IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

M&G POLYMERS USA, LLC, a a Delaware Limited Liability Company,	)	
Plaintiff,	)	
	)	C.A. No. 07C-11-242 PLA
v.	)	
CARESTREAM HEALTH, INC., a Delaware Corporation,	)	
Defendant.	)	

Submitted: July 2, 2009
Decided Under Seal: August 5, 2009
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UPON PLAINTIFF'S *DAUBERT* MOTION
DENIED
UPON DEFENDANT'S *DAUBERT* MOTION
GRANTED in part; DENIED in part

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ABLEMAN, JUDGE

I. Introduction

This is the Court's decision on *Daubert*[1] motions filed by Defendant Carestream Health, Inc. ("Carestream") and Plaintiff M & G Polymers USA, LLC ("M & G"). Carestream claims that the analysis of M & G's economic damages expert impermissibly relies upon data provided by M & G, fails to account for future contingencies, and suggests that M & G could recover contract formation costs and price discounts. M & G also seeks exclusion of Carestream's expert, but on the bases that he is unqualified to opine on the areas for which his testimony is proffered, that his opinions lack a supporting analytical framework, and that his testimony would invade the province of the jury to decide the ultimate issues in this case.

For reasons set forth more fully hereafter, the Court concludes that the testimony of both experts is reliable and satisfies all criteria for admissibility under Delaware Rule of Evidence 702. The Court agrees with Carestream, however, that M & G's expert offers opinions regarding damages that are not recoverable under any applicable legal theory. Although exclusion of M & G's expert is not merited, M & G will not be permitted to present testimony regarding these non-recoverable items. Accordingly, M & G's

[1] *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

Daubert Motion will be **DENIED**, and Carestream's *Daubert* Motion will be **DENIED in part** and **GRANTED in part**.

II. Factual Background

This breach of contract claim involves a requirements supply agreement for polyethylene terephthalate (PET) resin pellets. Eastman Kodak Company ("Eastman Kodak"), predecessor in interest to defendant Carestream, entered into a written requirements contract to purchase PET resin pellets from M & G for use in its Windsor, Colorado facility ("the Windsor facility"). The contract ("the Supply Agreement") was effective for four years, beginning January 1, 2007. By a separate agreement, M & G also contracted to supply PET resin for Eastman Kodak's manufacturing plant in Rochester, New York. Eastman Kodak assigned the Supply Agreement to Carestream on May 1, 2007.

Under the Supply Agreement, Carestream was required to purchase, and M & G to supply, PET resin pellets meeting certain specifications.[2] Carestream was obligated to purchase "an amount of Product for its plant located in Windsor, Colorado . . . equal to at least the greater of 100% of the

[2] Supply Agreement, App. A.

. . . total demand" for the Windsor facility, up to a certain volume of demand per year, or "90% of the [Windsor facility's] total demand for PET pellets."[3]

The Supply Agreement included a pricing formula and prohibited either party from taking "unilateral action regarding price."[4] Carestream, however, was permitted to purchase PET resin from other suppliers.[5] Furthermore, under a meet-competition provision contained in § 13.2, Carestream could present a competitive offer to M & G and seek a price adjustment if it became possible to purchase "products of comparable quality, (including the Specifications), in volumes equal to or greater than those specified in [the] Agreement."[6] By its terms, the meet-competition provision could not be invoked until January 1, 2008.[7]

The relationship between the parties apparently broke down almost as soon as it began. Both parties agree that M & G's PET resin had to be "qualified for use" before Carestream's 2007 purchase obligation was

[3] *Id.*, App. B.

[4] *Id.* § 5.2.

[5] *Id.* § 3.3.

[6] *Id.* § 13.2.

[7] *Id.*

triggered.[8] The parties dispute, however, what qualification of the PET resin entailed and whether it was ever achieved. Carestream asserts that a planned trial of the M & G product from May 29 through May 30, 2007, was prematurely stopped because M & G's resin did not run properly on its 501 machine, the primary piece of equipment used to process PET at the Windsor facility.

Carestream manufactures medical imaging film from PET resin through an extrusion process.[9] The Windsor facility's 501 machine has two plasticators, which are large units containing thirty-six-foot stainless-steel screws that rotate continuously. PET resin is fed into the 501 machine, where it comes in contact with the screw. Each screw operates at high temperatures and pressures, and their rotation forces the PET resin forward along the barrel, melting and stretching the resin as it moves so that it can be

[8] *Id.*, App. B ("Kodak Colorado's 2007 Maximum Annual Volume commitment will be pro-rated to the number of full and partial months of the year that Supplier PET pellets are *qualified for use at the site* and the site is capable of processing greater than 80% of their PET demand in the form of PET pellets.").

