SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 North King Street, Suite 10400
Wilmington, Delaware 19801-3733
(302) 255-0664

Joel Friedlander, Esquire
John M. Seaman, Esquire
Bouchard, Margules & Friedlander, P.A.
222 Delaware Avenue, Suite 1400
Wilmington, Delaware 19801
Attorneys for Plaintiffs

Thomas R. Hunt, Jr., Esquire
Jon E. Abramczyk, Esquire
David J. Teklits, Esquire
Thomas W. Briggs, Jr., Esquire
Morris, Nichols, Arsht & Tunnell, LLP
1201 North Market Street
P.O. Box 1347
Wilmington, Delaware 19899
Attorneys for Defendant

Re: Candlewood Timber Group, LLC and Forestal Santa Barbara SRL v. Pan American Energy, LLC
C.A. No. 04C-12-139 RRC

Submitted: April 7, 2006
Decided: May 16, 2006

On Defendant Pan American Energy's Motion to Dismiss "in favor of expropriation action."
DENIED.

On Defendant Pan American Energy's "Motion for Summary Judgment."
DENIED IN PART; RESERVED IN PART.

On Defendant Pan American Energy's Motion to Dismiss "Candlewood Timber Group LLC from this action because Candlewood is not a proper party[.]"
DENIED.

On Defendant Pan American Energy's Motion to Dismiss "this action on the grounds that Plaintiffs' claims are barred by the applicable statute of limitations."
DENIED.

On Defendant Pan American Energy's "Motion *in Limine* to Exclude Testimony from Plaintiff's Proposed Experts."
DENIED.

On Defendant Pan American Energy's "Motion to Strike or in the Alternative, to Amend the Trial Scheduling Order."
DENIED.

On Plaintiff Candlewood's "Motion *in Limine* to Exclude Evidence of Prior Settlement Negotiations."
GRANTED.

Dear Counsel:

Before this Court are various motions brought by both parties in this complex litigation.

I. FACTS AND PROCEDURAL HISTORY.

These various motions all arise out of a complex multinational litigation, the background and history of which was summarized in an opinion by the Delaware Supreme Court, which also forms the basis for a portion of this opinion.[1] In essence, Candlewood Timber Group, LLC and Forestal Santa Barbara SRL (collectively "Candlewood")[2] seek monetary damages for losses that Candlewood attributes to various breaches of oil and gas extraction permits in Argentina by Pan American Energy, LLC ("Pan American"), which resulted in Candlewood's alleged inability to obtain

[1] *Candlewood Timber Group, LLC, et al. v. Pan Am. Energy, LLC*, 859 A.2d 989 (Del. 2004) (affirming the Court of Chancery's dismissal of the case based on lack of subject matter jurisdiction, but reversing dismissal based on *forum non conveniens* grounds and remanding with instructions to transfer case to Superior Court).

[2] This Court will collectively refer to both Plaintiffs as Candlewood. Where a more specific reference is required, "Forestal" or "FSB" will be used to refer to Forestal Santa Barbara SRL.

certain environmental certifications said to be necessary for their business.[3] This opinion is written primarily for the parties involved.[4]

II. PAN AMERICAN'S MOTION TO DISMISS IN FAVOR OF EXPROPRIATION ACTION

In support of its motion to dismiss this action in favor of the expropriation action that is currently stayed in Argentina, Pan American argues that "this case arises exclusively out of a dispute over land and mineral rights in Argentina," and that "the exclusive remedy available to FSB under Argentine law is the compensation from an expropriation action in exchange for the transfer of the title in favor of the mining concession."[5] In this situation, Pan American contends, Argentine law gives a mining rights concessionaire an interest in the land that is dominant over the rights in the land held by the surface owner.[6] The mining concessionaire has the authority to seek a forced sale, or expropriation, of the land on the basis of "the dominant 'public interest' that is established by the mining concession."[7] Thus, Pan American argues, that, as concessionaire, it has the "unconditional" authority to seek an expropriation of the property and that any recovery awarded to Candlewood should be limited to the potential recovery of an expropriation action.[8]

Candlewood, on the other hand, argues that the previous Delaware Supreme Court ruling that the Argentine courts did not have exclusive jurisdiction over the dispute is the "law of the case."[9] Therefore, contends Candlewood, Pan American's claims that this action should be dismissed in favor of an Argentine expropriation action or, if this action proceeds, that Candlewood's potential recovery should be limited to any potential recovery

---

[3] *Candlewood*, 859 A.2d at 992.

[4] The delay in the issuance of this opinion is attributable in part to 1) the complexity of the issues (mostly governed by Argentine law) and 2) the Court's postponement of the issuance of an opinion because of the fact that the parties were engaged in settlement negotiations right before trial, which began on May 8, 2006.

[5] Def.'s Op. Br. in Supp. of Mot. Summ. J. 1, 2.

[6] *Id.* at 11-12.

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

[8] *Id.* at 15.

[9] Pls.' Opp. to Def.'s Mot. Summ. J. ¶ 1.

in the Argentine expropriation action should be rejected here because they have already been decided and rejected by the Delaware Supreme Court.[10]

Pan American replies that the "law of the case" doctrine does not apply here because "[t]he opinion of the Delaware Supreme Court addressed a jurisdictional issue at the preliminary stages of this litigation before any discovery was taken on the merits of the claims or relief that Plaintiffs would be seeking."[11] Pan American argues that the factual record has significantly expanded, thus making the law of the case doctrine inappropriate here.[12] Pan American reiterates its position that it has authority to seek an expropriation action and that Candlewood's potential remedy is limited to a recovery from the forced sale of the property to Pan American.

