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17 Attorneys for Defendants
 SAP AG, SAP AMERICA, INC., and
 18 TOMORROWNOW, INC.

19 UNITED STATES DISTRICT COURT
 20 NORTHERN DISTRICT OF CALIFORNIA
 21 OAKLAND DIVISION

22 ORACLE USA, INC., et al.,

23 Plaintiffs,

24 v.

25 SAP AG, et al.,

26 Defendants.

Case No. 07-CV-1658 PJH (EDL)

**DECLARATION OF THARAN
 GREGORY LANIER IN SUPPORT OF
 DEFENDANTS' REPLY IN SUPPORT
 OF DEFENDANTS' MOTION TO
 EXCLUDE EXPERT TESTIMONY OF
 PAUL C. PINTO**

Date: September 30, 2010

Time: 2:30 p.m.

Courtroom: 3, 3rd Floor

Judge: Hon. Phyllis J. Hamilton

1 I, THARAN GREGORY LANIER, declare as follows:

2 I am a partner in the law firm of Jones Day, 1755 Embarcadero Road, Palo Alto,
3 California 94303, and counsel of record for Defendants SAP AG, SAP America, Inc. (together,
4 “SAP”), and TomorrowNow, Inc. (“TN”) (collectively, “Defendants”) in the above-captioned
5 matter. I am a member in good standing of the state bar of California and admitted to practice
6 before this Court. I make this declaration based on personal knowledge and, if called upon to do
7 so, could testify competently thereto.

8 1. Attached as **Exhibit 1** is a true and correct copy of the following excerpts from
9 May 5, 2010 Transcript of Proceedings relating to the parties’ motions for partial summary
10 judgment: pp. 39-47.

11 2. Attached as **Exhibit 2** is a true and correct copy of the following excerpts from the
12 May 19, 2010 Paul C. Pinto Deposition: 173:6-17, 175:22-178:1, 217:13-24, 305:13-306:23.

13 3. Attached as **Exhibit 3** is a true and correct copy of the following excerpts from the
14 Expert Report of Donald Reifer, dated March 26, 2010, which was produced by Defendants in
15 this case: p. 8.

16 4. Attached as **Exhibit 4** is a true and correct copy of the following excerpts from the
17 June 18, 2010 Donald Reifer Deposition: 88:11-89:3, 101:12-23, 110:13-20, 157:6-158:8, 192:2-
18 25.

19 5. Attached as **Exhibit 5** is a true and correct copy of the following excerpts from the
20 September 25, 2003 Donald Reifer Deposition in the case of *Evolution, Inc. v. Sun Trust Bank*,
21 No. 01-2409-CM (D. Kan.): 95:13-96:3, 96:15-97:8, 97:17-23.

22 6. Attached as **Exhibit 6** is a true and correct copy of *Fechtig v. Sea Pac. Inc.*, No. C
23 03-4056 JL, 2006 WL 2982148 (N.D. Cal. Oct. 17, 2006).

24 7. Attached as **Exhibit 7** is a true and correct copy of *Fresenius Med. Care Holdings,*
25 *Inc. v. Baxter Int’l, Inc.*, No. C 03-01431 SBA(EDL), 2006 WL 1646113 (N.D. Cal. June 12,
26 2006).

27 8. Attached as **Exhibit 8** is a true and correct copy of *Hynix Semiconductor Inc. v.*
28 *Rambus Inc.*, Nos. CV-00-20905 RMW, C-05-00334 RMW, C-05-02298 RMW, C-06-00244

1 RMW, 2008 WL 73681 (N.D. Cal. Jan. 5, 2008).

2 9. Attached as **Exhibit 9** is a true and correct copy of *IMA N. Am., Inc. v. Maryln*
3 *Nutraceuticals, Inc.*, No. CV-06-344-PHX-LOA, 2008 U.S. Dist. LEXIS 109623 (D. Ariz. Oct.
4 17, 2008).

5 10. Attached as **Exhibit 10** is a true and correct copy of *In re Guam Asbestos Litig.*,
6 No. 92-00064A, 1993 WL 470426 (D. Guam Oct. 19, 1993).

7 11. Attached as **Exhibit 11** is a true and correct copy of *Morin v. McCulloch Corp.*,
8 No. CV 01-6431 SVW (SHx), 2002 WL 34357202 (C.D. Cal. July 3, 2002).

9 12. Attached as **Exhibit 12** is a true and correct copy of *U.S. ex rel. Suter v. National*
10 *Rehab Partners Inc.*, Nos. CV-03-015-S-BLW, CV-03-128-S-BLW, 2009 WL 3151099 (D.
11 Idaho Sept. 24, 2009).

12 13. Attached as **Exhibit 13** is a true and correct copy of *Walsh v. City of Richland*, No.
13 CV-02-5067 EFS, 2005 WL 6201455 (E.D. Wash. Feb. 24, 2005).

14 I declare under penalty of perjury under the laws of the United States and the State of
15 California that the foregoing is true and correct. Executed this 16th day of September, 2010 in
16 Palo Alto, California.

17 /s/ Tharan Gregory Lanier
18 Tharan Gregory Lanier

EXHIBIT 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

ORACLE CORPORATION, ET AL.)	
)	
PLAINTIFFS,)	NO. C 07-01658 PJH (EDL)
)	
VS.)	
)	
SAP AG, ET AL.,)	PAGES 1 - 56
)	
DEFENDANTS.)	OAKLAND, CALIFORNIA
)	WEDNESDAY, MAY 5, 2010

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS: BINGHAM MUCCUTCHEN LLP
THREE EMBARCADERO CENTER
SAN FRANCISCO, CALIFORNIA 94111-4607

BY: ZACHARY J. ALINDER,
AMY K. DONNELLY,
HOLLY A. HOUSE,
GEOFFREY M. HOWARD,
DONN P. PICKETT,
JOHN POLITO,
CHAD RUSSELL, ATTORNEYS AT LAW

FOR DEFENDANTS: JONES DAY
SILICON VALLEY OFFICE
1755 EMBARCADERO ROAD
PALO ALTO, CALIFORNIA 94303

BY: JANE L. FROYD,
THARAN GREGORY LANIER,
ELAIN WALLACE, ATTORNEYS AT LAW

REPORTED BY: RAYNEE H. MERCADO, CSR NO. 8258

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TEXT REMOVED - NOT RELEVANT TO MOTION

THE OTHER ISSUE THAT WAS ADDRESSED AT THAT MOTION WAS WHETHER THEY WERE ENTITLED TO USE SAVED ACQUISITION COSTS AS A WAY TO VALUE THE SO-CALLED FAIR MARKET LICENSE. THE COURT'S RULING DID NOT ADDRESS THAT.

THE COURT: I DIDN'T REACH THAT ISSUE AT ALL.

MR. LANIER: THAT'S CORRECT, YOUR HONOR. SO THAT'S WHY WE BROUGHT IT UP AGAIN THIS TIME, BECAUSE WE THINK IT SHOULD BE STRUCK. AND IT'S WORTH NOTING THAT WHAT MR. MEYER DOES IN HIS REPORT -- MR. MEYER'S THE EXPERT -- THERE'S SOME MENTION OF, AND IN OUR PAPERS SUBSTANTIALLY, 'CAUSE OUR MOTION FOCUSED ON DAMAGES -- MR. MEYER ACTUALLY COMES UP WITH FOUR DIFFERENT WAYS TO VALUE THE FAIR MARKET VALUE LICENSE.

NOW, WE HAVE LOTS OF PROBLEMS WITH ALL OF THEM. WE'LL BE TALKING TO THE COURT AT THE PRETRIAL ABOUT DAUBERT

1 ISSUES AND ALL OF THAT. BUT PUTTING ALL THAT ASIDE, ONE OF
2 THOSE FOUR WAYS IS SAVED ACQUISITION COSTS.

3 THE QUESTION PRESENTED ON OUR MOTION IS NOT WHETHER
4 HE DID A GOOD JOB USING SAVED ACQUISITION COSTS OR WHETHER
5 THERE'S A PROBLEM WITH HIS OPINION. IT'S THE LEGAL AVAILABILITY
6 OF THE REMEDY. THE ONLY AUTHORITY FOR THE AVAILABILITY OF SAVED
7 ACQUISITION COSTS AS A COPYRIGHT REMEDY, WHETHER YOU CALL IT
8 FAIR MARKET VALUE OR NOT, IS THIS DELTAK CASE FROM THE SEVENTH
9 CIRCUIT. AND HERE, I'LL BE VERY BRIEF, 'CAUSE WE'VE ARGUED THIS
10 BEFORE. THE COURT JUST DIDN'T HAVE TO REACH IT. IT'S ADDRESSED
11 IN OUR PAPERS.

12 THAT DELTAK CASE IS NOT THE LAW OF THE NINTH CIRCUIT.
13 IT HAS NEVER BEEN ADOPTED IN THE NINTH CIRCUIT, AND AS PATRY THE
14 COMMENTATOR THAT WE BOTH CITED TO SAYS, DELTAK IS AN ABERRATION
15 AND SHOULD REMAIN ONE. SO SAVED ACQUISITION COSTS SHOULD NOT BE
16 AVAILABLE AS A REMEDY IN THE COPYRIGHT CASE AS WELL.

17 SO THAT'S OUR ARGUMENT IN A NUTSHELL ON THAT LARGEST
18 DAMAGES ISSUE. WE'RE PREPARED TO ADDRESS ANY OF THE OTHER
19 ISSUES ON OUR MOTION, IF THE COURT HAS QUESTIONS.

20 **THE COURT:** THE -- THOSE -- THAT WAS THE ONLY
21 DIFFICULT ISSUE IN MY VIEW ON YOUR MOTION.

22 **MR. LANIER:** THANK YOU, YOUR HONOR.

23 **THE COURT:** ALL RIGHT.

24 **MR. PICKETT:** GOOD MORNING, YOUR HONOR.

25 I'M PREPARED TO ADDRESS A SINGLE ISSUE IN OPPOSITION

1 TO THE MOTION, WHICH IS THIS ISSUE REGARDING THE SAVED
2 ACQUISITION OR SAVED DEVELOPMENT COSTS WITH RESPECT TO THE
3 COPYRIGHT INFRINGEMENT. ALL OTHER ISSUES, HOLLY HOUSE IS
4 PREPARED TO -- TO SPEAK TO.

5 THE REASON THAT I WANTED TO DO THAT WAS BECAUSE THERE
6 IS A -- KIND OF A GROUND HOG DAY SENSE IN WHICH WE ARGUE THIS --
7 MR. LANIER ARGUED THIS SAME POINT TO YOUR HONOR. YOU ASKED
8 QUESTIONS OF HIM. WE ARGUED. YOU TOLD ME I DIDN'T NEED TO
9 ARGUE IT BACK IN OCTOBER. I -- THERE'S NO QUESTION THAT THE
10 SAME CASES, THE SAME AUTHORITIES, THE SAME ARGUMENTS ARE ALL
11 BEFORE YOU.

12 MR. MEYER IN THE DECLARATION IN OPPOSITION -- OUR
13 DAMAGES EXPERT IN OPPOSITION TO THEIR MOTION LAST TIME TOLD YOUR
14 HONOR THAT HE WAS GOING TO CONSIDER THE R & D COSTS THAT WERE
15 SAVED ON THE PART OF THE S&P (SIC) AS PART OF THIS HYPOTHETICAL
16 NEGOTIATION, WHAT A WILLING BUYER AND WILLING SELLER WOULD COME
17 TO A PRICE TO. HE WOULD RELY ON OPINION TESTIMONY OF OTHER
18 EXPERTS REGARDING THOSE R & D COSTS.

19 AND YOUR HONOR, IN RESPONSE TO THEIR MOTION, WHICH
20 VERY MUCH SO HAD TWO ISSUES, YOU DENIED THE MOTION. YOU DIDN'T
21 SAY I DENY ONE PART OF IT AND I RESERVE JUDGMENT ON OTHER. YOU
22 DENIED IT, AND YOU DID SO IN VERY SWEEPING LANGUAGE. YOU SAID
23 ORACLE SHOULD BE PERMITTED TO PRESENT EVIDENCE REGARDING THE
24 FAIR MARKET VALUE OF THE COPYRIGHTS THAT SAP ALLEGEDLY
25 INFRINGED, INCLUDING EXPERT TESTIMONY BASED ON ESTABLISHED

1 VALUATION METHODOLOGY. AND THE VALUATION METHODOLOGY THAT WE
2 HAD PRESENTED TO YOU IN THE FORM OF MR. MEYER'S DECLARATION WAS
3 THAT ONE OF THE FACTORS HE WAS GOING TO CONSIDER WAS GOING TO BE
4 THESE SAVED ACQUISITION COSTS.

5 NOW, THERE'S A DISPUTE AS TO WHETHER IN -- IN SO
6 DENYING -- IN SO RULING, THAT DEALT WITH BOTH ISSUES OR NOT.
7 BUT WHAT I'M HERE TO SAY --

8 **THE COURT:** THERE'S -- THERE'S NO DISPUTE -- I MEAN,
9 I CAN CLARIFY. IT WAS NOT MY INTENTION TO REACH IT. YOU ALL
10 ARGUED AT LENGTH THE DELTAK CASE. IT'S AN ISSUE THAT WE SPENT
11 AN AWFUL LOT OF TIME LOOKING AT. I'M NOT ENTIRELY PERSUADED
12 THAT I SHOULD FOLLOW THE SEVENTH CIRCUIT. I'LL MAKE AN ULTIMATE
13 DETERMINATION ON THIS GO-ROUND. IT WAS SOMETHING THAT I
14 INTENTIONALLY DID NOT REACH. AND TO THE EXTENT THAT ANY OF MY
15 LANGUAGE HAS CAUSED YOU ANY CONFUSION, I'LL CLARIFY THAT IN
16 THE -- IN THE ORDER THAT'S ISSUED ON THIS MOTION.

17 **MR. PICKETT:** EVEN IN THAT CASE, I WOULD SUBMIT THAT
18 THE LOCAL RULE 7-9 WAS NOT FOLLOWED BECAUSE --

19 **THE COURT:** IT DIDN'T NEED TO BE FOLLOWED.

20 **MR. PICKETT:** ALL RIGHT.

21 **THE COURT:** I DON'T VIEW THIS AS A MOTION FOR
22 RECONSIDERATION.

23 **MR. PICKETT:** OKAY. LET ME TURN, THEN, TO THE MERITS
24 OF IT.

25 FIRST OF ALL, LET ME START WITH A KIND OF

1 COMMON-SENSE POINT, AND IT COMES FROM YOUR HONOR'S JANUARY 28TH
2 ORDER OF THIS YEAR. YOU CITED THE POLAR BEAR CASE -- IN A
3 DIFFERENT CONTEXT, BUT YOU CITED IT FOR THE PROPOSITION THAT
4 THERE ARE TWO SIDES OF THE DAMAGES COIN IN PATENT -- COPYRIGHT
5 INFRINGEMENT CASES. ONE LOOKED AT IT FROM THE ASPECT OF THE
6 COPYRIGHT HOLDER'S LOSS, AND THE OTHER SIDE OF THE COIN WAS TO
7 LOOK AT IT FROM THE INFRINGER'S GAIN.

8 AND, OF COURSE, THE SAVINGS OF RESEARCH AND
9 DEVELOPMENT COSTS THAT ONE EXPERIENCES BY SIMPLY STEALING
10 COPYRIGHTED MATERIAL IS A INFRINGER'S GAIN. AND CLEARLY FITS
11 WITHIN THE DICHOTOMY THAT THE NINTH CIRCUIT SETS OUT IN POLAR
12 BEAR, ALBEIT IN A DIFFERENT CONTEXT, BUT, CLEARLY HERE, IF
13 YOU'RE THE VICTIM OF THEFT OF YOUR PROTECTED INTELLECTUAL
14 PROPERTY, YOU CAN LOOK AT DAMAGES -- AND THIS IS -- WE HAD A
15 LONG SESSION ON THIS BACK IN OCTOBER -- YOU ARE -- ARE ENTITLED
16 AS THE VICTIM TO LOOK AT BOTH SIDES OF THAT DAMAGE COIN. YOU
17 CAN LOOK AT YOUR LOSS, BUT YOU CAN ALSO LOOK AT THEIR GAIN,
18 THE -- THE VIOLATORS' GAIN.

19 AND HERE, ONE OF THE GAINS IS THIS SAVED R & D COSTS.
20 I DON'T HAVE TO GO OUT AND HIRE ENGINEERS. I DON'T HAVE TO DO
21 ALL THAT WORK. I CAN JUST, YOU KNOW, TAKE IT. AND THAT'S
22 RELEVANT TO THIS ISSUE OF DAMAGES.

23 IT'S RELEVANT IN ANOTHER WAY ALSO BECAUSE, AS YOUR
24 HONOR SET OUT IN THE JANUARY 28TH RULING, VERY CLEARLY, AS TO
25 THIS -- THIS -- WE HAVE A COUPLE OF CHOICES OF MEASURES OF

1 DAMAGES. ONE IS LOST PROFITS. THE OTHER, THOUGH, IS THIS FAIR
2 MARKET VALUE, THE HYPOTHETICAL LICENSE.

3 AND AS PART OF THAT, WHAT A WILLING BUYER AND WILLING
4 SELLER WOULD COME TO IN TERMS OF NEGOTIATED PRICE, WOULD BE,
5 WELL, IF I'M GOING TO AVOID A BIG EXPENSE BY NOT HIRING
6 ENGINEERS AND SO ON, THAT'S DIRECTLY RELEVANT. THAT'S JUST
7 RIGHT ON POINT TO WHAT THAT NEGOTIATIONS IS GOING TO BE.

8 AND SO WHEN THE JURY HEARS FROM THE VARIOUS EXPERTS,
9 WELL, WHAT WOULD THAT PRICE BE -- AND WE'LL HAVE SOME EXPERTS
10 SAY, HERE'S THE FACTORS THAT WILL BE CONSIDERED THIS WAY. AND
11 THEY WILL HAVE EXPERTS COME AND SAY THOSE WOULD BE FACTORS THAT
12 WILL BE CONSIDERED THE OTHER WAY. THAT'S CLEARLY RIGHT UP THE
13 FAIRWAY OF WHAT SOMEONE TRYING TO LICENSE THIS SOFTWARE WOULD
14 CONSIDER, BOTH, MIND YOU, FROM THE BUYER'S STANDPOINT, I WOULD
15 SAVE THOSE COSTS, AND ALSO FROM THE SELLER'S STANDPOINT, I KNOW
16 THAT THERE WILL BE A LOT OF AVOIDED COSTS HERE TO DEVELOP, THAT
17 IF I LICENSE THIS, THAT'S GOING TO BE SOMETHING THAT I'M GOING
18 TO INSIST ON A CERTAIN AMOUNT OF COMPENSATION FOR.

19 AND YOU DON'T HAVE TO LOOK ANY FARTHER THAN THE SID &
20 MARTY KROFFT CASE IN THE NINTH CIRCUIT TO SEE THAT THAT ALSO
21 FOLLOWS ESTABLISHED NINTH CIRCUIT LAW, BECAUSE --

22 **THE COURT:** WHAT --

23 **MR. PICKETT:** -- IN THAT CASE --

24 **THE COURT:** WHAT CASE --

25 **MR. PICKETT:** THAT'S THE SID & AND MARTY KROFFT

1 TELEVISION PRODUCTIONS AGAINST MCDONALD'S CASE. IT'S 562 F.2D.
2 1157 AT 1174.

3 **THE COURT:** DOES THAT PREDATE DELTAK?

4 **MR. PICKETT:** THAT DOES PREDATE, BUT THAT'S -- THAT'S
5 HOW WE GET TO THE DELTAK RULE. THIS IS THE FOUNDATIONAL -- THIS
6 IS HOW YOU GET THERE. THEY -- THE NINTH CIRCUIT SAID IN THAT
7 CASE -- AND IT WAS THE FIRST TO CLEARLY IDENTIFY IT -- IT SAID
8 THAT THE FAIR MARKET LICENSE APPROACH, THE APPROACH THAT YOUR
9 HONOR HAS AUTHORIZED US TO PROCEED WITH IN YOUR JANUARY ORDER,
10 ALLOWS THE JURY TO CONSIDER, QUOTE, THE VALUE, IF ANY, TO
11 DEFENDANTS OF THE USE OF PLAINTIFFS' WORKS.

12 SO IT -- IT EMBRACES THE NOTION THAT THE VALUE OF USE
13 BY THE DEFENDANT IS A RELEVANT FACTOR. AND OF COURSE, VALUE OF
14 USE WOULD BE, WELL, I'M GOING TO SAVE, YOU KNOW, HUNDREDS AND
15 HUNDREDS OF MILLIONS, IF NOT MORE, IN NOT DEVELOPING ALL THIS
16 SOFTWARE.

17 SIMILARLY, THE NINTH CIRCUIT MODEL JURY INSTRUCTION
18 DOESN'T LIMIT ANY CONSIDERATION OF THE BENEFITS THAT DEFENDANTS
19 WOULD ENJOY FROM USING THE MATERIALS -- THE COPYRIGHTED
20 MATERIALS. THERE'S NO LIMITATION IN IT. IT SIMPLY SAYS, YOU
21 PUT UP THE EVIDENCE, AND THERE'S A -- THERE'S A DECISION THAT'S
22 TO BE MADE WHAT A WILLING BUYER, WILLING SELLER WOULD -- WOULD
23 REASONABLY REQUIRE TO PAY AT THE TIME OF INFRINGEMENT. AND THAT
24 IS, AS I EARLIER TOLD, I THINK VERY CLEARLY, VERY LOGICALLY HOW
25 MUCH COSTS YOU'D AVOID WOULD BE A RELEVANT PART OF THAT

1 DISCUSSION, SOMETHING THE JURY SHOULD BE ALLOWED TO CONSIDER.

2 THEN DELTAK IS A CASE IN WHICH THEY EXPRESSLY SAY,
3 RIGHT, VALUE OF USE, CITING THE KROFFT CASE, CITING THE
4 SID & MARTY KROFFT CASE, DELTAK RELIES ON NINTH CIRCUIT LAW AND
5 SAYS, YEAH, OF COURSE, YOU CAN CONSIDER -- AS PART OF THE VALUE
6 OF USE BY THE INFRINGER, YOU CAN CONSIDER AN AMOUNT EQUAL TO THE
7 ACQUISITION COSTS SAVED BY THE INFRINGEMENT INSTEAD OF BY BUYING
8 IT OR LICENSING IT.

9 THAT -- THAT -- THAT'S THE LOGICAL EXTENSION THEY GOT
10 FROM THE NINTH CIRCUIT LAW.

11 NOW, THERE IS ONE CASES -- ONE CASE, THE BUSINESS
12 TRENDS CASE THAT FOUR YEARS LATER IN THE SECOND CIRCUIT SAID, NO
13 WE'RE GOING TO DISAGREE WITH THE SEVENTH CIRCUIT ON THAT. BUT
14 THE KEY THERE IS A ON DAVIS CASE, WHICH CAME LATER AND WHICH
15 YOUR HONOR CITED IN YOUR JANUARY RULING HERE.

16 THE ON DAVIS CASE EXPRESSLY REJECTS THE BUSINESS
17 TRENDS CASE THAT PLAINTIFFS RELY ON. THEIR UNDERLYING ANALYSIS
18 AND THE -- AND THE BUSINESS TRENDS CASE HAS NO VIABLE MEANING
19 AFTER YOU READ ON DAVIS. WHAT THE PANEL IN THE ON DAVIS CASE
20 DID WAS ESSENTIALLY REJECT IT.

21 SO NONE OF THE CASES SUPPORT PLAINTIFF, EXCEPT FOR
22 THIS SUPERSEDED CASE.

23 AND AS FAR AS SOME OF THE OTHERS, THERE ARE -- THERE
24 ARE NIMMER -- THESE COMMENTARIES -- NIMMER HIMSELF ACKNOWLEDGES
25 THE RULE, THE "PALTRY (SIC) ON COPYRIGHT" CRITICIZES DELTAK AS

1 AN ABERRATION BUT FOR A VERY, VERY DIFFERENT POINT. IT'S AN
2 IMPORTANT DISTINCTION, BECAUSE THEY'RE CITING THIS PALTRY
3 TREATISE AS CRITICISM OF DELTAK AS AN ABERRATION, BUT THE
4 ABERRATION IN THE TREATISE'S VIEWPOINT HAD NOTHING TO DO WITH
5 THE ISSUE ON THIS MOTION, HAD NOTHING TO DO WITH WHETHER YOU
6 CONSIDER AS PART OF THE VALUE OF DEFENDANTS' USING THE
7 COPYRIGHTED MATERIAL, AS TO WHETHER THAT'S A RELEVANT FACTOR IN
8 VALUING IT. BUT IT'S WHETHER THAT KIND OF CONSIDERATION WAS
9 APPROPRIATE IN CONSIDERING THE PROFITS ISSUE, THE OTHER MEASURE
10 OF DAMAGES, NOT THE FAIR MARKET VALUE HYPOTHETICAL NEGOTIATIONS,
11 THE OTHER ONE. SO IT'S JUST -- IT'S JUST MISLEADING TO TALK
12 ABOUT DELTAK AS AN ABERRATION IN THAT -- IN THAT CONTEXT.

13 SO IN SHORT, WE THINK THAT VALUE OF USE IS
14 APPROPRIATE UNDER NINTH CIRCUIT LAW. WE THINK VALUE OF USE
15 INCLUDES A CONSIDERATION OF THE METHODOLOGY THAT OUR EXPERT HAS
16 PUT FORTH. WE THINK IT'S A LEGITIMATE QUESTION FOR THE JURY TO
17 DECIDE, WHETHER A HYPOTHET- -- IN THAT HYPOTHETICAL NEGOTIATION,
18 AVOIDED COST WOULD BE RELEVANT AND TO WHAT EXTENT THE JURY
19 WOULD -- WOULD WEIGH THAT.

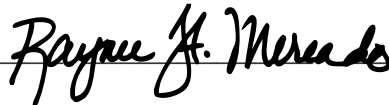
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21 TEXT REMOVED - NOT RELEVANT TO MOTION
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CERTIFICATE OF REPORTER

I, RAYNEE H. MERCADO, OFFICIAL REPORTER FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C07-01658PJH(EDL), ORACLE CORPORATION, ET AL. V. SAP AG, ET AL., WERE REPORTED BY ME, A CERTIFIED SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED UNDER MY DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY ME AT THE TIME OF FILING.

THE VALIDITY OF THE REPORTER'S CERTIFICATION OF SAID TRANSCRIPT MAY BE VOID UPON DISASSEMBLY AND/OR REMOVAL FROM THE COURT FILE.



RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR

MONDAY, MAY 10, 2010

EXHIBIT 2

PAUL PINTO May 19, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

Page 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

--00o--

ORACLE CORPORATION, a Delaware
Corporation; ORACLE, USA, INC.,
a Colorado Corporation, and
ORACLE INTERNATIONAL CORPORATION,
a California Corporation,

Plaintiffs,

Vs.

No. 07-CV-01658-PJH (EDL)

SAP AG, a German Corporation,
SAP AMERICA, INC., a Delaware
CORPORATION, TOMORROWNOW, INC.,
a Texas Corporation, and DOES
1-50, Inclusive,

Defendants.
_____ /

VIDEOTAPED DEPOSITION OF
PAUL PINTO

Wednesday, May 19, 2010

HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

Reported By: WENDY E. ARLEN, CSR #4355, CRR, RMR
Job 427372

Merrill Legal Solutions
(800) 869-9132

PAUL PINTO May 19, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

Page 173

TEXT REMOVED - NOT RELEVANT TO MOTION

6 Q. How in the year 2000 did you come to start
7 using this process?

8 A. That's when I joined NIIT, which again is a
9 CMM Level 5 company. So all processes are
10 documented.

12:45

11 Q. Okay. And you -- and that process is
12 documented at NIIT?

13 A. A variant of this process is documented.

14 Q. Why did you use a variant of it here in this
15 report?

12:45

16 A. Because this is specifically written for this
17 context.

TEXT REMOVED - NOT RELEVANT TO MOTION

PAUL PINTO May 19, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

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TEXT REMOVED - NOT RELEVANT TO MOTION

22 Q. You see under Roman vi it says ten-step
23 analysis, et cetera?

24 A. Yes, I do.

12:47 25 Q. And then A, Step One, B, Step Two, et cetera?

Merrill Legal Solutions
(800) 869-9132

PAUL PINTO May 19, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

Page 176

1 A. Yes.

2 Q. All the way to J, Step Ten. Those are the
3 ten steps that you employed, right, in your function
4 point analysis?

12:47 5 A. Those are the ten steps I employed in this
6 analysis.

7 Q. Are you aware of whether those ten steps in
8 that order have been approved by any standard setting
9 group such as the International Software Benchmarking
12:48 10 Standards Group?

11 A. But, Mr. Butler -- --

12 Q. Yeah.

13 A. -- these ten steps were specifically written
14 and tailored for this case.

12:48 15 Q. So the answer is no.

16 A. No, that's not the answer.

17 Q. Let me ask my question again because I'm
18 entitled to an answer to my question not the question
19 you want to answer.

12:48 20 A. Understood.

21 Q. Okay. This -- you see here ten steps you
22 have page i, Roman i in front of you.

23 A. I do.

24 Q. And there's ten steps going all the way from
12:48 25 Step One to Step Ten.

PAUL PINTO May 19, 2010
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

Page 177

1 A. I see that.

2 Q. Okay. Have those ten steps in that order as
3 you have them on that paper -- page I see you looking
4 at right in front of you, page i of your report, have
12:48 5 those ten steps been approved by any standard setting
6 group such as the International Software Benchmarking
7 Standards Group?

8 MS. HOUSE: And I'm going to object to the
9 word approved as vague.

12:48 10 THE WITNESS: Yeah, I can't say as to whether
11 they've -- they've been approved --

12 Q. MR. BUTLER: Okay.

13 A. -- by those organizations.

14 Q. Okay. Are you -- thank you. Are you aware
12:49 15 of any IFPUG publication that uses this ten-step
16 process?

17 MS. HOUSE: Asked and answered.

18 THE WITNESS: I am not aware.

19 Q. MR. BUTLER: Has this ten-step process listed
12:49 20 here been peer reviewed, as far as you know?

21 A. Yes, it has been peer reviewed.

22 Q. Okay. And you believe it would be
23 publishable in a peer reviewed professional journal?

24 A. Yes, I do.

12:49 25 Q. Have you seen it published in such a journal?

PAUL PINTO May 19, 2010
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1 A. I have not.

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PAUL PINTO May 19, 2010
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13 Q. MR. BUTLER: You hold yourself out as having
14 some sort of function point expertise?

14:29 15 A. I hold myself out as being an expert in the
16 field of commercial product development and as such
17 have applied a number of estimating techniques.

18 Q. Okay. But you don't specifically hold
19 yourself out as a function point expert?

14:29 20 A. I didn't --

21 MS. HOUSE: Objection, overbroad, misstates
22 his testimony.

23 THE WITNESS: I do not hold myself out as a
24 function point specialist.

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PAUL PINTO May 19, 2010
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Page 305

TEXT REMOVED - NOT RELEVANT TO MOTION

13 Q. MR. BUTLER: Mr. Pinto, I'm handing you what
14 has been marked as Exhibit 2060.

16:36 15 A. Yes.

16 Q. And it's a document entitled COCOMO II Model
17 Definition Manual.

18 A. I see that.

19 Q. Right. Sorry. I was looking at the wrong
16:37 20 page here. Have you seen this manual before today?

21 A. I have.

22 Q. When was that?

23 A. Numerous times.

24 Q. Okay. In the course of preparing your
16:37 25 report, did you see this report -- or this document?

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PAUL PINTO May 19, 2010
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1 A. I've seen this document for many years prior
2 to that.

3 Q. Oh, you have.

4 A. And in the course of preparing my report.

16:37 5 Q. Okay. If you turn to page 1 of that
6 document.

7 A. Yes.

8 Q. You see Eq. 1 and Eq. 2 there?

9 A. I do.

16:37 10 Q. Those are the equations I showed you earlier
11 today.

12 A. I see that.

13 Q. Do you recognize those?

14 A. I recognize those as being from this manual.
16:37 15 I also recognize them as -- as being the equations
16 contained in my COCOMO spreadsheet.

17 Q. Okay. And if you turn to page something
18 which I'll get to in a second -- well, bear with me
19 one second, Mr. Pinto. There we go. Okay. If you
16:38 20 turn now, please, to page 41 there is equation 14
21 that we referred to earlier. Do you recognize that
22 as being the equation we looked at before?

23 A. I do see that there.

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Page	Line	Change:	Reason:
<u>263</u>	<u>21</u>	"SO" TO "A"	CORRECTION
<u>285</u>	<u>1</u>	"IF COULD" TO "IF I COULD"	CORRECTION
<u>295</u>	<u>15</u>	"IT NOT" TO "IT IS NOT"	CORRECTION
<u>316</u>	<u>17</u>	"CM LEVEL" TO "CMD LEVEL"	CORRECTION
<u>319</u>	<u>18</u>	"143" TO "144"	CORRECTION
<u>325</u>	<u>13</u>	"CHANGES" TO "RATES"	CORRECTION
<u>330</u>	<u>21</u>	OMIT "IS"	CORRECTION

ACB Subject to the above changes, I certify that the transcript is true and correct.

_____ No changes have been made. I certify that the transcript is true and correct.


(signature)

6/23/10
(date)

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CERTIFICATE OF REPORTER

I, WENDY E. ARLEN, a Certified Shorthand Reporter, hereby certify that the witness in the foregoing deposition was by me duly sworn to tell the truth, the whole truth and nothing but the truth in the within-entitled cause;

That said deposition was taken down in shorthand by me, a disinterested person, at the time and place therein stated, and that the testimony of the said witness was thereafter reduced to typewriting, by computer, under my direction and supervision.