[9] Despite the numerous motions filed by both parties in this case, neither side has provided even a cursory explanation of how the 501 machine operates. Therefore, the Court's understanding is drawn primarily from apparently undisputed portions of defense expert Charles Mikulka's report. The Court also resorted to the Internet for general background on plastics extrusion processes. The parties would be well-advised to be clearer in their presentation of technical information at trial. Jurors will not be permitted to conduct outside research for basic explanatory information, and moreover, should not be placed in the position of feeling such measures necessary.

extruded into long sheets of material that are further processed to produce film.

Carestream alleges that processing M & G's PET pellets on the 501 machine at Windsor created a condition called plasticator instability, which caused unacceptable variations in the output flow of melted PET where it exited the screw. This plasticator instability, Carestream claims, resulted in a defective final product that was off-color and did not meet thickness specifications.

Carestream claims that it conducted a further trial in June, and again experienced plasticator instability. In June 2007, Carestream notified M & G of concerns regarding the PET pellets. M & G sent a team of their personnel and an outside consultant to the Windsor facility in late July of 2007 to participate in a joint effort to resolve the plasticator instability. The parties planned to induce the instability deliberately in order to identify its source and solution.

M & G claims that after this joint trial ran to completion, Carestream personnel reported that M & G's PET pellets could be used successfully on its machinery. Carestream, however, contends that the two-day joint test never revealed the root cause of the plasticator instability, and that M & G was aware that additional extended trials would be required before its resin

pellets could be considered "qualified for use" at the Windsor facility. Approximately one week after the joint trial run, Carestream notified M & G that it would not purchase PET pellets from M & G in 2007, and would instead use a different PET material purchased from Eastman Chemical Company. M & G alleges that Carestream raised false quality complaints regarding its PET pellets as a bad-faith attempt either to force M & G into a price concession or to avoid the Supply Agreement and pursue a less expensive contract with another supplier. M & G claims that the Supply Agreement provided for qualification of its PET resin pellets at the Kodak Park facility in New York, and that no particular qualification process at the Windsor facility was a necessary prerequisite to Carestream's purchase obligation.

M & G informed Carestream on August 13, 2007, that it considered Carestream to be in breach of the Supply Agreement. On November 30, 2007, M & G filed suit, alleging that Carestream committed breach of contract by refusing to perform under the Supply Agreement, wrongfully terminating the Supply Agreement, and violating several duties under New York's Uniform Commercial Code.[10] In June 2009, the Court denied cross-

[10] Docket 1 (Compl.). The Court dismissed an additional count alleging fraud in the inducement on July 30, 2008. Pursuant to a choice-of-law provision in the Supply Agreement, New York law governs the substantive merits of M & G's claim.

motions for summary judgment.[11] Now before the Court are *Daubert* motions filed by both parties.

III. Parties' Contentions

Carestream's *Daubert* Motion

Carestream's motion requests that the Court exclude the expert testimony of Robert F. Reilly, who is proffered by M & G as its economic expert. Carestream cites three alleged defects in Reilly's expert report that it claims require exclusion.

First, Carestream argues that Reilly's report relies almost exclusively upon facts reported, and in some cases summarized, by M & G management. According to Carestream, Reilly's failure to independently verify or analyze data provided to him by his client requires exclusion of any opinions derived from this information.

Second, Carestream claims that Reilly's report is impermissibly speculative because Reilly projects damages based upon unfounded assumptions that the Supply Agreement would be renewed for an additional term, that Carestream's PET requirements would remain at maximum levels despite real-world declines in its PET needs, and that Carestream would not

[11] *See* Docket 36.

invoke the Supply Agreement's meet-competition provision.[12] Furthermore, Carestream contends that Reilly's future price estimates are uncertain because he does not explain the method by which he derived the present value discount rates used to account for the uncertainties of future markets and did not survey the existing PET market to ascertain applicable discounts.

Finally, Carestream argues that exclusion is necessary because Reilly's report posits that M & G could recover development costs that are not recoverable in a breach of contract claim. In his damages analysis, Reilly opines that M & G can recover the costs of developing the custom resin it provided Carestream, legal costs associated with negotiating the Supply Agreement, and contract price discounts provided to Carestream. If Reilly's analysis is accepted, Carestream argues, M & G would recover both reliance and expectancy damages, providing it with an unwarranted windfall. In addition, Carestream notes that attorneys' fees related to contract formation are only recoverable under New York law where provided for by agreement, statute, or court rule, and that discounts or price reductions used as incentives to entering into a contract are not recoverable unless the parties explicitly so provide.