Under the law of the case doctrine, "findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the trial court or in a later appeal."[13] The trial court, therefore, may make any decision or order during the course of the case so long as such a direction is not inconsistent with the decision of the appellate court.[14] This Court concludes, as Candlewood argues, that the findings of fact and conclusions of law by the Delaware Supreme Court in the first *Candlewood* case are binding and create the legal landscape in the present litigation.

The Delaware Supreme Court characterized this dispute as one "about compensation for harm to privately-owned land, not about ownership rights to real property or issues involving protection of the environment."[15] Thus, the expropriation action in Argentina has no effect on the present litigation, which essentially is now a contract claim from which Candlewood can seek to be compensated for Pan American's breach, if proven. This present litigation is not implicated by the subsequently-filed Argentine expropriation action because, according to the Delaware Supreme Court, "even if

---

[10] *Id.*

[11] Def.'s Reply in Supp. of Mot. Summ. J. 3.

[12] *Id.* at 4-5.

[13] *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 39 (Del. 2005) ("The doctrine is meant to bring 'some closure to matters already decided in a given case by the highest court of a particular jurisdiction.'") (quoting *Gannett Co., Inc. v. Kanaga*, 750 A.2d 1174, 1181 (Del. 2000)).

[14] *Id.*

[15] *Candlewood*, 859 A.2d at 1005.

expropriation relief were granted, that would not affect Candlewood's claims, all of which would have arisen pre-expropriation."[16]

Pan American relies on *Moses v. State Farm Fire & Cas. Ins. Co.*, which held that the law of the case doctrine does not apply where the initial decision that purportedly forms the law of the case, was based on "an assumption of facts which subsequent testimony revealed to be otherwise."[17] That, however, is not the case here. The essential underlying facts found by the Delaware Supreme Court, which formed the basis for the conclusion that all of the claims for which Candlewood seeks recovery arose pre-expropriation, have not changed. Although there has been extensive additional fact and expert witness discovery in this case since the Supreme Court's initial ruling, the more developed record does not change that the present claims arose pre-expropriation and that this lawsuit principally involves "compensation for harm to privately-owned land[.]"[18] Despite the additional facts in this record, the facts regarding whether the Argentine expropriation should govern have remained constant and unchanged, unlike the underlying facts in *Moses*, and allow the application of the law of the case doctrine. Thus, Pan American's Motion to Dismiss "in favor of expropriation action" is **DENIED.**

III. PAN AMERICAN'S MOTION FOR SUMMARY JUDGMENT.

Of the issues remaining from the current motions, only a few are subject to a summary judgment disposition.[19] In this section, this Court will decide two of these issues: (1) whether Candlewood has the right, under Argentine law, to seek and potentially recover restoration costs or costs to remediate the damaged property, and (2) whether Candlewood may recover damages arising after Pan American was granted the concession.

---

[16] *Id.* at 1003.

[17] 1992 WL 179488, *2 (Del. Super.).

[18] *Candlewood*, 859 A.2d at 1003, 1005**.**

[19] The issues, taken somewhat out of order from Pan American's brief, are: (1) whether Candlewood can seek and potentially recover restoration costs, (2) whether Candlewood may recover damages arising after Pan American was granted the concession, (3) whether punitive damages are an appropriate form of recovery, (4) whether Candlewood may recover damages related to lots 4337 and 4338, (5) whether Candlewood has a viable claim for damages because the entire San Pedro property was not allegedly certified, and (6) whether Candlewood is entitled to attorneys' fees.

The issue raised in Pan American's motion of whether Candlewood is potentially entitled to punitive damages has been mooted because Candlewood's claim of fraud has been withdrawn. Also, at the pretrial conference on April 26, 2006, counsel for Candlewood represented that if Candlewood was allowed to remain in the case, pending resolution of Pan American's motion to dismiss Candlewood as an improper party, on some ground other than fraud, then the fraud claim, and as a result any claim for punitive damages, would be dropped from the case and thus, mooted.[20]

As for the issue of whether Candlewood may not recover for damage to lots 4337 and 4338, that issue is moot because Candlewood no longer seeks recovery for "lost profits."

Based upon this Court's ruling below that Candlewood may potentially recover restoration costs as a matter of Argentine law and Candlewood's subsequent withdrawal of any testimony and claim of lost profits from the case, the issue of whether Candlewood has a claim for damages for failure to obtain certification is now moot.

Finally, it has been agreed upon by the parties that the issue of attorneys' fees will be decided after the trial has concluded. Therefore, this Court reserves its decision as to any potential award of attorneys' fees until after the trial.

A. Standard of Review

Summary judgment is granted only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[21] The Court must view the facts in a light most favorable to the non-

[20] Tr. Pretrial Conference at 30-31 (April 26, 2006) ("[PLAINTIFF'S COUNSEL]: If I don't need the fraud claim to keep Candlewood as a party plaintiff, I don't need the fraud claim. It's gone. THE COURT: All right. Since I've ruled that Candlewood will remain as a plaintiff, the Court understands the fraud claim to be dismissed by the plaintiffs.").