That before completion of the deposition, review of the transcript [] was [] was not requested. If requested, any changes made by the deponent (and provided to the reporter) during the period allowed are appended hereto.

I further certify that I am not of counsel or attorney for either or any of the parties to the said deposition nor in any way interested in the event of use and that I am not related to any of the parties thereto.



DATED: May 25, 2010

Wendy E Arlen

WENDY E. ARLEN CSR, No. 4355

EXHIBIT 3

Expert Report of Donald J. Reifer

26 March 2010

Expert Report of Donald J. Reifer

Oracle USA, Inc., et al. v. SAP AG, et al.

**Designated Highly Confidential
Pursuant to Protective Order**

Donald J. Reifer, President
Reifer Consultants, Inc.
14820 N. Dragons Breath Lane
Prescott, AZ 86305-5644

Expert Report of Donald J. Reifer**Designated Highly Confidential
Pursuant to Protective Order**

From 1996 to present, I have served as a Visiting Associate at the Center for Systems and Software Engineering at the University of Southern California (USC/CSSE) where I am a senior member of the COCOMO II project team. COCOMO II is the world's most widely used cost estimating model. From 1996 to 2000, I helped to calibrate the COCOMO II model and its cost and scale drivers. I also interfaced with the organizations supplying the data and checked it to ensure its correctness and usability. In 2000, I co-authored a book on COCOMO with Dr. Boehm and other members of the USC team entitled "Software Cost Estimation with COCOMO II." From 2000 until the present, I have been working as a member of the COCOMO II team.

I have prepared independent software effort and duration estimates for clients in commercial industry and government. These have been used as benchmarks against which competitive bids have been compared and their reasonableness ascertained. I also teach a course on software cost estimating with COCOMO II.2000 for selected clients. The next offering of this class will be in April 2010 for Tecolote Research, a government support contractor specializing in software cost estimating. I continue to be asked to perform consulting services and teach professionals how to properly calibrate and use software cost models, especially COCOMO II.2000.

I am also leading a joint Army and Air Force Study that is investigating ways to improve how software maintenance is estimated and budgeted by both their headquarters staffs and software life cycle support centers. These centers employ over ten thousand programmers who are involved in updating, repairing, optimizing, and improving software being used for both Information Technology and weapons system applications ranging from ERP (Enterprise Resource Planning) systems used in-house to military aircraft and missile systems.

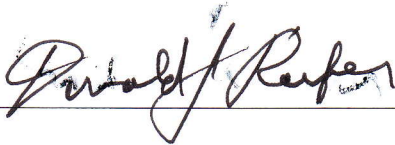
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X. OPTION TO REVISE

I reserve the right to modify and/or supplement this report and/or opinions set forth herein if additional damages or other rulings are made by the Court and/or additional evidence becomes available, including through my continued analysis of information provided by the parties to this litigation.

I, Donald J. Reifer, having conducted the aforementioned analysis and having authored this report, confirm that the opinions contained herein represent a fair and impartial analysis of the facts presented to me in the materials considered and provided.

Date: 26 March 2010

A handwritten signature in cursive script, appearing to read "Donald J. Reifer", is written over a horizontal line.

Donald J. Reifer

EXHIBIT 4

EXHIBIT 4

HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY
DONALD REIFER - 6/18/2010

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

--oOo--

ORACLE CORPORATION, a)
Delaware corporation, ORACLE)
USA, INC., a Colorado)
corporation, and ORACLE)
INTERNATIONAL CORPORATION, a)
California corporation,)
)
Plaintiffs,)
)
vs.) 07-CV-1658 (PJH)
)
SAP AG, a German corporation,)
SAP AMERICA, INC., a Delaware)
corporation, TOMORROWNOW,)
INC., a Texas corporation, and)
DOES 1-50, inclusive,)
)
Defendants.)
_____)

VIDEOTAPED DEPOSITION OF DONALD REIFER

JUNE 18, 2010

HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

REPORTED BY: SARAH LUCIA BRANN, CSR 3887 (#427125)

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DONALD REIFER - 6/18/2010

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11:43:15 11 Q. When did you do your COCOMO II analyses
11:43:19 12 that are contained in your report here?
11:43:22 13 A. Throughout my engagement.
11:43:24 14 Q. Starting when?
11:43:26 15 A. Probably in -- starting in February. I
11:43:34 16 tried to reconstruct Mr. Pinto's analysis and found
11:43:40 17 that when I ran the models the answers were
11:43:46 18 different. And then I started to look for why. And
11:43:53 19 I ran a number of analyses with other versions of
11:43:58 20 COCOMO, and basically ones that we have no longer
11:44:06 21 support at USC, and found that he did run the 1997
11:44:12 22 model, and confirmed his numbers in his runs by
11:44:18 23 running the 1997 version of the model.
11:44:21 24 And then I started looking at what would
11:44:23 25 happen if we ran the 2000 version of the model,

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DONALD REIFER - 6/18/2010

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11:44:26 1 which is the current and supported version, and
11:44:31 2 basically looked at the differences and then looked
11:44:35 3 at his ratings and started doing my analysis.

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DONALD REIFER - 6/18/2010

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12:00:52 12 Q. How many times have you run a COCOMO II
12:00:56 13 cost estimate?
12:01:00 14 A. Hundreds. It's just -- a lot of times.
12:01:09 15 Q. How many times have you run it with COCOMO
12:01:10 16 II '97?
12:01:14 17 A. Hundreds.
12:01:15 18 Q. And COCOMO II.2000?
12:01:21 19 A. Oh, '97, none. Sorry. My apologies. Let
12:01:22 20 me correct that answer.
12:01:24 21 1997 -- I have never developed an estimate
12:01:26 22 for a client with 1997. Hundreds of times with
12:01:31 23 COCOMO 2000.

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12:12:41 13 Q. And you haven't used COCOMO II.1997 in
12:12:46 14 order to develop an estimate and then deliver on
12:12:48 15 that; correct?

12:12:49 16 A. The 1992 -- 1997 model is an antiquated
12:12:55 17 model that has been basically put on the shelf, put
12:12:59 18 on the shelf for history purposes that, of the 43
12:13:07 19 firms that are in the USC affiliates, no one uses
12:13:11 20 1997. I checked that.

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DONALD REIFER - 6/18/2010

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14:15:46 6 Q. I believe you referenced this earlier in
14:15:47 7 the deposition. But this is the "Notes re Response
14:15:50 8 to Rebuttal report of Donald J. Reifer."
14:15:54 9 Do you see that?
14:15:55 10 A. Yes, I see that.
14:15:56 11 Q. And these are the Pinto notes that we were
14:15:59 12 talking about earlier; correct?
14:16:01 13 A. Yes, I see those.
14:16:02 14 Q. And then on page three of these notes at
14:16:06 15 the top there's the comparison between the
14:16:10 16 custom-built replicas, the USC code counter, and
14:16:16 17 Mr. Pinto's actual code counters?
14:16:19 18 A. I see that.
14:16:19 19 Q. You see that Mr. Pinto's code counters
14:16:26 20 are -- end up being the most conservative of the
14:16:29 21 three?
14:16:29 22 A. I have no confidence at all in Mr. Pinto's
14:16:32 23 code counters until I have them in hand and can
14:16:35 24 execute them.
14:16:37 25 Q. You have them in hand.

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DONALD REIFER - 6/18/2010

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14:16:39 1 A. Until I can execute them.

14:16:40 2 Q. Right. And you never asked anyone for
14:16:42 3 help to get -- in executing them; correct?

14:16:46 4 A. If a PhD student and a 40-year veteran
14:16:50 5 can't get them to work in a period of two weeks,
14:16:53 6 it's going to take more than two weeks to get them
14:16:56 7 to work. So the answer is no, we have not asked for
14:17:00 8 help.

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DONALD REIFER - 6/18/2010

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15:22:17 2 A. And which model are you talking about, the
15:22:19 3 2000 or the 1997?

15:22:21 4 Q. Is there a difference?

15:22:22 5 A. Yes, major difference. The 1997 is an
15:22:27 6 outdated and inaccurate model that we no longer
15:22:32 7 provide support and no one that I know uses.

15:22:36 8 Q. We are talking about the SPR tables, sir.

15:22:39 9 A. Well, you were talking about --

15:22:41 10 Q. Is there a difference with respect to
15:22:43 11 those two models with respect to the SPR tables that
15:22:46 12 we were talking about?

15:22:47 13 MR. BUTLER: Had you finished your answer
15:22:49 14 before you were cut off by the attorney for Oracle?

15:22:53 15 THE WITNESS: Yes, I had not finished.

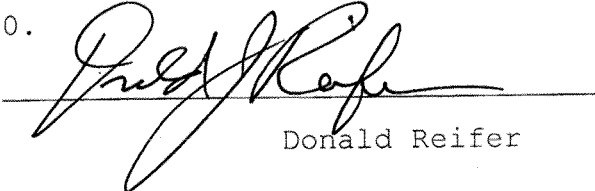
15:22:55 16 MR. BUTLER: Do you want to finish your
15:22:56 17 answer?

15:22:56 18 THE WITNESS: Well, yes, I would.

15:22:58 19 So if one looks at the 1997 version, the
15:23:01 20 1997 version of COCOMO is a much less accurate
15:23:07 21 model. And in my report I put the accuracy that has
15:23:13 22 been -- pertained. And it inflates costs upward.
15:23:18 23 And no one uses it, including the people I have
15:23:24 24 contacted in India, which are Infosys and Taca, and
15:23:34 25 the people that train in India, QAI.

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DONALD REIFER - 6/18/2010

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19:29:11 1 I declare under penalty of perjury the
19:29:11 2 foregoing is true and correct. Subscribed at
19:29:11 3 PRESOTT, ~~California~~, ^{ARIZONA} this 16th day
19:29:11 4 of JULY, 2010.
19:29:11 5 
19:29:11 6 Donald Reifer
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CERTIFICATE OF REPORTER

I, SARAH LUCIA BRANN, a Certified Shorthand Reporter, hereby certify that the witness in the foregoing deposition was by me duly sworn to tell the truth, the whole truth, and nothing but the truth in the within-entitled cause;

That said deposition was taken in shorthand by me, a disinterested person, at the time and place therein stated, and that the testimony of the said witness was thereafter reduced to typewriting, by computer, under my direction and supervision;

That before completion of the deposition, review of the transcript [X] was [] was not requested. If requested, any changes made by the deponent (and provided to the reporter) during the period allowed are appended hereto.

I further certify that I am not of counsel or attorney for either or any of the parties to the said deposition, nor in any way interested in the event of this cause, and that I am not related to any of the parties thereto.

DATED: June 25, 2010

Sarah Lucia Brann

SARAH LUCIA BRANN, CSR No. 3887

EXHIBIT 5

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13 Q Why did you make the decision to use SLOC rather
14 than function point analysis for purposes of the COCOMO
15 II model that you developed for Evolution?

16 A The simple answer was that we could count the
17 lines of code on the product.

18 Q Couldn't you also count the function points?

19 A No, you can't.

20 Q Why not?

21 A You have to -- the reason that you can't count
22 function points is that you have to have the spec to do a
23 specification analysis to determine the number of
24 function points.

25 Q So without a specification, you can't do a

1 function point.

2 A I couldn't do a function point count. I don't
3 know if others could. Without a spec, I couldn't do it.

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15 Q Why would it be inappropriate to take the source
16 lines of code and, as I believe you said, backfire to
17 create function points?

18 A Would you restate your question.

19 MR. HARRISON: Would you read that back, please.

20 THE WITNESS: I don't know if you said

21 "appropriate" or "inappropriate."

22 BY MR. HARRISON:

23 Q "Inappropriate" is what I said.

24 A Okay.

25 Q I was asking: Why would it be inappropriate to

1 do that?

2 THE REPORTER: Inappropriate?

3 MR. HARRISON: Inappropriate.

4 THE WITNESS: I'm sorry. That --

5 MR. HARRISON: Atlanta accent.

6 THE WITNESS: I believe it would be
7 inappropriate because one is a spec base measure of size,
8 and the other is a physical measure of size.

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17 Q Are you aware of any instances in which COCOMO
18 II has been used with a function point analysis?

19 A Yes. Fidelity Investment.

20 Q But Fidelity Investment isn't in the database.

21 A Fidelity Investment is in the database.

22 Q It is.

23 A But we backfired to produce lines of code.

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I, DONALD J. REIFER, do hereby declare under penalty of perjury that I have read the foregoing transcript; that I have made such corrections as noted herein, in ink, initialed by me, or attached hereto; that my testimony as contained herein, as corrected, is true and correct.

EXECUTED this ____ day of _____,
_____, at _____, _____
(City) (State)

DONALD J. REIFER

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I, the undersigned, a Certified Shorthand Reporter of the State of California, do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth; that any witnesses in the foregoing proceedings, prior to testifying, were placed under oath; that a verbatim record of the proceedings was made by me using machine shorthand which was thereafter transcribed under my direction; further, that the foregoing is an accurate transcription thereof.

I further certify that I am neither financially interested in the action nor a relative or employee of any attorney of any of the parties.

IN WITNESS WHEREOF, I have this date subscribed my name.

Dated: _____



KARIN E. GLAAB
CSR No. 2638

EXHIBIT 6

Not Reported in F.Supp.2d, 2006 WL 2982148 (N.D.Cal.)
(Cite as: 2006 WL 2982148 (N.D.Cal.))

C
Only the Westlaw citation is currently available.

United States District Court,
N.D. California.
Randy O. FECHTIG, Plaintiff,
v.
SEA PACIFIC INCORPORATED, et al., Defendants.
No. C 03-4056 JL.
Oct. 17, 2006.

Edward M. Bull, III, Eugene A. Brodsky, Jennifer L. Fiore, Banning Micklow & Bull LLP, Michael C. Miller, Brodsky Baskin & Miller, Inc., San Francisco, CA, for Plaintiff.

Galín G. Luk, Richard C. Wooton, Cox Wooton Griffin Hansen & Poulos, LLP, San Francisco, CA, for Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING BENCH TRIAL

JAMES LARSON, Chief Magistrate Judge.

Introduction

*1 In his summation, counsel for the Plaintiff candidly admitted that his entire case rests on the credibility of the Plaintiff. Unfortunately, as plausible as his version may be, the defense has completely dismantled it.

Plaintiff is the only witness who says he fell on deck. He is the only witness who says the vessel's winch jerked and jammed before he fell. His testimony is inconsistent. His memory is faulty.

Defendants presented credible witnesses who testified that Plaintiff didn't fall, when they were on deck with him and Plaintiff said they saw him. The

same witnesses testified that the winch jammed two weeks *after* Plaintiff was injured and the crew hammered on it, but it didn't start. They used another winch for a while, then they restarted the first winch and it worked fine for another year and a half. These witnesses were credible. They didn't have a personal stake in the outcome of this lawsuit and their stories have been consistent over time.

Plaintiff's expert has some practical experience but minimal expertise about winches. He based his conclusions mostly on Plaintiff's version of events. He never saw the Defendants' winch and his testimony conflicted with that of Defendants' expert.

Defendants' expert has impressive credentials and a long career inspecting, analyzing, overhauling and using hundreds of winches. He saw the Defendants' winch, identified it, obtained the specs from the manufacturer and based his conclusions on those specs, the testimony of a number of witnesses and his own vast experience and knowledge. He concluded that the alleged accident could not have happened the way Plaintiff described it.

The Court concludes that what Plaintiff claims happened didn't happen. Maybe he fell, and maybe he fell on the deck of the F/V Sea Clipper, but if so his fall was not due to any problem with the winch or any other negligence or unseaworthiness identified at the trial.

The Court also finds that Defendants paid Plaintiff maintenance and cure as soon as possible after he notified them of his claim and probably overpaid him by \$2,000.

The Court finds for Defendants and concludes that Plaintiff has not met his burden of proof under the Jones Act or the doctrine of unseaworthiness.

Procedural Background

In his complaint, filed September 5, 2003, Plaintiff

Not Reported in F.Supp.2d, 2006 WL 2982148 (N.D.Cal.)
(Cite as: 2006 WL 2982148 (N.D.Cal.))

alleges that on or about June 28, 2002, he sustained injuries to his back, right hip, left shoulder and cervical spine while employed by Defendants as a member of the crew of the F/V Sea Clipper.

Defendants allege that the F/V Sea Clipper was at all relevant times owned by Defendant Sea Pacific, Inc. All of the Defendants deny negligence or liability in any way and deny that the vessel was unseaworthy.

This case was assigned at filing to the district court (Hon. Sandra Brown Armstrong). On January 8, 2004 all parties consented to the jurisdiction of this Court, as provided by 28 U.S.C. § 636(c) and Civil Local Rule 73. The case was reassigned and the first case management conference before this Court was held February 25, 2004.

*2 The parties pursued private arbitration and Plaintiff dismissed individual Defendant Eugene Clahan.

On June 30, 2004 the parties appeared for a further case management conference and were referred to a magistrate judge (Hon. Bernard Zimmerman) for a settlement conference and dates were set for pretrial proceedings and trial.

On July 12, 2004, Plaintiff dismissed his Second and Third causes of action.

The settlement conference was held on November 18, the case did not settle at that time and a further case management conference was held on December 15.

In February 2005 another case management conference was held and Plaintiff hired new counsel. His new counsel, Edward M. Bull III, on March 3, 2005 waived his client's right to jury trial and stipulated to a bench trial.

On April 29, 2005 the Court signed the parties' stipulation and proposed order continuing the trial to June 20, 2005. The Court later granted the parties' request for a further continuance of the trial to

September 19, 2005, along with new pretrial dates.

The parties submitted a number of motions in limine. The Court held a pretrial conference on September 15 at which it ascertained that the parties had not completed discovery. The Court vacated the trial date, scheduled a further case management conference for September 21 and re-set the trial for November 28.

The Court conducted a six-day bench trial beginning November 28, 2005 and concluding December 6. Counsel argued, witnesses testified in person or by deposition, and exhibits were received in evidence. Counsel filed proposed findings of fact and conclusions of law on January 20, 2006. The Court ordered the parties to supplement their proposed findings and conclusions with citations to the record. The parties obtained a trial transcript and filed their findings and conclusions with citations on July 28, 2006. The matter was submitted.

PARTIES' STIPULATED FINDINGS OF FACT

Agreed Facts

Plaintiff was born on July 15, 1965, and graduated from Walnut High School in Walnut, California in 1983. Plaintiff thereafter worked in the construction and electrical trades for approximately ten years. In about 1993, Plaintiff moved to Crescent City, California to be close to his mother and grandmother and worked for several years as a cook. Plaintiff remains a resident of Crescent City to this day. Plaintiff is divorced and has a dependent son of five years of age.

The F/V Sea Clipper is a fishing vessel (hereinafter "F/V Sea Clipper").

In 2002, the F/V Sea Clipper was owned by Sea Pacific, Inc.

Defendant Sea Pacific, Inc. is a California Corporation with its principal place of business in San

Not Reported in F.Supp.2d, 2006 WL 2982148 (N.D.Cal.)
(Cite as: 2006 WL 2982148 (N.D.Cal.))

Francisco.

Sea Pacific's primary shareholder, Mr. Eugene Clahan, was originally named as a Defendant, but was later dismissed.

Beginning in about 1996, Plaintiff took his first job as a commercial fisherman. Plaintiff worked part time as a fisherman and did odd jobs until 2002, when he joined F/V Sea Clipper.

***3** At the time of his alleged accident Plaintiff had been employed as a deckhand aboard the F/V Sea Clipper since February 12, 2002 in the bottom fishing and hake seasons. The F/V Sea Clipper had been involved in "bottom fishing" until late May of that year. At the end of May 2002, the F/V Sea Clipper converted to fishing for pacific whiting, otherwise known as hake, and Plaintiff continued to work as a deckhand during the new season. Hake or "whiting" is a type of seasonal mid-water fish (i.e. it can be fished only during certain times of the year).

Hake fishing is performed in a series of one or two day "derby runs," in which the vessels motor to the fishery, set their nets and haul in fish until their fish holds are full or the vessel is scheduled to return to the processor. The vessel then returns to port for unloading, and then sails back to the fishing grounds.

The F/V Sea Clipper fished in the 2002 hake season, which ran from June 15 to July 18, 2002.

For the 2002 hake season, the F/V Sea Clipper's crew consisted of Captain Mark Gentry and generally two deckhands. The crew never consisted of more than two deckhands at one time.

From approximately June 20 to June 25, 2002 the deckhands were Ody Richcreek and the Plaintiff. From approximately June 26 to June 29, 2002 the deckhands were Kent Mooreland and the Plaintiff. On June 30, 2002 and July 1, 2002, Kent Mooreland served as the only deckhand on the F/V Sea Clipper. The Plaintiff served as one of the deck-

hands on the F/V Sea Clipper from approximately July 2, 2002 to July 18, 2002.

The F/V Sea Clipper's trawling operation worked as follows. Upon arriving at the fishing grounds, the crew released the "trawl net" from a roller into the water behind the vessel. The forward end of the trawl net is open and the cod end (aft end) was tied tight. Two wires ran from the opposite sides of the net to two "doors" (heavy rudder-like angled metal pieces) which were also lowered into the water to spread the forward end of the net as it is towed behind the vessel.

When the net was full, the crew pulled in the net to discharge its contents into the fish holds. The deckhands used two main "warp winches" to retrieve the doors and lift them to stern port and starboard blocks at the vessel's stern. When the doors had been lifted from the water, the deckhands disconnected the wires securing the net to the doors, and re-connected them to a main "retrieval wire" which ran forward to a net reel drum ("forward net reel drum"). The forward net reel drum was located in the forward one-third and center section of the F/V Sea Clipper's main deck. When the retrieval wire was connected, the captain engaged the forward net reel drum to pull in the net to the point where the most forward cod end of the net, the part of the net containing the fish, was on the F/V Sea Clipper's ramp. The ramp was located aft and center of the F/V Sea Clipper's main deck.

The tension created by the net of fish also caused the part of the net between the ramp and the forward net reel drum to spread fully open. When the net was fully spread, there was a gap of approximately 1 foot between either side of the net and the divider boards.

***4** The divider boards, which are approximately 3 feet high, were located port and starboard of the center line of the deck and run from approximately aft of the F/V Sea Clipper to approximately several feet before the forward net reel drum. The divider boards contained the fish as they were released

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from the trawl net into the fish holds. The fish holds were located between the divider boards.

After the most forward cod end of the net, the part of the net containing the fish, was on the F/V Sea Clipper's ramp, the deckhand working on the starboard side stepped over the divider boards and either into the space between the net and the divider board or onto the net. The deckhand then made the hook fast to a splitting strap on the net. The hook was connected to a block from which the "lift wire" ran through.

The lift wire was controlled by a winch located just aft of the wheel house ("lift winch") and operated by Captain Gentry. The lift wire ran from that winch to a block suspended from the forward A-frame down and back to the aft A-frame (where it is tied off when the net is in the water).

After the lift wire was made fast to the net, Captain Gentry, working from his position at the winch controls aft and starboard of the wheelhouse, engaged the winch to lift the net and pulled it forward to a position over the fish holds. The deckhand then pulled a "zipper line" (or splitting strap) on the bottom of the net, which opened the net to discharge the fish into the hold. The purpose of the zipper line was to allow sections of the net to be discharged in sequence. The process of pulling the net forward and releasing the zipper line continued until all sections of the net were unloaded.

During this operation, the second deckhand was positioned on the port side. His duties included observing the operation, making sure that the hook line did not interfere with the other deckhand's work, and hosing the fish out of the net and into the hold.

The Plaintiff claims that the "accident" occurred after Captain Gentry had pulled up the most forward cod end of the net onto the F/V Sea Clipper's ramp and prior to the crew making its first lift of the trawl net full of hake.

The Plaintiff testified that he was facing aft while standing on the aft deck of the F/V Sea Clipper, forward of the ramp, and between the divider boards. According to the Plaintiff, he then attempted to hook the block to a splitting strap when Captain Gentry instructed him to hook the block to a forward splitting strap (towards the forward part of the F/V Sea Clipper).

According to the Plaintiff, as he was standing on the deck between the divider boards holding onto the block and while his hands were approximately between his waist and his shoulder, the line running from the lift winch to the block suddenly pulled and jerked him off his feet and backward onto his left shoulder and back. The Plaintiff testified that his back hit the deck of the F/V Sea Clipper inboard of the divider boards. According to the Plaintiff, after he fell, he looked down and observed that his left shoulder landed on a steel hammer lock. If the winch had been engaged to pull in the net when Plaintiff was standing as he claimed, the cable and the hook in his hands would have moved up and backward (toward the front of the boat).

*5 Splitting straps are located at approximately 12 foot intervals on the trawl net. Hammer locks are steel horseshoe shaped pieces of coupling that connect together at the open end. Hammer locks are located next to the splitting straps and at 12 foot intervals on the trawl net.

At the time of, the alleged accident Plaintiff was approximately 6' 2" tall and weighed approximately 220 pounds.

Despite the fall, Plaintiff continued working that day and the next morning without comment or complaint. He didn't mention any problem with his shoulder until the next afternoon, when he dropped about 30-40 feet of 3/4 inch wire into the water as he was attempting to transfer it from the trawl door to the net. When Captain Gentry asked the Plaintiff why he dropped the wire, the Plaintiff explained that he had hurt his shoulder in a fall he suffered on deck the day before.

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After the vessel returned to port on June 29, Mr. Fechtig sought, and Captain Gentry approved, a medical exam for him at the Columbia Memorial Hospital in Astoria, Oregon. The medical report states that he was injured when he fell on the deck of the boat while he was “pulling a line-lost balance [and] fell on his left scapular.” His chief complaints were of pain in the left scapular region and left low back. He also reported crunching in his left shoulder. Examination revealed swelling in the apex of the left shoulder and with bruising over the left scapula. The doctors diagnosed the Plaintiff with a “contusion of the left shoulder and low back secondary to work related injury.” Diagnostic imaging studies of the left shoulder, scapula or sacroiliac joints were all negative. The Plaintiff declined pain medication. On July 1, Doctor Zagata performed a follow-up exam. Dr. Zagata released the Plaintiff back to light duty work after noting that he was “ambulating without difficulty” with “good range of motion about the left shoulder.”

The Plaintiff returned to work throughout the rest of the hake season and performed his strenuous deckhand duties. Plaintiff worked as the only deckhand for the July 11 run and the July 16-17 run, when the vessel landed one of its highest fish catches of the season.

Facts in Dispute

The Winch

Plaintiff's argument

Plaintiff contends that at the time of the accident, because of the design (rigging or defect) of the winch, the responsible crewman had to maintain constant tension on the cable (applying approximately fifty pounds of force) while maneuvering and rigging the hook to the net. Captain Gentry did admit that the crew would have to keep approximately 50 pounds of force on the hook, cable and winch. Gentry TT 634:6-19. He also admitted that the

winch stopped working for part of a trip and that the crew had to bang on it with a hammer. Gentry Trial Transcript (“TT”) 588:22-589:15 & 589:25-590:4.

According to the crew member witnesses, it was necessary to maintain constant tension on the hook line attached to this winch to prevent the cable from becoming loose and potentially overriding, binding and/or backlashing. Fechtig TT 161:13-162:18 & 163:5-12; Gentry TT 634:6-19. See also the testimony of Charles Walther (“Walther”), TT 419:13-18 & 422:2-425:19[admitting could cause “bird nesting” and line reversal.

*6 Plaintiff contends that the winch used to lift the net not only required constant tension but often backlashed or stopped working altogether. Prior to his injury, whenever the winch stopped altogether, the Captain and crew had to bang on the winch with hammers to break free whatever was jamming it internally. The winch stopped working altogether at one point during the 2002 hake season and Captain Gentry and the crew banged on it with a hammer to try to free it up. Fechtig TT 172:18-173:18 & 176:20-177:21.

At trial Captain Gentry admitted that following the season in question the winch was removed from the boat and was to be overhauled. Gentry TT 638:20-639:9. Although this work was never done (when the winch was replaced with a new and larger winch), one item that was identified as needing repair was the winch brake system. Testimony of Warren Junes (“Junes”) Deposition Transcript (“DT”) at 24:8-18 (Mr. Junes appeared at trial via deposition and his testimony was not reported, his transcript having been lodged with the Court, and then admitted into evidence as Court Exhibit 2). References are therefore to his deposition of October 6, 2005. According to Junes, the faulty brake could both cause the winch to seize up and to slip (though, according to him, it could only slip with thousands of pounds of pressure being applied). Junes, DT 25:13-27:7; 50:15-20)

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Defendants' argument

Defendants contend that although there was a problem with the hydraulics which ran the winch two weeks *after* the accident, Captain Gentry and Mr. Mooreland agree that there was no problem with the winch before or at the time of the accident. [Gentry TT 529:15-530:17; Mooreland Deposition Transcript (“DT”) 17:11-25:17, on video at Ex. UUU, transcript admitted into evidence as Court Exhibit 5. Captain Gentry further testified that there wasn't a problem with the wire “birdsnesting” before or at the time of the accident Gentry TT 588:5-19 Defendants' expert, Mr. Walther, also testified that a hydraulic problem would not cause the winch to stick or jerk, but would merely affect its speed. Walther TT 374:5-375:19.

Captain Gentry testified that the winch did not cause the wire to jerk either. On one occasion during the season, the winch froze and had to be turned off. When it was turned back on, it worked again through the rest of that season and for another year later. Gentry TT 588:20-590:15. Mr. Walther testified that this was likely due to dirt in the hydraulic system release valve, which would divert hydraulic oil from the winch control and stop it from moving. After the system cooled and the release valve closed, the system would operate properly. Walther TT 395:6-396:21.

The Accident

Plaintiff's argument

Captain Gentry admitted that he would most likely have been operating the winch from the lower deck in an area located behind the forward net reel and the starboard trawl winch. Gentry, TT 578:3-19 & 579:22-581:12. While he testified that he believed he would have been leaning out (with his arm extended behind him), and thus would have had a clear view of the accident scene, actual photographs taken by the defense show him to be well behind the deck equipment in order to access the controls.

See Defense Exhibit B-06. These photographs also make it clear that at times the area of the accident (directly forward of the ramp and between the trawl boards), would be obscured by the net reel. See Plaintiff's Exhibit 5 and Defendants' Exhibits B-06, B-07 & B-08. See also Fechtig's testimony regarding Gentry's many duties while he would have been hooking up the line. Fechtig, TT 167:5-168:2.

*7 The Plaintiff testified that he never considered reporting the event in question as an “accident.” Fechtig, TT 198:11-199:25. He assumed that he had simply bruised and/or **sprained his back** and shoulder and that his pain would subside if he kept working. *Id.* However, as he continued to work the day after the accident and his left shoulder pain persisted, it is undisputed that the Plaintiff did report to Captain Gentry that he had injured his shoulder when he fell on deck the previous day. Fechtig, TT 200:5-202:10 & 203:23-204:15. Gentry, TT 594:15-595:10. It is also undisputed that the Plaintiff requested and received medical attention for his shoulder injury immediately upon reaching port and that Gentry was aware of this medical visit. Gentry, TT 596:22-597:1.

Gentry admitted at trial that the Plaintiff did report falling on the deck and that he sent an e-mail to the vessel owners on August 13, 2002, reporting the Plaintiff's incident (that the Plaintiff reported that he “had taken a fall on deck”). See Plaintiff's Trial Exhibit No. 22. Although the e-mail referenced the accident as having occurred on July 29, 2002 (rather than on June 28), Gentry's Trawl Logbook contains notations in his own hand writing that he learned of the incident on June 29. See Defense Exhibit D.

Defendants' argument

Defendants claim that while Plaintiff alleges that the accident occurred as he was standing on the deck on the stern end of the F/V Sea Clipper attempting to hook the lift wire and block to a splitting strap, Plaintiff's story is flatly contradicted by

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Captain Gentry and deckhand Mooreland. Although the Plaintiff testified on direct examination that he didn't know if anyone saw him fall, Fechtig TT 197:22-198:23, he testified at deposition that he didn't report the accident that day because Captain Gentry and Mr. Mooreland saw him fall. Fechtig TT 456:17-457:21.

Captain Gentry and Kent Mooreland testified, however, that they did not see Plaintiff fall, nor did he complain of hurting his shoulder until the next day. Gentry TT 575:11-20; 587:7-18; 594:15-595:21; Mooreland TT 33:11-38:3. Captain Gentry testified that he was supervising the net hauling operation and would have seen the Plaintiff fall had the accident happened as he claims. Gentry TT 586:6-587:6. Mr. Mooreland testified that during this operation, his role was generally to observe the other deckhand and assist as necessary. Mooreland DT 31:21-33:10.

Plaintiff's previous injuries

Plaintiff's argument

Dr. Sampson specifically addressed the three documented prior complaints of Plaintiff's shoulder pain and testified that the fact that they were passing in nature ruled them out as having any connection to the condition requiring the surgery. Sampson, TT 30:19-31:8. Dr. Sampson also addressed the fact that the Plaintiff was able to move some furniture and a lawn mower shortly before his surgery. He testified that the lifting in question (with the Plaintiff using his arms in an extended "traction" position) was not inconsistent with the Plaintiff's complaints of pain and, indeed, that it would actually tend to relieve his pain by taking the pressure off the joint and relieving the impingement. Sampson, TT 28:22-29:18 & 30:6-18.