[12] Carestream also argues that Reilly's report "estimates lost profits with no regard for the [Supply] Agreement's liability limitation." Docket 40, at 3. Because the Court has held that the liability limitation clause will not apply to M & G's claim, this ground will not be addressed. *See* Docket 36, at 18.

In response to Carestream's motion, M & G argues that Reilly's report is a reliable product of sound methodology. According to M & G, Reilly drew upon his own experience and expertise, and independently reviewed data from M & G, in arriving at his opinions. To the extent Reilly relied upon information requested from M & G, he stated that such information is customarily and reasonably relied upon by experts in conducting damages analyses, in accordance with standards promulgated by the American Institute of Certified Public Accountants (AICPA).

M & G also argues that Reilly's report makes acceptable assumptions in calculating projected damages and that exclusion of an expert's testimony is not appropriate where the expert makes factual assumptions that are subject to dispute between the parties. Rather, when the calculation of damages requires assumptions based upon facts or contingencies that are in dispute between the parties, the amount of reasonable damages becomes a question for the jury. Therefore, M & G suggests that Carestream's "proper recourse for challenging Reilly's assumptions and methodology is cross-examination, not *Daubert* exclusion."[13]

Finally, M & G argues that Carestream wrongly focuses on a "sliver" of potentially excludible damages in arguing that Reilly's entire analysis

[13] Docket 46, at 3.

must be kept from the jury. M & G challenges Carestream's assertions that it cannot recover attorneys' fees or the supposed "contract price discounts," which it argues were actually a subsidy provided to defray the costs of installing PET pellet grinders at Carestream's Windsor facilities.

M & G's *Daubert* Motion

M & G urges the Court to exclude the testimony of Charles Mikulka ("Mikulka"), one of Carestream's proffered experts. In its motion, M & G alleges that Mikluka's testimony is offered to address two issues: (1) PET industry customs and practices, and (2) economic damages. M & G questions Mikulka's qualifications to opine on either of these topics. M & G further critiques Mikulka's opinions as being devoid of any supporting analytical framework. Finally, M & G contends that Mikulka's opinions consist primarily of inadmissible legal conclusions regarding the ultimate issues in this case, including whether M & G's resin was "qualified for use" at the Windsor facility within the meaning of the Supply Agreement, whether Carestream invoked the meet-competition clause, and whether M & G was legally entitled to recover certain of its claimed losses.

In response, Carestream contends M & G's motion is predicated on a "heads-I-win-tails-you-lose" premise that suggests Mikulka's opinion is proffered for purposes beyond the scope of his expertise to enable M & G to

attack his qualifications. Carestream asserts that Mikulka's testimony will reflect his expertise in chemical industry customs and practices, particularly the accreditation of performance or specialty chemicals. Thus, Carestream argues that Mikulka is qualified to offer expert opinions regarding the qualification of the PET resin M & G created for Carestream's manufacturing process.

Carestream also challenges M & G's position that it should be required to offer an expert on the PET industry, which is subsumed by the broader performance chemicals industry. Moreover, Carestream argues that to the extent an expert on the specifics of the PET industry is required, Mikulka possesses sufficient experience with the markets for PET and its precursors to opine as a "PET expert."

Regarding the substance of Mikulka's opinions, Carestream states that they are well-supported and properly based upon the facts, industry customs and standards with which Mikulka is familiar, and his experience in the performance chemicals field. Carestream rejects M & G's proposition that it must demonstrate that Mikulka's opinions are underpinned by an analytical framework or scientific methodology. Rather, Carestream asserts that Mikulka's opinions constitute non-scientific expert testimony and are

therefore not subject to the typical *Daubert* factors used to evaluate scientific testimony.

As to Mikulka's opinions regarding M & G's economic damages, Carestream argues that Mikulka has extensive experience in damages analyses and should be qualified as an expert in the area. Specifically, Carestream notes that Mikulka offered expert testimony regarding damages in thirteen of the litigation support engagements listed in his C.V., and his opinions have never been subject to judicial exclusion.

IV. Analysis

Admissibility of Expert Testimony

Delaware Rule of Evidence ("DRE") 702 controls the admissibility of expert testimony. DRE 702 states as follows:

> 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.[14]

[14] D.R.E. 702.

