by Kabler and the reliability [**19] of his opinions, including Kabler's qualifications.

First, the court will address the issue of Kabler's qualifications. Based upon his *curriculum vitae*, Kabler has been a certified public accountant for over twenty years. More importantly, he has been specializing in business valuations and damage calculations for over seven years. Kabler is currently a partner and director in the litigation services group at an accounting firm. Further, he has been qualified as an expert in business valuations and damage calculations in five trials and has testified in numerous depositions. Thus, this court finds that Kabler is qualified to testify as an expert on the issue of damages in the present case.

Having determined that Kabler is qualified, the court must now address whether Kabler's testimony is based upon reliable, scientific reasoning and methodology. *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993); see also Kumho Tire Co., Ltd. v. Patrick Carmichael, 526 U.S. 137, 143 L. Ed. 2d 238, 119 S. Ct. 1167 (1999)* (applying the "gate-keeper" function of the court to all expert

testimony). It appears from [**20] the parties' submissions and Kabler's expert report that Kabler determined the amount of damages by calculating the plaintiffs' actual expenses (incurred in setting up its steel processing business) and deductions based upon adjusted profits and values gained by plaintiffs. This methodology does not, in itself, seem unreliable. However, nearly all of Kabler's damages are based upon the assumption that Bar would not have been created but for defendants' representations that it could deliver a Cell suitable to perform at the contract specifications (the "assumption") -- which plaintiffs claim defendants have failed to do. Thus, plaintiffs seek to recover all of their costs incurred in setting up Bar Technologies as a company.

In general, contract damages are limited to those damages that are reasonably foreseeable at the time of contract formation. However, plaintiffs may be entitled to recover the amount of damages which would return them to the position they would have been in if the contract had never been executed. While the court has serious doubts as to the validity of plaintiffs' assertion that it would not have created Bar but for the defendants' representations, the court cannot [**21] determine at this time whether plaintiffs can prove such an allegation. Consequently, the court cannot determine whether Kabler's use of this [*795] assumption makes his calculations unreliable. Thus, at this time, the court denies defendants' motion *in limine* to exclude the testimony of Thomas Kabler. Such a ruling must be deferred until the court can determine whether the plaintiffs can prove this assumption with reasonable certainty. However, the court has serious doubts as to the propriety of Kabler's calculations with respect to the amount of damages incurred based upon that assumption. The court recognizes that defendants have raised specific questions regarding the reliability of certain portions of Kabler's damages calculations. The court, however, will defer addressing those arguments: those specific challenges may be moot if plaintiffs fail to present reasonable evidence of the reliability of the underlying assumption.

Further, it appears that the only element of damages unrelated to the above-discussed assumption is the amount for "cost inefficiencies." Kabler claims that he based this calculation on the Cell's performance reports and labor expenses incurred operating the [**22] Cell. The method does not seem inherently unreliable so as to require exclusion from evidence. However, this does not preclude defendants from challenging this calculation at trial (either on cross examination or with rebuttal testimony).

**CONCLUSION**

For the foregoing reasons, the court grants in part and denies in part plaintiffs' motions *in limine*. Further, the court grants in part and denies in part defendants' motions *in limine*.

1. Plaintiffs' motion *in limine* # 1 is granted with respect to evidence of the arrest and granted, except for impeachment purposes, with respect to the lawsuit.

2. Plaintiffs' motion *in limine* # 2 is granted in part and denied in part.

3. Plaintiffs' motion *in limine* # 3 is granted.

4. Plaintiffs' motion *in limine* # 4 is granted

5. Plaintiffs' motion *in limine* # 5 is granted.

6. Plaintiffs' motion *in limine* # 6 is denied.

7. Plaintiffs' motion *in limine* # 7 is denied.

8. Plaintiffs' motion *in limine* # 8 is denied.

9. Plaintiffs' motion *in limine* # 9 is denied.

10. Plaintiffs' motion *in limine* # 10 is denied.

11. Plaintiffs' motion *in limine* [**23] # 11 is denied.

12. Plaintiffs' motion *in limine* # 12 is granted in part and denied in part.

13. Plaintiffs' motion *in limine* # 13 is granted.

14. Defendants' motion *in limine* to exclude evidence of paragraph 19 of the contract is denied.

15. Defendants' motion *in limine* to exclude the testimony of John Szobocsan

is denied.

16. Defendants' motion *in limine* to exclude undisclosed evidence is denied.

17. Defendants' motion *in limine* to exclude evidence of lost profits is granted in part and denied in part.

18. Defendants' motion *in limine* to exclude the expert report and testimony of Thomas Kabler is denied.

Date: APR 18 2000

James H. Alesia

United States District Judge