Defendants' argument

*8 Defendants claim that Plaintiff's medical records show that his need for medical attention had nothing

to do with this supposed accident. Plaintiff's medical records reflect that he had problems with his shoulder long before his accident due to years of heavy work and prior non work-related accidents. His need for treatment was just another exacerbation of a long history of pre-existing shoulder problems. (See Defendants' Exhibits A, BB, HH)

Legal Issues in Dispute

Whether Defendants were negligent (Jones Act Negligence)

Legal standard:

The Jones Act provides a federal cause of action for "any seaman who shall suffer personal injury in the course of his employment." See 46 U.S.C.App. § 688(a). "The employer of a seaman owes the seaman a duty under the Jones Act to provide the seaman with a safe place to work." *Ribitzki v. Canmar Reading & Bates, Ltd. Partnership*, 111 F.3d 658, 662 (9th Cir.1997). To recover under the Jones Act, a Plaintiff must prove that the Defendant was "negligent and that this negligence was a cause, however slight, of his injuries." *Id.* "The quantum of evidence necessary to support a finding of Jones Act negligence is less than that required for common law negligence, ... and even the slightest negligence is sufficient to sustain a finding of liability." *Id.* Thus, "a seaman must demonstrate only that his employer's negligence played any part, even the slightest, in producing his injury." *Id.* Nevertheless, "an employer is only liable under the Jones Act if the employer or its agent either knew or should have known of the dangerous condition" that contributed to the Plaintiff's injury. *Id.* at 663.

The elements of a Jones Act negligence claim are: duty, breach, notice and causation. The only difference between Jones Act negligence and common law negligence is the test for causation. The test for causation, which is often described as a "featherweight" causation standard, is whether the

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proofs justify that the employer's negligence played any part, even the slightest, in producing the injury for which Plaintiff seeks damages.

Whether the F/V Sea Clipper was unseaworthy

Legal Standard:

"Liability based upon unseaworthiness is wholly distinct from liability based upon negligence." *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 498 (1971). "A shipowner has an absolute duty to furnish a seaworthy ship," a ship "reasonably fit for its intended use." *Ribitzki*, 111 F.3d at 664. "The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service." *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960). "A vessel's condition of unseaworthiness may arise from any number of circumstances, including an insufficient number of men assigned to perform a shipboard task, or the existence of a defective condition, however temporary, on a physical part of a ship." *Ribitzki*, 111 F.3d at 664. To establish a claim of unseaworthiness, where a defective condition rather than a deficient crew is at issue, the Ninth Circuit has held that a Plaintiff must establish: "(1) the warranty of seaworthiness extended to him and his duties; (2) his injury was caused by a piece of the ship's equipment or an appurtenant appliance; (3) the equipment used was not reasonably fit for its intended use; and (4) the unseaworthy condition proximately caused his injuries." *Id.* "Causation is established by showing that the unseaworthy condition was a substantial, factor in causing the injury." *Id.* at 665. "The shipowner's actual or constructive knowledge of an unseaworthy condition is not essential to liability." *Id.* at 664.

Were Plaintiff's Injuries Caused by Either Negligence or Unseaworthiness?

Expert Testimony: Witness Qualifications

*9 The Court in evaluating the parties' contentions as to the possible negligence of Defendants in operating an unsafe winch or the unseaworthiness of the F/V Sea Clipper looks first to the qualifications of the expert witnesses who offered opinions on the issue.

This Court evaluated the qualifications of Plaintiff's expert on winches, Mr. Vito Giglio, as well as his methodology for evaluating the workings of the winch on the F/V Sea Clipper. One complication is that the winch was replaced before Mr. Giglio ever had a chance to see it. The boat was out at sea, so he couldn't examine the winch, and then it was replaced. Plaintiff claims Defendants replaced the winch because it was defective. Defendants deny this and say it was merely replaced by a newer, stronger, faster winch.

Whatever the reason, Mr. Giglio hypothesized what happened based mostly on what Fechtig told him and on his own prior experience as a captain who operated winches.

In evaluating expert testimony on scientific or technical subjects, the Court at trial must apply the specifics of [Federal Rules of Evidence Rule 702](#) and attendant case law, specifically the case of *Kumho Tire*, in which the U.S. Supreme Court explained the *flexible* use of the *Daubert* factors in the non-scientific arena. a trial court should apply them on an individualized basis, depending on the nature of the technology and the experience of the expert:

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), this Court focused upon the admissibility of scientific expert testimony. It pointed out that such testimony is admissible only if it is both relevant and reliable. And it held that the Federal Rules of Evidence "assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id.*, at 597, 113 S.Ct. 2786. The Court also discussed certain more specific factors, such as testing, peer re-

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view, error rates, and “acceptability” in the relevant scientific community, some or all of which might prove helpful in determining the reliability of a particular scientific “theory or technique.” *Id.*, at 593-594, 113 S.Ct. 2786.

This case requires us to decide how *Daubert* applies to the testimony of engineers and other experts who are not scientists. We conclude that *Daubert*'s general holding-setting forth the trial judge's general “gatekeeping” obligation-applies not only to testimony based on “scientific” knowledge, but also to testimony based on “technical” and “other specialized” knowledge. See *Fed. Rule Evid. 702*. We also conclude that a trial court may consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability. But, as the Court stated in *Daubert*, the test of reliability is “flexible,” and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, *141-142 (1999)

*10 The lower court in *Kumho Tire* had excluded an expert's testimony that a tire blowout which caused a fatal accident was due to a defect because it did not accept his scientific methodology or the way he applied it, and granted summary judgment for Defendants. The Court of Appeals for the Eleventh Circuit reversed the trial court, holding as a matter of law that the trial court had erred in applying *Daubert* to non-scientific testimony. The U.S. Supreme Court granted cert to address the following question:

in light of uncertainty among the lower courts about whether, or how, *Daubert* applies to expert testimony that might be characterized as based not upon “scientific” knowledge, but rather upon “technical” or “other specialized” knowledge.

Id. at 146-147.

The Court concluded that:

... *Daubert*'s general principles apply to the expert matters described in *Rule 702*. The Rule, in respect to all such matters, “establishes a standard of evidentiary reliability.” 509 U.S., at 590, 113 S.Ct. 2786. It “requires a valid ••• connection to the pertinent inquiry as a precondition to admissibility.” *Id.*, at 592, 113 S.Ct. 2786. And where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, see Part III, *infra*, the trial judge must determine whether the testimony has “a reliable basis in the knowledge and experience of the relevant discipline.”

Id. at 149.

The *Daubert* factors may apply to the testimony of engineers and other experts who are not scientists and some of those factors may be helpful in evaluating the reliability even of experience-based expert testimony. The Court of Appeals in *Kumho Tire* had erred insofar as it ruled those factors out in such cases. In determining whether particular expert testimony is reliable, the trial court should consider the specific *Daubert* factors where they are reasonable measures of reliability. *Id.*

The Court in the case at bar looks to the qualifications of the parties' experts with the *Daubert* factors in mind, as delineated in *Kumho Tire* for application to non-scientific expert testimony. Neither expert is a scientist but both have experience with the technology at issue, hydraulic winches, and the application of that technology in the operation of commercial fishing vessels. The Court may apply the factors to determine whether the parties' experts have a reliable basis in their knowledge and experience of the relevant disciplines, whether they be the proper operation of commercial fishing vessels or hydraulic winches.

Plaintiff's Expert

Mr. Vito Giglio was at one time master of a vessel,

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the Sea Aker Husky, which used winches to position mooring systems for oil rigs in the Gulf of Mexico. (Giglio, Excerpted Proceedings Transcript (“EPT”)(Admitted into evidence as Court Exhibit 1) 65:21-66:6) He also served as master for twenty plus years on various tuna fishing vessels, which would typically deploy a large net, which rolled aboard pulled by a power block on the boom, using Gearmatics and other winches. He would usually be at the controls of the hydraulic winches. Giglio EPT 68:7-70:2. The tuna fishing vessels he captained had nets with hook lines. Giglio EPT 73:19-23.

***11** Mr. Giglio had never testified in court as an expert, although he had served as a non-testifying expert for Plaintiff's counsel on several other personal injury cases involving fishing vessels. Giglio EPT 71:10-22.

For this trial he reviewed the depositions of Mr. Fechtig, Captain Gentry and Mr. Warren Junes. He also reviewed some photos, the report of Mr. Walther and finally the winch repair records. He reviewed the deposition of Mr. Junes after he prepared his own Rule 26 report because it was not available earlier. Giglio EPT 82:2-24.

This Court examines Mr. Giglio's expertise and experience to find whether they are sufficient to qualify him as an expert and his testimony as reliable. *Kumho Tire*, 526 U.S. at 139.

The Court finds that Mr. Giglio has experience with winches, but only as a captain of vessels that use winches. He testified that he had never on his own repaired a winch, inspected a winch, or testified as an expert about a winch. His sole previous litigation experience involving winches was his testimony in his own personal injury lawsuit for an injury caused by a defective winch. Giglio EPT 97:1-3.

He did not have any experience with the particular fisheries in which the F/V Sea Clipper engaged. Giglio EPT 80:14-16. He was a tuna fisherman, which is entirely different from the bottom fishery.

He used winches in the course of captaining tuna fishing vessels, but did not claim to have repaired winches on his own or to have any specialized experience with them. On direct examination he said that he assisted the chief engineer with repairs, but conceded that, although he knew what the inside of a hydraulic winch looked like, he “was no professional.” Giglio EPT 79:15-20; 80:9-12.

Giglio never examined the particular winch which Plaintiff claims was the source of his injury. Giglio EPT:84:4-8. This wasn't anyone's fault, but it reduces the reliability of his testimony about whether the winch was defective or not. He also testified to phenomena which other witnesses familiar with this particular winch said did not exist or which could not have caused the circumstances which Plaintiff claims caused the accident.

For example, he described birdsnesting or backlashing as being caused by a defect in the winch which causes the line to jerk. Giglio EPT 88:12-89:5 However, everyone else with knowledge of winches and of the F/V Sea Clipper winch testified that birdsnesting occurred only when the line was being let out, not when it was being pulled in. Plaintiff does not contend that the line was being let out when he alleges he was jerked off his feet. He concedes that it was being reeled in. The birdsnesting or backlashing which Mr. Giglio identifies as the source of the jerk which allegedly pulled Plaintiff off his feet could only have happened if the line were being let out. Mr. Giglio's theory is inconsistent with the facts, both in terms of what causes a winch to jam and what happens when a line birdsnests or backlashes.

***12** When this Court applies the principles of *Daubert* and *Kumho Tire* to Mr. Giglio and his testimony, the Court finds that in a jury trial, it might have excluded him as a witness. However, in a bench trial, the Court merely adjusts the weight it gives to his testimony and finds it less than substantial.

For these reasons this Court rejects his theoretical

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conclusions as to what happened to cause Plaintiff's injury. The flaws in Mr. Giglio's testimony merely add to the doubt cast on Plaintiff's version of events by the inconsistencies of Plaintiff's own versions of those events.

In addition, Giglio's testimony and his conclusions about what happened with the winch on the F/V Sea Clipper and how that might have caused Plaintiff's injury is directly contradicted by the testimony of Defendants' expert, Mr. Walther, a marine engineer.

Defendants' Expert

Defendants' expert, Charles Walther, graduated with a degree in marine engineering, first in his class at California Maritime Academy. He worked for twenty-three years for Crowley Maritime, ultimately as director of engineering, in charge of operating, maintaining, overhauling and repairing hundreds of winches, many of them similar to that on the F/V Sea Clipper. Walther TT 354:16; 355:24-356:9.

He sailed for several years as a chief engineer on Crowley Maritime's harbor and ocean tugboats, in charge of all onboard machinery, including hydraulic equipment.

He received specialized training from marine component manufacturers in marine diesel engines and a fluid power course on hydraulics. Walther TT 356:23-357:23.

He is an elected member of the Society of Marine Architects and Engineers. Walther TT 357:25-358:1.

He is a member of a number of other boards and committees in the maritime industry.

He left Crowley Maritime in 1989 and has since had his own consulting business, offering technical advice for entities running tankers in Japan, the Blue and Gold Fleet in San Francisco, Matson Line,

the Alameda Ferry, and local governments' maritime agencies on marine equipment maintenance, repair, engineering and troubleshooting. Walther TT 359:10-361:1.

He does expert forensic consulting and has qualified as an expert witness in California State Court and in U.S. District Court and has previously worked for both the law firms in this case. Walther TT 361:4-362:23.

To prepare his Rule 26 report for this case, Mr. Walther did the following:

He looked at the winch that came from the vessel. He got some Braden Winch Company information, Braden being the manufacturer that superseded the manufacturer of the winch that was onboard. He interviewed Captain Mark Gentry. He read the Plaintiff's complaint, Plaintiff's response to Sea Pacific, the Plaintiff's settlement conference statement, Defendant Sea Pacific's response to Plaintiff's interrogatories, Defendant Sea Pacific's supplemental responses, Captain Mark Gentry's deposition transcript, deckhand Kent Mooreland's deposition transcript and Plaintiff Fechtig's deposition transcript. He obtained Plaintiff's height and weight, 6 feet and 210 pounds at the time of the accident; he did internet searches for the winches, hydraulics, wire ropes and hydraulic supply company. He did some research with another expert named Curly Winebrenner, took various photographs of the F/V Sea Clipper, corresponded with the winch representative and reviewed Giglio's deposition and Warren Junes' deposition. Because Mr. Giglio's deposition was not available until after he generated his Rule 26 report, he read it when it was available, as was also the case with Mr. Junes' deposition.

*13 He contacted the winch manufacturer, after obtaining the model name and serial number from the winch, so he could identify the components. He then did an Internet search and contacted Paccar, which is now the owner of Gearmatic, to find out "what information he could zero in on what that winch really is." He found that it was a Gearmatic

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C2200 winch. He was then able to get some schematic diagrams of its internal workings. He obtained some from the Internet and some from curly Winebrenner, whom he described as "the best hydraulic person that I've ever met or known." Mr. Winebrenner has done work on hydraulics for large cranes and has a number of old books with schematic diagrams of winches. Walther TT 362:21-364:25.

Testimony at Trial on Negligence and Seaworthiness

The Plaintiff and his expert, Vito Giglio, testified to several possible explanations for what might have caused the line to jerk and cause his fall. The possible explanations included:

In an answer to interrogatories, Plaintiff claimed that the vessel should have had a platform on which Plaintiff could stand while hooking up the wire and block to the splitting strap on the net. Fechtig's Response to Interrogatory No. 11, Ex. WW. This theory was withdrawn at trial, when Plaintiff testified he was standing on the deck instead of the loaded fish net at the time of his accident Fechtig TT 193:7-194:9, 336:18-341:22;

Plaintiff claimed that both before and after the accident, the wire jerked several times per day nearly every day during the hake fishing season. Fechtig TT 168:11-171:6, and that the deckhands were instructed to keep pressure on the hook end of the wire as it was being let out off the winch Fechtig TT 161:13-163:12. According to Mr. Giglio, this might have caused the wire to "birdsnest" or become loose on the reel as it was let out to the point it became entangled, causing it to jerk. Alternatively, Mr. Giglio testified that the wire may have "overwrapped," or entangled as it was hauled in, causing it to "backlash" or reverse directions with a jerk Giglio EPT 88:5-90:19.

The Plaintiff also testified that on one occasion during the hake season the winch froze, and the crew

beat on it with a hammer to unsuccessfully try to free it up. Fechtig TT 172:12-173:4. Mr. Giglio wrote in his expert report that he did not believe this caused the accident, but testified that based on the testimony of Mr. Junes, the winch repairman, that a defect in the winch brake system may have caused the wire to jerk. Giglio EPT 99:18-103:10.

The Plaintiff and Mr. Giglio agreed that the accident must have occurred as the wire was being hauled in. Giglio TT 462:23-463:19. Mr. Giglio testified that, assuming Plaintiff's version of the accident was true, Captain Gentry must have activated the winch to haul in the wire without warning the Plaintiff, and that this could have caused Plaintiff to either be jerked up and backwards or simply lose his balance and fall. Fechtig TT 92:21-93:23. The Plaintiff admitted that he does not know what caused the line to jerk, lift him in the air, and fall. Fechtig TT 249:17-22.

***14** The Defendant denied that an accident happened that day and explained why it couldn't have happened as Plaintiff claims. The Defendant presented the testimony of Captain Mark Gentry, deckhand Kent Mooreland, winch repairman Warren Junes, and marine engineering expert Charles Walther to respond to Plaintiff and Mr. Giglio's liability theories. Their testimony convinces the Court that the accident did not occur as Plaintiff claims because:

Although the Plaintiff testified on direct examination that he didn't know if anyone saw him fall, Fechtig TT 197:22-198:23, he testified at deposition that he didn't report the accident that day because Captain Gentry and Mr. Mooreland saw him fall. Fechtig TT 456:17-457:21. Captain Gentry and Kent Mooreland testified, however, that they did not see Plaintiff fall, nor did he complain of hurting his shoulder until the next day. Gentry TT 575:11-20; 587:7-18; 594:15-595:21; Mooreland DT 33:11-38:3.

Captain Gentry testified that he was supervising the operation and would have seen the Plaintiff fall had

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the accident happened as Plaintiff claims. Gentry TT 586:6-587:6. Mr. Mooreland testified that during this operation, his role was generally to observe the other deckhand and assist as necessary. Mooreland DT 31:21-33:10. Captain Gentry and Mr. Mooreland further testified that there wasn't a problem with the wire repeatedly jerking during this operation, either before or after the accident. Indeed, both denied that it ever happened. Gentry TT 529:15-530:17; Mooreland DT 17:11-25:17.

Captain Gentry further testified that there wasn't a problem with the wire "birdsnesting" before or at the time of the accident. Gentry TT 588:5-19. He testified and Mr. Walther confirmed that birdsnesting only happens when the wire is being let off the winch, which would not have been the case had the accident happened as Plaintiff claims. Gentry TT 588:5-19; Walther TT 383:12-384:8. Birdsnesting also causes the net reel to stop, which didn't happen. Fechtig TT 193:7-195:18. Mr. Walther further confirmed that keeping tension on the "hook end of the wire" as it is let off the winch to prevent birdsnesting is a normal practice in the marine industry. Walther TT 384:19-385:8.

Captain Gentry also testified that there wasn't a problem with the wire "overwrapping" before or after the accident. Gentry TT 587:19-588:4. Mr. Walther testified that overwrapping occurs as a wire is hauled in on a winch, when the wire does not spool evenly in perfect rows onto the winch. Walther TT 373:14-374:4. He explained, however, that overwrapping does not cause the wire to jerk either. Some overwrapping is normal when the wire builds up at one end of the spool, but that this causes no more than a two to five percent change in the wire speed, which wouldn't be perceived by a deckhand handling it. Walther TT 374:5-375:19. While a wire can overwrap so severely that it causes the winch to stop, the crew would be required to burn the wire off or pull it free, which didn't happen here. Finally, while an overwrap could cause a line reversal, it would bend and damage the wire, which didn't happen here either.

Walther TT 374:18-375:19; 384:9-18, 423:4-14; Giglio EPT 97:13-19.

*15 Captain Gentry testified that the winch did not cause the wire to jerk. On one occasion during the season, the winch froze and had to be turned off. When it was turned back on, it worked again through the rest of that season and for another year later. Gentry TT 588:20-590:15. Mr. Walther testified that this was likely due to dirt in the hydraulic system release valve, which would divert hydraulic oil from the winch control and stop it from moving. After the system cooled and the release valve closed, the system operated properly. Walther TT 395:6-396:21. Finally, Mr. Junes testified and Mr. Walther confirmed why a defect in the winch brake wouldn't cause the wire to jerk as Plaintiff claimed. They both testified that the brake would only slip if there was a significant load on the hook end of the wire (thousands of pounds) and that the wire would slip aft, not pull the load forward. There was no load on the wire at the time of the alleged accident. Junes Deposition Transcript (hereinafter "DT") 25:13-27:22, admitted into evidence as Court Exhibit 2); Walther TT 391:17-393:18.

Captain Gentry testified that he never activates a winch to haul in a wire without warning his crew, and that there would be no reason to haul in the wire according to Plaintiff's scenario anyway. Gentry TT 586:6-17. The Plaintiff claims he was directed to take the hook end to the wire to a splitting strap forward of where he was standing. Fechtig TT 192:5-15. Captain Gentry testified that if that was the case, he wouldn't haul in the wire because it would take slack out, making it harder for Plaintiff to reach the next forward splitting strap. Gentry TT 575:21-577:21.

Based on his inspection of the winch and confirmation from the manufacturer and other experts concerning its operational capacity, Mr. Walther testified that when the wire was double blocked, the wire could not move faster than 26 feet per minute, which could not cause a sudden jerk. Walther TT 397:1-399:4. Captain Gentry confirmed the maxim-

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um speed of the line. Gentry TT 549:6-19.

As the forward cod end of the net was pulled to the vessel's ramp, the weight of the fish in the net created tension on the empty net running from the ramp to the forward net reel, raising it off the deck. Gentry TT 556:12-558:1.

The empty net immediately forward of the ramp was approximately six inches to two feet off the deck. Gentry TT 571:6-11; 573:18-21. The height of the net off the deck progressively increased to the point where the net was connected to the forward net reel, where it was approximately 7 feet off the deck. Gentry TT 556:12-558:1; 573:18-574:8.

Captain Gentry further testified that if the Plaintiff had been jerked as claimed, he would have been pulled toward the center of the net where it is taut instead of falling into the one-foot gap between the edge of the net and the bin boards. Gentry TT 566:14-567:13; 586:25-587:6. Neither could he have hit the next forward hammer lock as claimed because it was about twelve feet forward of where Plaintiff was standing. Gentry TT 571:6-572:25.

*16 The Plaintiff and Mr. Giglio admitted that it is not unusual for deckhands on commercial fishing vessels to slip and fall at times, particularly when handling lines, without any negligence on the part of the vessel owner or unseaworthiness of the vessel. Fechtig EPT 116:5-9; Giglio EPT 95:23-96:12; Fechtig TT 350:16-21; 473:11-22.

Findings of Fact on Negligence and Unseaworthiness

Given the foregoing, the Court finds that the Plaintiff and Mr. Giglio's testimony concerning the accident was not credible and does not establish either that the accident happened as Plaintiff claimed, that Defendants were negligent, or that the vessel was unseaworthy. The Court finds that Captain Gentry, Mr. Mooreland, Mr. Junes and Mr. Walther were credible and adopts their testimony that the accident didn't happen and in fact couldn't

have happened as claimed, and that the Defendant was not negligent and the vessel was not unseaworthy. The Court finds that if the Plaintiff fell while working on the F/V Sea Clipper, it did not happen as he claims and was not due to the Defendant's negligence or the vessel's unseaworthiness.

Plaintiff's Injuries

Medical Treatment Following the Incident

With respect to his alleged injuries, the Court finds that the Plaintiff had a history of long-term problems with his shoulder, neck and back prior to the alleged accident.

He was treated by Chiropractor Tracy Cole from February, 1996 through 1999, complaining of low back and shoulder problems he attributed to a series of auto accidents and the cumulative effects of his heavy labor. He sought an award of disability benefits for this condition. Cole DT (Transcript admitted into evidence as Court Exhibit 4) 9:16-10:25; 17:24-18:15; 24:13-25:24; 26:16-29:4.

The Plaintiff's back and shoulder problems did not end in 1999. He saw chiropractor Mark Henry for left shoulder complaints in 2001, and again in February, 2002 for pain in his "lower back, upper back, shoulders, neck, R. knee-long term injuries." He complained that the pain in his back was "unbearable" when he fished. Fechtig TT 486:22-490:6; Henry DT (Transcript admitted into evidence as Court Exhibit 3) 13:12-21, 44:9-47:1.

Captain Gentry confirmed that the Plaintiff worked just as hard, if not harder, after the alleged accident, as he did before it through the end of the hake season. He never complained of any pain in his back, neck or shoulders, or that he could not perform the work of a deckhand. Gentry TT 597:19-598:16. At the end of the hake season, the Plaintiff told Captain Gentry he wanted to take some time off with his family, but would return for bottom fishing. Captain Gentry didn't hear from him again. Gentry

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TT 598:17-25.

The Plaintiff continued to seek chiropractic treatment with Dr. Henry for his long term injuries after the alleged fall. Fechtig TT 257:20-258:2. Although Dr. Henry's practice and routine was to ask each patient whether he'd suffered any new accidents or injuries since his last visit, Plaintiff didn't mention this alleged accident until September 20, 2002, after he'd already seen Dr. Henry two times. Henry DT 23:5-16, 26:3-33:14.

*17 Dr. Thomas Sampson performed [arthroscopic surgery](#) on the Plaintiff's left shoulder on June 25, 2003. However, the undisputed testimony of Leisa Halbohn and Danny Chavez, neighbors of Plaintiff's ex-wife and the testimony of Defendants' expert Dr. Victor Prieto provide very strong evidence that Plaintiff's complaints of pain were exaggerated, and the need for surgery was either unnecessary or related to long term wear and tear rather than the alleged accident. Chavez TT 700:8-720:25; Halbohn TT 722:20-730:23; Prieto TT 820:4-827:5, 828:4-834:20, 835:22-836:2. On October 21, 2003, Dr. Sampson found that the Plaintiff had no ratable disability and released him to full duty with no restrictions. Sampson TT 37:11-21; 38:4-8; 53:6-56:15. Dr. Victor Prieto confirmed that Plaintiff was able to return to commercial fishing. Prieto TT 832:15-833:25.

The Court finds that after October 21, 2003, Plaintiff had no residual disability that prevented him from working as a deckhand in the commercial fishing trades.

Additional Findings of Fact

Additionally, the Court notes that Plaintiff's testimony concerning his damages was not credible and confirms that his testimony about liability should be distrusted. The Plaintiff testified that his low pre-accident earnings were due to his voluntary decision to not work because his wife earned a good salary and he wanted to spend time with his new-

born son. Fechtig TT 40:13-43:25, 46:4-20, 326:5-327:17.

He claimed that in 2002, he realized he needed to work more to support himself and his son, and he claims significant past and future wage loss. However, the evidence showed that in reality he suffered from depression and other mental illnesses which impacted his ability to find stable work. Although he did work in the fishing trades before 2002, he proved to be unreliable, untrustworthy and easily frustrated. The Plaintiff admitted that he quit the employ of several vessels because the situation "wasn't good" or was "too stressful." Fechtig TT 332:15-335:8.

His back and shoulder problems were so significant that he sought California state disability in September, 1999, Fechtig TT 480:16-483:25, and told chiropractor Henry in February, 2002 his back pain was "unbearable" when fishing. Henry DT 13:12-21, 44:9-47:1.

Whether the Plaintiff was comparatively negligent

Legal standard:

"In maritime personal injury actions under the Jones Act ... courts have long applied the concept of comparative fault." *Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co.*, 565 F.2d 1129, 1138 (9th Cir.1977). Contributory negligence is applicable to mitigate damages when a seaman is injured if "alternative courses of action are available to the injured party, and he chooses the unreasonable course." *DuBose v. Matson Nav. Co.*, 403 F.2d 875 at 878 (9th Cir.1968) (citing cases from the First, Second, Fourth and Fifth Circuits); *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 432-33 (1939) (contributory negligence is proper if a seaman "knowingly failed to choose an available safe method of doing his or her work, "such as making use of a defective appliance knowing that a safe one is available"). Contributory negligence is measured

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by what a reasonable person would have done under similar circumstances. See *American President Lines, Ltd. v. Welch*, 377 F.2d 501, 504-05 (9th Cir.1967). Courts apply the doctrine of comparative fault to encourage reasonable care by seamen while at the same time placing a high degree of responsibility on owners for the seaworthiness and safety of their vessels and appliances. *Socony*, 305 U.S. at 432-433. The general rule permitting application of the doctrine of contributory negligence is well settled; however, there is an exception. A seaman may not be held contributorily negligent for carrying out orders that result in injury, even if the seaman recognizes possible danger and does not delay to consider a safer alternative.

*18 The Court finds that there was no substantial testimony presented at trial that Plaintiff either was or was not comparatively negligent.

Plaintiff's Damages

This Court finds no liability of Defendants and therefore does not in detail evaluate Plaintiff's claim for damages. However, the Court makes the following findings:

Contrary to his claim that he didn't work much in 2000 because he wanted to spend time with his newborn son, he was jailed for 50 days after being convicted of violating a domestic violence restraining order. Fechtig TT 327:8-332:13.

He admitted he quit three boats because of conflicts with the captains. Fechtig TT 332:15-335:8.

Ann Timmer, owner of the F/V Donita, confirmed that he quit working on her boat because he couldn't sleep, then filed a claim and threatened to sue her. Timmer TT 232:3-237:21.

Although the Plaintiff claims he has been unable to return to work in commercial fishing, his testimony was refuted by Captain Roger Semanak and deckhand Randy Franck, who confirmed that Plaintiff took a job as a deckhand on a crab boat, quitting

only because his girlfriend complained, then asked for his job back. Franck TT 655:21-658:5; 674:18:681:4. Mr. Semanak appeared at trial via video deposition and his testimony was not reported, the transcript having been lodged with the Court. It was admitted into evidence as Court Exhibit 6). References are therefore to his deposition of November 9, 2005. Semanak DT 23:279-28:415, video of deposition at Ex. TTT.

The Court finds there is nothing in the Plaintiff's work history to suggest he was capable of or would have earned more than his prior historical earnings.

Whether Defendants failed to promptly pay maintenance and cure to Plaintiff-Plaintiff appears to have abandoned this issue

Legal Standard:

"Maintenance and cure is designed to provide a seaman with food and lodging when he becomes sick or injured in the ship's service; and it extends during the period when he is incapacitated to do a seaman's work and continues until he reaches maximum medical recovery." *Vaughan v. Atkinson*, 369 U.S. 527, 531 (1962). A seaman who is entitled to receive maintenance and cure may recover "a living allowance during the recovery period (maintenance), reimbursement for medical expenses (cure), and unearned wages for the period from the onset of injury or illness until the end of the voyage." *Gardiner v. Sea-Land Service, Inc.*, 786 F.2d 943, 946 (9th Cir.1986). The duty to provide maintenance and cure "does not rest upon negligence or culpability," and is not "restricted to those cases where the seaman's employment is the cause of the injury or illness." *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 527 (1938).

Moreover, "if the seaman can establish that he had not in fact fully recovered, his return to work on another vessel does not terminate his right to maintenance and cure from the vessel in whose service he was injured or became ill." *Permanente S.S. Corp.*

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v. Martinez, 369 F.2d 297, 299 (9th Cir.1966).

*19 In the case at bar, Plaintiff does not dispute that Defendants began making payments to him as soon as they were notified of his claim and that Defendants made the payments negotiated by his former attorney, in addition to paying all his related medical expenses.

Plaintiff's former counsel Mr. Brodsky negotiated with Defendants and agreed to a rate of \$33.00 per day for maintenance. London TT 753:1-15. There was some delay while arrangements were made to satisfy a tax lien by the State of California. London TT 754:21-756:2. The period covered by the first payment was July 15, 2002 to February 28, 2003, and payment was wired to Plaintiff's bank account within one week of the agreement with his attorney. London TT 756:22-757:9.

Plaintiff reached maximum cure according to Doctor Sampson on October 21, 2003. Defendants stopped making payments on December 15, 2003, in fact overpaying Plaintiff by \$2000.00. London TT 759:8-760:7.

CONCLUSIONS OF LAW

The Plaintiff has pled causes of action for Jones Act negligence and for general maritime law unseaworthiness, maintenance and cure, and the wrongful refusal to pay maintenance and cure. The U.S. Constitution extends federal judicial powers to "all cases of admiralty and maritime jurisdiction." U.S. Const. Art. III, § 2. Section 9 of the Judiciary Act of 1789 implements this constitutional extension of judicial power to maritime cases. The controlling law is the maritime law of the United States.

The Jones Act, 46 U.S.C. section 688 *et seq.*, requires that the employer provide to its employees a reasonably safe place to work under the circumstances, but it does not require that the work area be absolutely safe. *Bankston v. Ogden Marine, Inc.*, 843 F.2d 497 (5th Cir.1988).

To recover damages for Jones Act negligence, a seaman must prove that his employer was negligent and that the negligence caused his injury. *Benoit v. Humble Oil and Refining Co.*, 368 F.2d 228 (5th Cir.1966); *Litherland v. Petrolane Offshore Const. Services, Inc.*, 546 F.2d 129 (5th Cir.1977).

Negligence

To prove that his employer was negligent under the Jones Act, a seaman must prove that he failed to use such care as a reasonable employer would have under like circumstances. *Ribitski v. Canmar Reading & Bates, Ltd.*, 111 F.3d 658 (9th Cir.1997); *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir.1997) See Ninth Circuit Manual of Model Jury Instructions Civil, No. 9.3.

A vessel owner will not be held liable if a job could have been performed with reasonable safety, but the Plaintiff was injured because he did it in an unsafe manner. *Debose v. MS Loppersum*, 438 F.2d 642, 642-643 (5th Cir.1971); *American Seafoods v. Nowak*, 2002 U.S. Dist. Lexis 20255 (W.D.Wa., 2002).

Applying these standards, the Court finds that Defendants were not negligent. The Plaintiff has failed to prove, indeed there is no credible evidence, that Captain Gentry or the vessel owner failed to use reasonable care in the ownership, maintenance or operation of the vessel. The Court finds that if the Plaintiff was injured on the vessel, it did not occur as he claimed and was likely due to a shipboard fall which occurred without any negligence on the part of the vessel owner or captain.

Seaworthiness

*20 Under the general maritime law, a vessel owner has a non-delegable duty to provide and maintain a seaworthy vessel. *Mitchell v. Trawler Racer*, 362 U.S. 539 (1960).

The vessel owner is not, however, an insurer of the

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safety of its seaman, nor is it required to provide a vessel that is accident free. *Phipps v. N.V. Nederlandsche Amerikaansche Stoomvaart, Maats.*, 259 F.2d 143 (9th Cir.1958). Perfection is not required and the mere fact of an accident does not establish unseaworthiness. *Smith v. American Mail Line, Ltd.*, 525 F.2d 1148 (9th Cir.1975); *Rice v. Atlantic Gulf & Pacific Co.*, 484 F.2d 1318 (2d Cir.1973); *Mosley v. Cia Marit. Adra. S.A.*, 314 F.2d 223 (2d Cir.1963).