[21] Super. Ct. Civ. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56 (Del. 1991).

moving party,[22] and all reasonable inferences must be drawn in favor of the non-moving party.[23]

B. Candlewood May Recover, Under Argentine Law, Restoration Damages.

As to whether Candlewood, under Argentine law, is able to seek and potentially recover restoration costs, or the cost of remediating the damaged forest land, Pan American argues that "under Argentine law there are two methods to calculate the appropriate recovery from damage to property, both of which are appropriate and fully compensate the plaintiff: (i) the diminution in the value of the property; and (ii) the cost of repair."[24] In that framework, urges Pan American, "the judicial tendency in Argentina would be to award the least costly recovery."[25] Thus, argues Pan American, "to the extent that FSB has a right to any recovery for purported damage to its property, that right is limited to the difference in the value of the property before the damage and the value of the property after the damage."[26]

Candlewood responds that Pan American's argument has no effect on Forestal's contract claims[27]: "There is no indication in the contract that compensation for damages must be limited to a difference in the value of the land."[28] Candlewood claims that Pan American's argument is "nothing but an attempt to re-introduce through the backdoor Defendant's argument [that the Candlewood's damages should be limited by the Argentine expropriation action, which] has already been clearly rejected by the Delaware Supreme Court."[29] Candlewood also adds that the Argentine Civil Code does not

---

[22] *Merrill v. Crothall-American, Inc.,* 606 A.2d 96, 99-100 (Del. 1992).

[23] *Liberty Mutual Ins. Co. v. Devlin*, 1998 WL 283424, *3 (Del. Super.) (citing *Sweetman v. Strescon Indus.*, 389 A.2d 1319, 1324 (Del. Super. Ct. 1978)).

[24] Def.'s Op. Br. in Supp. of Mot. Summ. J. 29-30 (citing Litvinoff Dep. Tr. 272-74).

[25] *Id.* at 30 (citing Litivinoff Dep. Tr. 274-75).

[26] *Id.* at 29.

[27] It should be noted that Forestal, not Candlewood, was the only party-plaintiff to the contracts in dispute here. However, Forestal is wholly owned by Candlewood, so that, as Professor Litvinoff says, "[s]ince FSB is owned and controlled by Candlewood, it should be immaterial whether certain damages are owed to one or the other." Litvinoff Rep. II ¶ 60.

[28] Pls.' Opp. to Def.'s Mot. Summ. J. ¶ 56.

[29] *Id.* ¶ 55.

operate to limit Pan American's "obligation to compensate FSB for the full amount of the reparation costs."[30]

In response to Pan American's claim that the restoration costs must be limited to the value of the property, Candlewood relies on its expert on Argentine law, Professor Saul Litvinoff. Candlewood argues that Professor Litvinoff "testified that Argentine law 'does not link restoration damages to the value of the property.'"[31] Further Candlewood cites to Professor Litvinoff's second report for the proposition that "[u]nder Argentine law, recovery for restoration is not limited even if such recovery exceeds … the market value of the land[.]"[32] Candlewood also invokes Article 41 of the Argentine Constitution: "[E]nvironmental damage shall generate with priority the obligation of restoration."[33] Candlewood also cites to Pan American's expert on Argentine law, Dean Atilio Anibal Alterini, who "did not testify to such a limitation [of damages based on the value of the property.]"[34] Candlewood points out that "[Dean] Alterini unequivocally testified that Argentine law requires restoration of a damaged asset to its 'previous legal status quo' and that restoration costs are measured by the cost of reparation."[35]

Pan American replies that "nothing in the [Delaware] Supreme Court's opinion can be read to definitively rule on FSB's right under Argentine law to collect monetary restoration damages."[36] Pan American argues that the law in the Argentine Civil Code advocated by Pan American is the controlling law, which would limit any recovery to the value of the land.[37] Moreover, as to the applicable Argentine law, Pan American argues that "the principle of full compensation under Argentine law … means legal fullness, which is the recovery allowed by law and subject to the limitations established by law."[38] Finally, as to Candlewood's invocation of Article 41 of the Argentine Constitution, Pan American argues that "Plaintiffs'

---

[30] *Id.* ¶ 56.
[31] *Id.* ¶ 58 (quoting Litivinoff Rep. I ¶ 54).
[32] *Id.* (citing Litvinoff Rep. II ¶ 35).
[33] *Id.*
[34] *Id.* ¶ 60.
[35] *Id.* (citing Alterini Dep. Tr. 89:14-17, 91:13-15).
[36] Def.'s Reply in Supp. of Mot. Summ. J. 23.
[37] *Id.* at 23-24.
[38] *Id*. at 24 (citing Alterini Rep. I ¶ 67).

argument is completely disingenuous because Plaintiffs would be under no obligation to actually spend the money to restore the environment."[39]

Under Superior Court Civil Rule 44.1, it is this Court's obligation in this case to determine the applicable Argentine law. The only practical way to do that here is to analyze the conclusions of the parties' respective experts on Argentine law. On the issue of whether Candlewood may potentially seek restoration damages for the injury caused to the San Pedro property, this Court finds that because this action is in large part a contract action, then, as stated in the contract, Candlewood is entitled to seek restoration costs on the basis of Forestal's contract claim. Article 1197 of the Argentine Civil Code provides that "[a]greements made in contracts establish a rule for the parties to which they are subject as they are to the law itself." The contract between Forestal and Pan American states that Pan American must

> [h]old harmless FSB for all and every one of the losses caused in properties or any other assets (moveable or real estate) owned by FSB whether the damage is produced directly or indirectly by any employee or person or company contracted by PAE, with obligation to repair or replace the asset damaged at the choice of FSB, immediately.[40]

The replacement remedy as the sole remedy for Candlewood would effectively limit the compensation to the value of comparable land, as advocated by Pan American, whereas the repair remedy would approximate the cost of restoring the property and would not be limited to the value of the property.