In interpreting and applying DRE 702, Delaware courts have explicitly adopted *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[15] and *Kumho Tire Co. Ltd. v. Carmichael*,[16] two decisions establishing a framework for determining the admissibility of expert opinions under Federal Rule of Evidence 702. Under *Daubert* and *Kumho*, the trial judge serves a gatekeeping function, ensuring that expert testimony is both relevant and reliable.[17] The proponent of the expert testimony bears the burden of establishing its relevance, reliability, and admissibility by a preponderance of the evidence.[18]

The trial court's gatekeeping obligation applies "to *all* expert testimony on 'scientific,' 'technical,' or 'other specialized matters'" within the purview of DRE 702.[19] Prior to *Daubert*, Delaware courts identified several factors drawn from the Delaware Rules of Evidence that are to be considered in deciding the admissibility of scientific or technical expert testimony:

(1) Whether the expert witness is qualified (DRE 702);

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[15] 509 U.S. 579 (1993).

[16] 526 U.S. 137 (1999).

[17] *Minner v. Am. Mortgage & Guar. Co.*, 791 A.2d 826, 843 (Del. Ch. 2000).

[18] *Id.*

[19] *M.G. Bancorporation, Inc.*, 737 A.2d at 521 (citing *Kumho*, 526 U.S. at 147-48).

> (2) Whether the evidence is otherwise admissible, relevant, and reliable (DRE 401 and 402);
> (3) Whether the bases of the expert's opinion are reasonably relied upon by experts in the field (DRE 703);
> (4) Whether the specialized knowledge being offered would assist the trier of fact to understand the evidence or determine a fact in issue (DRE 702); and
> (5) Whether introducing the evidence will create unfair prejudice, confuse the issues, or mislead the jury (DRE 403).[20]

These factors continue to guide the Court's admissibility analysis under DRE 702.[21] In addition, the *Daubert* inquiry focuses on whether the expert's testimony will assist the trier of fact and whether the testimony constitutes scientific knowledge.[22] *Daubert* set forth five non-exclusive factors that may guide the trial court's determination as to when an expert's theory or technique constitutes "scientific knowledge": (1) whether it can be, and has been, tested; (2) whether it has been subject to peer review and publication; (3) whether it carries a known or potential rate of error; (4) whether its application is controlled by particular standards; and (5) whether it is generally accepted within a relevant scientific community.[23]

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[20] *Nelson v. State*, 628 A.2d 69, 74 (Del. 1993).

[21] *See, e.g.*, *Sturgis v. Bayside Health Ass'n Chartered*, 942 A.2d 579, 584 (Del. 2007).

[22] 509 A.2d at 592.

[23] *Id.* at 593-94.

The trial court is afforded wide latitude in determining if the factors offer a reasonable gauge for the reliability of testimony in a particular case.[24] The factors will be applied flexibly where a proffered witness's area of expertise is not expected to carry the traditional indicia of scientific acceptance; however, "reliability remains a prerequisite to admissibility of all expert opinions," whether they are based upon scientific, technical, or other specialized knowledge.[25]

M & G Expert Robert Reilly

Although Reilly's testimony must be limited to exclude certain legally impermissible items of recovery, the Court agrees with M & G's position that this case is one in which differing assessments of the plaintiff's damages arise from factual disputes that are appropriate for determination by the jury. No challenge is made to Reilly's qualifications, and the Court finds that his methodology, including his use of data supplied by M & G, is reliable.

Reilly's use of data provided by M & G management upon his request is not grounds for exclusion in the context of the lost profits economic damages analysis involved in this case. At his deposition, Reilly stated that his report was prepared in compliance with applicable industry standards set

[24] *M.G. Bancorporation, Inc.*, 737 A.2d at 522.

[25] *Mayew v. Chrysler, LLC*, 2008 WL 447707, at *4 (Del. Super. Oct. 1, 2008).

forth by AICPA.[26] Reilly further explained that AICPA standards require economic damages analysts to "ask for and test and examine the underlying documents [and] underlying data [provided by a company in response to the analyst's request] to the extent that [the analyst believes] it reasonable on a sampling basis," but not to perform an audit, which is only possible in analyses of historical financial statements.[27] Consistent with these standards, Reilly requested sales invoices from M & G that met with defined search parameters for mitigation sales, verified that M & G management was providing appropriate invoices that satisfied his criteria, and then requested an aggregate summary of invoices that met the criteria for 2007 and 2008.[28] Reilly continued to confer in writing and by telephone with M & G management to ensure that they understood his data requests and had fulfilled them with relevant information.[29] As Reilly received documents from M & G, he reviewed them for responsiveness to his data requests.[30] When M & G reported that it could find no mitigating sales from August 2008 onward, Reilly independently confirmed this assertion by viewing

[26] Docket 47, Ex. 2, at 118:12-13.