To establish unseaworthiness, a seaman must prove that a vessel or its parts and equipment are not reasonably fit for their intended purpose, and that the unseaworthiness played a substantial part in bringing about injury or damage and is operated by a crew reasonably adequate and competent for the work assigned. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944), Ninth Circuit Manual of Model Instructions Civil No. 9.7.

The test of reasonable fitness is determined by the “reasonable man” standard. *Gautreaux v. Scurlock Marine, Inc.* 107 F.3d 331, 339 (5th Cir.1997).

In determining whether a vessel is seaworthy, the trier of fact must consider that the rigors of a seaman's life are unlike those of land-side workers. Some danger is to be expected and does not necessarily constitute unseaworthiness. *Colon v. Trinidad Corp.*, 188 F.Supp. 97 (S.D.N.Y.1960).

Applying these standards, the Court finds that the F/V Sea Clipper was not unseaworthy. If the Plaintiff was injured on the vessel, it did not occur as he claimed and was likely due to something other than any unseaworthy condition of the vessel.

Maintenance and Cure

“Maintenance” refers to the daily subsistence allowance for quarters and meals an injured or sick maritime employee is entitled to receive. *See generally Sana v. Hawaiian Cruises, Ltd.*, 181 F.3d 1041 (9th Cir.1999).

The seaman is entitled to this benefit to the point he reaches “maximum cure.” *See Id.* The parties may agree to rates of maintenance. *See Gardiner v. Sea-Land Service, Inc.*, 786 F.2d 943 (9th Cir.1986).

The Court finds that the Defendants paid the full rate of maintenance until the Plaintiff reached maximum cure and did so in a timely manner after notification of Plaintiff's claim. Plaintiff is therefore not entitled to damages or attorneys fees for the Defendants' alleged willful refusal to pay maintenance.

Conclusion and Order

Given that the Plaintiff has failed to meet his burden of proof as to any of his causes of action, judgment shall be entered in favor of the Defendants and against the Plaintiff as to all causes of action.

IT IS SO ORDERED.

N.D.Cal.,2006.

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END OF DOCUMENT

EXHIBIT 7

Not Reported in F.Supp.2d, 2006 WL 1646113 (N.D.Cal.)
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Only the Westlaw citation is currently available.

United States District Court,
N.D. California.

FRESENIUS MEDICAL CARE HOLDINGS,
INC., a New York corporation; and Fresenius USA,
Inc., a Massachusetts corporation, Plaintiffs and
Counterdefendants,

v.

BAXTER INTERNATIONAL, INC., a Delaware
corporation; and Baxter Healthcare Corporation, a
Delaware corporation, Defendants and Counter-
claimants.

No. C 03-01431 SBA(EDL).

June 12, 2006.

Jon B. Streeter, Judy Monfay Shih, Lee Jay Y. Kuo,
Keker & Van Nest, L.L.P., Limin Zheng, Fish &
Richardson P.C., Redwood City, CA, Thomas Mc-
Clenahan, Fish & Richardson P.C., Minneapolis,
MN, for Plaintiffs.

Adam L. Marchuk, Alan L. Barry, Michael Edward
Martinez, Bell Boyd & Lloyd LLC, Chicago, IL,
Joseph C. Reagen, Thomas S. Borecki, Baxter
Healthcare Corporation, Deerfield, IL, for Defend-
ants.

Elizabeth Mary Brown, Patrick Kelleher, Gardner
Carton & Douglas LLP, for Defendants and Coun-
terclaimants.

Daniel J. Furniss, Anne M. Rogaski, Townsend and
Townsend and Crew LLP, Palo Alto, CA, Erik Fe-
lix Dyhrkopp, Gregory Phillip Sitrick, Lisa A. Car-
roll, Michael J. Abernathy, Esq., Patrick Benjamin
Lawbell, Sanjay K. Murthy, Thomas Lawson Gem-
mell, Boyd & Lloyd LLC, Chicago, IL, for Defend-
ants, Counterclaimants and Counterdefendants.

David M. Beckwith, McDermott, Will & Emery,
San Diego, CA, Christopher Duane Bright, McDer-
mott Will & Emery, Irvine, CA, J. James Li, Lisa

Sattler Blackburn, McDermott Will & Emery, Palo
Alto, CA, for Counterdefendants.

James M. Wagstaffe, Keith K. Fong, Kerr & Wag-
staffe LLP, David J. Silbert, Khari Jamil Tillery,
Stuart L. Gasner, Keker & Van Nest, L.L.P., San
Francisco, CA, Juanita R. Brooks, Todd Glen
Miller, Fish & Richardson P.C., San Diego, CA,
Mathias W. Samuel, Fish & Richardson P.C., Min-
neapolis, MN, Roger S. Borovoy, Shaham Kameron
Parvin, Fish & Richardson P.C., Redwood City,
CA, for Plaintiffs and Counterdefendants.

**ORDER DENYING BAXTER'S MOTION IN
LIMINE NO. 4 PRECLUDING EVIDENCE
AND ARGUMENT REGARDING PATENT
DEATHS AND PRODUCT RECALLS**

SAUNDRA BROWN ARMSTRONG, District
Judge.

*1 This matter comes before the Court on Baxter's
Motion *in Limine* No. 4 to preclude evidence and
argument regarding patient deaths and product re-
calls. Having considered the submissions and argu-
ments of the parties, and the applicable facts and
law, the Court hereby DENIES Baxter's Motion.

The “patient death and product recall” evidence
Baxter seeks to preclude includes numerous recalls
of both hemodialysis machines, including System
1000, and disposables and other components, in-
cluding dialyzers and bloodlines.^{FN1} This evi-
dence is relevant to both the calculation of a reason-
able royalty and the validity of the patents-in-suit,
especially in view of Baxter's heavy reliance on
Fresenius's commercial success in the market.

^{FN1}. While Baxter phrased the evidence at
issue as evidence regarding “patient deaths
and product recalls,” the patient death
evidence is tangential to the recall evi-
dence.

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With respect to evidence of machine recalls, Baxter offers no argument as to why this evidence should be precluded. Fresenius contends that this evidence is highly relevant to the calculation of a reasonable royalty under the *Georgia Pacific* framework. The Court agrees.

First, commercial success of the product allegedly made under the patented technology is one of the important factors to be considered in determining a reasonable royalty. *Georgia-Pacific Corp. v. U.S. Plywood Co.*, 318 F.Supp. 1116, 1120 (D.C.N.Y.1970) (“8. The established profitability of the product made under the patent; its commercial success; and its current popularity.”). In this case, Baxter argues that Fresenius's commercial success with its [hemodialysis](#) products was due to the incorporation of a touch screen in the 2008K machines and therefore would lead to a higher royalty rate in the hypothetical negotiation. Fresenius counters that evidence of Baxter's repeated recalls demonstrates otherwise. Fresenius argues that the multiple recalls have severely affected Baxter's reputation in the marketplace and has contributed significantly to Fresenius's commercial success with its [hemodialysis](#) products, including the 2008K machines. Evidence of machine recalls tends to show that Fresenius's success in selling its 2008K machines was due to factors such as perceived differential in [hemodialysis](#) product quality between Baxter and Fresenius, rather than the patented technology.

Second, a key part of the reasonable royalty determination under *Georgia Pacific* is whether the accused infringer had acceptable non-infringing alternatives available to it at the time of the hypothetical negotiation. *Id.* at 1120 (“9. The utility and advantages of the patent property over the old modes or devices, if any, that had been used for working out similar results.”). In this case, Fresenius contends that its 2008H [hemodialysis](#) machine-which did not use a touch screen-was such an alternative, and that had Althin or Baxter demanded an excessive royalty, Fresenius would have continued selling

the 2008H machine. Baxter argues, however, that the 2008H machine was not an acceptable alternative because it lacked a touch screen. To rebut this argument, Fresenius contends that if Fresenius could not sell the 2008K machines, customers facing the choice between the safe, reliable 2008H machines and the less than reliable Althin/Baxter machines would have chosen the 2008H machines, notwithstanding its lack of a touch screen. To determine whether the 2008H machine is an acceptable non-infringing alternative as Fresenius claims, the jury needs to be presented with a complete and accurate view of the marketplace. Evidence of recalls of Baxter's [hemodialysis](#) products forms part of the market reality that should be considered by the jury. ^{FN2}

^{FN2}. Relatedly, Baxter bases its over \$80 million royalty damages claim on the theory that if Fresenius could not add a touch screen to its machines, it would suffer severe market contraction and lost sales; and to avoid this loss of sales, Fresenius would have paid a very high royalty. Baxter's theory assumes that without a touch screen product, Fresenius would lose sales to Althin/Baxter's products with a touch screen. Fresenius argues, however, even without a touch screen product, it would not have suffered any meaningful market contraction because customers would have preferred the proven reliability of Fresenius's machines-even without a touch screen-to the Althin/Baxter products. Again, to resolve the dispute, the jury needs to be presented with a full and accurate view of the marketplace.

*2 Third, evidence of product recalls is relevant to the terms of the hypothetical license. *Id.* at 1120 (“7. The duration of the patent and the term of the license.”). License agreements have historically included provisions for adjusting royalty rates. Quality control problems of a competitor-licensor is likely to lead the licensee to re-negotiate for a

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lower royalty rate over the term of the hypothetical license.

Fourth, evidence of product recalls is also relevant to the determination of the commercial relationship between Fresenius and Althin, Baxter's predecessor, or Baxter, which is another factor to be considered in calculating a reasonable royalty. *Id.* at 1120 (“5. The commercial relationship between the licensor and licensee, such as, whether they are competitors in the same territory in the same line of business; or whether they are inventor and promoter.”). The quality problems Baxter faced were largely inherited from its predecessor Althin. Evidence of recalls tends to show that customers view Fresenius's machines as superior than Althin's or Baxter's machines. In such a case, the degree to which Althin's or Baxter's and Fresenius' machines (and disposables) compete is reduced, which in turn would tend to reduce the royalty rate in the hypothetical negotiation.

Moreover, Baxter has relied heavily on Fresenius's commercial success as “secondary considerations” evidence in countering Fresenius's invalidity contention based on obviousness. “For objective evidence to be accorded substantial weight, its proponent must establish a nexus between the evidence and the merits of the claimed invention.” *In re GPAC, Inc.*, 57 F.3d 1573, 1580 (Fed.Cir.1995). Evidence of recalls is relevant to a determination of whether there is the requisite nexus between Fresenius's commercial success and the patented technology. In the hemodialysis market, sales for products are primarily driven by factors such as vendors' reputations for quality, service, machine reliability. [Kelleher Decl. (Dkt. No. 447), Ex. 1, at ¶¶ 19, 137-138, 141-142 & n. 84.] Evidence of product recalls tends to show that Fresenius's commercial success in the market was due to its reputation in product quality and reliability, rather than the patented technology, which in turn will support a finding that there is a lack of the requisite nexus between Baxter's alleged secondary considerations evidence and the merits of the claimed invention.

With respect to the evidence of recalls of dialyzers and bloodlines, Baxter argues that such evidence should be excluded because these products are “not even at issue.” However, it is Baxter, not Fresenius, who has chosen to make these products an issue. Baxter's damages claim is based in part on Fresenius's sales of unpatented “disposables, spare parts, and service,” including dialyzers, under the theory that Fresenius was able to sell these products as “convoyed” products along with the accused machines. Fresenius contends that customers purchased its dialyzers because of their superior quality, not because the customers may also have purchased a 2008K machine at some point in time. Evidence of recalls of Althin/Baxter's disposables and other hemodialysis components tends to show that customers were seeking out Fresenius's products based on the fact that they were superior to the competition, not because Fresenius introduced a machine with a touch screen, and thus is relevant to the calculation of damages.

*3 “All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority.” Fed.R.Evid. 402. Baxter invokes Federal Rule of Evidence 403 as a reason to exclude this evidence, claiming that the evidence will be prejudicial to Baxter and confusing to the jury. The Court, however, finds that Federal Rule of Evidence 403 does not warrant the preclusion of the evidence.

With respect to the evidence of machine recalls, Baxter does not, and cannot make any argument as to why the relevant evidence should nonetheless be excluded. Baxter bases its prejudice claim largely on the allegedly “inflammatory” patient death evidence. This argument does not apply to evidence of machine recalls because none of the machine recalls involved patient deaths.

With respect to the evidence of recalls of dialyzers and bloodlines, the probative value of the evidence substantially outweighs any marginal prejudice to

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Baxter or supposed danger of jury confusion.

Baxter's reliance on products liability cases is misplaced. In the cases relied on by Baxter, before reaching the conclusion that the probative value of the recall evidence was substantially outweighed by the Rule 403 dangers, the courts first found that the recalls arising out of unrelated defects had no relevance to the products liability claims at issue. *Olson v. Ford Motor Company*, 410 F.Supp.2d 869, 873-74 (D.N.D.2006); *Verzwyvelt v. St. Paul Fire & Marine Insurance Company*, 175 F.Supp.2d 881, 888 (W.D.La.2001). To the contrary, in the present case, as discussed above, evidence of repeated recalls of Baxter's products are highly relevant to both the validity of the patents-in-suit and the computation of a reasonable royalty should Fresenius be found to have infringed any valid and enforceable claim of the patents-in-suit.

Moreover, the likelihood of unfair prejudice and jury confusion existed in *Olson* and *Verzwyvelt* is absent in this case. In products liability cases, because of the likelihood for spillover between recalls and inference of fault, there is a real danger that unfair prejudice and jury confusion will arise if the plaintiff is permitted to parade before the jury evidence of a product recall of a different product. *See Verzwyvelt*, 175 F.Supp.2d at 888-89. However, in this patent case, such danger does not exist. Even if there is any likelihood for spillover between recalls and inference of fault, Baxter's liability is not at issue and thus will not be prejudiced. In addition, prejudice is unlikely to arise in this case because both Baxter and Fresenius are commercial entities. *Posttape Associates v. Eastman Kodak Co.*, 537 F.2d 751, 758 (3d Cir.1976) ("It is doubtful that there would be any prejudice because the parties were both commercial entities[.]").

As noted by the court in *United States v. Bainbridge Management, L.P.*, Case Nos. 01 CR 469-1, 01 CR 469-6, 2002 WL 31006135, at *1 (N.D.III. Sept.5, 2002), a case relied on by Baxter, evidence is excluded on a motion in limine "only if the evidence is clearly inadmissible for any purpose." FN3

"In weighing the probative value of evidence against the dangers and considerations enumerated in Rule 403, the general rule is that the balance should be struck in favor of admission." *United States v. Dennis*, 625 F.2d 782, 797 (8th Cir.1980); *see also United States v. Dodds*, 347 F.3d 893, 897 (11th Cir.2003) (noting that Rule 403 is "an extraordinary remedy which the district court should invoke sparingly, and [t]he balance ... should be struck in favor of admissibility"). Even in the context of products liability actions, where recall evidence is relevant to a central issue in a case, admission is warranted. *See, e.g., Snodgrass v. Ford Motor Co.*, Case No. Civ 96-1814(JBS), 2002 WL 485688, at *3-*6 (D.N.J. March 28, 2002) (denying motion to preclude evidence of safety recall even though it was conceded that the evidence was prejudicial to Ford because the evidence was relevant to issues central to the case).

FN3. *Bainbridge* is also distinguishable from the present case in that the evidence excluded in *Bainbridge* had no probative value. In *Bainbridge*, the defendants were indicted with mail and wire fraud, health care fraud, and racketeering charges. The crux of the indictment involved a kickback and bribery scheme. Physicians allegedly used unnecessary medical procedures to generate fees and obtain funds from Medicare, Medicaid, and private insurers. In excluding the evidence of the death of two patients, allegedly the results of two such unnecessary procedures, the court found that the evidence was not probative of either the necessity of the medical procedures performed or the elements of wire and mail fraud, racketeering, or health care fraud. *Bainbridge*, 2002 WL 31006135, at *2.

*4 In this case, evidence relating to the quality and reliability of Baxter's hemodialysis products is highly relevant to both the calculation of a reasonable royalty and Baxter's contention of secondary

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considerations. The prejudice to Baxter, if any, would be nominal, and in any event would not be “unfair.” See *Snodgrass*, 2002 WL 485688, at *5 (noting that exclusion under Rule 403 requires that the prejudice be *unfair*). Introduction of the recall evidence “does not portend a foregone conclusion in [Fresenius's] favor, nor does it suggest decision in [Fresenius's] favor due to an emotionally-charged issue, such as gender-based derogatory comments in a sex discrimination case.” *Id.* Moreover, jury confusion is unlikely given that Baxter is not being sued for products liability of products unrelated to the recalls here. Any residual confusion can be cured by clear limiting instructions of the purposes for which the evidence may be considered. See *id.* at *6. Therefore, Rule 403 does not warrant preclusion of the relevant recall evidence in this case.

For the foregoing reasons, the Court hereby DENIES Baxter's Motion *in Limine* No. 4.

IT IS SO ORDERED.

N.D.Cal.,2006.

Fresenius Medical Care Holdings, Inc., v. Baxter Intern., Inc.

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END OF DOCUMENT

EXHIBIT 8

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H

United States District Court, N.D. California,
San Jose Division.

HYNIX SEMICONDUCTOR INC., Hynix Semiconductor America Inc., Hynix Semiconductor U.K. Ltd., and Hynix Semiconductor Deutschland GmbH, Plaintiffs,

v.

RAMBUS INC., Defendant.
Rambus Inc., Plaintiff,

v.

Hynix Semiconductor Inc., Hynix Semiconductor America Inc., Hynix Semiconductor Manufacturing America Inc.,

Samsung Electronics Co., Ltd., Samsung Electronics America, Inc., Samsung Semiconductor, Inc., Samsung Austin Semiconductor, L.P., Rambus Inc., Plaintiff,

v.

Samsung Electronics Co., Ltd., Samsung Electronics America, Inc., Samsung Semiconductor, Inc., Samsung Austin Semiconductor, L.P., Defendants.
Nanya Technology Corporation, Nanya Technology Corporation U.S.A., Defendants.

Rambus Inc., Plaintiff,

v.

Micron Technology, Inc., and Micron Semiconductor Products, Inc. Defendants.

Nos. CV-00-20905 RMW, C-05-00334 RMW, C-05-02298 RMW, C-06-00244 RMW.

Jan. 5, 2008.

Craig N. Tolliver, Pierre J. Hubert, Brian K. Erickson, David C. Vondle, Gregory P. Stone, Carolyn Hoecker Luedtke, Peter A. Detre, Burton Alexander Gross, Steven McCall Perry, Jeannine Y. Sano, for Defendant(s).

Matthew D. Powers, David J. Healey, Edward R. Reines, John D. Beynon, Jared Bobrow, Leeron Kalay, Theodore G. Brown, III, Daniel J. Furniss, Jordan Trent Jones, Kenneth L. Nissly, Geoffrey H.

Yost, Susan Gregory van Keulen, Patrick Lynch, Jason Sheffield Angell, Vickie L. Feeman, Mark Shean, Kai Tseng, for Defendant(s).

ORDER GRANTING IN PART AND DENYING
IN PART RAMBUS'S MOTIONS *IN LIMINE*
NOS. 4 & 5 RELATING TO DR. CHRISTOPHER
McARDLE'S OPINIONS ON COSTS OF AL-
TERNATIVE TECHNOLOGIES AND "LOCK IN"
COSTS

RONALD M. WHYTE, District Judge.

*1 This order addresses two motions brought by Rambus seeking to exclude the testimony of Dr. Christopher McArdle. Motion *In Limine* No. 4 challenges the reliability of his opinions on the costs of implementing the Manufacturers' proposed alternatives to all of Rambus's technologies at the time that SDRAM and DDR standards were being discussed at JEDEC. The motion also objects to Dr. McArdle's competence to testify as to whether a JEDEC memory engineer would have considered such costs in deciding what standard to adopt. Motion *In Limine* No. 5 seeks to exclude Dr. McArdle's testimony relating to "lock in" costs (costs that would have been incurred by the electronics industry in making an abrupt or gradual change away from the use of Rambus's DRAM technologies following the adoption of the JEDEC standard). The Manufacturers jointly oppose the motions. The court has reviewed the papers and considered the arguments of counsel.

For the reasons set forth below, the court denies Motion *In Limine* No. 4 to the extent it seeks to preclude Dr. McArdle's opinion on the cost differences between the disputed Rambus technologies and the suggested alternative approaches and grants the motion insofar as it seeks to exclude Dr. McArdle's opinion on the effect these cost differentials would have had on the decision-makers at JEDEC. The court denies Motion *In Limine* No. 5 to the extent

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that Dr. McArdle may testify about the “lock-in” phenomenon generally and how the Manufacturers would incur switching costs were they to make a gradual change away from the use of Rambus's technologies in DRAM products. Dr. McArdle may not testify as to his “abrupt change” scenario, nor may he testify to his dollar estimates of “lock-in” damages in the “gradual change” scenario.

I. LEGAL STANDARD

Federal Rule of Evidence 702 governs the admissibility of expert testimony. An expert must be qualified by virtue of his or her “knowledge, skill, experience, training, or education.” Fed.R.Evid. 702. Experience is often the only basis for reliable expert testimony. See Fed.R.Evid. 702, adv. committee note (2000). An expert who relies on experience, however, must “explain how that experience leads to the conclusion reached, why the experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts.” *Id.* The court may not “simply tak[e] the expert's word for it.” *Id.* (internal quotations omitted). To illustrate, the District Court of Alaska recently exercised its discretion and excluded an expert's opinion based upon nothing more than a statement of experience. *Adams v. Teck Cominco Alaska, Inc.*, 399 F.Supp.2d 1031, 1036-37 (D.Alaska 2005). In that case, an environmental engineer opined that a feasibility study would have cost \$1 million and a site investigation would have cost \$5 million. *Id.* at 1036. The engineer based his estimates on his “professional judgment and experience,” but consulted no sources in making his estimates and knew virtually nothing about the case at the time he made his estimates. *Id.* at 1036-37. The court held that this explanation failed to satisfy Rule 702. *Id.* at 1037; accord *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319 (9th Cir.1995) (“We’ve been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough.”).

*2 Nevertheless, “[a] review of the caselaw after

Daubert^{FN1} shows that the rejection of expert testimony is the exception rather than the rule.” Fed.R.Evid. 702, adv. committee note (2000). In fact, “[i]n certain fields, experience is the predominant, if not sole, basis for a great deal of expert testimony.” *Id.* For example, in *First Tennessee Bank Nat. Ass'n v. Barreto*, the court of appeals upheld the admission of expert testimony that a bank did not act in accordance with prudent banking standards based upon the witness's own practical experiences in the banking industry. 268 F.3d 319, 335 (6th Cir.2001); see also *Hangarter v. Provident Life and Acc. Ins. Co.*, 373 F.3d 998, 1017 fn 14 (9th Cir.2004) (pointing out that cross-examination is an effective way to attack the factual basis for an opinion).

FN1. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)

Also, reliable testimony must be (1) “based upon sufficient facts or data,” (2) “the product of reliable principles and methods,” and (3) the witness must reliably apply the principles to the facts. *Id.* “Facts or data” may include other experts' reliable opinions or hypothetical facts that are supported by the evidence. Fed.R.Evid. 702, adv. committee note (2000).

As an initial matter, the parties here debate how a court should exercise its “gatekeeper” obligation regarding expert testimony. Rambus emphasizes the “substantial danger” and “quite misleading” nature of improper expert testimony. Mot. 4 at 3 (citing cases). The Manufacturers contend that the court's gatekeeper role is a “limited” one and that “the standard is not that high.” Opp. 4 at 4 (citing 4-702 Weinstein's Federal Evidence § 702.05 (2007)). Putting aside the parties' characterizations of the gatekeeper role, the party offering expert testimony must demonstrate by a preponderance of the evidence that its expert's opinions are reliable. See *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 743-44 (3d Cir.1994). While the court has broad discretion in deciding whether that standard has been met, the court cannot shirk its gatekeeper duties. See *Gener-*

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al Elec. Co. v. Joiner, 522 U.S. 136, 142, 146 (1997); compare with *id.* at 148 (Breyer, J., concurring). With these standards in mind, the court addresses the challenged aspects of Dr. McArdle's opinions.

II. ANALYSIS

A. Dr. McArdle's Reports and Qualifications

Dr. McArdle has filed three reports. His first report contains his opinion regarding the costs associated with an abrupt disruption of the availability of DRAM technologies. See Eskovitz Decl., Ex. A at 13 (Jan. 13, 2005) (hereinafter "McArdle I"). His second report rebuts a Rambus expert's testimony regarding the costs of implementing various alternatives to Rambus's DRAM technologies before any specific implementation of Rambus's technologies. See Eskovitz Decl., Ex. G at 4 (Jul. 7, 2006) (hereinafter "McArdle II"). Finally, Dr. McArdle's third report supplements the opinions he gave in his two prior reports. See Eskovitz Decl., Ex. L at 4 (Aug. 1, 2007) (hereinafter "McArdle III"). Dr. McArdle has now been deposed four times in connection with this litigation. See Eskovitz Decl. at 3-4; Exs. B (deposition transcript, Nov. 17, 2005), E (deposition transcript, Apr. 20, 2006), K (deposition transcript, Jul. 24, 2006), & M (deposition transcript, Sept. 20, 2007).

*3 Dr. McArdle has over 25 years of experience in the electronics industry. McArdle I at 5. He holds a Ph.D. in microelectronics and is a fellow of the Institution of Electrical Engineers. *Id.* Over his career, he has been responsible for the design and manufacture of "a wide range of electronic, micro-electronic and software products." *Id.*

Dr. McArdle has not, however, designed or supervised the design of any DRAM chips. Eskovitz Decl., Ex. B at 5:6-15. He acknowledged that DRAM design "is a very specialist field that, you know, as I've said, I don't have experience." *Id.* at 149:24-150:8. He clarified that while the "core

memory elements of a DRAM" are specialized, the design of an interface to a DRAM is analogous to any other digital logic work. Eskovitz Decl., Ex. K at 173:15-23. Nevertheless, he has not designed an interface for any SDRAM, DDR SDRAM, DDR2 SDRAM, or RDRAM products. *Id.* at 173:24-174:6. He has worked for a number of companies (see McArdle I at 5), but has never worked for a DRAM manufacturer. Eskovitz Decl., Ex. B at 144:7-9. He has no JEDEC or DRAM standard setting experience, nor has he ever attended a JEDEC meeting or participated in any DRAM standard-setting activities. *Id.* at 140:20-23, Eskovitz Decl., Ex. K at 51:10-12; Eskovitz Decl. Ex. M at 140:14-23, 156:6-8.

B. Rambus's Objections

1. Lack of Qualifications

Rambus's primary complaints concerning Dr. McArdle's alternative cost differentials are that Dr. McArdle lacks the requisite qualifications to render such estimates and that the estimates are based upon Dr. McArdle's "own unsupported-and un-informed-personal opinions." Mot. at 2:10-11. It is important to recognize that Dr. McArdle is not offering an opinion on the viability of design alternatives but rather merely commenting on the potential difference in the costs of using those alternatives identified by Joe McAlexander and Graham Allen compared to the costs of implementing the Rambus technologies. Therefore, Dr. McArdle's lack of specific DRAM interface design experience does not necessarily mean that he cannot estimate the costs of implementing someone else's design. Dr. McArdle states in his second report that "[he is] able to comment on the likely level of information available to [memory technology engineers] and their likely conclusions as, during the period in question, I specified, designed and managed the design of a wide range of products in semiconductor and other electronic technologies across a wide range of application areas[.]" McArdle II at 8. The court finds that Dr. McArdle by education and ex-

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perience has sufficient expertise to justify offering his cost differential opinion to the jury.

2. Bases of Cost Opinion

Dr. McArdle's report discusses a number of factors that influence the cost of implementing the respective technologies. In each instance, Dr. McArdle is responding to the report of a Rambus expert, Michael Geilhufe. After discussing various factors affecting the costs of alternative technologies, Dr. McArdle renders his estimate of the additional cost of implementing each alternative technology identified by McAlexander and Allen over the cost of implementing the corresponding Rambus technology. Rambus correctly points out that some of Dr. McArdle's assumptions are based upon little, if anything, other than his purported personal experience and knowledge. For example, Dr. McArdle in discussing amortization costs states that the industry commonly "re-uses" chip designs, and product life cycles are longer than the one year utilized by Mr. Geilhufe. *Id.* at 9. He does not explain, however, the basis of his opinion that "the cost of the design of the interface circuits could be spread over just 5 devices (5 x 20 million = 100 million)" and, therefore, a "more suitable figure for amortisation [sic]" is in excess of 100 millions units. *Id.* Dr. McArdle's report only justifies spreading the cost of a design over five devices rather than one by the statement that the "approach of 'design re-use' has been followed in the industry for many years and is a major consideration in the design of a modern product." *Id.*

*4 Nevertheless, despite some marginally supported statements, the court finds Dr. McArdle has adequately supported his alternative cost differentials. *See id.* at 7-32; McArdle III at 20-23. The court, therefore, in its discretion, finds Dr. McArdle's alternative cost differential opinion sufficiently reliable to allow it into evidence subject, of course, to testing by cross-examination.

C. JEDEC Evaluations of the Cost of Alternative Technologies

Aside from the question of the reliability of Dr. McArdle's opinion of the difference in costs between the Rambus technologies and the Manufacturers' proposed alternatives, Rambus challenges Dr. McArdle's ability to testify to whether a JEDEC memory technology engineer would have considered such costs in deciding which technology to adopt. Dr. McArdle's final conclusion is that "the people at JEDEC making the decision would be unlikely to be convinced of which approach to adopt purely on the basis of cost." McArdle II at 32; McArdle III at 24. Rambus's challenge focuses on Dr. McArdle's qualifications. Rambus emphasizes that Dr. McArdle has never attended a JEDEC meeting, read JEDEC minutes, or talked to anyone that has attended JEDEC. *See, e.g.,* Eskovitz Decl., Ex. B at 140:20-141:5. Although Dr. McArdle has years of experience in deciding what weight to assign costs in a variety of electronics fields, the court finds that he is not qualified to express an opinion of the effect of costs on JEDEC decisions. First, it seems to the court that costs are inextricably intertwined with effectiveness of the design of the DRAM interface technology and Dr. McArdle does not have that design experience. Second, he has no basis for concluding how a JEDEC decision-maker would weigh the cost factor. Although the Manufacturers can argue that in light of the limited cost differential, a JEDEC member voting on the standard to be adopted would have voted against the adoption of the Rambus technology as the standard, Dr. McArdle has no specialized knowledge on this question. Therefore, although he can testify on the cost differential of the alternatives proposed by Allen and McAlexander, he cannot give his opinion on how a JEDEC member would have voted.

D. Extent of "Lock In"

Rambus challenges each of Dr. McArdle's opinions on the extent of damages allegedly caused by the

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DRAM industry being “locked in” to using Rambus's technologies. Dr. McArdle has submitted two reports on the subject, which outline an “abrupt change” theory of “lock-in” damages (McArdle I) and a “gradual change” theory of lock-in damages (McArdle III).

1. The “Abrupt Change” Hypothesis

Dr. McArdle's “abrupt change” theory of damages begins with the assumption that “following the dispute between Rambus and Hitachi in 2000, the DRAM technology then predominant in the industry became abruptly unavailable and needed to be quickly replaced by a technology which did not contain any of the features that were the substance of that dispute.” McArdle I at 6. From that basis, Dr. McArdle concludes that major DRAM manufacturers (Samsung, Micron, Infineon, Hynix, Nan-ya and Elpida) would have chosen to adopt a new DRAM technology. *Id.* at 39. These companies, he asserts, would have suffered \$5,538,000,000 in damages from scrapping their inventory and losing sales and \$459,948,000 in new product introduction costs. *Id.* Dr. McArdle also expresses opinions on the costs imposed on other industrial sectors by an abrupt unavailability of DRAM technology. *See id.* at 40-54.

*5 To be admissible, expert testimony must be helpful to a jury in deciding an issue of fact. Fed.R.Evid. 702; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591 (1993). A reasonable jury cannot credit testimony that fails to reflect reality. *See, e.g., Am. Booksellers Ass'n, Inc. v. Barnes & Noble, Inc.*, 135 F.Supp.2d 1031, 1040-42 (N.D.Cal.2001) (granting directed verdict on antitrust claim where plaintiffs' expert's testimony “contains entirely too many assumptions and simplifications that are not supported by real-world evidence”). The foundation for Dr. McArdle's “abrupt change” hypothesis and damage estimates are so unmoored from reality as to be unhelpful to a jury. For example, he did little to verify or support design costs, the number and volumes of allegedly

affected motherboard companies and retail outlets, training expenses, costs incurred by companies other than Hynix in developing products, and the status of Rambus licensees. He did no economic analysis of the industry during the time period of the “abrupt change.” Another example of the lack of reality is his failure to consider that Samsung, the largest DRAM manufacturer at the time, was a Rambus licensee during the period of the assumed abrupt change. Samsung would have had no reason to scrap inventory or develop a new product when it was freely able to continue selling licensed DRAMs. In his deposition, Dr. McArdle conceded that his analysis did not take into account whether any DRAM manufacturers were licensed to use Rambus's technology. *See generally*, Eskovitz Decl., Ex. B at 31:19-37:22. Given that some DRAM manufacturers had licenses to use Rambus's technology, Dr. McArdle also admitted that his scenario and testimony were inconsistent with reality. *Id.* at 36:10-37:13. Because Dr. McArdle's “abrupt change” scenario has no basis in reality, it cannot be presented to the jury.