This Court finds that the opinions set forth by Candlewood's expert, Professor Litvinoff, are most persuasive as to the proposition that, under Argentine law,where restoration damages are allowed, they are not necessarily linked to the value of the property.[41] Professor Litvinoff cites to Article 1083 of the Argentine Civil Code, which provides that "[r]eparation of damages shall consist of restoring things to their prior status, unless it were impossible to do so, in which case reparations shall be fixed in money."[42] Dean Alterini also has testified that the purpose of Article 1083

---

[39] *Id.* (citing Litvinoff Dep. Tr. 266).

[40] Temporary Entry, Traffic and Stay Permits (Oct. 18, 2000 & Nov. 7, 2000), annexed to App. of Documents Cited in Pls.' Mem. of Argentine Law, Ex. 14, 15.

[41] Litvinoff Rep. I ¶ 54.

[42] *Id.*

is to restore the parties "[t]o their previous legal status quo."[43] Also, as Professor Litvinoff states, "[t]his article furnishes clear statutory authority for the proposition that plaintiffs are entitled to restoration as a remedy[.]"[44] Finally, as to whether damages are limited to the value of the property or comparable property, Professor Litvinoff opines "that the obligation to restore the property damaged by payment of restoration damages is not limited by the value of the thing sustaining the damage."[45]

Thus, as a matter of Argentine law, although Forestal was the only party-plaintiff to the contract, the Candlewood plaintiffs are entitled to recover restoration costs. Pan American's motion for summary judgment that would limit Candlewood's potential recovery to the value of the land is **DENIED.**

C. Candlewood May Recover Damages Arising After Pan American Was Granted The Concession.

As to whether the granting of the concession to Pan American acts to preclude Candlewood from recovering damages arising after the concession, Pan American argues that Article 162 of the Argentine Mining Code operates to cut off a mine owner or concessionaire's liability for damage caused to works that were undertaken after the concession on areas subject to exploitation by the concessionaire.[46] This result, contends Pan American, is consistent with the Argentine Mining Code's policy in favor of mining the country's natural resources and "opt[ing] for a strict *status quo* rule, which prohibits the surface landowner from initiating any new works or projects that might interfere with the exploitation of the mine after the granting of the concession.[47]

Candlewood answers that it would be able to seek full compensation for damage caused after the concession because the provision of the Mining Code relied upon by Pan American has no effect on Forestal's rights under the contracts at issue here.[48] Candlewood claims that "the contracts reflected

---

[43] Alterini Dep. Tr. 89:16.
[44] Litvinoff Rep. I ¶ 54.
[45] Litvinoff Rep. II ¶ 35.
[46] Def.'s Op. Br. in Supp. of Mot. Summ. J. 25.
[47] *Id.* at 28.
[48] Pls.' Opp. to Def.'s Mot. Summ. J. ¶ 30.

in the entry permits are the law between the parties."[49] Moreover, Candlewood argues that the Mining Code, upon which Pan American relies, has been superseded by the Argentine Hydrocarbon Law, which, *inter alia*, "does not address damages caused to works that were undertaken near a mine after the granting of the concession."[50]

Pan American replies that "because FSB did not purchase the San Pedro Property and plan to commence its forestry business until *after* the granting of the concession, FSB has no basis under Argentine law to demand compensation from Pan American based upon its planned forestry business."[51] Pan American also argues that the Argentine Mining Code has not been superseded by the Hydrocarbon Law, and, even if it did, the same rule that would "bar the owner of a servient estate from starting any activity that interferes with or adversely affects the rights of the dominant estate[]" would still apply.[52] Pan American, however, does not really reply to Candlewood's claim that this is primarily a contract claim, which provides the applicable law in place of both the Mining Code and the Hydrocarbon Law.

The law of case doctrine, discussed above, also applies here to allow Candlewood to recover potential damages that arise after Pan American was granted the concession. Again, "this dispute is about compensation for harm to privately-owned land, not about ownership rights to real property or issues involving protection of the environment."[53]

Candlewood's primary cause of action here is one based on Forestal's rights under the contract. The contract between the parties that granted Pan American access to Forestal's property also seemed gave Forestal a choice of remedy if Pan American directly or indirectly damaged Forestal's property. The fact that Pan American was granted a concession by the Argentine Government is irrelevant for the purposes of Candlewood's recovery under the contract as that is an independent action. The concession might only be relevant if Pan American had filed an expropriation action in Argentina prior to the filing of this action. Thus, as this is primarily a contract claim that seeks damages to privately owned property, as

---

[49] *Id.* ¶ 33.
[50] *Id.* ¶ 45, 48.
[51] Def.'s Reply in Supp. of Mot. Summ. J. 18.
[52] *Id.* at 18-19.
[53] *Candlewood*, 859 A.2d at 1005.

characterized by the Delaware Supreme Court, Candlewood may recover damages under the contract that arose after Pan American was granted the concession, as a matter of law. As this litigation is primarily one of breach of contract, this Court need not reach issues related to the intersection, application and possible supersession of the Argentine Mining Code and the Argentine Hydrocarbons Law. Pan American's motion for summary judgment on that ground is **DENIED**.

IV. PAN AMERICAN'S MOTION TO DISMISS CANDLEWOOD AS A PARTY.

Pan American alleges that Candlewood, as an individual entity (not including Forestal Santa Barbara), is not a proper party to this action as it does not have a "right or interest recognized by Argentine law with respect to the San Pedro Property."[54] Forestal is wholly owned by Candlewood. Therefore, argues Pan American, Forestal Santa Barbara is the only proper plaintiff to this action.