[27] Docket 47, Ex. 2, at 119:18-120:4.

[28] Docket 47, Ex. 2, at 24:16-29:6.

[29] Docket 47, Ex. 2, at 44:9-18.

[30] Docket 47, Ex. 2, at 76:9-14.

monthly production reports that showed M & G's manufacturing facility was operating below capacity in an amount that exceeded the monthly projected sales volume to Carestream for 2008 under the Supply Agreement.[31]

Carestream has not provided contrary evidence that a party's self-reported profit or expense data is not reasonably relied upon by experts in performing economic damages analyses for lost profits; indeed, as M & G notes, Carestream expert Charles Mikulka indicated that it would have been acceptable for Reilly to "rely on aggregate data provided by M & G" if the data underlying the calculations was verified and the underlying factual assumptions were reasonable.[32] Reilly's deposition suggests that he engaged in sufficient verification of the underlying data provided by M & G to meet the applicable standards for experts in the field.

The practice of permitting economics experts to incorporate sales and expense data reported by their clients in lost profits analyses appears logical. M & G's own records were likely the best source of information regarding M & G's profits and expenses. Moreover, Reilly did not merely regurgitate the data provided to him by M & G, but rather utilized his specialized knowledge and expertise to craft his data requests, to verify that the

[31] Docket 47, Ex. 2, at 28:13-22.

[32] Docket 47, Ex. 3, at 134:5-14.

information provided by M & G was responsive to those requests, and to conduct a damage analysis consistent with the model detailed in his report. Reilly's report is thus distinguishable from the expert opinions challenged in *Arista Records, LLC v. Usenet.com, Inc.*[33] and *Sommerfield v. City of Chicago*,[34] two cases raised by Carestream. In *Arista Records*, exclusion of a portion of an expert's declaration was appropriate where the proffered expert reiterated a party's disputed factual assertions as to the capacity and capabilities of its computer servers and software without independently verifying the party's information or applying any sort of expertise or specialized knowledge to assessing it.[35] In *Sommerfield*, a federal district court held that an expert report failed to satisfy *Daubert* where the expert relied upon an attorney's summary of deposition testimony regarding a police department's training and instructional procedures.[36] The expert in *Sommerfield* did not attempt to ascertain the accuracy of the information contained in the deposition summaries, nor was there any evidence that such information was of a type reasonably relied upon by experts in the field.

[33] 608 F. Supp. 2d 409 (S.D.N.Y. 2009).

[34] F.R.D. 317 (N.D. Ill. 2008).

[35] 608 F. Supp. 2d at 425-25.

[36] 254 F.R.D. at 321-22.

Neither *Arista Records* nor *Sommerfield* involved an expert analysis in which it was professionally reasonable to rely in part upon facts provided by the party retaining the expert, as is the case under AICPA standards for evaluating a lost profits claim.

Carestream's reliance upon *Chemipal Ltd. v. Slim-Fast Nutritional Foods International, Inc.*[37] is also misplaced. *Chemipal* involved a lost profits claim arising from a distribution agreement under which plaintiff Chemipal was to distribute defendant Slim-Fast's diet products in Israel.[38] Chemipal brought suit against Slim-Fast for breach of the distribution agreement and presented an expert report regarding its lost profits claim. In calculating lost profits, Chemipal's expert relied upon an advertising plan prepared in anticipation of the distribution agreement that set a goal of a ten-percent Israeli market share for Slim-Fast's products. Chemipal's expert assumed that this ten-percent goal would be met, despite the fact that it was an aspirational figure and might not have been achieved.[39] Chemipal's expert also failed to verify information provided to him by Chemipal, and did not apply any expertise in gathering or analyzing data obtained from

[37] 350 F. Supp. 2d 582 (D. Del. 2004).

[38] *Id.* at 585.

[39] *Id.* at 589.