2. The “Gradual Change” Hypothesis

Dr. McArdle's most recent report builds on his prior work to introduce a theory of how much it would have cost to gradually move away from using Rambus's claimed technology. *See* McArdle III at 3. While suggesting that there are many “non-abrupt change” scenarios, Dr. McArdle in his report describes a situation where a manufacturer would choose to develop an alternative product in parallel with a standardized product to minimize risk. *See id.* at 10-13. Only after being convinced that consumers would switch to an alternative product, Dr. McArdle hypothesizes, would a manufacturer be willing to stop making the standardized product. *Id.* at 12.^{FN2}

FN2. Dr. McArdle also suggests a collective radical change where an industry migrates to a new standard all at once. He considers such a scenario unlikely.

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McArdle III at 12-13.

After describing various processes of adopting a new standard, Dr. McArdle estimates the costs of doing so. To provide a “best-case” or lowest cost estimate, Dr. McArdle assumes that the entire industry would adopt a changed interface technology when migrating to the next generation memory device. *Id.* at 14. He then takes his estimate for engineering costs from his first report to suggest a range for the amount the memory industry would have to spend to migrate to an alternative standard. *See id.* at 15. Dr. McArdle also states that switching to a new standard would result in lower initial yields (reflecting the industry's unfamiliarity with making a new product). *Id.* at 15-16. This would result in delays to introducing the product, and delays lead to reduced sales. *Id.* at 16-19. Dr. McArdle then suggests the general magnitude of such costs. *Id.* at 20.

*6 Rambus challenges Dr. McArdle's qualifications to offer such opinions, argues that Dr. McArdle did not rely on sufficient facts or data to make his analysis reliable, and that Dr. McArdle's methodology for approximating costs is unreliable. Rambus's arguments regarding the quality of McArdle's data and the accuracy of his methods are meritorious. Dr. McArdle did not adequately testify to the source of his cost data regarding DRAM design despite being asked in multiple depositions. *See* Eskovitz Decl., Ex. B at 58:8-14 & Ex. M at 33:11-36:4. Dr. McArdle's first report suggested that he relied on “interviews and teleconferences with major memory, chipset, tester, IP, software and related organizations.” *See* McArdle I at 9. When pressed, however, he conceded that these “interviews and teleconferences” consisted of a total of six conversations, most around thirty minutes long. *See generally* Eskovitz Decl., Ex. E at 50:10-57:18.

The Manufacturers are not making damages claims beyond their attorneys' fees. Accordingly, the magnitude of Dr. McArdle's “lock-in” estimates are not of critical importance. While Rambus's objection to

how Dr. McArdle constructed his estimates is meritorious, Dr. McArdle does have the expertise to explain in general terms why the Manufacturers were “locked-in” and the type of economic considerations that would come into play in a gradual change to different technology. The court finds that Dr. McArdle's background in engineering and product development does qualify him to testify to his opinion on this subject. *See* McArdle I at 5.

III. ORDER

For the foregoing reasons, the court grants in part and denies in part Rambus's Motions *In Limine* Nos. 4 and 5:

1. Dr. McArdle may testify as to his opinion on the cost differences between the disputed Rambus technologies and the alternative approaches suggested by Allen and McAlexander;
2. Dr. McArdle is precluded from expressing an opinion on the effect these cost differentials would have had on the decision-makers at JEDEC;
3. Dr. McArdle may testify about the “lock-in” phenomenon generally and how the Manufacturers would incur switching costs were they to make a gradual change away from the use of Rambus's technologies in DRAM products;
4. Dr. McArdle may not testify as to his “abrupt change” scenario; and
5. Dr. McArdle may not express an opinion on the dollar amount of “lock-in” damages in the “gradual change” scenario.

N.D.Cal.,2008.

Hynix Semiconductor Inc. v. Rambus Inc.

Not Reported in F.Supp.2d, 2008 WL 73681 (N.D.Cal.), 75 Fed. R. Evid. Serv. 507

END OF DOCUMENT

EXHIBIT 9



LEXSEE 2008 U.S. DIST. LEXIS 109623

IMA North America, Inc., Plaintiff/Counterdefendant, vs. Maryln Nutraceuticals, Inc., d/b/a Naturally Vitamins, Defendant/Counterclaimant.

No. CV-06-344-PHX-LOA

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

2008 U.S. Dist. LEXIS 109623; 77 Fed. R. Evid. Serv. (Callaghan) 1166

October 17, 2008, Decided

October 17, 2008, Filed

SUBSEQUENT HISTORY: Later proceeding at *IMA N. Am. v. Maryln Nutraceuticals, Inc., 2008 U.S. Dist. LEXIS 90131 (D. Ariz., Oct. 27, 2008)*

PRIOR HISTORY: *IMA N. Am., Inc. v. Marlyn Nutraceuticals, Inc., 2008 U.S. Dist. LEXIS 7867 (D. Ariz., Feb. 1, 2008)*

COUNSEL: [*1] For IMA North America, Inc., Plaintiff: Amy Abdo, David A Weatherwax, LEAD ATTORNEYS, Susan Moon O, Fennemore Craig PC, Phoenix, AZ.

For Marlyn Nutraceuticals, Inc, doing business as Naturally Vitamins, Defendant: Paul M Levine, LEAD ATTORNEY, McCarthy Holthus Levine, Phoenix, AZ.

For Bank of America, N.A., Garnishee: James Edward Shively, Poli & Ball PLC, Phoenix, AZ.

For Marlyn Nutraceuticals, Inc, Counter Claimant: Paul M Levine, LEAD ATTORNEY, McCarthy Holthus Levine, Phoenix, AZ.

JUDGES: Lawrence O. Anderson, United States Magistrate Judge.

OPINION BY: Lawrence O. Anderson

OPINION

ORDER

This matter arises on Plaintiff/Counterdefendant IMA North America, Inc.'s ("IMA") Motion to Exclude the Report and Testimony of Damian Hillseth. (docket # 101) Defendant/Counterclaimant, Maryln Nutraceuticals, Inc. ("Marlyn" or "Defendant") has identified Mr. Hillseth as an expert witness to testify regarding the value of the Comprima 230 at the time of purchase by Marlyn. IMA claims that: (1) Mr. Hillseth is not qualified to testify as an expert; (2) his opinion is unreliable; and (3) he is not qualified to render an opinion regarding lease terms. (docket # 101)

After considering the parties' briefing, evidence, and the relevant [*2] case law, the Court will grant the motion and will exclude the report and expert testimony of Mr. Hillseth. The Court declines to conduct an evidentiary hearing on the pending motion because the evidence in the record is sufficient to support a ruling on the motion and the parties expressly advised the Court during a bench trial on the merits of this case that the record before the Court contains all of the evidence and arguments which counsel wish to present on the pending motion. *Weinstein's Federal Evidence § 702.02* (stating that "[a]n evidentiary hearing is not required if the information before the court is sufficient to support a ruling on the reliability of the proposed evidence.").

I. Background

Plaintiff/Counterdefendant IMA, the vendor of a Comprima 230 tablet press ("press") manufactured in Italy by IMA S.P.A., a separate corporation, brings this payment-deficiency action against Defendant Marlyn, d/b/a Naturally Vitamins, the purchaser of the press and a manufacturer of vitamins and other tablets for sale.

On April 30, 2004, IMA faxed a purchase order ("the Comprima Purchase Order") to Marlyn pursuant to which Marlyn agreed to: (1) purchase a Comprima 230 from IMA for \$ 585,000 [*3] (including delivery) plus a trade-in of an S 250 Killean tablet press IMA had sold to Maryln in 2000; (2) pay a down payment of 40 % of the purchase price (\$ 234,000); and (3) pay the balance in full upon delivery of the Comprima 230 to Maryln's Phoenix warehouse. (Complaint P 6, Answer P 6) IMA alleges claims of breach of contract and unjust enrichment. IMA contends that, although Marlyn paid the down payment (\$ 234,000), it breached the Comprima Purchase Order by failing to pay the remaining \$ 351,000 owed for the Comprima 230. (Complaint at P 8)

Marlyn denies any wrongdoing. It alleges that IMA proposed to sell, and Marlyn intended to buy, a new and unused Comprima 230. It is undisputed that Marlyn paid IMA the agreed upon down payment of \$ 234,000 before delivery of the Comprima 230. Marlyn claims that at or shortly after the delivery of the Comprima 230, Marlyn discovered that the Comprima 230 was not the new tablet press it had agreed to purchase as evidenced by, among others, rust, powder residue, and the age of the Comprima 230's parts. Marlyn alleges that "[a]t no time did IMA ever disclose to [Marlyn] that the [press] had been manufactured in 1999, that it contained aged parts [*4] that were tested in 1999, that it had been displayed and used [as a demonstration model] at a trade show in Germany in 2000, or that it was at least four (4) years old. . . [and that Maryln] was led to believe that it was purchasing a new [press]." (docket # 77 at 4) Marlyn counterclaims for breach-of-contract damages and rescission of the purchase contract.

Maryln's proposed expert, Damian Hillseth, opines that the Comprima 230 that Marlyn received was valued at \$ 225,000 at the time of purchase. (docket # 102, Exh. 1) Marlyn's counterclaim seeks \$ 9,000.00 in damages, the difference between what Marlyn paid for the press, \$ 234,000.00, and its expert's valuation of the Comprima 230 at \$ 225,000.

II. Admissibility of Expert Opinions in Federal Court

This Court has diversity jurisdiction over this lawsuit pursuant to 28 U.S.C. § 1332 because the amount in controversy exceeds \$ 75,000, exclusive of interest and costs, and the adverse parties are of diverse citizenship. 28 U.S.C. § 1332. (docket # 102 at 1) Pursuant to *Erie*, federal courts sitting in diversity apply state substantive law and federal procedural law. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938); *Wray v. Gregory*, 61 F.3d 1414, 1417 (9th Cir.1995) [*5] ("Although the Federal Rules of Evidence ordinarily govern in diversity cases, they do not always."). The parties agree that *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), its progeny, and *Federal Rule of Evidence 702* govern the admission of expert testimony in this case.

Federal Rule of Evidence 702 governs the admissibility of expert testimony and permits the presentation of "scientific, technical, or other specialized knowledge" if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." *Fed. R. Evid. 702*. For expert testimony to be admissible, "(1) the testimony [must be] based upon sufficient facts or data, (2) the testimony [must be] the product of reliable principles and methods, and (3) the witness [must have] applied the principles and methods reliably to the facts of the case." *Fed.R.Evid. 702*.

Before expert testimony can be admitted, the district court must ensure that the proffered "expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 597 (1993). The Supreme Court describes judges as "gatekeepers of evidence," *Daubert*, 509 U.S. at 597, [*6] whose role is "to make certain that an expert, whether basing testimony on professional studies or personal experience, employs in the courtroom the same level of rigor that character-izes the practice of the expert in the relevant field." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). If an expert's proposed testimony fails to meet either the "reliability" or "relevance" prong, it should be excluded. *United States v. Scholl*, 166 F.3d 964, 971 (9th Cir. 1999) (affirming exclusion of expert testimony as irrelevant); *Martinez v. Terex Corp.*, 241 F.R.D. 631, 641, 2007 WL 951721, * 10 (D. Ariz., March 27, 2007) (declining to address relevance of proposed expert testimony after

finding that testimony unreliable).

For purposes of *Federal Rule of Evidence 702*, the test for relevance is "higher than the standard for bare relevance." *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 745 (3rd Cir. 1994); *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1317 n. 17 (9th Cir. 1995) ("*Daubert II*") (explaining that *Rule 702*'s "relevance" requirement is not "merely a reiteration of the general relevancy requirement of *Rule 402*.".) Rather, because expert testimony can be "both powerful and [*7] quite misleading because of the difficulty in evaluating it," *Daubert*, 509 U.S. at 595, district courts must exclude proffered expert testimony "unless they are convinced that it speaks clearly and directly to an issue in dispute in the case, and that it will not mislead the jury." *Daubert II*, 43 F.3d at 1321 n. 17.

The test for reliability focuses on the expert's "principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. at 594-95. Proposed expert testimony "must be supported by appropriate validation - i.e. good grounds, based on what is known." *Daubert*, 509 U.S. at 590. The *Daubert* Court provided a non-exclusive list of factors courts should consider in determining whether scientific testimony is sufficiently reliable: (1) whether the method or technique has been tested, (2) whether the method or technique has been subjected to peer review and publication, (3) the potential or known rate of error, and (4) whether the method or technique is generally accepted within the relevant scientific community. *Id.* at 593-94; *Clausen v. M/V New Carissa*, 339 F.3d 1049, 1056 (9th Cir. 2003) (stating that "[s]cientific evidence is deemed reliable if the principles [*8] and methodology used by an expert are grounded in the methods of science.") (citing *Daubert*, 509 U.S. at 589-95). Accordingly, the expert's method must be adequately explained. *United States v. Hermanek*, 289 F.3d 1076, 1094 (9th Cir. 2002).

After *Daubert*, in *Kumho Tire Co.*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999), the Supreme Court explained that the district court's gatekeeping role applies to all forms of expert testimony, not just scientific testimony." 526 U.S. at 148. The *Kumho* Court explained that the factors identified in *Daubert* may not be pertinent in assessing reliability in all cases. Rather, the circumstances and issues of each case will determine which factors apply. *Id.* The objective of *Daubert*'s gatekeeping inquiry is to "make certain that an expert,

whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* at 152. In *Daubert*, the Court further held that "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible [*9] evidence." *Id.* at 588.

Discussing *Daubert* and *Kumho Tire*, the Ninth Circuit has stated that, "far from requiring trial judges to mechanically apply the *Daubert* factors . . . to both scientific and non-scientific testimony, *Kumho Tire* heavily emphasizes that judges are entitled to broad discretion when discharging their gatekeeping function." *United States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir. 2000). The Ninth Circuit has held that the "trial court not only has broad latitude in determining whether an expert's testimony is reliable, but also in deciding *how* to determine the testimony's reliability." *Elsayed Mukhtar v. California State University, Hayward*, 299 F.3d 1053, 1064 (9th Cir. 2002) (emphasis in original) (citing *Hankey*, 203 F.3d at 1167).

In determining whether a proffer of expert testimony is sufficiently reliable, the Ninth Circuit has "held that '[o]ne very significant fact to be considered is whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.'" *Clausen*, 339 F.3d at 1056 (citing *Daubert II*, 43 F.3d at 1317). [*10] "If the testimony is not based on independent research then what is required is 'proof that the research and analysis supporting the proffered conclusions have been subjected to normal scientific scrutiny through peer review and publication.'" *Id.*

If neither of *Daubert II*'s two primary criteria (expert's testimony is based on independent research or proffered conclusions have been subjected to normal scientific scrutiny through peer review and publication) for establishing the reliability of expert testimony is met, "a proffer of scientific testimony may still be deemed reliable enough to be admitted." *Clausen*, 339 F.3d at 1056. "Where peer review and publication are absent, 'the experts must explain precisely how they went about reaching their conclusions and point to some objective source - a learned treatise, the policy statement of a

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professional association, a published article in a reputable scientific journal or the like - to show that they have followed the scientific evidence method, as it is practiced by (at least) a recognized minority of scientists in their field." *Id.* (recognizing that a "differential diagnosis is a common scientific technique, and federal courts, generally [*11] speaking, have recognized that a properly conducted differential diagnosis is admissible under *Daubert.*") (citations omitted); *Heck v. City of Lake Havasu*, 2006 U.S. Dist. LEXIS 64007, 2006 WL 2460917 *8 (D. Ariz., April 24, 2006).

"[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146-47, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997) (trial judge did not abuse her discretion when she concluded that the studies upon which Joiner's experts relied were not sufficient, whether individually or in combination, to support their conclusions that Joiner's exposure to PCB contributed to his cancer). In *Joiner*, the Supreme Court held that *Daubert* not only applies to the "principles and methodology" of the expert, but also to any conclusions the expert reached. *Id.* Because "conclusions and methodology are not entirely distinct from one another" and "[t]rained experts commonly extrapolate from existing data," a district court "may conclude that there is simply too great an [*12] analytical gap between the data and the opinion proffered." *Id.*

The party proffering an expert bears the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. *Joiner*, 522 U.S. at 144; *Domingo v. T.K. M.D.*, 289 F.3d 600, 607 (9th Cir. 2002); *Lust v. Merrell Dow Pharms., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996). In performing its "gatekeeper" responsibilities, a district court is not obligated to conduct a separate evidentiary hearing on the admissibility of the proffered expert testimony. *United States v. Alatorre*, 222 F.3d 1098, 1102 (9th Cir. 2002) ("Nowhere in *Daubert*, *Joiner*, or *Kumho Tire* does the Supreme Court mandate the form that the inquiry into relevance and reliability must take, nor have we previously spoken to this issue.").

Mindful of the foregoing principles, the Court will

consider the qualifications of the proffered expert witness, Damian Hillseth, and the admissibility of his opinions and testimony.

III. Defendant's Expert Witness - Damian Hillseth

A. Mr. Hillseth's Qualifications to Proffer Expert Opinions

To testify as an expert, an individual must be qualified by "knowledge, skill, experience, training, or education." [*13] *Fed.R.Evid.* 702. A witness may qualify as an expert based on reliable evidence, including deposition testimony. *See* 4-702 *Weinstein's Federal Evidence* § 702.02. *Rule 702* "contemplates a broad conception of expert qualifications . . . [and] is broadly phrased and intended to embrace more than a narrow definition of qualified expert." *Thomas v. Newton International Enterprises*, 42 F.3d 1266, 1269 (9th Cir. 1994) (finding that expert's 29 years of longshoreman experience laid at least minimally sufficient foundation of knowledge, skill, and experience required to give expert testimony regarding working conditions of longshoreman personnel).

As discussed below, Mr. Hillseth's experience buying and selling manufacturing equipment in the pharmaceutical and nutraceutical industries qualifies him as an expert to testify regarding the value of the Comprima 230 at issue. Mr. Hillseth graduated from Loyola Marymount College in 1980 and began a career in the pharmaceutical and nutraceutical industry buying and selling manufacturing equipment for Mustang Machinery. (docket # 108, Hillseth depo. at 7) In 1983, he went to work for Sundance Supply buying and selling used equipment in the microelectronic [*14] industry. (*Id.*) After short break from the industry, in 1985, he went back to work for Mustang Machinery. (*Id.* at 8) In 1990, Mr. Hillseth started his own company, Star Industries, which buys and sells used machinery in the pharmaceutical, biotechnical, cosmetic, chemical, and nutraceutical businesses. (docket # 108, Hillseth depo. at 7-8) In connection with his business, Mr. Hillseth buys, sells, and appraises machinery. (Hillseth depo. at 12)

1. Value of Comprima 230

Mr. Hillseth's experience in the business of buying and selling equipment in the pharmaceutical industry qualifies him to give expert testimony regarding the value of the Comprima 230 at issue in this case. IMA contends

that Mr. Hillseth is not qualified to give an opinion as to the value of the Comprima 230 because he lacks "formal education regarding valuation of pharmaceutical equipment . . ." (docket # 101 at 3) Mr. Hillseth's lack of specific training does not disqualify him as an expert. *Rogers v. Raymark Industries, Inc.*, 922 F.2d 1426, 1429 (9th Cir. 1991) ("A witness can qualify as an expert through practical experience in a particular field, not just through academic training.") (citation omitted). IMA's overemphasis [*15] on qualifications is inconsistent with the liberal approach to expert witness qualification taken by *Rule 702. Holbrook v. Lykes Brothers Steam Ship Co., Inc.*, 80 F.3d 777, 782 (3rd Cir. 1996).

2. Lease Terms

In his report, Mr. Hillseth also offer opinions regarding lease rates for the Comprima 230. He opines that if the Comprima 230 was leased on a monthly or annual basis, the price quote attached to his report would apply. (docket # 102, Exh. 1) IMA contends that Mr. Hillseth is not qualified to testify regarding lease terms. The Court need not resolve this issue because Marlyn advises the Court that it does not intend to offer Mr. Hillseth for any opinions regarding the fair lease value of the press. (docket # 108 at 6, n. 5)

B. Reliability of Mr. Hillseth's Opinion regarding Value of the Comprima 230

Although Mr. Hillseth is qualified as an expert to testify regarding the value of the Comprima 230 at issue, his opinion regarding that value is unreliable. "[T]he test under *Daubert* is not the correctness of the expert's conclusions but the soundness of his methodology." *Daubert II*, 43 F.3d at 1318. Accordingly, "[o]ffering only a bottom line conclusion does not assist the trier of fact [*16] and should not be admitted." *Pizel v. Monaco Coach Corp.*, 374 F.Supp.2d 653, 655 (N.D. Ind. 2005) (citing *Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, 395 F.3d 416, 420 (7th Cir.2005)); *Smith v. Freightliner, LLC*, 239 F.R.D. 390, 392-93, 2006 WL 3299753, at * 3 (D.N.J. 2006) (holding that when an expert's opinion is not based on discernable methodology, the opinion must be excluded).

Here, Mr. Hillseth's value of the Comprima 230 at issue is based on his review of "documents and information" and not a physical inspection of that machine. (docket # 101, Exh. 1) The lack of a physical inspection, however, is not significant because reliable

appraisals may be rendered solely based upon photographs and records pertaining to the item at issue. *Pizel*, 374 F.Supp.2d at 657 (holding that while a valuation is more precise when a physical inspection occurs, the lack of a physical inspection does not render the opinion unreliable). Indeed, an expert may rely on data that is not within his personal knowledge when forming his opinion. *Fed.R.Evid. 702; United States v. Locascio*, 6 F.3d 924, 938 (2nd Cir. 1993) (stating that "expert witnesses can testify to opinions based on hearsay or other inadmissible [*17] evidence if experts in the field reasonably rely on such evidence in forming their opinions.").

Mr. Hillseth opines that the Comprima 230 delivered to Marlyn was valued at \$ 225,000. Mr. Hillseth's opinion is not "the product of reliable principles and methods that are reliably applied to the facts of the case." *Masterson Marketing, Inc., v. KSL Recreation Corp.*, 495 F.Supp.2d 1044, 1051 (S.D.Cal. 2007). Indeed, Mr. Hillseth has not adequately explained his methodology for arriving at the value of the Comprima 230 at issue. He states that when he appraises a machine he relies on age, condition, marketability and location of the machine and then defines those terms. (Hillseth depo. 33) Mr. Hillseth concluded that a machine that had been turned on for ten hours would be considered used and that he considered the Comprima 230 tablet press at issue a "demoed" machine. (Hillseth depo. at 59, 60) He testified that when determining the value of a tablet press machine, whether it has been demonstrated by producing a tablet at a trade show would affect its value. (Hillseth depo at 57-58) And that the machine would have a lower value if it had produced a tablet. (Hillseth depo. at 59)

Although [*18] Mr. Hillseth testified that whether the Comprima 230 had been run to produce tablets would affect its value, he stated that he valued the Comprima 230 "as a demoed machine" without regard to "whether it made tablets or it didn't." (Hillseth depo. at 59-60) Thus, even if part of Mr. Hillseth's methodology included consideration of the condition of the machine, he did not apply that methodology in this case.

Mr. Hillseth's methodology is not reliable because he did not perform research of comparable sales to determine what a Comprima 230 tablet press with the options included on the machine at issue would be worth. *Stoebner Holdings, Inc. v. Automobili Lamborghini S.P.A.*, 2007 U.S. Dist. LEXIS 88227, 2007 WL 4230878,

2008 U.S. Dist. LEXIS 109623, *18; 77 Fed. R. Evid. Serv. (Callaghan) 1166

* 5 (*D. Hawaii, Nov. 30, 2007*) (finding certain aspects of an expert's valuation of a 2002 Lamborghini Murcielago automobile reliable where expert conducted research on other Lamborghinis offered for sale on the internet to determine that a vehicle with no repairs would be worth approximately \$ 200,000). Additionally, Mr. Hillseth did not consult industry standard guides or similar publications. *Long v. Monaco Coach Corporation, 2007 WL 4613000, * 3* (E.D. Tenn., Sept. 27, 2007) (finding expert's testimony [*19] regarding value of motor coach was reliable where expert's methodology included "consulting industry standard guides . . . , researching comparable sales, and consulting the purchase order of the motor coach at issue.")

Assuming *arguendo* that Mr. Hillseth's methodology itself was reliable, he did not reliably apply that methodology to the facts of this case. In arriving at the value of the Comprima 230 at issue, Mr. Hillseth merely considered a bare bones machine without any of the options or other extras, such as an 18-month warranty, specific to the machine which Marlyn had ordered. Specifically, the Comprima 230 sold to Marlyn was customized with options which Marlyn selected. (docket # 101, Exh. 4) The Comprima Purchase Agreement also provided an 18-month extended warranty, six months longer than the standard IMA warranty; at least, two weeks of training by IMA personnel at Marlyn's Phoenix warehouse; and the installation of the Comprima 230 at Marlyn's warehouse. (docket # 101, Exh. 4)

Mr. Hillseth testified that a machine sold by an original equipment seller, such as IMA, would be valued differently than a machine sold by a third-party used equipment dealer. However, Mr. Hillseth [*20] valued the Comprima 230 at issue as if it was sold by a third-party used equipment dealer. (Hillseth depo at 86-87) He explained that the valued "the machine itself" with "no warranty, no spare parts, [and] no service." (*Id.* at 87) Specifically, Mr. Hillseth did not consider the value of all of the options that IMA included on the Comprima 230 at Marlyn's request. (Hillseth depo. at 81-83) These options include the additional charge (item 1004), software package (item 1010), single station size parts (item 1011), embossing tool (item 1012), table draw-off unit (item 1014), PVC tooling box (item 1015), automatic washing group (item 1017), packing, shipping, and installation. (Hillseth depo. at 81-83; docket # 101, Exh. 4)

Mr. Hillseth also did not consider the value of the 18-month warranty which IMA provided on the Comprima 230 at issue. (Hillseth depo. at 87-88) Mr. Hillseth testified that a warranty "absolutely" has some value, but stated that he did know, or consider, the value of the warranty that was part of the Comprima Purchase Agreement. (Hillseth depo. at 88, 90-91) Mr. Hillseth further testified that he did not include the value of the two weeks of training IMA provided with [*21] the Comprima 230. (Hillseth depo at 98) In fact, Mr. Hillseth testified that he did not know if IMA would provide training on the Comprima at issue. (*Id.* at 98)

In summary, Mr. Hillseth has not adequately explained the methodology he used to arrive at the value of the Comprima 230. *United States v. Hermanek, 289 F.3d 1076, 1094 (9th Cir. 2002)* (stating that expert's methods must be adequately explained); *Daubert II, 43 F.3d at 1319* (holding that the expert must "explain the methodology . . . followed to reach [his or her] conclusions."). Additionally, his opinion regarding the value of the Comprima 230 at issue fails to take into account all of the factors which affect the value of that machine, including the options, the warranty, and training. Mr. Hillseth simply did not value the machine at issue in this case, and therefore, his opinion is not reliable. *See Stoenner Holdings, Inc., 2007 U.S. Dist. LEXIS 88227, 2007 WL 4230878, * 5* (finding expert's opinion "inadmissible to the extent that it addresses problems with the vehicle that are not at issue in this action."). Mr. Hillseth's opinion on the value of the Comprima 230 is simply the *ipse dixit* of Mr. Hillseth without any independent research of comparable [*22] sales to determine what a used or demonstrated Comprima 230, or any model of Comprima, tablet press would be worth. *Joiner, 522 U.S. at 146-47; Automobili Lamborghini S.P.A., 2007 U.S. Dist. LEXIS 88227, 2007 WL 4230878 at * 5.*

Accordingly,

IT IS ORDERED that Plaintiff/Counterdefendant IMA North America, Inc.'s Motion to Exclude the Report and Testimony of Damian Hillseth, docket # 101, is **GRANTED**.

Dated this 17th day of October, 2008.

/s/ Lawrence O. Anderson

Lawrence O. Anderson

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United States Magistrate Judge

EXHIBIT 10

Not Reported in F.Supp., 1993 WL 470426 (D.Guam A.D.)
(Cite as: 1993 WL 470426 (D.Guam A.D.))

H

Only the Westlaw citation is currently available.

District Court of Guam, Appellate Division.
In re GUAM ASBESTOS LITIGATION.
Patrick J. BRENNAN, Plaintiff-Appellee,

v.

OWENS-CORNING FIBERGLAS CORP., Defend-
ant-Appellant.

No. 92-00064A.

Oct. 19, 1993.

Larry L. Simms, Stephen R. McAllister, Washing-
ton, DC, G. Patrick Civile, Moore, Ching, Bo-
ertzel, Civile, Dooley & Roberts, Agana, GU for
appellant.

Joseph Daniel Davis, Thomas D. Thomas, Davis &
Thomas, Los Angeles, CA, Charlotte E. Costan,
Burbank, CA, Duncan G. McCully, Thomas J.
Lannen, McCully, Lannen, Beggs & Melancon,
Agana, GU, for appellee.

Before: UNPINGCO, MUNSON ^{FN*}, and
RAFEEDIE ^{FN**}, JJ.

OPINION

ALEX R. MUNSON, Chief Judge.

*1 Appellee Patrick J. Brennan brought suit against
appellant Owens-Corning Fiberglas Corporation
(OCF) and three other defendants for asbestos-re-
lated injuries. By agreement of the parties, trial was
bifurcated. At the conclusion of Phase I, defendant
Foster-Wheeler moved for a directed verdict, which
was granted. Between Phases I and II the other two
defendants settled with plaintiff. The jury returned
a verdict against appellant OCF for \$2.5 million in
compensatory damages and \$4.125 million in punit-
ive damages. OCF timely filed its notice of appeal
and now argues several grounds for remand for a

new trial and reversal of the award of punitive dam-
ages.

Issues and Analysis

1. Did the cumulative effect of certain evidentiary
rulings deprive OCF of a fair trial?

Appellant OCF argues that the combined effect of
several evidentiary rulings worked to deprive it of a
fair trial. We shall consider each ruling in turn.

Dr. Demopoulos' Testimony

Appellant OCF asserts that the trial court erred
when it prevented OCF's medical expert, Dr. De-
mopoulos, from testifying about the nature of ap-
pellee's medical condition and the causes of that
condition.

The record shows that three days prior to the May
20, 1991, pretrial conference, and in accordance
with the General Pretrial Order, appellant desig-
nated Dr. Demopoulos as an expert defense witness
on matters of medical pathology. The trial court
denied appellee's motion to wholly exclude the doc-
tor's testimony on the ground that they had effect-
ively been prevented by appellant from deposing
him. However, the next day the court ruled that Dr.
Demopoulos could not testify about appellee's ex-
posure to radiation and that OCF could not mention
it, even when cross-examining Brennan about his
own testimony or when questioning Brennan's two
experts, who had mentioned in their depositions
studies reporting a possible link between radiation
and mesothelioma. Appellant argues that it was
made to suffer for appellee's failure to promptly de-
pose the doctor after he had been designated as an
expert.

Appellant claims the trial court also erred when it
limited Dr. Demopoulos' testimony on pathology

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matters to “materials that he has reviewed,” thus preventing him from explaining his diagnosis that appellee suffered from adenocarcinoma and not mesothelioma. Appellant maintains that the trial court, by allowing appellee to present four experts on the causes of cancer and lung disorders and effectively preventing OCF from presenting even one, abused its discretion by permitting appellee's evidence of his medical condition to go to the jury almost unchallenged.

Appellee responds that: 1) Dr. Demopoulos was designated as an expert on pathology only, 2) the trial court did not abuse its discretion in prohibiting him from testifying about radiation exposure because he had not been designated as an expert in that area, 3) that OCF's cross-examination of appellee's experts on the issue showed that the possibility of appellee's cancer being due to his exposure on two occasions in the early 1950s to extremely low levels of atomic bomb radiation was almost nil, and 4) Dr. Demopoulos was not completely prevented from testifying about the causes of appellee's cancer. Rather, he was restricted, in giving his opinion that appellee suffered from adenocarcinoma, to relying on whatever materials he had actually reviewed in reaching that conclusion, based on his education, experience, training and background.^{FN1}

*2 A trial court's evidentiary rulings are reviewed for an abuse of discretion. *Mitchell v. Keith*, 752 F.2d 385, 392 (9th Cir.), cert. denied, 472 U.S. 1028, 105 S.Ct. 3502, 87 L.Ed.2d 633 (1985). The trial court has broad discretion in admitting and excluding expert testimony and we will sustain the court's action unless it is manifestly erroneous. *Reno-West Coast Distribution Co. v. Mead Corp.*, 613 F.2d 722, 726 (9th Cir.), cert. denied, 444 U.S. 927, 100 S.Ct. 267, 62 L.Ed.2d 183 (1979).

The trial judge never made clear on the record the basis for his rulings regarding Dr. Demopoulos. However, a reading of the record supports the conclusion that the trial court prohibited Dr. Demopoulos' testimony about anything other than his

opinion concerning the pathology of appellee's medical condition for two reasons. First, because the court was apparently convinced that appellant had intentionally kept from Dr. Demopoulos (its own expert) some pathology slides which, as part of a pretrial agreement between the parties, had been sent by appellee for him to review. This appears to have been done so that appellee would not be able to depose him as to his conclusions about what the slides revealed. Second, Dr. Demopoulos was not allowed to testify about radiation because he had not been designated as an expert in that area and appellee had thus had no opportunity to prepare to depose him about such testimony.

It is difficult not to conclude that any harm to appellant's case was primarily self-inflicted and came about as a result of failed gamesmanship. Nevertheless, we have considered the allegations of error and cannot say that, with the facts before it, the trial court's decision to limit Dr. Demopoulos' testimony was manifestly erroneous.