Candlewood's response to the motion states that it has a viable action in tort for damage caused by Pan American to Candlewood's business as well as any "other damages that are either the direct or indirect consequence of [Pan American's] wrongful acts.[55] Specifically, Candlewood alleges that Pan American's wrongful acts caused damage to Candlewood in the form of, among others, "expenses in overseeing the activities of FSB, expenses in seeking expertise and in preparing for negotiations with [Pan American]…"[56] Also alleged, as discussed above, is the overarching claim for restoration damages that Candlewood, as the owner of FSB, has asserted against Pan American for the damages to the land. Candlewood also argues that it also has a claim for unjust enrichment against Pan American.[57] Under Argentine law, Candlewood contends, it has a right to recover for those damages sustained as a result of Pan American's actions.[58]

As to the tort claim, Pan American contends that Candlewood has only alleged damage to Forestal Santa Barbara in the form of restoration

---

[54] Def.'s Op. Br. in Supp. of Mot. Summ. J. 24.
[55] Pls.' Opp. to Def.'s Mot. Summ. J. ¶ 36.
[56] *Id.*
[57] *Id.* at ¶ 37.
[58] *Id.* at ¶ 38.

damages.[59] Finally, Pan American argues that Argentine law does not support a claim of unjust enrichment if there are other contractual or non-contractual remedies available, which Pan American argues is the case here.[60]

This Court finds that Candlewood has established that, under Argentine law, Candlewood is a proper party to this litigation and can survive a motion to dismiss. Candlewood's tort claim is supported by the Argentine Civil Code. Article 903 provides that "[t]he immediate [or direct] consequences of freely performed acts are imputable to the person that realized them." Article 904 sets forth the rule for indirect or mediate consequences that "are also imputed to the actor when he/she had predicted them or, when employing the due care and knowledge about the things, he/she would have been able to predict them." Thus, under Argentine law, a wrongdoer can be held liable for any direct or foreseeable indirect consequences of their actions.

As to unjust enrichment, Professor Litvinoff states that "to recover for unjust enrichment in Argentine law, the following requirements must be met: 1) [t]here must be an enrichment; 2) [t]here must be an impoverishment; 3) [t]here must be a causal connection between the enrichment and the impoverishment; 4) [t]here must not be a cause justifying the enrichment."[61] Candlewood has established through expert testimony that there is a cause of action under Argentine law for unjust enrichment, which may, specifically, be based on Pan American's cost savings (assuming these are proven at trial), which, as both experts have opined, if all other elements are present, is a suitable theory of unjust enrichment.[62]

Here, this Court finds that, in the context of a motion to dismiss, a sufficient record has been developed by Candlewood that demonstrates that it has sustained losses for which, if proven, Candlewood may potentially recover under the tort claim as well as under the unjust enrichment claim. Thus, Candlewood is a proper party to this litigation and Pan American's motion to dismiss Candlewood as a party is **DENIED.**

---

[59] *Id.* at 17. Candlewood's claim for damages in the form of lost profits was withdrawn.

[60] *Id.*

[61] Litvinoff Rep. I ¶ 108.

[62] *See* Alterini, *Derecho de Obligaciones Civiles y Comerciales* ¶ 1765 (Abdelo-Perrot ed., 2d ed. 1998); Litvinoff Rep. I ¶ 114.

V. PAN AMERICAN'S MOTION TO DISMISS THE ACTION BASED ON STATUTE OF LIMITATIONS.

As its final argument in support of the motion for summary judgment, Pan American contends that the applicable statute of limitations is the six-month period provided for by section 162 of the Argentine Mining Code.[63] Pan American argues that because Candlewood has not shown that the claims were filed within six months of the date of the construction, then the claims should be dismissed.[64]

Candlewood responds that the applicable statute of limitations is based on section 4023 of the Argentine Civil Code, which provides for a ten-year period for breach of contract claims.[65] Candlewood also argues that section 162 only applies to a claim based on the statute, not to a claim based on breach of contract or tort.[66] Moreover, both Argentine law experts cited to a Supreme Court of Argentina case that "applied the 10 year general limitation period under the Argentine Civil Code … [and] expressly did not apply the six-month limitation period.[67] Alternatively, Candlewood argues that the Delaware statute of limitations applies as Candlewood is a Delaware corporation.[68]

This Court agrees with Candlewood that the applicable statute of limitations is not the six-month period provided for in section 162 of the Argentine Mining Code, as advocated by Pan American. With that period foreclosed, the facts here demonstrate that whichever remaining period is used, that of either Argentina or Delaware, Candlewood's claims cannot be dismissed on statute of limitations grounds. Forestal did not even purchase the land at issue until 1998,[69] and the record is replete with evidence that Pan American's activities that allegedly caused the damage, especially the building of the road, occurred in 2000-2001. Candlewood originally filed

---

[63] Def.'s Op. Br. in Supp. of Mot. Summ. J. 39.

[64] *Id.*

[65] Pls.' Opp. to Def.'s Mot. Summ. J. ¶ 86. Section 4023 of the Argentine Civil Code states: "In the absence of a special provision, every personal action for a matured obligation prescribes in ten years."

[66] *Id.* ¶ 87.

[67] *Id.* ¶¶ 88-89 (citing Litvinoff Rep. I ¶¶ 164-167; Alterini Rep. I ¶ 121).

[68] *Id.* ¶ 90.