Chemipal or secondary sources used in the advertising plan.[40] Indeed, the expert in *Chemipal* admitted in his deposition that "[h]e did not know what he was basing his testimony on."[41] Accordingly, the *Chemipal* court concluded that his opinion was inherently unreliable and could not satisfy *Daubert*.[42]

Although more on point than the other cases cited by Carestream in that it involves a lost profits claim, *Chemipal* represents an egregious example of an "inexpert expert" conducting a clearly unreliable analysis. It does not stand for the proposition that an expert may never reasonably use data reported by a party in conducting an economic damages analysis. Here, in contrast to *Chemipal*, Reilly's report and deposition reveal that he understands the sources of information upon which his opinion relies, having formulated the data requests at issue. Reilly's damages model does not blindly adopt a marketing plan, but rather uses M & G's actual sales and expense history, market data, information set forth in the Supply Agreement's sales volume table and pricing formula, and present-value

[40] *Id.*

[41] *Id.* at 590.

[42] *Id.*

discount rates to calculate M & G's lost profits.[43] Although Carestream may challenge the factual assumptions upon which Reilly bases his opinions, Reilly's use of data reported by M & G in response to his inquiries is an accepted and understandable practice in his field, and does not render his opinions unreliable.[44]

The concerns Carestream raises regarding Reilly's reliance on factual assumptions about the future of the Supply Agreement and the PET market are valid areas for challenge via cross-examination and rebuttal, but do not provide a basis to exclude Reilly's opinions. In the event a breach is found, the extent of reasonable damages is a question for the jury. To the extent M & G's damages claim is premised upon disputed factual assumptions, it is the province of the jury to resolve those disputes and determine the appropriate recovery. Carestream may cross-examine Reilly and present rebuttal regarding Reilly's assumptions that M & G's profits would not have been affected by a reduction in Carestream's PET requirements below maximal values set in the Supply Agreement, invocation of the meet-competition provision, or declines in PET market prices.

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[43] *See* Expert Report of Robert F. Reilly, at 16-19.

[44] *See Inline Connection Corp. v. AOL Time Warner, Inc.*, 470 F. Supp. 2d 435, 443 (D. Del. 2007) (holding that expert report was admissible under *Daubert* where AICPA guidelines permitted experts to rely upon facts and assumptions provided by the experts' client).

Carestream's claim that Reilly "provides no explanation of how the discount rates were determined or applied for each year in question or the reliability of this process" is belied by Reilly's expert report, which sets forth how he calculated present value discount rates for both the Supply Agreement term and the projected renewal term, and identifies the industry sources upon which his calculations relied.[45] As discussed above, Reilly asserts that the analysis contained in his report is consistent with industry standards, and Carestream has not identified any reason why the approach Reilly used should be considered unreliable. The Court is aware that multiple methods exist for calculating present value discount rates, and Carestream may properly question Reilly's choice of methodology and its potential disadvantages vis-à-vis these other approaches. The mere existence of alternative means of deriving a present discount value rate, however, does not imply that Reilly's method is unreliable.

The Court further concludes that Reilly may testify as to the portion of his damages analysis that presumes a single-term renewal of the Supply Agreement from 2011 to 2013. Even in the absence of a renewal provision within the Supply Agreement, M & G has presented a sufficient basis for Reilly's assumption, such that the projected lost profits from a renewal could

[45] Expert Report of Robert F. Reilly, Ex. IX.

be proven "with reasonable certainty" and are more than merely speculative.[46] Although the parties did not have a lengthy relationship with each other upon entering into the Supply Agreement, both were well-established businesses with measurable profit histories. As Reilly explained in his deposition, both M & G and Carestream have a history of renewing their PET resin contracts: M & G's multi-year customer contracts were "typically renewed for at least one period," if not longer, and Carestream had maintained a continuous relationship with its previous PET supplier for approximately twenty years.[47] In addition, the fact that M & G provided a $600,000 price concession, apparently to defray the $1.6 million cost of installing grinders at the Windsor facility to process M & G's pellet-form PET resin, offers further factual support for M & G's position that the Supply Agreement was perceived by both parties as the start of a longer-term relationship and that M & G therefore reasonably expected a renewal of at least one term upon provision of conforming goods. This is not to say that renewal was a foregone conclusion, but rather that M & G has offered a sufficient basis for Reilly's factual assumption that the jury may be presented with Reilly's lost profit projections assuming the alternatives of

[46] *E.g.*, *O'Neill v. Warburg, Pincus & Co.*, 833 N.Y.S.2d 461, 463 (App. Div. 2007).

[47] Docket 47, Ex. 2, at 86:5-19.

non-renewal or single-term renewal.[48] As trier of fact, the jury can then determine "how long the relationship would have lasted" and what weight to assign Reilly's projections.[49]

Turning to Carestream's final claim, the Court agrees that Reilly's report would award M & G certain unrecoverable damages. The mistaken legal and factual assumptions underlying these points in Reilly's analysis do not merit precluding Reilly from testifying; however, his testimony will need to be limited.