Evidence of OCF's Financial Condition

Appellant argues that the “most appropriate” admissible evidence of its financial condition were statements of OCF's net income and net worth, and that evidence that was admitted of its gross sales, gross assets, gross value of all its shares of stock, and its pre-tax profits was so prejudicial and misleading as to require reversal and a new trial. Appellant relies on *Adams v. Murakami*, 54 Cal.3d 105, 284 Cal.Rptr. 318, 813 P.2d 1348 (1991), to support its argument that the California Supreme Court has now expressly rejected those cases in which evidence other than net worth or net income was used and upon which the trial court here relied.^{FN2}

Appellee responds that *Adams* states only that record evidence of a defendant's financial condition is a prerequisite to an award of punitive damages and that plaintiff has the burden of putting on such evidence. Appellee further argues the jury was en-

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titled to as complete a picture of defendant's financial condition as was possible in order to make an informed decision.

As noted above, we review this evidentiary ruling for an abuse of discretion, *Mitchell v. Keith*, 752 F.2d at 392. We find no such abuse here. *Adams v. Murakami* does not state that only evidence of a defendant's net worth may be presented, only that plaintiff must present some evidence of financial condition before punitive damages can be awarded. As appellee correctly notes, the Court in *Adams v. Murakami* expressly declined "to prescribe any rigid standard for measuring a defendant's ability to pay." *Adams*, 284 Cal.Rptr. at 325 n. 7. There was no error, particularly when defendant could have offered its own evidence regarding the corporation's financial condition and chose not to do so.

The Deposition of John Thomas

*3 Appellant complains of the admission into evidence of the deposition of Mr. John Thomas, a former president of OCF. Appellant objected to the admission of the April, 1991, deposition on two grounds: that Thomas was not a competent witness under Title 6, Guam Code Annotated (GCA) §§ 601-603^{FN3} and that he decided not to sign his deposition because he could not attest to its accuracy. As to the first ground, appellant claimed that the 83-year-old Thomas had been diagnosed by his physician as having serious memory problems and to be suffering from dementia. Appellant sought to obtain an affidavit on the issue from Thomas' personal physician or to be granted a continuance to depose him. The trial court refused to allow either.

The first (and only) sentence of 6 GCA § 601 and the entire text of § 603 are substantially identical to the correspondingly numbered Federal Rules of Evidence. We "look to relevant Ninth Circuit authority when interpreting a Guam statutory rule that closely tracks a federal procedural rule." *Guam v. Ojeda*, 758 F.2d 403, 406 (9th Cir.1985) (federal rules of evidence); *De Vera v. Blaz*, 851 F.2d 294,

296 (9th Cir.1988) (federal rules of civil procedure).^{FN4}

A trial court's determination of the competency of a witness will not be reversed absent an abuse of discretion. See, e.g., *Batchelor v. Cupp*, 693 F.2d 859, 865 (9th Cir.1982). A reviewing court cannot reverse unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors. *Fjelstad v. American Honda Motor Co., Inc.*, 762 F.2d 1334, 1337 (9th Cir.1985). It is for the jury to determine the weight properly to be given the testimony. *Batchelor*, 693 F.2d at 865.

On July 5, 1991, OCF moved to "suppress" the Thomas deposition and submitted a 22-page memorandum in support of its motion. The trial court read the entire deposition, noted that Thomas chose not to sign his deposition after both his attorney and doctor recommended that he not sign it, and allowed its use at trial. As noted by the parties, different courts in other lawsuits against appellant have come to different conclusions on the use of Thomas' deposition. However, we cannot say that the trial court, having read Thomas' deposition, "committed a clear error of judgment" by allowing its use here.

Dr. Castleman's Testimony

Appellant first argues that Barry Castleman was not qualified to testify as an expert concerning medical knowledge of the hazards of asbestos during the time periods relevant to this lawsuit, and that the prejudice stemming from denominating him an expert far outweighed the probative value of his testimony. Appellant further asserts that the trial court erred because the documents Castleman testified about were ordinary, everyday OCF corporate documents and internal correspondence, which "speak for themselves."

Appellee responds that Castleman's "specialized

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knowledge” was admissible for one reason: it assisted the jury. [6 GCA § 702](#).^{FN5} Appellee notes that Castleman's expertise was not as a medical doctor but, rather, was derived from his many years of study of the asbestos industry.

*4 [Title 6 GCA §§ 403](#) ^{FN6} and 702 are substantially identical to their counterparts in the Federal Rules of Evidence. As noted above, we “look to relevant Ninth Circuit authority when interpreting a Guam statutory rule that closely tracks a federal procedural rule.” *Guam v. Ojeda*, 758 F.2d at 406; *De Vera v. Blaz*, 851 F.2d at 296. The trial court's evidentiary rulings are reviewed for an abuse of discretion, *Mitchell*, 752 F.2d at 392, and its broad discretion in admitting and excluding expert testimony will be sustained unless it is manifestly erroneous. *Reno-West Coast Distribution Co. v. Mead Corp.*, 613 F.2d at 726. A witness can qualify as an expert through practical experience in a particular field. *Rogers v. Raymark Industries, Inc.*, 922 F.2d 1426, 1429 (9th Cir.1991). Here, Dr. Castleman gained his expertise by many years of studying corporate response to knowledge concerning the hazards of asbestos by collecting and categorizing documents, publications, and reports demonstrating the industry's decisions regarding information and warnings to users about the possible risks associated with asbestos products. The trial court, in an exercise of its discretion, determined that Castleman had sufficient specialized knowledge, skill, experience, training, or education to synthesize his research and knowledge and render an opinion which would be of assistance to the jury in its deliberations. On the record before us, we cannot say that the trial court's conclusion in this regard was “manifestly erroneous.”

The Chronology Given to the Jury by Appellee's Counsel During Closing Argument

The trial court permitted appellee to distribute to the jury during his closing argument a 30-page summary of the evidence. Appellant had objected to the tactic when appellee first informed the court of

his desire to give a summary to the jury but the court reserved ruling. Later, without ever explicitly ruling on the objection, the court let appellant give a copy to each juror without first examining the summary to ensure it did not contain improper material or allowing OCF to examine it. Appellant makes no specific objection except to claim that the trial court violated clear Ninth Circuit precedent and that allowing use of appellee's chronology “perverted the judicial process and contributed to the excessive verdict in this case.”

Appellee responds that the court has broad discretion to allow the use of charts and summaries which might clarify testimony, that the 30-page summary contained the same information included on large charts which he had also prepared, set on an easel, and referred to during his closing argument, and that the summary was not admitted into evidence or taken into the jury room when the jury began its deliberations. Finally, appellee notes that the trial court instructed the jury that: “Charts and summaries are only as good as the underlying evidence that supports them. You should therefore give them only such weight as you think the underlying evidence deserves.”

*5 Appellant is correct that the Ninth Circuit has determined that two precautionary measures should be taken by a district court when summary charts are used. First, the court must carefully examine the summary charts, out of the presence of the jury, to determine that everything contained in them is supported by the proof. *United States v. Soulard*, 730 F.2d 1292, 1300 (9th Cir.1984), citing *United States v. Abbas*, 504 F.2d 123, 124 (9th Cir.1974), cert. denied, 421 U.S. 988, 95 S.Ct. 1990, 44 L.Ed.2d 477 (1975). Second, summaries may be used as testimonial aids for witnesses and visual aids for counsel during argument, but should not be admitted into evidence or used by the jury during deliberations. *Id.* While we endorse the Ninth Circuit procedure and recommend its adoption by the Guam courts as an added safeguard, we review here only for an abuse of discretion. *Holland v. United*

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States, 348 U.S. 121, 128, 75 S.Ct. 127, 131, 99 L.Ed. 150 (1954).

We believe it was error for the trial court to allow the use of the summary without first having reviewed it to determine that everything in it was supported by the proof. However, we find that the error was harmless in light of these facts: 1) appellant did not renew its objection when the summary was first brought out for the jury, 2) the summary given to the jury replicated the larger charts used by appellee during his closing argument, 3) the summary was not admitted into evidence or used by the jury in its deliberations, and 4) the cautionary instruction given to the jury by the trial court ameliorated the error.

2. Was the jury improperly instructed on the issue of causation?

Appellant OCF claims it is entitled to a new trial as a matter of law because the jury was never required by the instructions to find that a defect in OCF's product, Kaylo, caused appellant's medical condition. Appellant argues that Phase I of the bifurcated trial was to establish only whether or not plaintiff suffered from an asbestos-related disease. Left to Phase II was the determination of whether there was a defect in Kaylo and if the defect in fact caused appellee's medical condition. According to OCF, appellee successfully misled the trial court at the beginning of Phase II that the jury had determined legal causation in Phase I. Appellant claims that California Bar-Approved Jury Instruction (BAJI) 3.76, "Legal Cause," was given unnecessarily in Phase I and that it confused both the court and the jury. Therefore, when the jury made its findings in Phase II it had not been instructed regarding any of the elements of strict liability, nor had it been specifically charged to determine whether any of the elements of strict liability had been proved.

Appellee counters that OCF did not object in Phase I to the giving of BAJI 3.76 or to the special verdict

form, which asked the jury to determine causation. As further proof that causation was tried in Phase I, appellee cites to defendant Foster-Wheeler's motion for directed verdict, which was granted because no causal link had been shown between appellee and Foster-Wheeler's products.

*6 The record reveals that during the jury instructions at the conclusion of Phase I the jury was instructed to determine whether "the asbestos-containing products of any of the defendants were a substantial factor in causing or contributing to plaintiff Patrick Brennan's asbestos-related disease or injury," [Ph. I Tr. 1363] The jury was further instructed that:

A legal cause of injury, damage, loss or harm is a cause which is a substantial factor in bringing about the injury, damage, loss or harm. There may be more than one legal cause of an injury. When conduct of two or more persons contributes concurrently as legal causes of an injury, the conduct of each of said persons is a legal cause of the [in]jury, regardless of the extent to which each contributes to the injury. [Ph.I, Tr. 1368]

And, finally, that "[a] cause is concurrent if it was operative at the moment of injury and acted with another cause to produce the injury. It is no defense that the conduct of a person not joined as a party, was also a legal cause of the injury." [Ph.I, Tr. 1369]

The special verdict form given to the jury at the conclusion of Phase I contained Question No. 3: "Were the asbestos-containing products of any of the following defendants a substantial factor in causing or contributing to plaintiff Patrick Brennan's asbestos-related disease or injury." The jury answered "yes" as to three defendants, including OCF.

We review jury instructions as a whole, to determine if the trial court gave instructions that were misleading or that stated the law incorrectly to the prejudice of the *objecting* party and will reverse only

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for an abuse of discretion. *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 212 (9th Cir.1988) (emphasis added). Instructions are reviewed in the context of the case. *Lewy v. Southern Pacific Transp. Co.*, 799 F.2d 1281, 1287 (9th Cir.1986). The reviewing court should consider the guidance provided by the verdict form. *In re Aircrash in Bali, Indonesia*, 871 F.2d 812 (9th Cir.), cert. denied, 493 U.S. 917, 110 S.Ct. 277, 107 L.Ed.2d 257 (1989). A party who does not object to an instruction may not complain of it. *Hammer v. Gross*, 932 F.2d 842, 847-848 (9th Cir.1991) (no "plain error" exception is recognized in the Ninth Circuit); *United States v. Parsons Corp.*, No. 90-56328, slip op. at 8484 (9th Cir. Aug. 6, 1993) (Regarding Fed.R.Civ.P. 51, "judges are more likely to correct errors if they are aware the lawyer is raising legal objections, not just quibbling about matters within the court's discretion.") The relevant portion of *Guam Rule of Civil Procedure 51* provides: "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." This language is identical to the federal rule existing at the time this case was heard. *Guam v. Ojeda, supra*, 758 F.2d at 406; *De Vera v. Blaz, supra*, 851 F.2d at 296.

*7 Appellant failed to object to the instructions in question, thus waiving any claim of error. In any event, given the record before us, we could not accept appellant's argument that the issue of causation was not before the jury in Phase I. Accordingly, we affirm.

3. Was OCF entitled to judgment notwithstanding the verdict on the ground that plaintiff failed to prove two essential elements of his strict liability cause of action:

- a. That the jury could not have rationally inferred that plaintiff's exposure to OCF Kaylo caused his medical condition; and,
- b. That plaintiff presented insufficient evidence

in Phase II of the trial to permit the jury to find that a defect in OCF Kaylo caused his medical condition.

Appellant OCF argues that the jury's finding in Phase I that Owens-Illinois' (OI) Kaylo was not a substantial factor in appellee's medical condition was inconsistent with its finding in Phase II that appellant's Kaylo was a factor. This is because there was no such thing as OCF Kaylo until 1958 and appellee's testimony was that he had first been exposed to asbestos-containing products in 1949. Thus, any 1949-1958 exposure had to be to OI Kaylo and not OCF Kaylo. Because latency periods for mesothelioma extend to forty or fifty years, the jury could not have rationally absolved OI of blame and concluded that OCF's Kaylo was a substantial factor in appellee's diseases.

Appellee responds that two distinct lines of thought have emerged as to the type of evidence an asbestos plaintiff must prove to show a defendant's product was the legal cause of his or her injuries. In the "Hawaii cases," *In re Hawaii Federal Asbestos Cases*, 960 F.2d 806, 817 (9th Cir.1992), courts required particularized proof that a plaintiff came into contact with a defendant's products before he or she was allowed to recover from that defendant. Other courts have recognized that plaintiffs may not be able to identify with specificity the manufacturers of products to which plaintiffs were exposed decades earlier, and these courts require only that the plaintiff show a particular manufacturer's products were present at the worksite. If the plaintiff can do so, it can be inferred that the plaintiff's exposure to the products was a substantial factor in causing the disease. *Id.* at 817 (collected cases). Appellee claims he met both tests.

In reviewing denial of a motion for judgment notwithstanding the verdict, we examine the evidence in the light most favorable to the prevailing party and draw all reasonable inferences in favor of that party. *Zuniga v. United Can Co.*, 812 F.2d 443, 450 (9th Cir.1987). We will affirm if the jury's verdict was supported by substantial evidence; that is, such

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relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 450-451. A jury verdict may be reversed only if it is clearly erroneous. *Id.*

Here, the evidence at trial showed that appellant OCF advertised and distributed Kaylo insulation products manufactured by Owens-Illinois (OI) between 1953 and 1958. Appellant acquired OI in 1958 and thereafter manufactured and sold Kaylo until 1973. Appellee began working with Kaylo in 1953 and continued to use it for the duration of his working life. Appellee's asbestosis was diagnosed in 1988 and his mesothelioma in 1990. The latency period for asbestosis is ten to thirty years and six to fifty years for mesothelioma. There was substantial evidence to support the jury's conclusion that since most of appellee's exposure to asbestos dust came after 1953, and appellant's product Kaylo was the product he used most of the time, that Kaylo was defective, and that his exposure to the defective Kaylo was a substantial factor in his injuries. There was substantial evidence to support the jury's finding; that is, there was such relevant evidence as a reasonable mind might accept as adequate to support the conclusion.

4. Is OCF entitled to a remittitur or a new trial for both the compensatory and punitive damage awards?

*8 Appellant argues that it is entitled to a remittitur or a new trial because the compensatory and punitive damages awards in this lawsuit are unreasonable and excessive. Specifically, appellant argues that the maximum possible amount of compensatory damages shown at trial was approximately \$1 million but the jury returned a verdict for \$2.5 million. We address this issue only as to compensatory damages; the award of punitive damages will be discussed in Issue 5, below.

Guam Civil Code § 3359^{FN7}, enacted in 1953, essentially mirrors the similarly-numbered California Civil Code section: damages must in all cases be

reasonable. As we noted earlier, decisions of California courts which pre-date the December, 1933, enactment of the Guam territorial laws are controlling authority on issues of the statutory construction and effect of Guam laws identical to California laws, and California cases subsequent to the adoption of the Guam codes, while not binding, are persuasive. *Roberto v. Aguon*, 519 F.2d at 575.

“A reviewing court does not ordinarily substitute its judgment for that of the jury and trial court, which have evaluated in terms of damages the pain, humiliation, disfigurement, and loss of earning capacity suffered by a plaintiff.” *Johnston v. Long*, 30 Cal.2d 54, 76, 181 P.2d 645 (1947). Such reasoning, coming as it does from a post-1933 California decision, is deemed persuasive in the Guam courts. Appellant offers nothing to indicate that the jury's compensatory damages verdict does not simply reflect its acceptance of the high end of the range of objective damages proved to it at trial and its quantification of plaintiff's pain and suffering. We decline to order a remittitur.

5. Does the \$4.5 million award of punitive damages violate due process?

Finally, appellant OCF argues that the \$4.5 million punitive damages award violates due process^{FN8} because the jury was not adequately instructed and because the trial court failed to conduct a meaningful post-verdict review of the award for reasonableness. Appellant asserts that we must, after reviewing the award, reverse and order a new trial.

We disagree. The Supreme Court and the U.S. Court of Appeals for the Ninth Circuit have recently addressed this issue. *See TXO Production Corp. v. Alliance Resources*, 61 U.S.L.W. 4766, 113 S.Ct. 2711, 125 L.Ed.2d 366 (June 25, 1993); *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991); and, *Morgan v. Woessner* (“*Morgan II*”), 997 F.2d 1244 (9th Cir.1993). Our reading of these cases leads us to the following conclusion: The United States Su-

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preme Court has refused to formulate a “bright-line” test to determine whether an award of punitive damages violates due process. The Court has stated only that “a general concern of reasonableness ... properly enters into the constitutional calculus.” *TXO Production Corp.*, 61 U.S.L.W. at 4770, quoting *Haslip*, 499 U.S. at 18, 111 S.Ct. at 1043. And, “[a]ssuming that fair procedures were followed, a judgment that is the product of that process is entitled to a strong presumption of validity.” *Id.* (Citation omitted.)

*9 Below, in *TXO*, the West Virginia Supreme Court of Appeals had used a common law three-factor “reasonable relationship” test when assessing the award of punitive damages: 1) the potential harm that defendant's action could have caused, 2) the maliciousness of defendant's actions, and 3) the penalty necessary to discourage the defendant from acting similarly in the future. 187 W.Va. 457, 419 S.E.2d 870 (1992). The United States Supreme Court in *TXO* upheld this sort of examination, as it had done in *Haslip*.^{FN9}

The Court in *Haslip* noted that neither it nor any federal or state court decision of which it was aware had ever found that the common-law method for assessing punitive damages violated due process. 499 U.S. at ----, 111 S.Ct. at 1043. Under the traditional common-law approach, the amount of the punitive award is initially determined by the jury, which has been instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by the trial and appellate courts to ensure that it is reasonable. 499 U.S. at ----, 111 S.Ct. at 1042. Having approved this methodology, the Court turned to the question of whether the size of the award violated the due process clause and was thus unconstitutional.

Similarly, in *Morgan II* the Ninth Circuit used the three-stage review of punitive damages found by the Supreme Court in *Haslip* to comport with constitutional standards. The Ninth Circuit said that the jury instructions given must first be reviewed, to

determine if they apprised the jury of the proper role of such damages: not to compensate plaintiff, but to punish defendant and deter defendant and others. In the matter before us, the trial court instructed the jury, in part:

If you find that the plaintiff suffered damage as a legal result of the conduct of defendant, ... you may then consider whether or not you should award punitive damages against defendant, Owens-Corning Fiberglas, for the sake of example and by way of punishment.

You may, in your discretion, award such damages if, but only if, you find by clear and convincing evidence that said defendant was guilty of oppression, fraud or malice in the conduct on which you base your finding of liability. * * *

The law provides no fixed standards as to the amount of such punitive damages [b]ut leaves the amount to the jury's sound discretion, exercised without passion or prejudice.

In arriving at any award of punitive damages, you are to consider the following: One, the reprehensibility of the conduct of the defendant. Two, the amount of punitive damages which will have a deterrent effect on the defendant in light of defendant's financial condition. And three, that the punitive damages must bear a reasonable relation to the actual damages.

The plaintiff has the burden of proving by clear and convincing evidence all of the facts necessary to establish that defendant ... was guilty of oppression, fraud or malice, entitling the plaintiff to punitive damages.

*10 Ph. II, Tr. 1119-1121.

The court had previously instructed the jury that, as to compensatory damages:

The total amount of plaintiff's damages is the amount that will reasonably compensate him for each of the following elements of claimed loss or

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harm[.]

Ph. I, Tr. 1369.

In reviewing the instructions as a whole we find that they were adequate. The punitive damages instruction implicitly informed the jury that such damages were not to compensate the plaintiff and the instructions on compensatory damages made that point explicitly. While it is a close question (and while reiteration of the non-compensatory nature of punitive damages would have been welcome during the instruction regarding punitive damages), it was not necessary in light of the instruction on compensatory damages.

The second stage of review requires that the trial court review the punitive damages award and record its reasons for upholding or altering it. *Morgan II*, 997 F.2d at 1257. Here, as in *TXO*, the trial court did not specifically articulate its reasons for upholding the punitive damages award but, rather, reviewed a challenge to the sufficiency of the instructions and determined in a thorough, ten-page order that they were constitutionally adequate. Because the court gave counsel an adequate hearing on its post-verdict motions, we follow the lead of the Supreme Court in *TXO*: we recognize (and emphasize) the desirability of the trial court's recording its reasons for altering or upholding the punitive damages award on the record but we are not prepared to consider the failure to do so a constitutional violation. *TXO*, 61 U.S.L.W. at 4772. We do encourage the Guam courts to more fully develop their own criteria for use by all judges when reviewing punitive damages awards, and to make a complete record.

At the third stage of review, this court is to conduct two enquiries. First, we must satisfy ourselves that defendant received the first two stages of scrutiny, which we have done. Our second task is a substantive review of the amount of the award to ensure that it “does not exceed an amount that will accomplish society's goals of punishment and deterrence.” *Haslip*, 111 S.Ct. at 1045. That is, the award must

be reasonable and rational in light of its twin purposes of punishment and deterrence. Because we have above determined that “fair procedures were followed,” we accord the judgment that was a product of that process “a strong presumption of validity.” *TXO*, 61 U.S.L.W. at 4769. Here, as in *TXO*, the members of the jury were determined to be impartial before they were allowed to sit, their assessment of damages was the product of collective deliberation based on evidence and the arguments of adversaries, and their award was reviewed and upheld by the trial judge who also heard the testimony. *TXO*, 61 U.S.L.W. at 4769. The award here, though large, does not “jar one's constitutional sensibilities.” *Haslip*, 499 U.S. at 18. It presumably reflects the jury's and the trial court's assessment of the harm to appellee, the bad faith of appellant, a larger pattern of concealment by appellant of the dangers of its product, and appellant's wealth. ^{FN10} *TXO*, 61 U.S.L.W. at 4771.

Conclusion

*11 Having found no error below sufficient to warrant reversal or remand, we AFFIRM.

FN* The Honorable Alex R. Munson, Chief Judge, U.S. District Court for the Northern Mariana Islands, sitting by designation.

FN** The Honorable Edward Rafeedie, District Judge, United States District Court for the Central District of California, sitting by designation.

FN1. He was allowed to “explain his conclusion with regard to what disease plaintiff suffers from, and he may explain why he does not believe that the plaintiff's expert witnesses are correct in their diagnosis.” (Ph. I Tb. 1057.)

FN2. Both parties indiscriminately cite

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Roberto v. Aguon, 519 F.2d 754 (9th Cir.1975), for the proposition that “Guam generally borrows California law,” Appellant’s Brief, p. 14, or that “Guam looks to California for assistance in resolving substantive questions of law,” Appellee’s Brief, p. 38. Neither of these statements is correct. *Roberto* and the cases which cite it state only that decisions of California courts which pre-date the December, 1933, enactment of the Guam territorial laws are controlling authority on issues of the statutory construction and effect of Guam laws, and California cases subsequent to the adoption of the Guam codes, while not binding, are persuasive. *Id.* at 755. Guam courts need defer only to pre-December, 1933, California decisions which interpret California code sections identical to, or substantially similar to, Guam Code sections. Here, however, because the trial court expressly stated that it would use California jury instructions and California law, we will do likewise. [Ph. I Tr. pp. 110-111.]

FN3. Section 601 provides: “Every person is competent to be a witness except as otherwise provided in this title.” Section 603 requires that: “Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.”

FN4. However, if a Guam rule merely sets general standards of litigation conduct (as opposed to a challenge to the substantive sufficiency of the pleadings), we will defer to the interpretation placed upon the rule by the local court, unless the local court has purported to adopt and follow Ninth Circuit law. *Lynn v. Chin Heung International, Inc.*, 852 F.2d 1221, 1222-23 (9th

Cir.1988).

FN5. Section 702, Testimony by Experts, is identical to Federal Rule of Evidence 702, and 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.

FN6. Section 403, Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time, provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative issues.

FN7. Guam Civil Code § 3359 provides:

Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered.

FN8. The Due Process Clause is a federal constitutional standard to be applied in the case of federal as well as state punitive damages awards. The Fifth Amendment and Fourteenth Amendment due process clauses should be applied in the same manner when two situations present identical questions differing only in that one involves a proscription against the federal government and the other a proscription

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against the States. For the purpose of Due Process Clause scrutiny of a punitive damages claim it makes no difference whether the damages were imposed in a federal court or a state court, on a federal claim or a state claim. *See generally Morgan v. Woessner (Morgan II), supra.*

FN9. We cannot direct the Guam courts to undertake a specific type of review of punitive damages awards but we note that the U.S. Supreme Court looked favorably upon what have come to be called the *Hammond* factors. These were outlined by the Supreme Court of Alabama in *Hammond v. City of Gadsden*, 493 S.E.2d 1374, 1379 (Ala.1986), and subsequently refined by that Court in *Green Oil v. Hornsby*, 539 So.2d 218, 223-224 (Ala.1989) and *Central Alabama Electric Cooperative v. Tapley*, 546 So.2d 371, 376-377 (Ala.1989). These include: 1) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred, 2) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct, 3) the profitability to the defendant of the wrongful conduct and the desirability of removing the profit and of having the defendant also sustain a loss, 4) the "financial position" of the defendant, 5) all the costs of litigation, 6) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation, and 7) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

FN10. We recognize, as did the Court in *TXO*, that the emphasis during argument

on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident. However, the financial position of the defendant is one factor that can be taken into account when assessing punitive damages. *TXO*, 61 U.S.L.W. at 4771.

D.Guam,1993.

In re Guam Asbestos Litigation

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EXHIBIT 11

Not Reported in F.Supp.2d, 2002 WL 34357202 (C.D.Cal.)
(Cite as: 2002 WL 34357202 (C.D.Cal.))

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Only the Westlaw citation is currently available.

United States District Court,
C.D. California.
Thomas A. MORIN, Plaintiff,
v.
McCULLOCH CORP. et al., Defendants.
No. CV 01-6431 SVW (SHx).

July 3, 2002.

Named Expert: Arvin Hille, Robert Kadlec, [John Jones](#)
[David S. Blau](#), Hahn & Bolson, Los Angeles, CA,
[Jeffrey T. Bolson](#), Hahn & Bolson, LLP, Torrance,
CA, for Plaintiff.

[Craig F. Sears](#), Harrington Foxx Dubrow & Canter,
[Peter A. Dubrawski](#), Haight Brown & Bonesteel,
Los Angeles, CA, for Defendants.

ORDER PROVIDING FURTHER DETAIL ON
PRETRIAL ORDERS GRANTING PLAINTIFF'S
MOTION *IN LIMINE* TO EXCLUDE EXPERT
WITNESS TESTIMONY OF ROBERT KADLEC;
GRANTING PLAINTIFF'S MOTION *IN LIMINE*
TO PRECLUDE EXPERT TESTIMONY FROM
ARVIN HILLE REGARDING THE CHAIN
BRAKE; AND GRANTING DEFENDANTS' MO-
TION *IN LIMINE* TO EXCLUDE EXPERT
TESTIMONY OF JOHN JONES

[STEPHEN V. WILSON](#), District Judge.

I. Introduction.

*1 The plaintiff sought recovery under multiple theories of strict and negligent products liability, including various design defects and failures to warn. The Court pre-tried the case on March 4, 5, and 6 of 2002, and again on April 17, 2002. The Court tried the case to a jury on April 23 to 26, 2002. The jury

found for the defendants. On special interrogatories the jury expressly found against the plaintiff on all theories of design defect.

The parties filed motions *in limine* to exclude the testimony of John Jones, the plaintiff's expert; to exclude the testimony of Robert Kadlec, the defendant Sears' expert; and to preclude the defendant Blount's expert Arvin Hille from testifying on the accused chainsaw's chain brake. The Court granted each of these three motions. This Order further explains the rationale for the rulings, beyond the explanation provided in the hearing transcripts.

II. Analysis.

A. Admissibility of expert testimony.

1. Testing reliability under Rules 702 and 104(a).

[Rule 702 of the Federal Rules of Evidence](#) ("FRE") in part codifies the Court's role as a gatekeeper in passing on the admissibility of expert testimony. [Rule 702](#) provides:

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

[Fed.R.Evid. Rule 702](#) (West 2002); *also id.*, Note to 2000 Amendment. ^{FN1, FN2}

^{FN1}. The Judicial Conference amended [Rule 702](#) in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993),

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and to the many cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). See Notes to 2000 Amendment, FRE Rule 702.

FN2. Stating that “The amendment affirms the trial court’s role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. Consistently with *Kumho*, the Rule as amended provides that all types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful.

The admissibility of all expert testimony is governed by the principles of Rule 104(a). See Fed.R.Evid. Rule 702 Notes to 2000 Amendment (“[T]he admissibility of all expert testimony is governed by the principles of Rule 104(a).”); Fed.R.Evid. Rule 104(a). Rule 104(a) states:

Preliminary questions concerning the qualification of a person to be a witness ... or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it [the court] is not bound by the rules of evidence except those with respect to privileges.

Fed.R.Evid. Rule 104(a). Under Rule 104(a), the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. See *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987).

2. Rule 702 does not provide an exclusive list of reliability criteria.

The new Rule 702 does not codify the *Daubert* factors for testing the reliability of proffered testimony. See *id.*, Note to 2000 Amendment (“No attempt has been made to ‘codify’ these specific

factors.... [listing plurality of factors used after *Daubert* to test reliability] ... All of these factors remain relevant to the determination of the reliability of expert testimony under the Rule as amended. Other factors may also be relevant. See *Kumho*, 119 S.Ct. at 1176 (“[W]e conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.”) FN3

FN3. The Note continues

Daubert itself emphasized that the factors were neither exclusive nor dispositive. Other cases have recognized that not all of the specific *Daubert* factors can apply to every type of expert testimony. In addition to *Kumho*, 526 U.S. at 151, 119 S.Ct. at 1175, see *Tyus v. Urban Search Management*, 102 F.3d 256 (7th Cir.1996) (noting that the factors mentioned by the Court in *Daubert* do not neatly apply to expert testimony from a sociologist). See also *Kannankeril v. Terminix Int’l, Inc.*, 128 F.3d 802, 809 (3d Cir.1997) (holding that lack of peer review or publication was not dispositive where the expert’s opinion was supported by “widely accepted scientific knowledge”). The standards set forth in the amendment are broad enough to require consideration of any or all of the specific *Daubert* factors where appropriate.

Id.

*2 The Court has broad discretion in discharging its gatekeeping function. See *Kumho Tire*, 526 U.S. at 141-42, 119 S.Ct. at 1176; *United States v. Mendoza-Paz*, 286 F.3d 1104, 1112 (9th Cir.2002); *United States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir.2000).

3. Relevant criteria for testing reliability of ex-

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pert testimony.

Daubert itself set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the *Daubert* Court are (1) whether the expert's technique or theory can be or has been tested—that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. See *Daubert*, 509 U.S. at 594. The Court in *Kumho* held that these factors might also be applicable in assessing the reliability of non-scientific expert testimony, depending upon “the particular circumstances of the particular case at issue.” See *Kumho*, 526 U.S. at 151, 119 S.Ct. at 1175.

Courts both before and after *Daubert* have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. These factors include: (1) Whether experts are “proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.” *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir.1995); (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion, see *General Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997) (noting that in some cases a trial court “may conclude that there is simply too great an analytical gap between the data and the opinion proffered”); (3) Whether the expert has adequately accounted for obvious alternative explanations, see *Claar v. Burlington N.R.R.*, 29

F.3d 499 (9th Cir.1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition), compare *Ambrosini v. Labarraque*, 101 F.3d 129 (D.C.Cir.1996) (the possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert); (4) Whether the expert “is being as careful as he would be in his regular professional work outside his paid litigation consulting,” *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir.1997); see *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151, 119 S.Ct. 1167, 1176, 143 L.Ed.2d 238 (1999) (*Daubert* requires the trial court to assure itself that the expert “employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field”), (5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give, see *Kumho Tire Co. v. Carmichael*, 526 U.S. at 151, 119 S.Ct. at 1175 (*Daubert*'s general acceptance factor does not “help show that an expert's testimony is reliable where the discipline itself lacks reliability, as for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.”); *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269 (5th Cir.1998) (en banc) (clinical doctor was properly precluded from testifying to the toxicological cause of the plaintiff's respiratory problem, where the opinion was not sufficiently grounded in scientific methodology); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir.1988) (rejecting testimony based on “clinical ecology” as unfounded and unreliable).

*3 No single factor is necessarily dispositive of the reliability of a particular expert's testimony. See, e.g., *Heller v. Shaw Industries, Inc.*, 167 F.3d 146, 155 (3d Cir.1999) (“not only must each stage of the expert's testimony be reliable, but each stage must be evaluated practically and flexibly without bright-line exclusionary (or inclusionary) rules.”); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317, n. 5 (9th Cir.1995) (noting that

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some expert disciplines “have the courtroom as a principal theatre of operations” and as to these disciplines “the fact that the expert has developed an expertise principally for purposes of litigation will obviously not be a substantial consideration.”).