[69] Def.'s Op. Br. in Supp. of Mot. Summ. J. 4.

this action the Delaware Court of Chancery on January 23, 2003.[70] No matter which statute of limitations is used, Candlewood's cause of action was filed well within both the 10 year period in the Argentine Civil Code. Thus, all of Candlewood's claims survive and Pan American's Motion to Dismiss based on the statute of limitations is **DENIED.**

VI. PAN AMERICAN'S MOTION *IN LIMINE* TO EXCLUDE CERTAIN OF PLAINTIFFS' PROPOSED EXPERTS

In its Motion *in limine* to Exclude Testimony from Plaintiffs' Proposed Experts, Pan American sought to exclude testimony of seven of Candlewood's experts who "fail to meet the well-established standards for admissible expert opinion."[71] The seven experts Pan American originally argued should not be allowed to testify at trial on certain subjects were Dr. Clark Binkley, Dr. John Sessions, Julius Spivack, Dr. Geoffrey Heal, Dr. Donald Gray, Charles Lockhart, and Dr. Jeffrey McDonnell.

At the oral argument of this motion on April 7, 2006, Candlewood's counsel represented to the Court that Dr. Geoffrey Heal will not be called at trial to testify.[72] Thus, Pan American's motion as it relates to Dr. Heal is moot.

On April 21, 2006, Candlewood wrote a letter to the Court regarding certain issues that (conditionally) would not require further judicial attention. The letter stated that Candlewood had "determined that unless required as a matter of law, [Plaintiffs] will not put on evidence from those experts needed to prove lost profits (*e.g.* Messrs. Binkley, Spivack and Sessions)."[73] Candlewood also acknowledged that if that course was taken, then the testimony of Dr. McDonnell becomes moot.[74] However, Candlewood added:

> There is one significant caveat to our decision. As Your Honor knows, defendant has argued that under Argentine law restoration damages are capped at the economic value of the land, and we strongly dispute that any

---

[70] *Candlewood*, 859 A.2d at 992.

[71] Def.'s Mot. to Exclude Pls.' Experts 1.

[72] Tr. at 123 (April 7, 2006) ("[PLAINTIFFS' COUNSEL]: So in these circumstances, we don't intend to call [Dr.] Heal.").

[73] Letter to the Court from Joel Friedlander, Esq., at 1 (April 21, 2006).

[74] *Id.*

> such principle of law exists. In the event Your Honor disagrees with our position, we will need to present evidence at trial of lost profits.[75]

As shown above in Part III.A, Candlewood, as a matter of Argentine law, may potentially recover restoration costs. Additionally, this Court finds that such an award is not "capped" at the value of the land as a matter of Argentine law. This Court's decision was made independently of Candlewood's April 21, 2006, letter and is sufficiently supported by the testimony and reports of the parties' respective experts on Argentine law. Thus, Pan American's motion as it relates to Mr. Spivack, Dr. Sessions, Dr. McDonnell and Dr. Binkley (insofar as his testimony concerns lost profits) is moot.[76]

Remaining therefore for review under the pending motion is the proposed expert testimony of Mr. Lockhart and Dr. Gray.

Pan American argues that each of the testimony of these experts on restoration damages "is based on admittedly insufficient data and is therefore irrelevant and unreliable and should be excluded."[77] First, Dr. Gray's opinions as to the amount of soil that eroded from the "cut slopes" next to the roads constructed by Pan American are, Pan American urges, unreliable because of improper extrapolation and "do[] not even come close to the proper use of regression analysis[.]"[78] As to Lockhart, who relies in part on Gray's reports, Pan American argues that his opinions are merely preliminary and thus, unreliable, and that Lockhart himself "conceded that he lacked the requisite information to render an accurate assessment of the costs associated with implementing Gray's remedial recommendations."[79] Specifically, Pan American contends that Lockhart's "preliminary cost estimates are not based on information reasonably relied upon by experts in the field, will not assist the jury, and will confuse and mislead the jury.[80]

---

[75] *Id.*

[76] Although Dr. Binkley was originally offered as an expert who would testify as to potential restoration damages, he was deleted as a witness from the Revised Pretrial Stipulation and Order entered into by the parties on May 2, 2006. As a result, Pan American's motion as it relates to Dr. Binkley's testimony of restoration damages is moot.

[77] Def.'s Mot. to Exclude Pls.' Experts 3.

[78] *Id.* at 23-24.

[79] *Id.* at 25.

[80] *Id.* at 26-27.

Candlewood responds that Dr. Gray's opinion is relevant because he "conducted two inspections of the San Pedro property, collected a huge volume of data about [the property] … and used this mass of site-specific data to determine what erosion control measures should be put in place to prevent further damage to the San Pedro property …"[81] As to Dr. Gray's reliability, Candlewood argues that Dr. Gray used "***six*** different methods of estimation in his statistical cut slope erosion analysis" and compared them to a known equation concerning soil erosion and cut slope, which "is precisely how a statistical analysis of this type ought to be done."[82] As to Lockhart, Candlewood contends that his opinions are relevant because "it is an essential component of the restoration damages" and reliable because Lockhart produced the same type of preliminary cost estimate that is relied upon by the Army and the Department of Energy for budgeting purposes.[83]

Pan American replies that Lockhart should be precluded from testifying because his "estimates are not grounded in sufficient information, are not specific or detailed enough to provide any guidance to the jury and, consequently, are purely speculative."[84] As for Gray, Pan American alleges that his opinions are not tied to the facts of this case and should be excluded.[85]

Delaware Rule of Evidence 702, which governs the admissibility of expert testimony, 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.

The Delaware Supreme Court has also articulated a five-factor analysis for the admissibility of expert testimony under DRE 702:

---

[81] Pls.' Opp. to Def's Mot. to Exclude Pls.' Experts 5.
[82] *Id.* at 6-7.
[83] *Id.* at 8-9.
[84] Def.'s Reply at 11.
[85] *Id.* at 13.