New York's version of the Uniform Commercial Code permits an aggrieved seller of goods who would not be adequately compensated for a buyer's breach by market price damages to recover "the profit (including reasonable overhead) which the seller would have made from full performance by the buyer."[50] The intent of lost profits damages under U.C.C. § 2-708 is "to put the seller in as good a position as performance [by the buyer] would have done."[51]

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[48] *Cf. Supervalu, Inc. v. Assoc. Grocers, Inc.*, 2007 WL 624342, at *3 (D. Minn. Jan. 3, 2007) (holding that damages expert's testimony incorporating assumptions that contract between parties with an established business history would be renewed was not unduly speculative, as contrasted with "unaccepted bids on a new business").

[49] *Id.*

[50] N.Y. U.C.C. § 2-708.

[51] *Id.*

Reilly's damages calculation assumes that M & G would be legally entitled to recover certain costs associated with the negotiation and formation of the Supply Agreement, including the costs of developing the PET resin, legal costs of contract formation, and employee expenses associated with researching, developing, and negotiating the contract. These expenses, however, would all have been incurred in the course of obtaining the profits M & G now seeks to recover; indeed, some of these expense items would have arisen regardless of whether any contract was formed between the parties and are simply the proverbial "costs of doing business." Accordingly, M & G will not be permitted to present testimony that its contract negotiation and formation costs, or the expenses associated with developing resin for the Windsor facility, are recoverable items.[52]

Similarly, Reilly's testimony must be limited to avoid suggesting that any of the contract price discounts he identifies as items of damage in his report are recoverable. Whether viewed as price discounts or subsidies to incentivize the installation of grinders at the Windsor facilities, these amounts would not have been recovered by M & G in the event that

[52] *See* RICHARD A. LORD, WILLISTON ON CONTRACTS § 64:1 (4th ed. 2009) ("This rule [of compensation] governing the recovery of so-called direct or general damages necessarily requires the court to take into account not only the defendant's promised performance but the plaintiff's as well. Indeed, a failure to do so will frustrate the compensation principle by overcompensating the plaintiff, for he or she would otherwise receive what the defendant promised without the cost of performing his or her return promise.").

Carestream had fully performed under the contract. Therefore, M & G cannot recover them as damages in addition to the lost profits it seeks.

Carestream Expert Charles Mikulka

Upon review of the record, the Court is satisfied that Mikulka is qualified to opine as an expert regarding the two areas for which Carestream seeks to proffer his testimony: the customs and practices of the chemicals industry—including the PET market—as to qualification or accreditation of performance chemicals, and the evaluation of M & G's damages claim. Mikulka's opinions, as expressed in his report, reliably apply his specialized knowledge to the facts of this case. Accordingly, M & G's motion to preclude Mikulka's testimony will be denied.

Mikulka's qualifications arise from thirty-five years of experience in the chemicals and related industries. He worked as a chemical engineer during the 1970s, but he has spent most of his career as a consultant. He holds both a B.S. and an M.S. in Chemical Engineering, as well as an M.B.A. in Management and International Business. Of relevance to this case, Mikulka has experience providing litigation support, as well as technical and economic analysis for the chemical products industry. In his litigation support engagements, Mikulka has provided assessments of damages claims in more than a dozen cases. His C.V. notes engagements

involving a variety of specialty and performance chemicals, although PET is not specifically listed as one of his highlighted business areas.[53] He has been involved in at least two engagements involving PET contracts during his career.[54]

Having reviewed Mikulka's credentials, the Court considers him amply qualified to opine regarding industry customs and practices related to accreditation and processing of performance chemicals, and to provide expert testimony regarding M & G's damages claim. M & G has not produced evidence suggesting that the PET market is distinguishable from the broader chemicals market as a whole such that Mikulka's experiences in the performance chemicals industry are irrelevant to PET contracts. Moreover, Mikulka does possess some experience, albeit limited, with PET contracts. Mikulka's business degree and experience providing damages assessments qualify him to offer his opinion regarding whether Reilly's use of rounding in his damages analysis conforms to standard practices in the industry.[55]

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[53] *See* Expert Report of Charles Mikulka, App. A.

[54] Docket 38, Ex. 2, at 47:15-17.

[55] By his own deposition testimony, Mikulka acknowledges that the calculation of present value discount rates is outside his area of expertise, and thus he cannot opine regarding this portion of Reilly's analysis. Docket 38, Ex. 2, at 182:11-183:2.