B. Application.

1. John Jones.

Sears and Blount filed a motion *in limine* seeking to exclude testimony from the plaintiff's expert, John Jones (“Jones”). The gravamen of the challenge was not the substance of Jones' testimony, but his foundation as an expert.^{FN4} The plaintiff represented that he intended to call Jones to testify: 1) on the feasibility of alternative chainsaw and replacement chain and bar designs; 2) the relative weight of the risks to the chainsaw consumer in the current state of the accused products as against the (diminished) utility to the chainsaw consumer inherent in each suggested alternative design; and 3) the inadequacy of the warnings provided on the chainsaw, the replacement chain, and particularly the replacement chain packaging.

^{FN4}. The Court considered testimony in which Jones applied several texts on warning label design to evaluate the warning labels on the accused products. The defendants disputed Jones' interpretation of the applicability of disparate ANSI standards relating to warning labels in general (ANSI Z535.4-1991) and warning labels specific to chainsaws (ANSI B175.1-1991). Were Jones qualified as an expert and opined that these texts were authoritative, the plaintiff could have offered such testimony at trial. As the Court found that Jones was not qualified as an expert in this field, the plaintiff was unable to introduce the texts or learned treatises through Jones at trial. The plaintiff did not attempt to introduce the texts through Arvin Hille, Blount's expert and the only expert who testified at

trial. The plaintiff did not seek to qualify any other expert who might have provided a foundation for introduction of these texts.

Jones' testimony was unnecessary to establish the feasibility of alternative designs proposed by the plaintiff. The plaintiff could and did establish the feasibility of requiring a tip guard, and varying the gauge of the drive component and cutting chain so as to render professional chain incompatible with a device rated for safety chain, through Bount's expert Arvin Hille.

The real substance of Jones' proffered testimony was his evaluation of the warning labels on the products. The Court and parties conducted an extensive *voir dire* of Jones at the pre-trial conference for purposes of exploring his qualifications as an expert in the design and evaluation of warning labels on consumer power tools. During this proceeding the Court directed the parties to identify every instance in Jones' deposition testimony and on his curriculum vitae in which Jones reported prior experience in the design or evaluation of warning labels for consumer power tools.

Jones lacked the experience to qualify as an expert in warning label design or evaluation for consumer power tools; or to opine as an expert on the relative weights of the current product risks as against the diminished utility of the product incorporating the proposed design changes.

a. Jones is not an expert in warning design.

There is no question that Jones “designed” warning labels at various points in his career. That does not, by itself, qualify Jones as an expert in the design and evaluation of warning 27 labels.^{FN5} None of Jones' experience, taken individually or in the aggregate, qualifies Jones as an expert in warning labels for this action. At the pre-trial hearing Jones testified that he designed warning labels 1) in the 1960s as part of package design for a pharmaceutical product for sale to medical personnel while

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working for Johnson & Johnson; 2) for placement on industrial lathes on the floor of his wood shop when he owned a woodworking business; and 3) for the packaging of a consumer smoke detector. Jones claims that he gathered or surmised a methodology for designing the warning on the pharmaceutical product as a matter of 'general engineering principles.'

FN5. Jones holds a Bachelor's of Science in mechanical engineering, is licensed as a professional engineer, and has worked as a 'forensic engineer' in his current capacity as a litigation consultant. Jones reports that he has testified as an expert in twelve (12) trials and offered a deposition as an expert in nineteen (19) actions. Jones is not an industrial engineer, and was not qualified as an expert in warning label design for consumer power tools in these proceedings.

*4 Jones states that in the 1960s there was not yet an established methodology for designing and testing the effectiveness of warning labels—a process later codified in the texts upon which Jones sought to rely in relation to evaluating the warnings on the accused products.^{FN6} The sutures wrapped in the package designed by Jones for Johnson & Johnson were not power tools, and did not involve the same concerns or risks requiring communication to the consumer. Jones did not describe any clear method by which he evaluated whether the labels he 'designed' effectively communicated their message to the intended audience, nor what methods—if any—were used to identify the intended audience.^{FN7} This on-the-job experience does not qualify Jones as an expert in warning design and evaluation for the accused products in this case.

FN6. If this statement is accurate, then Jones admits that this experience did not apply what is now established methodology or teaching in warning design—although Jones may have followed parallel procedures. Jones does not represent that he did follow currently accepted methodo-

logy. If the statement is inaccurate, then it further supports the conclusion that Jones is not qualified as an expert in warning design.

FN7. Jones testified that the sutures were sold primarily through medical supply retailers to medical professionals.

Jones next described designing a warning label for a consumer smoke detector package, which advised the consumer to replace the battery periodically and to dispose of the battery properly. As with the sutures, the audience and concerns applicable to the label were different in kind from those at issue in the accused products. The difference in concerns between the effectiveness of this warning and the substance of the warning for the accused products is underscored by the fact that ANSI provides a distinct warning standard specifically addressed to chainsaws. The Court finds that this experience does not qualify Jones as an expert in warning design. As with the sutures package, Jones described no methodology by which he or his team evaluated the effectiveness of the label, or tested alternative formulations.

Jones described designing and implementing warnings for the fixed power tools, including a lathe, on the floor of his woodworking company's shop. The warnings were provided for his employees, who were professional woodworkers or carpenters. This, too, is dissimilar to the warnings at issue in the accused products. The audience for the shop tool warnings were professionals, trained in part by Jones. Even if Jones evaluated the workers for receptiveness to the warnings, a matter on which he did not testify, it would be difficult to disentangle the role of the warning labels from the impact of Jones' training or shop operating procedures, or the skill level of the workers from the efficacy and attention-getting qualities of the warnings. This practical experience falls short of qualifying Jones as an expert in warning design under ANSI standards for consumers and chainsaws.

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Finally the Court considers Jones' experience as a 'forensic engineer.' In that capacity Jones evaluated designs and warning labels including: 1) an operator safety warning on a jet ski; 2) warnings on a power angle polisher; and 3) warnings and design for a battery operated carving knife. Jones developed an opinion on each for trial. The closest experience was the jet ski warning, where Jones concluded that, in rough terms, one of several admonishments was improperly buried in the list on the warning label / operating instructions thereby diluting its effectiveness. As before, this experience is dissimilar. The accused products implicate a single relevant warning, according to a specific ANSI standard for chainsaws. His prior testimony as an expert witness does not qualify Jones as an expert in designing warning labels in this action.

*5 None of this experience qualified Jones as an expert on warning labels for this action.

b. Jones is not an expert in chainsaw design.

Similarly Jones was not qualified as an expert in chainsaw design. Jones testified to consumer experience with chainsaws. He never designed a chainsaw, cutting chain or bar. Jones never tested chainsaws or cutting chains for kickback, nor designed mechanisms to dampen kickback. He never studied the occupational or operational risk of kickback injury across a representative population. In short, Jones was not qualified to testify as to the design flaws alleged in the accused products, nor the risk or utility associated with current or alternative designs.

2. Robert Kadlec.

The plaintiff filed a motion *in limine* to exclude expert testimony from Sears' expert, Robert Kadlec ("Kadlec").^{FN8} Sears intended to offer Kadlec in order to establish that the accused chainsaw was properly designed. In particular, Sears intended to offer testimony relating to a conceptual analysis by Kadlec as evidence that the chainsaw was safely

designed to deal with kickback. This testimony fails the reliability analysis of [Rule 702](#) and *Daubert*.

FN8. Kadlec holds a doctorate in aeronautics, astronautics and physics from Stanford, as well as a bachelor's in mechanical engineering from Minnesota. He is a professional engineer, and now works as a consultant for litigation.

Kadlec, like Jones, never designed chainsaws or cutting chains, or tested chainsaws or chains for kickback. His personal experience with chainsaws consisted of clearing brush on private land in Montana. Although there is an established analytical methodology in ANSI for estimating the force of nose bar kickback across various chainsaw power heads and cutting chain combinations, Kadlec analyzed the accident in this case using a freebody diagram and Newtonian physics. Kadlec assumed that the kickback was a "pinch type" rather than a nose-bar event. He based his opinion on factual assumptions (stance of the plaintiff while cutting, the method of cutting, the geometric measurements of the log, and so on) lacking foundation; he did not test his analysis with available data; ignored a clear alternative explanation of nose bar kickback; and failed to deal with or consider testing data on rotational forces for a nose bar kickback. Kadlec's testimony lacked reliability under *Daubert* and its progeny and was excluded from trial.

3. Arvin Hille.

The plaintiff filed a motion *in limine* to prevent Blount's expert, Arvin Hille, from testifying in relation to the efficacy or operation of the chain brake on the accused chainsaw. Blount intended to offer Hille's opinion that:

If the chainsaw had been equipped with a chain brake that had been properly maintained and working, to a reasonable degree of engineering probability, even with the chain that was on the saw, if there had been an injury, it would have been far less than

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what occurred.

Hille Dep. vol. 2 at 133:19-134:1. Hille based this assertion on a rule of thumb that the “chain stop angle” (the point in the arc described by the chain-saw engaged in kickback at which the chain stops moving after the operational chain brake has engaged) is *roughly* half of the “computed kickback angle” (the measure of arc which a chainsaw should describe during a nose bar kickback for a given operating speed and cutting chain combination). Hille's 28 testimony in this respect fails the reliability criteria of *Daubert* and its progeny, and was excluded from trial.

*6 Hille was involved in Blount's measurements of kickback for various cutting saws and cutting chain combinations. He even designed the test equipment still in use for such measurements. Hille did not measure the accused chainsaw (McCulloch 610) for actual kickback angle when used with a functional chain brake and the accused cutting chain (Blount 72LG).

Hille's own testimony undermined the reliability of estimating a chain stop angle for this combination of equipment. First, Hille admits that he does not know the chain stop angle for this combination of equipment. Second, Hille admits that cutting chains respond unpredictably to chain speed itself-wherein safety chains kickback more severely (and consequently have a higher chain stop angle) when run at less than full speed, while professional chains tend to kick back more severely at higher chain speeds. Hille does not know what the actual kickback angle in this case was, but must extrapolate from the fact that the saw contacted the plaintiff's face. In short, Hille lacks a reliable basis for asserting that the chain brake-had it properly functioned-would have stopped the cutting chain motion prior to the chain's contact with the plaintiff's face.

In short, Hille's testimony in relation to the accused chain saw chain brake was not reliable. For that reason the Court granted the plaintiff's motion *in limine* to preclude offering such testimony at trial.

III. Conclusion.

Each motion *in limine* to preclude or exclude expert testimony was GRANTED.

IT SO ORDERED.

C.D.Cal.,2002.

Morin v. McCulloch Corp.

Not Reported in F.Supp.2d, 2002 WL 34357202
(C.D.Cal.)

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EXHIBIT 12

Slip Copy, 2009 WL 3151099 (D.Idaho), 80 Fed. R. Evid. Serv. 1151
(Cite as: 2009 WL 3151099 (D.Idaho))

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Only the Westlaw citation is currently available.

United States District Court,
D. Idaho.
UNITED STATES of America ex rel., Cheri
SUTER and Melinda Harmer, Plaintiffs,
v.
NATIONAL REHAB PARTNERS INC. and Magic
Valley Regional Medical Center, Defendants.
Nos. CV-03-015-S-BLW, CV-03-128-S-BLW.

Sept. 24, 2009.

West KeySummary
Labor and Employment 231H ↪856

231H Labor and Employment

231HVIII Adverse Employment Action

231HVIII(B) Actions

231Hk856 k. Time for Proceedings; Lim-
itations. **Most Cited Cases**

Employees who asserted a retaliation claim under the Federal False Claims Act (FCA), filed their claim almost two years after the statute of limitations period expired. The employees brought an action alleging they were discharged after reporting their employer's noncompliance with Medicare regulations. Although the FCA did not contain an express statute of limitations, the 180-day limitations period of the Idaho Protection of Public Employees Act applied as an analogous state statute. **31 U.S.C.A. § 3730(h); Idaho Code § 6-2105.**

B. Newal Squyres, Holland & Hart, **Amy S. Howe**, US Attorney's Office, Boise, ID, **Douglas L. Abbott**, Holland & Hart, Denver, CO, for Plaintiffs.

Keely E. Duke, **Richard E. Hall**, Hall Farley Oberrecht & Blanton, **Tyler J. Anderson**, **Patricia M. Olsson**, Moffatt Thomas Barrett Rock & Fields Chtd., Boise, ID, **David Rosenbloom**, McDermott Will & Emery, Chicago, IL, **Michelle L. Manzo**, **Russell Hayman**, McDermott Will & Emery, Los Angeles, CA, for Defendants.

MEMORANDUM DECISION AND ORDER

B. LYNN WINMILL, Chief Judge.

INTRODUCTION

*1 The Court has before it Defendant Magic Valley's Motion for Summary Judgment (Docket No. 125), Plaintiffs' Motion for Partial Summary Judgment (Docket No. 127), Defendant Magic Valley Regional Medical Center's Motion for Summary Judgment or Summary Adjudication (Docket No. 129), Defendant Magic Valley Regional Medical Center's Motion to Strike Plaintiffs' Expert Witness Ronald H. Clark (Docket No. 130), Defendant Magic Valley Regional Medical Center's Motion to Strike Relators' Expert Witness Leslie Mack (Docket No. 131), National Rehab Partners Inc.'s Joinder in Motion to Strike Plaintiffs' Expert Witness Ronald H. Clark (Docket No. 133), National Rehab Partners Inc.'s Joinder in Motion to Strike Plaintiffs' Expert Witness Leslie Mack (Docket No. 134), and National Rehab Partners Inc.'s Joinder in Motion for Summary Judgment (Docket No. 135). The Court heard oral argument on the motions on March 5, 2009, and now issues the following decision.

ANALYSIS

I. Summary Judgment Standard of Review

One of the principal purposes of the summary judgment “is to isolate and dispose of factually unsupported claims” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). It is “not a disfavored procedural shortcut,” but is instead the “principal tool[] by which factually insufficient claims or defenses [can] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources.” *Id.* at 327. “[T]he mere existence of some

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alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

The evidence must be viewed in the light most favorable to the non-moving party, *id.* at 255, and the Court must not make credibility findings. *Id.* Direct testimony of the non-movant must be believed, however implausible. *Leslie v. Grupo ICA*, 198 F.3d 1152, 1159 (9th Cir.1999). On the other hand, the Court is not required to adopt unreasonable inferences from circumstantial evidence. *McLaughlin v. Liu*, 849 F.2d 1205, 1208 (9th Cir.1988).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir.2001) (en banc). To carry this burden, the moving party need not introduce any affirmative evidence (such as affidavits or deposition excerpts) but may simply point out the absence of evidence to support the nonmoving party's case. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 532 (9th Cir.2000).

This shifts the burden to the non-moving party to produce evidence sufficient to support a jury verdict in her favor. *Id.* at 256-57. The non-moving party must go beyond the pleadings and show “by her affidavits, or by the depositions, answers to interrogatories, or admissions on file” that a genuine issue of material fact exists. *Celotex*, 477 U.S. at 324. Only admissible evidence may be considered in ruling on a motion for summary judgment. *Orr v. Bank of America*, 285 F.3d 764, 773 (9th Cir.2002); *see also* Fed.R.Civ.P. 56(e).

II. MVRMC's Motion for Summary Judgment (Counts I and VI in Case No. CV-03-128-S-BLW)

*2 Defendant MVRMC asserts that Counts I and VI

of Plaintiffs' Complaint are barred by the applicable statute of limitations. Plaintiffs concede the motion with respect to Count VI for other reasons. Accordingly, the Court will grant summary judgment in favor of MVRMC on that claim, and the Court will address MVRMC's motion only as it applies to Count I.

In Count I, Plaintiffs assert a retaliation claim under the Federal False Claims Act (“FCA”) pursuant to 31 U.S.C. § 3730(h), alleging that they were terminated because they complained about MVRMC's alleged noncompliance with Medicare regulations. The FCA does not contain an express statute of limitations for Section 3730(h). *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 545 U.S. 409, 125 S.Ct. 2444, 162 L.Ed.2d 390 (2005). In fact, the Supreme Court has determined that the six-year limitations period referenced in Section 3731(b) does not apply to retaliation claims brought under Section 3730(h). *Id.* For that reason, this Court must borrow a limitations period from the most closely analogous state statute. *Id.* at 422; *North Star Steel Co. v. Thomas*, 515 U.S. 29, 33-34, 115 S.Ct. 1927, 132 L.Ed.2d 27 (1995).

Thus, in order to ascertain the limitations period applicable to Plaintiffs' FCA claim under 3730(h) in this case, this Court must determine the most closely analogous Idaho state statute. *Graham County* gives us the appropriate statute. In *Graham County*, the Supreme Court listed the likely analogous statutes for each of the fifty states. *Id.* at 419 n. 3. For section 3730(h) claims filed in Idaho, the Supreme Court indicated that Idaho Code § 6-2105 or § 5-2243 would be the most likely applicable statutes to consider when borrowing a limitations period for a section 3730(h) claim. *Id.* Of these two statutory provisions, the Court finds that the Idaho Protection of Public Employees Act (“IPPEA”) is the more analogous state statute. Of particular significance in this case is Plaintiffs' Complaint, where Plaintiffs initially asserted causes of action under both the IPPEA and FCA. In the Complaint, Plaintiffs pled almost identical facts under the two

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claims-improper record keeping and improper billing practices-which relate to both the IPPEA and the FCA.

Applying the analogous IPPEA limitations period, the Court must look to [Idaho Code § 6-2101](#), which establishes “a legal cause of action for public employees who experience adverse action from their employer as a result of reporting waste and violations of a law, rule or regulation.” [I.C. § 6-2101](#). Section 6-2103(1) provides that “ ‘[a]dverse action’ means to discharge....” [Section 6-2105](#), which establishes the IPPEA's limitations period, provides that: “[a]n employee who alleges a violation of this chapter may bring a civil action for appropriate injunctive relief or actual damages, or both, within one hundred eighty (180) days after the occurrence of that alleged violation of this chapter.” Therefore, the 180-day limitations period likewise applies to an FCA retaliation claim in Idaho.

*3 In this case, Plaintiffs' cause of action could have accrued for purposes of their FCA claim no later than March 28, 2001-the date MVRMC terminated Plaintiffs. However, Plaintiffs did not file their FCA claim until March 27, 2003, almost two years later. Thus, Plaintiffs' FCA claim was filed beyond the limitations period.

Still, Plaintiffs suggest that the IPPEA limitations period does not apply because they were not public employees under the IPPEA. In support of their argument, Plaintiffs suggest that the breadth of the IPPEA's protections covers employers enrolled in PERSI. This construction of the statute is out of line with the plain language of the statute, which broadly defines employer to include any “political subdivision or governmental entity *eligible* to participate in the public employees retirement system, chapter 13, title 59, Idaho Code.” [I.C. § 6-2103](#) (4)(a) (*Italicized emphasis added*). In Idaho, “[w]here the language of a statute is clear and unambiguous, statutory construction is unnecessary, and this Court need only determine the application of the words to the facts of the case at hand.... The interpretation of a statute should begin with an ex-

amination of the literal words of the statute, and this language should be given its plain, obvious, and rational meaning.” [Jen-Rath Co. v. Kit Manufacturing Co.](#), 137 Idaho 330, 48 P.3d 659, 664 (Idaho 2002) (Citations omitted). Plaintiffs' misreading of the statute would turn the fundamental public policy interests of the IPPEA on their heads and cut-off whistleblower protections to a class of employees who work for public entities simply because the entities elected not to enroll in PERSI. There is no support for such an argument.

Moreover, it is clear that MVRMC was eligible for PERSI enrollment. This is true notwithstanding MVRMC's contention that, as a county owned hospital, MVRMC was only eligible to enroll in PERSI if the county itself was enrolled. [Idaho Code § 59-1321](#) establishes the process for non-enrolled political subdivisions to become enrolled in PERSI, and nothing in those enrollment procedures indicates that the county's own enrollment is an eligibility prerequisite for a county-owned political subdivision. Thus, statutory enrollment procedures do not support county enrollment as a prerequisite for a political subdivision's PERSI eligibility. Accordingly, as a political subdivision at the time of Plaintiffs' employment, MVRMC was eligible to enroll in PERSI. MVRMC was therefore a public employer as defined by the IPPEA and the 180-day limitations period of the IPPEA applies. The Court will therefore grant summary judgment in favor of MVRMC on Count I.

II. Motion to Strike Expert Witness Leslie Mack

Plaintiffs retained Leslie Mack as an expert to review the physical therapy records of patients who received treatment at MVRMC's Transitional Care Unit (“TCU”) and to determine whether the hospital delivered physical therapy services in accordance with Medicare requirements. Specifically, Plaintiffs retained Mack to determine whether TCU patients received individualized therapy or group therapy, whether group therapy exceeded Medicare's limits, and whether unlicensed therapy aides were used

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improperly.

*4 The familiar standard, under [Rule 702 of the Federal Rules of Evidence](#) and *Daubert*, requires that “the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). To satisfy the requirements of [Rule 702:\(1\)](#) an expert's opinion must be based upon sufficient facts or data; (2) it must be the product of reliable principles and methods; and (3) the expert must have applied those principles and methods reliably to the facts of the case. [Fed.R.Evid. 702](#); see also *Daubert*, 509 U.S. at 589; *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 148, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

MVRMC argues that Mack's opinions should be excluded for the following reasons: (1) her opinions are based on insufficient data; (2) she did not use a reliable methodology in selecting the documents she reviewed; (3) she did not use a proper methodology for an audit of Medicare reimbursements; and (4) she is not qualified to audit patient records for compliance with requirements for Medicare reimbursements. The Court will address each argument below.

A. Sufficient Facts or Data

MVRMC contends that Mack's opinion is inadmissible because it is not based on sufficient facts or data. However, Mack states that she relied on the actual physical therapy records of each patient as well as the testimony of the therapists. (Abbott Decl. Ex. G, Mack August 28, 2008 Tr. at 175:2-9; 218:25-219:9; 2008 Report at p. 3). Additionally, Plaintiffs explain that Mack reviewed all physical therapy documentation provided to them by MVRMC in response to the discovery request for all records documenting therapy, which were the only documentation in the patient medical records describing when and how the hospital delivered physical therapy at the TCU.

Moreover, MVRMC's allegation of apparent time conflicts in therapy sessions is not evidence that Mack relied on insufficient facts and data. Instead, such information may be used on cross-examination. Thus, because Mack relied on all information in the patients' official medical records relating to the hospital's delivery of physical therapy, MVRMC's argument that Mack relied on insufficient facts or data fails.

B. Selecting Documents for Review

MVRMC next argues that Mack's testimony should be excluded because Plaintiffs' attorneys selected the documents for her review. However, as pointed out by Plaintiffs, the nature of the evidence relied upon by an expert goes more to the weight of her testimony—an issue which may be explored during cross-examination. *Hangerter v. Provident Life and Acc. Ins. Co.*, 373 F.3d 998, 1017 n. 14 (9th Cir.2004) (citing *Children's Broad. Corp. v. Walt Disney Co.*, 357 F.3d 860, 865 (8th Cir.2004)).

Still, MVRMC is correct that if counsel improperly provides an expert with a biased subset of documents that may so skew her opinion that it becomes inadmissible under [Rule 702](#). *Rowe Entm't Inc. v. William Morris Agency, Inc.*, 2003 WL 22124991, at *2 (S.D.N.Y.2003); *U.S. Info. Sys., Inc. v. IBEW Local Union No. 3*, 313 F.Supp.2d 213, 233-234 (S.D.N.Y.2004). In *William Morris*, the plaintiffs' expert concluded that black concert promoters were underutilized by the defendant booking agencies due to race discrimination. *William Morris*, 2003 WL 22124991, at *2. The court excluded the expert because the plaintiffs had provided the expert with contracts only involving white promoters, predetermining the expert's conclusion. *Id.* at *3.

*5 Here, unlike the situation confronted by the court in *William Morris*, MVRMC makes no specific allegation as to how counsel provided Mack with a biased subset of documents; only that the documents were provided by counsel, and that Mack should have been provided with more documents.

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MVRMC's mere belief that Mack should have considered additional evidence does not establish bias or insufficiency. Without specific details as to how Mack's consideration of a limited subset of the available documents skewed her conclusions or otherwise affected the reliability of her opinion, as was provided by the defendant in *William Morris*, the Court cannot find that Mack's opinion should be barred under [Rule 702](#).

C. Methodology for Audit/Review of Medicare Reimbursements

MVRMC also contends that Mack's opinions are not the product of a reliable methodology. Plaintiffs counter that, in developing her opinions, Mack used the simplest and most comprehensive methodology available by reviewing every document related to physical therapy.

To satisfy [Rule 702](#), an expert's opinion must be the product of reliable principles and methods. [Fed.R.Evid. 702](#); see also *Daubert*, 509 U.S. at 589; *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 148, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). Plaintiffs suggest that Mack's method was grounded in the review of the most pertinent documents possible—the patient's physical therapy records produced by MVRMC in response to Plaintiffs' request for production of “[a]ll records documenting therapy.” (Abbott Decl. Ex. G, Mack August 28, 2008 Tr. at 174:23-175:9; 218:25-219:16). Mack then reviewed the nature and frequency of the exercises performed, the therapist notes and evaluations, and the times therapy was recorded as having occurred and who performed it. (Abbott Decl., Ex. C, 2005 Report at 2, 8, 9-10); Ex. G, Mack August 28, 2008 Tr. at 226:18-24; 227-23:228:11). She then developed a method to chart the information on the Daily Flow Sheets to look for a pattern of group therapy sessions. (*Id.* at 107:13-19).

Mack ultimately opines that MVRMC's practices violated Medicare's limits on group therapy because multiple patients were routinely seen at 9:00 a.m.

and 1:00 p.m., patients received the similar amounts of treatment time, little documentation existed showing patient monitoring during therapy sessions or individualized attention, and treatments consisted of routine exercises and were similar between patients regardless of their condition, diagnoses, or progress. The Court concludes that Mack's methodology is sufficient to support her conclusions.

D. Qualified to Give Expert Opinion

Finally, MVRMC argues that Mack's opinion is inadmissible because she is not qualified to review physical therapy patient records for compliance with Medicare requirements. “A witness can qualify as an expert through practical experience in a particular field, not just through academic training.” *Rogers v. Raymark Indus., Inc.*, 922 F.2d 1426, 1429 (9th Cir.1991). As noted by Plaintiffs, it is undisputed that Mack has extensive knowledge of, and experience with, Medicare's requirements for the performance of physical therapy services. It is also undisputed that Mack has experience supervising therapy and reviewing medical records to determine whether patients received individualized therapy or group therapy. It is also clear that she has done chart reviews to determine whether documentation meets Medicare requirements. (Abbott Decl. Ex. G, Mack August 28, 2008 Tr. at 96:17-25).

*6 Based on the foregoing, the Court finds that Mack is qualified to render an opinion and testify as to the manner in which the hospital delivered physical therapy services in this case. Accordingly, the Court will deny MVRMC's motion to strike.

III. MVRMC's Motion for Summary Judgment or Summary Adjudication (Counts I-VI in CV-03-015-S-BLW)

As a preliminary matter regarding MVRMC's Motion for Summary Judgment or Summary Adjudication, the Court notes that Plaintiffs have conceded

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Counts I and II, as well as all claims tied to the dates between July and September 1998. Accordingly, the Court will grant summary judgment in favor of MRVMC on those claims.

With respect to the remaining claims, a Plaintiff in an FCA action must prove the following elements: “(1) a ‘false or fraudulent’ claim; (2) which was presented, or caused to be presented, by the defendant to the United States for payment or approval; (3) with knowledge that the claim was false.” *U.S. v. Mackby*, 261 F.3d 821, 826 (9th Cir.2001). Additionally, the Ninth Circuit incorporates a materiality element. *U.S. v. Bourseau*, 531 F.3d 1159, 1170 (9th Cir.2008).

A. False or Fraudulent Claim

Plaintiffs allege that MVRMC submitted false claims to Medicare by improperly seeking reimbursement for therapy that did not comply with the Group Therapy and Line of Sight Guidance. MVRMC takes issue with what it calls nonbinding Medicare guidance.

The Centers for Medicare and Medicaid Services issues manuals which instruct Medicare and the Medicare Fiscal Intermediary about Medicare regulations. These manuals do not, in and of themselves, have the effect of statutes and regulations. *Nat'l Med. Enters. v. Bowen*, 851 F.2d 291, 293 (9th Cir.1988). However, courts have allowed non-binding guidance to predicate FCA liability in cases where the non-binding guidance merely interprets specific language in an existing statute or regulation. Thus, the relevant inquiry is whether the manuals articulate interpretive or legislative rules.

On the one hand, an agency rule is interpretative if the agency “is exercising its rule-making power to clarify an existing statute or regulation[.]” *In re Cardiac Devices Qui Tam Litig.*, 221 F.R.D. 318, 350 (D.Conn.2004) (quoting *Metro. School Dist. v. Davila*, 969 F.2d 485, 488 (7th Cir.1992)). On the other hand, legislative rules “create new law, rights,

or duties....” *Id.* at 350 (quoting *Davila*, 969 F.2d at 488). Medicare manual rules have consistently been considered interpretive rules. *Id.* at 351 (quoting *St. Mary's Hosp. v. Blue Cross & Blue Shield Ass'n*, 788 F.2d 888, 891 (2d Cir.1986)). Accordingly, “there have been numerous cases imposing FCA liability ... based on violations of Medicare manual provisions.” *Id.* at 351-52.

Here, the Medicare Provider Reimbursement Manual, sections 2831-37, fall under the heading “Skilled Nursing Facility Prospective Payment System.” Section 2831 states that it “also provides operational instructions and further clarification of the applicable rules contained in 42 CFR 413 Subpart J.” Subpart J codifies the Medicare Perspective Payment System regulations, including its rate methodology, and the requirement for skilled nursing facilities to submit resident assessment data for administering that methodology. See 42 C.F.R. §§ 413.337 & 413.343. Section 483.20 describes the clinical assessment tool known as the Minimum Data Set, which allocates patients into Resource Utilization Groups (“RUGs”) based on minutes of therapy.

*7 Section 2837 of the Medicare Provider Reimbursement Manual states the following with respect to which minutes may be counted in the Minimum Data Set: “[M]inutes of therapy provided by at least one supervising therapist (or therapy assistant) within a group of 4 or fewer participants, may be fully counted, provided that those minutes account for no more than 25 percent of the patient's weekly as reported in Section P of the [Minimum Data Set].” (Squyres Decl. Ex. 16, Medicare Provider Reimbursement Manual, § 2837 (July 1998)). Thus, Section 2837 further clarifies the rehabilitative therapy reporting requirements of the Minimum Data Set. It is therefore an interpretative rule.

With respect to the Federal Register preamble, Plaintiffs suggest that it interprets 42 C.F.R. §§ 409.30-.31 and 424.20. Section 409.30 states that posthospital skilled nursing facility care is covered if a patient is “assigned to one of the Resource Util-

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ization Groups that is designated ... as representing the required level of care.” 42 C.F.R. § 409.30. Pursuant to 42 C.F.R. § 424.20, Medicare pays for post-hospital skilled nursing facility care if the individual “has been correctly assigned to one of the Resource Utilization Groups[.]” 42 C.F.R. § 424.20. Plaintiffs' theory rests on the preamble's interpretation of how to assign a patient to a correct RUG based on the minutes of therapy required.

Plaintiffs also note that 42 C.F.R. § 409.31(a)(2) and (3) define covered rehabilitation services as those provided by a physical therapist if “furnished directly by, or under the supervision of, such personnel.” 42 C.F.R. § 409.31(a)(2) and (3). In such a case, Plaintiffs rely on the preamble interpretation that therapy aides can provide therapy, which can be counted for RUG assignment purposes, but with certain limitations. For example, the preamble interprets the direct supervision requirement of 42 C.F.R. § 409.31(a)(3) to mean that the therapist must have “visual contact with the aide at all times” and adds that aides “must never be responsible” for group therapy. 64 Fed.Reg. 41,661. Accordingly, this language may form the basis for FCA liability. Thus, as explained in *Cardiac Devices*, “[t]o adopt defendants' position that interpretive rules are not binding would effectively nullify the Medicare manuals in their entirety and would allow defendants to submit claims for any and all types of non-covered services that clearly were not reasonable or necessary.” *Cardiac Devices*, 221 F.R.D. at 353.

MVRMC also suggests that because Section 2837 does not have the effect of law, it is not binding on the Provider Reimbursement Review Board. However, as explained above, Section 2837 constitutes an interpretive rule which may bind Medicare providers and form the basis for FCA liability. MVRMC's argument is therefore unpersuasive.

Finally, MVRMC contends that the only potential evidence that any patients received group therapy, or therapy by an unsupervised aide, is the testimony of Plaintiffs' expert, Leslie Mack. In turn, MVRMC argues that because Mack is unqualified to give an

expert opinion, Plaintiffs' claims fail for lack of evidence. As explained above, Mack is qualified to give her expert opinion. Therefore, MVRMC's final argument fails as well.

B. Presented or Caused to be Presented to Government for Payment

*8 The second element of an FCA claim is satisfied if a person “knowingly presents, or causes to be presented, a false or fraudulent claim [to the United States] for payment or approval.” 31 U.S.C. § 3729(a)(1) (1994). Here, Plaintiffs' claims are based on the UB-92s which were submitted to the government with the purpose and effect of obtaining payment. There is really no dispute that these forms were submitted to the Government for payment. The real dispute relates to falsity, as addressed above, and knowledge and materiality as addressed below.