1. Whether the witness is qualified as an expert by knowledge, skill, experience, training or education;
2. Whether the evidence is relevant and reliable;
3. Whether the expert's opinion is based upon information reasonably relied upon by experts in the particular field;
4. Whether the expert testimony will assist the trier of fact to understand the evidence or to determine fact in issue; and
5. Whether the expert testimony will create unfair prejudice or confuse or mislead the jury.[86]

Under that framework, it is clear from the record that the expert reports and testimony of Dr. Gray and Mr. Lockhart are sufficiently relevant and reliable as to satisfy the standard required to pass this Court's "gatekeeper" function. Each of these experts satisfies the *Cunningham* analysis needed to be admissible at trial. Both Dr. Gray and Mr. Lockhart are well qualified as experts in their respective fields.[87] Consequently, their testimony as to Candlewood's potential restoration damages will assist the jury, the ultimate factfinder.

Dr. Gray used a method (in fact, he used six methods) of calculating the amount of soil that eroded from the "cut slope" by utilizing the site-specific data he took from San Pedro and then comparing that to a well-known formula by using a "reasonable engineering approach."[88] Thus, Gray's opinion concerning erosion on the "cut slope" is both relevant and reliable.

Lockhart relied on Gray's report to determine the engineering cost assessment and used specific Argentine data to calculate a cost estimate, which is relevant to the measure of restoration damages. Lockhart's opinion is somewhat buttressed by this Court's holding that Gray's opinion was relevant and reliable. Lockhart took the data that Dr. Gray had provided to him regarding recommended remediation methods and determined the labor and materials needed to implement the measures. Then, Lockhart assembled cost information, as it would be in Argentina, as to each of the remedial steps Dr. Gray set forth in his report, and calculated the cost required to restore the San Pedro property as Dr. Gray instructed. Although, Lockhart's cost estimate was characterized by him as "preliminary," such a "reconnaissance-level" cost estimate is frequently used to determine the final

[86] *Cunningham v. McDonald*, 689 A.2d 1190, 1193 (Del. 1997).
[87] Pls.' Opp. to Def's Mot. to Exclude Pls.' Experts 5, 7, 14.
[88] *Id.* at 6-7.

cost of a project. Moreover, Lockhart used a contingency factor in order to compensate for the existence of uncertainties. Further, Lockhart's opinion is reliable because he used methods of calculation that are "reasonably relied upon by experts in [his] particular field."

Therefore, the above experts can testify at trial as to the measure of Candlewood's restoration damages based on their expert reports. Pan American's motion *in limine* to exclude the remaining experts, Dr. Gray and Lockhart, under this motion is **DENIED.**

VII. PAN AMERICAN'S MOTION TO STRIKE

Pan American also moves for an order that would strike certain affidavits submitted by Candlewood with their papers in opposition to Pan American's motion *in limine* to exclude testimony of Candlewood's proposed experts.[89] Alternatively, Pan American moved to amend the Trial Scheduling Order and reschedule the trial so that the experts could be deposed on these affidavits.[90] The affidavits in question are from Dr. Binkley, Dr. Sessions, Mr. Lockhart and Dr. McDonnell. However, based on Candlewood's representations that Drs. Sessions and McDonnell will not testify and that Dr. Binkley, if called, will testify only as to restoration damages, Pan American's Motion to Strike is moot as to the affidavits of those experts.[91] Thus, the only affidavit remaining at issue is that of Lockhart.

The following analysis expands upon the Court's briefer oral ruling on April 26, 2006.

Pan American claims that the Lockhart affidavit should not be admissible as it represents "new opinions concerning estimating engineering costs."[92] Specifically, Pan American argues that Lockhart claims that his self-proclaimed "preliminary" reports "simply form the basis for determining whether to proceed with a project," and that the overall estimate for the cost of the project should not substantially change.[93] Thus, Pan

[89] Def.'s Mot. to Strike ¶ 3.
[90] *Id.*
[91] Dr. Binkley's affidavit appears to only concern potential testimony on lost profits.
[92] Def.'s Mot. to Strike ¶ 10.
[93] *Id.*

American argues, because these new opinions were not disclosed in Lockhart's expert report, and, as a result, would be untimely, they should be excluded.[94] Pan American also argues that attached to Lockhart's affidavit are hundreds of pages of material that Pan American claims had not, before then, been disclosed.[95]

Candlewood responds that Lockhart's affidavit did not contain new or supplemental opinions, but rather was "submitted to assist the Court in evaluating the expert['s] methodologies and resolving any question about the reliability of the underlying analyses – not to offer [a] new opinion[]."[96] Candlewood adds that the "Lockhart affidavit, which is consistent with his deposition testimony, merely explains why it was appropriate and reliable to base his analysis on data developed from the 'reconnaissance' stage of a project."[97] As for the papers attached to the affidavit, Candlewood asserts that Lockhart relied on them in his analysis and that they were identified at his deposition.[98]

As Pan American argues that the affidavits constitute new opinions rendered by Candlewood's experts, and that if that is true, then they are untimely and should be excluded, this Court must first decide whether the Lockhart affidavit constitutes a new opinion or not. Based upon the affidavit itself and Candlewood's representations, this Court finds that the opinions set forth in Lockhart's affidavit are not new. Thus, the affidavit is not untimely nor does it substantively or impermissibly expand the scope of Lockhart's previous opinion. Moreover, the submission of an affidavit by the proposed expert to clarify any question of reliability is appropriate, especially under the complex circumstances present here. In speaking of a pretrial procedure to determine the admissibility of expert testimony, this Court has said:

> The Judge must gather the necessary information and evaluate the reliability of the underlying principles, the methodology employed by the expert witness, and the potential relevance of the proposed evidence. [Citation omitted.] The Court, in the normal course, should be supplied with the expert's deposition testimony, as well as any supporting

---

[94] *Id.* ¶ 13.
[95] *Id.* ¶ 10.
[96] Pls.' Opp. to Mot. to Strike 1.
[97] *Id.* at 4.
[98] *Id.* at 5.