The Court's role in assessing expert witness qualifications does not entail ensuring that only the "best qualified" expert witnesses are presented, nor guaranteeing that proffered experts possess the most narrow possible area of expertise.[56] Rather, alleged "weaknesses" of specialization of the sort raised by M & G in this case may be addressed through cross-examination, providing the opposing party an opportunity to contest the weight to be afforded the expert's testimony.[57] The Court's exposure to the technical aspects of this case leave it with no doubt that the jury would be greatly assisted by testimony from an expert witness familiar with industry customs and practices regarding accreditation of performance chemicals and with damages assessments. Mikulka possesses specialized knowledge of both topics that far exceed that of the lay person, which suffices to qualify him.

In addition to finding Mikulka qualified as an expert, the Court is satisfied that his opinions are reliable, as they are based upon the standards and customs of the chemical products industry. Although Mikulka's expertise is in a scientific field, it is important to note that his opinion is *non-scientific*: he offers specialized knowledge of a particular market and its

[56] *Holbrook v. Lykes Bros. S.S. Co., Inc.*, 80 F.3d 777, 782 (3d Cir. 1996); *Starnes v. Sears Roebuck & Co.*, 2005 WL 34346371, at *3 (W.D. Tenn. Dec. 14, 2005).

[57] *Starnes*, 2005 WL 34346372, at *3.

practices. It makes little sense to expect Mikulka's opinions regarding how performance chemicals are accredited to bear the traditional indicia of scientific acceptance gauged by a straightforward application of the *Daubert* factors. As Carestream argues, the Court's task in evaluating challenged non-scientific expert opinion under *Daubert* and *Kumho* is to "determine whether the testimony has 'a reliable basis in the knowledge and experience of [the relevant] discipline.'"[58]

Here, Mikulka's experience in and knowledge of the chemicals product industry provides a reliable basis for his opinions. The length and breadth of Mikulka's experience in the chemicals product industry, including his extensive work as a consultant both within the industry and in litigation engagements, support the reliability of his knowledge. Mikulka's report states that his opinions are based upon application of this experience to the facts of the instant case.[59] For example, a portion of Mikulka's report uses a brief case study of PET accreditation trials undertaken by Eastman Kodak at the Windsor facility using another manufacturer's PET resin as a point of comparison for the later M & G product trials.[60] Throughout the

[58] *Kumho*, 526 U.S. at 149 (quoting *Daubert*, 509 U.S. at 592).

[59] Expert Report of Charles Mikulka, at 4.

[60] *Id.* at 12-13.

analysis section of his report, Mikulka identifies those portions of the M & G resin trial runs that he considers to be notably consistent or inconsistent with industry customs and practices to support his final opinion that M & G's product was never accredited on the Windsor facility machinery in a manner consistent with industry practice. Mikulka does not, and could not, wedge his specialized knowledge into a scientific methodology. A review of his report and deposition excerpts shows that his opinions have a reliable basis in his knowledge and experience, and his report explains how that knowledge and experience informed his opinions regarding this case.

Contrary to M & G's position, Mikulka's opinions do not constitute improper legal conclusions.[61] Under DRE 704, "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact." At trial, M & G is free to assail Mikulka's opinions through its own witnesses and via cross-examination, leaving little risk that his testimony will confuse or mislead jurors. Mikulka's opinions regarding the conduct and outcome of the qualification process may touch upon the ultimate issues of this case, but they clearly apply the standards and customs of the industry, *not* legal

[61] M & G's motion attacks several of Mikulka's statements regarding items in its damages claim that he (correctly) considered non-recoverable. The Court has resolved many of these issues in the previous section discussing limitations on Reilly's testimony.

standards, to the facts of the case. It will remain for the jury to determine what qualification process was intended by the parties under the Supply Agreement, whether that process was fulfilled, and whether Carestream acted in good faith.

V. Conclusion

Although the parties have agreed upon little during the course of this contentious litigation, both sides managed to fall into the trap of confusing questions of testimonial weight for the jury with questions of expert reliability that must be resolved by the Court. For the reasons set forth herein, Carestream's *Daubert* Motion is **GRANTED in part** to limit the testimony of Robert F. Reilly with regard to non-recoverable damages claims, consistent with this opinion, and **DENIED in part** as to the rest of Reilly's testimony. M & G's *Daubert* Motion is **DENIED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary
cc: Somers S. Price, Esq.
James M. Kron, Esq.
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