C. Knowledge that the Claim was False

“The FCA defines ‘knowing’ and ‘knowingly’ to mean that, with respect to information, a person: (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information.” *U.S. v. Bourseau*, 531 F.3d 1159, 1167 (9th Cir.2008) (Internal quotations omitted); 31 U.S.C. § 3729(b). “[N]o proof of specific intent to defraud is required.” *Id.* (Quoting 31 U.S.C. § 3729(b)). “The requisite intent is the knowing presentation of what is known to be false, as opposed to innocent mistake or mere negligence.” *Id.* (Internal citation and quotation omitted).

MVRMC offers two reasons why it did not knowingly present false claims for payment: (1) it was not reckless in hiring and relying on Rehability or NRP to provide appropriate therapy services and document those services accurately to support its claims to Medicare; and (2) the underlying Group Therapy Guidance is inherently ambiguous.

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MVRMC relies heavily on *U.S. ex rel. Ervin & Associates, Inc. v. Hamilton Security Group, Inc.*, 298 F.Supp.2d 91 (D.D.C.2004) in asserting that it is not liable because it relied on Rehability and NRP to provide appropriate therapy services and document those services accurately. In *Hamilton*, HUD awarded Hamilton Security Group a contract to dispose of several billion dollars in HUD-held mortgage notes through public auctions. *Hamilton*, 298 F.Supp.2d at 93. Hamilton Security Group subcontracted with Bell Laboratories, a nationally known scientific research company, to develop a computer model to select the combination of bids to maximize revenue to HUD. *Id.* at 93-94. Bell Laboratories made a small mathematical error, which Hamilton Security Group did not catch.

Among other reasons, but of relevance here, the court in *Hamilton* determined that Hamilton Security Group's conduct was not so reckless as to conclude that it had knowingly made a false claim to the Government. Specifically, the court determined that "Hamilton did not represent that it would specifically test the results of the optimization process to verify that it had indeed yielded the 'optimal' result." *Id.* at 101. Therefore, "it was ... not negligent in the extreme, if negligent at all, for Hamilton to rely on an organization like Bell Labs" *Id.* The court also observed that Hamilton, "due to the complexity of the pioneer, massive, and time-sensitive note sale transaction, subcontracted the work of developing an optimization formula to a prestigious scientific laboratory...." *Id.* The court ultimately concluded that Hamilton Security Group's failure to create a system better attuned to the possibility of error did not constitute reckless disregard within the meaning of the False Claims Act. *Id.* at 102.

*9 Here, the claims are not like the complex, massive, and time-sensitive note sale transaction in *Hamilton*. Instead, this case involves fairly straightforward claims. Moreover, Plaintiffs' claims suggest that MVRMC's employees understood the group therapy rules, knew they weren't being fol-

lowed, but submitted false claims anyway. Plaintiffs also provide the Court with evidence of MVRMC employees' understanding of the regulations and personal knowledge of the therapy provided by Rehability and NRP therapists. Finally, it is significant that the *Hamilton* court made its determination following a bench trial after all the evidence had been presented. Given these distinctions, the conclusion in *Hamilton* seems largely inapposite to the facts presented here. The Court concludes that a genuine issue of material fact exists with respect to whether, by relying on Rehability and NRP, MVRMC acted in deliberate ignorance, or in reckless disregard of the truth or falsity, of the information. *Bourseau*, 531 F.3d at 1167.

MVRMC's second argument-that it is not subject to FCA liability because group therapy is inherently ambiguous-is also unpersuasive. MVRMC contends that because group therapy has no standardized definition, MVRMC cannot have knowingly violated group therapy provisions. The scant case law on this issue suggests that whether a defendant reasonably interpreted the regulation is a relevant inquiry. The Eighth Circuit, citing a Ninth Circuit case, has rejected the contention that a defendant cannot be held to have made a false statement by verifying compliance with an ambiguous regulation, if the defendant's verification was consistent with a possible interpretation of the regulation. *Minnesota Ass'n of Nurse Anesthetists v. Allina Health*, 276 F.3d 1032, 1052 (8th Cir.2002) (citing *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 460, 463 (9th Cir.1999)). In *Oliver*, the Ninth Circuit suggested that the reasonableness of one's interpretation of an applicable regulation or standard is relevant to whether it knowingly submitted a false claim. *Oliver*, 195 F.3d at 463. However, as suggested by the Eighth Circuit in *Allina*, if a plaintiff shows that a defendant certified compliance with a regulation knowing that the regulating agency interpreted the regulation in a certain way and that their actions did not satisfy the requirements of the regulation as interpreted by the agency, any possible ambiguity of the regulations is

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moot. *Allina*, 276 F.3d at 1052.

Here, Plaintiffs have provided the Court with evidence suggesting that MVRMC understood that therapy was classified as either individual or group. Moreover, Plaintiffs have provided the Court with evidence that the Medicare Provider Reimbursement Manuals indicated that the Government would only pay for a maximum of 25% group therapy, leaving a requirement that at least 75% be individual therapy. (Squyres Decl. Ex. 16, Medicare Provider Reimbursement Manual, § 2837 (July 1998)). Moreover, Section 2837 also limited groups to no more than four patients. (*Id.*)

***10** Under these circumstances, the Court finds that genuine issues of material fact remain as to the question of whether MVRMC acted reasonably in its interpretation of the group therapy regulation, and whether MVRMC certified compliance with a regulation knowing that the agency interpreted the regulation in a way that would render MVRMC's actions as not satisfying the requirements of the regulation as interpreted by the agency. These questions are therefore better left to the jury.

D. Materiality

MVRMC also contends that Plaintiffs cannot establish their FCA claim because they cannot show that MVRMC submitted Medicare claims for more than it was entitled. It is an "obvious notion that a False Claims Act suit ought to require a false claim." *U.S. v. Kitsap Physicians Service*, 314 F.3d 995, 997 (9th Cir.2002). To prove a FCA claim, a plaintiff "must establish that a false claim was submitted to the government." *Id.* at 1002. It is not enough "to describe a private scheme in detail but then to allege simply and without any stated reason for his belief that claims requesting illegal payments must have been submitted." *Id.* (Internal quotation and citation omitted). Instead, the plaintiff "must show an actual false claim for payment being made to the Government." *Id.* (Internal quotation and citation omitted). Still, a plaintiff "may recover under the

False Claims Act regardless of whether it suffered damage-recovery is based solely upon proof that false claims were made." *Id.* (Internal quotation and citation omitted). Ultimately, the FCA "focuses on the submission of a claim, and does not concern itself with whether or to what extent there exists a menacing underlying scheme." *Id.*

As noted above, the Ninth Circuit incorporates a materiality element into FCA claims. *U.S. v. Bourseau*, 531 F.3d 1159, 1170 (9th Cir.2008). "The Supreme Court has stated that [i]n general, a false statement is material if it has a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed." *Id.* at 1171 (Internal citation and quotations omitted). Finding that it is more consistent with the plain meaning of the FCA, the Ninth Circuit has adopted the Fourth and Sixth Circuits' " 'natural tendency test' for materiality, which focuses on the potential effect of the false statement when it is made rather than on the false statement's actual effect after it is discovered." *Id.*

In this case, Plaintiffs allege that MVRMC submitted false UB-92 forms for the purpose and effect of obtaining payment. The argument is that RUG groups have a natural tendency to cause Medicare to pay amounts claimed on the UB-92s and there was no other basis for those payments to have been sought or made. MVRMC suggests that even if therapy minutes are removed from the Minimum Data Set, the RUG score *may remain unchanged*. That also means, however, that it also *may change* the RUG score, which would, in turn, change the reimbursement amount.

***11** The complexity of the Medicare Perspective Payment System makes it difficult to comprehensively evaluate how adjustments in therapy minutes affect the RUG score and reimbursement amount in every situation. However, the Court finds the following example provided by Plaintiffs persuasive in creating at least a genuine issue of material fact as to whether MVRMC submitted false RUG scores which had a natural tendency to cause Medicare to

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pay amounts claimed on the UB-92s:

Therapy times were entered on Daily Flow Sheets under the heading "Treatment Times/Billing." SOF ¶ 38. The resulting minutes were entered in Section P of the MDS, which determined qualification for the RUG. The RUG group generated was then recorded on the UB92, which is the claim for payment. Thus, to determine if the UB-92 was a false claim because the patient did not qualify for the RUG group, the next step is to determine how many minutes included in the MDS are derived from group therapy minutes that cannot be counted.

The case of patient Dora A. illustrates how counting excessive group therapy minutes resulted in a false claim (the minutes for all 17 patients are examined at SOF ¶ 56). Dora A.'s first MDS assessment placed her in the Very High RUG group, which requires at least 500 minutes of therapy over a five-day period per week. Section P of her five-day MDS assessment included 365 minutes of physical therapy and 209 minutes of occupational therapy over a period of five days, for a total of 574 minutes. However, comparing her Daily Flow Sheets to others who received therapy on the same five days reveals that she received therapy in groups 100% of the time, and that six of ten therapy sessions were in groups larger than four patients. *Id.* Thus none of her physical therapy minutes could be counted under PRM § 2837. Only the 209 minutes of occupational therapy could be counted, leaving her almost 300 minutes shy of the minutes needed to qualify for the Very High RUG group. Nonetheless, MVRMC used all of the physical therapy minutes to qualify her for payment at the Very High RUGs group on form UB-92. SOF ¶ 56. MVRMC was reimbursed by Medicare at the RVB per diem rate for the first seven days of her stay. This same pattern is repeated for all but a few Rehabilitation RUG patients over the two year period. SOF ¶¶ 44-45.

(Plaintiffs' Response In Opposition To MVRMC's

Motion For Summary Judgment Or Summary Adjudication, pp. 17-18 (Docket No. 145)).^{FN1} The Court therefore concludes that there is sufficient documentary evidence creating a genuine issue of material fact.

^{FN1}. The Court notes that it did not simply rely on the Statement of Facts provided by Plaintiffs for support of this example case. Instead the Court reviewed the actual documents and testimony referenced in the Statement of Facts to ensure that it was as described by Plaintiffs. Those documents and testimony include the following: Squyres Decl. Ex. 23 (Example Daily Flow Sheet); Squyres Decl. Ex. 38. (Patient Daily Flow Sheets, RUGS Rehab Worksheets and MDS forms); Squyres Decl. Ex. 5 (Burdick Testimony, May 24, 2005, Tr. at 185:7-187:9); Squyres Decl. Ex. 32 (Cover sheet and Daily Flow Sheets for 17 TCU patients during the week of March 28-April 3, 2000); Squyres Decl. Ex. 33 (Leslie Mack's charts for the week of March 28-April 3, 2000).

E. Public Disclosure

MVRMC argues that the Court lacks jurisdiction over Plaintiff Harmer's claims under the FCA's public disclosure bar. The analysis under the public disclosure provision of the FCA is divided into two steps. In the first step,

the court must determine whether, at the time the complaint was filed, there has been a "public disclosure" of the "allegations or transactions" on which the claim is based. If the allegations or transactions were not publicly disclosed, the court has subject matter jurisdiction even if the relator was not the original source of the information.

*12 *Seal I v. Seal A*, 255 F.3d 1154, 1159 (9th Cir.2001) (citing 31 U.S.C. § 3730(e)(4)(A)). The

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second step applies when the allegations or transactions were publicly disclosed. In that case, “the relator may bring the suit only if she was ‘an original source of the information.’ ” *Id.* (quoting 31 U.S.C. § 3730(e)(4) (A)).

MVRMC asserts that Harmer's allegations were publicly disclosed when Ellen Neff and Cheri Suter disclosed the alleged facts supporting the claims in this case to an Idaho Medicaid Fraud Unit for investigation. The FCA defines a public disclosure to include, among other things, “a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation....” *United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 917 (9th Cir.2006); see also *Seal I*, 255 F.3d at 1159. “[T]he term ‘investigation, as used in § 3730(e)(4)(A), must encompass any kind of government investigation—civil, criminal, administrative, or any other kind.’ ” *Seal I*, 255 F.3d at 1161. This includes “non-federal ... investigations.” *Bly-Magee v. Premo*, 470 F.3d at 918.

Plaintiffs do not dispute that Neff and Suter disclosed the information to Medicare Fraud Investigator Mond Warren on June 21, 2001. Instead, Plaintiffs suggest that because Warren was a government official and did nothing more than pass the information onto the Office of the Inspector General and the Medicare Fiscal Intermediary, the disclosure was not a public one.

The Ninth Circuit has “previously indicated that a government employee to whom information relevant to an FCA action is disclosed is not a member of the public under” Section 3730(e)(4)(A). *Seal I*, 255 F.3d at 1161. The disclosure in this case falls directly within that scenario. Therefore, the allegations or transactions were not publicly disclosed, and the Court has subject matter jurisdiction even if Plaintiff Harmer was not the original source of the information. *Seal I*, 255 F.3d at 1159 (citing 31 U.S.C. § 3730(e)(4)(A)).

IV. Plaintiffs' Motion for Partial Summary

Judgment

Plaintiffs seek partial summary judgment on their claims against MVRMC for unjust enrichment and conversion. In these two claims, Plaintiffs essentially assert that MVRMC was unjustly enriched by taking control of Plaintiffs' business, Cornerstone Therapy, and converting it to its own use.

A. Unjust Enrichment

In Idaho, a party may recover for unjust enrichment “where a defendant receives a benefit which would be inequitable to retain without compensating the plaintiff to the extent that retention is unjust.” *Vanderford Co. v. Knudson*, 144 Idaho 547, 165 P.3d 261, 271-72 (Idaho 2007) (citations omitted). There are three elements necessary to establish a prima facie case of unjust enrichment: “(1) there was a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) acceptance of the benefit under circumstances that would be inequitable for the defendant to retain the benefit without payment to the plaintiff for the value thereof.” *Id.* at 272.

*13 Plaintiffs contend that it is undisputed that the first element was satisfied when MVRMC acquired Cornerstone at the time Suter and Harmer became hospital employees on October 1, 2000. However, competing evidence suggests that MVRMC did not acquire Cornerstone, and that Plaintiffs never stopped operating Cornerstone. MVRMC has offered evidence that Plaintiffs continued to service at least one significant Cornerstone contract and retained the proceeds in a private bank account under their exclusive control. (Anderson Aff., Ex. B, Suter Depo. p. 417:15-17, 425:21-427:22; Anderson Aff., Ex. A, Harmer Depo. pp. 107:19-108:14, 111:13-21; Anderson Aff., Ex. C). Moreover, MVRMC offers evidence that, following their terminations from MVRMC, Plaintiffs continued to exercise legal control over Cornerstone by filing an annual report and Articles of Dissolution stating “change of name and location of business” as the

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sole purpose for Cornerstone's dissolution. (Anderson Aff., Exs. D & E).

Based on the evidence before the Court, there are genuine issues of material fact as to whether MVRMC acquired Cornerstone and received a benefit conferred upon it by Plaintiffs. Accordingly, summary judgment on Plaintiffs' unjust enrichment claim will be denied.

B. Conversion

Conversion is defined as "a distinct act of dominion wrongfully asserted over another's personal property in denial [of] or inconsistent with [the] rights therein." *Luzar v. Western Sur. Co.*, 107 Idaho 693, 692 P.2d 337, 340 (Idaho 1984) (Internal citation omitted). Plaintiffs argue that MVRMC committed the tort of conversion when it refused to pay Harmer and Suter the money owed to them from the Cornerstone acquisition, while retaining the benefit conferred on it by the acquisition.

As explained above with regard to the unjust enrichment claim, disputed issues of material fact exist as to whether MVRMC acquired Cornerstone. Those same disputed issues of fact prevent summary judgment on Plaintiffs' conversion claim because they prevent a finding on whether MVRMC committed a distinct act of dominion wrongfully asserted over Cornerstone. *Luzar*, 692 P.2d at 340. Accordingly, the Court will deny Plaintiffs' motion.

V. Motion to Strike Expert Witness Ronald Clark

The Court has determined that Ronald Clark's testimony does not affect the pending motions for summary judgment. Moreover, the Court believes that a *Daubert* hearing may be necessary and appropriate before issuing a decision on whether, and to what extent, Mr. Clark may testify a trial. Accordingly, the Court will deem moot the pending motion to strike Mr. Clark as an expert witness. However, MVRMC may renew the motion, and the parties

may request a *Daubert* hearing, at a later date prior to trial.

ORDER

NOW THEREFORE IT IS HEREBY ORDERED that Defendant Magic Valley's Motion for Summary Judgment (Docket No. 125) shall be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Partial Summary Judgment (Docket No. 127) shall be, and the same is hereby DENIED.

*14 IT IS FURTHER ORDERED that Defendant Magic Valley Regional Medical Center's Motion for Summary Judgment or Summary Adjudication (Docket No. 129) shall be, and the same is hereby GRANTED in part and DENIED in part. The motion is granted with respect to Counts I and II, as well as all claims tied to the dates between July and September 1998. The motion is denied with respect to all other claims.

IT IS FURTHER ORDERED that Defendant Magic Valley Regional Medical Center's Motion to Strike Plaintiffs' Expert Witness Ronald H. Clark (Docket No. 130) shall be, and the same is hereby DEEMED MOOT.

IT IS FURTHER ORDERED that Defendant Magic Valley Regional Medical Center's Motion to Strike Relators' Expert Witness Leslie Mack (Docket No. 131) shall be, and the same is hereby, DENIED.

IT IS FURTHER ORDERED that National Rehab Partners Inc.'s Joinder in Motion to Strike Plaintiffs' Expert Witness Ronald H. Clark (Docket No. 133) shall be, and the same is hereby, DEEMED MOOT.

IT IS FURTHER ORDERED that National Rehab Partners Inc.'s Joinder in Motion to Strike Plaintiffs' Expert Witness Leslie Mack (Docket No. 134) shall be, and the same is hereby, DENIED.

IT IS FURTHER ORDERED that National Rehab

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Partners Inc.'s Joinder in Motion for Summary Judgment (Docket No. 135) shall be, and the same is hereby, Granted in part and DENIED in part in the same manner as MVRMC's Motion for Summary Judgment (Docket No. 129).

IT IS FURTHER ORDERED that the Clerk of the Court shall set this matter for a status conference for the purpose of scheduling a trial date.

D.Idaho,2009.

U.S. ex rel. Suter v. National Rehab Partners Inc.
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END OF DOCUMENT

EXHIBIT 13

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(Cite as: 2005 WL 6201455 (E.D.Wash.))

C
Only the Westlaw citation is currently available.

United States District Court,
E.D. Washington.
Ricky J. WALSH, an individual, Plaintiff,
v.
CITY OF RICHLAND, a Municipal Corp., and
Glenn Johnson and Jane Doe Johnson, husband and
wife and the marital community thereof, Defend-
ants.
No. CV-02-5067 EFS.
Feb. 24, 2005.

Named Expert: Maui Garza.
[Janet E. Taylor](#), Janet Taylor Law Firm, LLC, Rich-
land, WA, for Plaintiff.

[Kenneth W. Harper](#), [Rocky Leroy Jackson](#), Menke
Jackson Beyer Elofson Ehlis & Harper, Yakima,
WA, [George Fearing](#), Leavy Schultz Davis & Fear-
ing PS, Kennewick, WA, for Defendants.

**ORDER GRANTING IN PART AND DENYING
IN PART CITY OF RICHLAND'S MOTION
TO EXCLUDE, GRANTING CITY'S MOTION
FOR PARTIAL SUMMARY JUDGMENT, AND
DENYING DEFENDANTS' MOTIONS TO
STRIKE**

[EDWARD F. SHEA](#), District Judge.

*1 BEFORE THE COURT, without oral argument,
[FNI](#) are the Defendant City of Richland's
(hereinafter, "the City") Motion for Partial Sum-
mary Judgment on Claim of Front Pay,
(Ct.Rec.120), the City's Motion to Exclude,
(Ct.Rec.118), and the Defendants' Motions to Strike
Statement of Facts, (Ct. Rec. 167, 172, & 178).
Plaintiff opposes the motions. After reviewing the
submitted material, the record, and applicable law,
the Court is fully informed and enters the instant

order granting in part and denying in part the Mo-
tion to Exclude, granting the motion for partial
summary judgment, and denying the motions to
strike. Briefly, Mr. Garza may testify regarding Mr.
Walsh's employability, marketability, and lost pro-
motion to City of Richland Battalion Chief posi-
tion; however, Mr. Walsh may not assert a claim
for front pay, i.e. lost wages following date of trial,
as Mr. Garza is not qualified to testify regarding
present value.

[FNI](#). In his response, Plaintiff requested
oral argument. However, reviewing the
materials, the Court finds oral argument is
unnecessary. LOCAL RULE 7.1(h)(3).

The City's motions are both related to Plaintiff's
claim for front pay. Plaintiff identified Maui Garza
as an expert regarding front pay. The issue presen-
ted in the Motion for Partial Summary Judgment is
whether a claim of front pay can be permitted in the
absence of competent testimony to support the
same; and the issues presented in the Motion to Ex-
clude are: (1) whether Mr. Garza is competent to
opine on the likelihood of promotion of an employ-
ee and on the economic consequences of promotion
when these subjects are beyond his expertise, and
(2) whether there is a factual basis to support an
opinion.

A. Motion to Exclude

1. Standard

Rule 702 governs the admissibility of expert wit-
nesses:

If scientific, technical, or other specialized know-
ledge 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, exper-
ience, training, or education, may testify thereto
in the form of an opinion or otherwise....

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Id. The three requirements set out in Rule 702 for the admission of testimony from a qualified expert are “(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.” [FED.R.EVID. 702](#). The trial judge's responsibility includes screening the reliability and relevance of expert testimony. [Daubert v. Merrell Dow Pharmaceuticals, Inc.](#), 43 F.3d 1311, 1318 (9th Cir.1995). For the “product of reliable principles and methods,” the Supreme Court suggested the following four factors to guide district courts: (1) whether a theory or technique can be or has been tested, (2) whether the theory or technique has been subjected to peer review and publication, (3) the known or potential rate of error, and (4) whether the theory or technique has attained “general acceptance” in the relevant scientific community. [Daubert v. Merrell Dow Pharmaceuticals, Inc.](#), 509 U.S. 579, 593-94 (1993). The Ninth Circuit acknowledged that these factors are illustrative and may not be applicable in some cases. “Rather we read the Supreme Court as instructing us to determine whether the analysis undergirding the expert's testimony falls within the range of accepted standards governing how scientists conduct their research and reach their conclusions.” [Daubert](#), 43 F.3d at 1316-17. The objective of *Daubert's* gatekeeping requirement is “to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” [Kumho Tire Co., Ltd. v. Carmichael](#), 526 U.S. 137 (1999). The burden is on the party offering the proposed expert opinion testimony to prove by a preponderance of the evidence that the testimony satisfies the requirements for admissibility. [Daubert](#), 509 U.S. at 592 n. 10.

2. Mr. Garza's Qualifications

*2 The City argues Maui Garza is not qualified or

capable to opine on economic issues because he lacks education or training in economics. As explained below, the Court agrees Mr. Garza is not qualified to opine on economic issues, but finds Mr. Garza is qualified to testify as to Mr. Walsh's employability, marketability as an employee, and lost opportunity for a promotion to Battalion Chief with the City of Richland.

Mr. Garza possesses a Bachelor of Arts degree in the field of Bilingual/Bicultural Education, and a Masters of Education in Counseling Psychology, both from Washington State University. From 1993 to the present, Mr. Garza worked as a vocational rehabilitation consultant. Mr. Garza has been providing vocational rehabilitation services since October 1993. Within this job, he has provided testimony or participated in depositions in over fifty workmen's compensation cases, over 100 social security hearings, and three civil cases.

Mr. Garza testified he has not calculated economic losses in any of the cases he has been involved in and would not feel comfortable reducing future damages to present value. Mr. Garza explained,

[a]s Vocational Rehabilitation professional and expert, it is often my job to identify the proper method for determining salary damages. It is the job of the vocational expert to look at salary differences. I do not put the numbers into present value-it is my job to identify the appropriate dollar amounts to consider in determining a loss. In cases where future losses are to be presented in a case I then give this information to an economist, who performs the necessary calculations and provides expert opinions on discount rates and the like. In this case, however, I will simply provide the jury with the salary information and they will be able to do the simple subtraction necessary to calculate Mr. Walsh' [sic] losses. My opinion regarding the proper measure of damage and methodology for calculating the damage is the type of opinion I regularly reach in my work as an expert and I have used well-established and accepted methodologies in forming my opinions

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in this case.

Due to Mr. Garza's own admitted lack of education and training in economics and Plaintiff's statement that Mr. Garza is not offering an opinion as to present value, the Court finds Mr. Garza cannot provide an opinion as to the present value of any of Mr. Garza's economic losses. *See Berlyn v. Gazette Newspapers*, 214 F.Supp.2d 530, 538 (D.Md.2002). However, given his professional experience, the Court finds Mr. Garza is qualified to provide an opinion on Mr. Walsh's employability, marketability as an employee, and lost opportunity for a promotion to Battalion Chief with the City of Richland. Therefore, the City's motion is granted in part and denied in part.

3. Methodology & Factual Foundation for Lost Promotion

The City questions the methodology and factual foundation used by Mr. Garza in determining that Mr. Walsh lost a promotion on the grounds that Mr. Garza did not apply a discernible methodology to known facts, but rather offers a pseudo-methodology that is unreliable and unknown to his discipline. The City specifically argues Mr. Garza's opinion is unreliable and does not fit within any identifiable methodology because (1) there are no peer-reviewed articles or treatises on the pseudo-methodology of predicting lost promotion opportunities, (2) Mr. Garza's pseudo-methodology is suspect because he did not conduct a labor market survey, which he acknowledges is necessary, (3) in the absence of such survey, and in the absence of accumulating data on several other topics identified by Mr. Garza, his conclusion suffers from substantial analytical gaps, and (4) an effort to assign a rate of error to these kinds of conclusions derived from this pseudo-methodology is futile.

***3** In determining whether Mr. Walsh was likely to obtain the Battalion Chief position, Mr. Garza considered Mr. Walsh's education, training, experience, physical ability, mental ability, age, geographic loc-

ation, and other factors affecting marketability. He then compared Mr. Walsh's qualifications to those qualifications expected for the Battalion Chief position. After conducting such research and analysis, in light of his training and experience, Mr. Garza opined:

Mr. Walsh's current occupation outlook is limited to his current position in the City of Richland's Fire Department due to the fact he was denied the opportunity to apply, test and interview for the position of Battalion Chief within the City of Richland's Fire Department. Had Mr. Walsh not been terminated during the aforementioned time period, it is probable that he would have been promoted to Battalion Chief within the City of Richland's Fire Department. Wages earned by Fire Fighters promoted to Battalion Chief represent what Mr. Walsh is likely to have earned had he not been terminated. As a direct result of Mr. Walsh's termination, he is unable to obtain employment as a Battalion Chief or of higher rank, thus affecting his life-time earnings.

Defendants correctly point out that during his deposition, Mr. Garza stated:

Q: But none of that training tells you when somebody will be passed over for a promotion, does it?

A: Not passed over for a promotion, no, but it gives me the knowledge needed to ascertain whether or not an individual is likely to be able to obtain that type of position.

Q: All right. Okay. Does anything in your knowledge or training predict when someone who's qualified for a position will be passed over for a position?

A: No.

However, these statements were made when discussing lost promotion in the abstract. Here, Mr. Garza was able to research the City's "previous hiring practices and what kind of review or qualifica-

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tions are looked at for the future openings, who makes up those questions or what the board is comprised of to make the determination of who's going to be given to the chief for picking the Rule of Three and how much information is available to those individuals to review." Thus, Mr. Garza's opinion regarded a specific lost opportunity for a promotion for a specific position with a specific employer. For this reason, the Court finds the failure to conduct a Labor Market Survey does not make Mr. Garza's opinion unreliable. Similarly, the Court finds the absence of peer-reviewed articles regarding the methodology to be used when determining lost promotion is not grounds to exclude the testimony, given the parameters of Mr. Garza's analysis.

The analysis that Mr. Garza performed is similar to the analysis he uses when determining the marketability or employability of a petitioner in a social security or disability case. See *Hemmings v. Tidymans, Inc.*, 285 F.3d 1174, 1188 (9th Cir.2002). The Court finds Mr. Garza's methodology and factual foundation used to opine regarding Mr. Walsh's lost promotion to City of Richland Battalion Chief sufficient to withstand a *Daubert* motion and the Defendants' course of action is to challenge Mr. Garza's opinion on cross-examination.^{FN2}

FN2. The Defendants also filed Motions to Strike pages 3-5 and a portion of page 7 of Mr. Garza's Declaration submitted in opposition to the *Daubert* Motion. Defendants seek to strike pages 3-5 on the grounds that they are an untimely supplementation of Mr. Garza's expert opinion and page 7, lines 14-15 on the basis that it is hearsay, not based on personal knowledge and/or is inadmissible opinion testimony regarding when or how the fire chief could 'bypass Mr. Walsh.' " The Court denies the Motions to Strike because (1) an expert has an obligation to supplement his report and these pages contain opinions that are consistent with Mr. Garza's previ-

ous report and statements during his deposition and (2) [Federal Rule of Evidence 703](#) allows an expert to rely on hearsay "[if] of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Vocational experts rely upon an employer's past hiring and promotion processes in order to make employability and marketability determinations.

*4 Finally, the City argues Mr. Garza's opinion that Mr. Walsh has lost a promotional opportunity is not helpful to the trier of fact because his testimony focuses on a topic that simply is not amendable to expert opinion because the possibility of a promotion at any specific time is subject to very different propositions. The Court concludes Mr. Garza's experience and training in the field makes his testimony useful to the jury and, thus, Mr. Garza can testify as to Mr. Walsh's employment outlook and lost opportunity for the Battalion Chief promotion. However, Mr. Garza cannot testify as to the economic ramifications of such. For these reasons, Defendant's Motion to Exclude is granted in part (Mr. Garza is not qualified to testify regarding present value/economics) and denied in part (Mr. Garza is qualified to testify regarding Mr. Walsh's employability, marketability as an employee, and lost opportunity for a promotion to Battalion Chief with the City of Richland; and sufficient foundation and reliable methodology for such opinions).

B. Summary Judgment on Issue of Front Pay

1. Standard

A party is entitled to summary judgment where the documentary evidence produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The party seeking summary judgment must show that there is an absence of disputed issues of material fact and that he is entitled to judgment as a matter of law. [FED. R. CIV. PROC. 56\(c\)](#). In other words, the

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moving party has the burden of showing that no reasonable trier of fact could find other than for the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). “A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth.” *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir.1982). The court is to view the facts and draw inferences in the manner most favorable to the non-moving party. *Anderson*, 477 U.S. at 255; *Chaffin v. United States*, 176 F.3d 1208, 1213 (9th Cir.1999).

A burden is also on the party opposing summary judgment to provide sufficient evidence supporting his claims to establish a genuine issue of material fact for trial. *Anderson*, 477 U.S. at 252; *Chaffin*, 186 F.3d at 1213. “[A] mere ‘scintilla’ of evidence will be insufficient to defeat a properly supported motion for summary judgment; instead, the non[-]moving party must introduce some ‘significant probative evidence tending to support the complaint.’” *Fazio v. City & County of San Francisco*, 125 F.3d 1328, 1331 (9th Cir.1997) (quoting *Anderson*, 477 U.S. at 249, 252).

2. Analysis

The City argues calculations of front pay or loss of future income involve technical evidence presented by an economics expert, which Plaintiff has failed to identify. Thus, the City submits Plaintiff's front pay claim should be dismissed.

Plaintiff submits Mr. Garza will subtract the amount Mr. Walsh earned as a firefighter from what he would have earned had he been promoted to Battalion Chief. Plaintiff also states the January 30(b)(6) deposition of the City of Richland employee will provide Plaintiff with the wage information for Battalion Chiefs. With this wage information, the Court finds a reliable formula can be drafted to calculate Plaintiff's claimed past wage lost (i.e. the difference between Battalion Chief and firefighter's pay from the claimed promotion date to the date of

trial; and/or lost firefighter pay from date of termination to either the claimed promotion date or date of trial). However, Plaintiff fails to recognize that the mere subtraction of firefighter wages from Battalion Chief wages does not take into account the present value of a front pay claim (i.e. lost wages from date of trial to some date in the future); Defendants are correct that Plaintiff has a responsibility to provide evidence to assist the jury in reducing a possible lost profits award to present value. See *Bruso v. United Airlines*, 239 F.3d 848, 862 (7th Cir .2001) (listing factors to be utilized when determining lost profits); *McKenna v. Pacific Rail Serv.*, 817 F.Supp. 498, 518 (D.N.J.1993). Therefore, due to Plaintiff's failure to provide evidence to assist the jury in reducing a possible lost profits award to present value, the Court grants the Defendants' Motion for Summary Judgment, excluding the issue of front pay.^{FN3}

FN3. The Court notes this ruling does not impact Plaintiff's ability to seek back pay (i.e. claimed wages from date of termination and/or lost promotion to date of trial).

*5 Accordingly, **IT IS HEREBY ORDERED:**

1. Defendant City of Richland's Motion to Exclude, (**Ct.Rec.118**), is **GRANTED IN PART** (Mr. Garza is not qualified to testify regarding present value/economics) **AND DENIED IN PART** ((a) Mr. Garza is qualified to testify regarding Mr. Walsh's employability, marketability as an employee, and lost opportunity for a promotion to Battalion Chief with the City of Richland, (b) sufficient foundation for such opinions, and (c) reliable methodology for such opinions).

2. Defendant City of Richland's Motion for Partial Summary Judgment on Claim of Front Pay, (**Ct.Rec.120**), is **GRANTED** (Plaintiff may not seek front pay damages, i.e. wages from date of trial to some date in future).

3. Defendants' Motions to Strike Statement of Facts, (**Ct. Recs. 167, 172, and 178**), are **DENIED**.

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