> affidavits, prior to making any determination as to whether a *Daubert* hearing is necessary.[99]

Applying that rationale here, it is entirely appropriate to consider the Lockhart affidavit, especially in light of the fact that it does not constitute a new opinion. Thus, Pan American's Motion to Strike is **DENIED.** Moreover, this Court will not allow amendment of the trial scheduling order.

VIII. CANDLEWOOD'S MOTION *IN LIMINE* TO EXCLUDE EVIDENCE OF PRIOR SETTLEMENT NEGOTIATIONS

As to Plaintiffs' motion *in limine* to exclude evidence of prior settlement negotiations, Candlewood argues that certain communications between Candlewood and Pan American starting in December 2001 should be precluded from being admitted at trial as "evidence of conduct or statements made in compromise negotiations."[100] The first letter is from December 2001 where Candlewood expressed concern over Pan American's construction of the road and well-site, the resulting damage to the environment and the possibility of failing to gain certification for Candlewood's sustainable forestry business.[101] The letter also indicates the presence of a dispute between the parties as to the amount of damage caused to the property.[102] The second document that Candlewood seeks to preclude from admission at trial is a memorandum attached to the December letter, which lays out in detail the alleged damage as well as the possible amount of such damage. The third document is a letter from Candlewood to Pan American that set forth proposals that would allow Pan American to invest in Candlewood and thus, become joint partners in the sustainable forestry business. Candlewood argues that because these communications represented settlement negotiations after a dispute had been recognized, they should not be admitted as evidence of such conduct.

By contrast, Pan American responds that the motion must be denied because "the documents do not contain offers to compromise the claims in this lawsuit, and … the documents are not being offered to prove the invalidity or amount of the claims that Plaintiffs brought more than a year

---

[99] *Minner v. American Mortg. & Guar. Co.*, 791 A.2d 826, 845-46 (Del. Super. Ct. 2000).

[100] Pls.' Mot. to Exclude Evidence of Prior Settlement Negotiations at 1.

[101] *Id.*

[102] *Id.*

later in this lawsuit."[103] Finally, Pan American argues that these documents can be admitted into evidence if it is offered for other purposes.[104] Specifically, Pan American argues that "the evidence showing [Candlewood's] willingness to waive any environmental claim against Pan American if Pan American made an investment in [Candlewood's] business plan illustrates [Candlewood's] bad faith and abuse of process in later claiming that their purpose in pursuing such a claim is to restore the environment."[105] Pan American alleges that, in this litigation, evidence of Candlewood's bad faith is relevant.[106]

Candlewood replies that Plaintiffs' began asserting a claim for damages in the spring of 2001, thus evidencing "a clear dispute as to how to calculate those damages.[107] Candlewood also argues that these documents are clear evidence of prior settlement negotiations because they represent Candlewood's attempts to reach a compromise with Pan American.[108]

As to the admissibility of evidence of prior settlement negotiations, Delaware Rule of Evidence 408 provides:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay or proving an effort to obstruct a criminal investigation or prosecution.

This Court finds that the documents at issue here constitute prior settlement negotiations. They were made after a dispute had arisen between Candlewood and Pan American as to the extent of the damage, and the

---

[103] Def.'s Opp. to Pls.' Mot. to Exclude Evidence of Prior Settlement Negotiations at 1.

[104] *Id*. at 7.

[105] *Id.* at 7-8.

[106] *Id*. at 8.

[107] Pls.' Reply at 1-2.

[108] *Id.* at 2-3.

monetary amount of such damages, that had been caused to Candlewood's property. Moreover, "if application of Rule 408 exclusion is doubtful, the better practice is to exclude evidence of compromise negotiations."[109] The documents will be excluded.

This ruling, however, does not bar this evidence from potentially coming in at trial pursuant to some other basis.

IX. CONCLUSION

Based on the foregoing, the Court makes the following rulings:

1. On Defendant Pan American Energy's Motion to Dismiss "in favor of expropriation action." **DENIED.**

2. On Defendant Pan American Energy's "Motion for Summary Judgment." **DENIED IN PART; RESERVED IN PART.**

3. On Defendant Pan American Energy's Motion to Dismiss "Candlewood Timber Group LLC from this action because Candlewood is not a proper party[.]" **DENIED.**

4. On Defendant Pan American Energy's Motion to Dismiss "this action on the grounds that Plaintiffs' claims are barred by the applicable statute of limitations." **DENIED.**

5. On Defendant Pan American Energy's "Motion *in Limine* to Exclude Testimony from Plaintiff's Proposed Experts. **DENIED.**

6. On Defendant Pan American Energy's "Motion to Strike or in the Alternative, to Amend the Trial Scheduling Order." **DENIED.**

7. On Plaintiff Candlewood's "Motion *in Limine* to Exclude Evidence of Prior Settlement Negotiations." **GRANTED.**

---

[109] *The Chase Manhattan Bank v. Iridium Africa Corp.*, 2003 WL 22928042, *2 (D. Del.) (citing *Affiliated Mfg., Inc. v. Aluminum Co. of Am.*, 56 F.3d 521, 526 (3d. Cir. 1995)).

IT IS SO ORDERED.

Very truly yours,

oc: Prothonotary