EXHIBIT 20

Not Reported in F.Supp., 1998 WL 151806 (E.D.Pa.)
(Cite as: 1998 WL 151806 (E.D.Pa.))

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Only the Westlaw citation is currently available.

United States District Court, E.D. Pennsylvania.
ROBERT BILLET PROMOTIONS, INC.
v.
IMI CORNELIUS, INC., et al.

Civ. A. No. 95–1376.
April 1, 1998.

MEMORANDUM AND ORDER

HERBERT J. HUTTON, J.

***1** Presently before the Court are the Defendants' Motion in Limine to Preclude the Testimony of Charles S. Lunden as Plaintiff's Expert on Damages (Docket No. 55), the Plaintiff's Response, and the Defendants' Supplemental Memorandum of Law. For the reasons that follow, the Defendant's Motion is granted in part and denied in part.

I. *BACKGROUND*

The Plaintiff, Robert Billet Promotions, Inc. ("RBP"), intends to offer an accountant, Charles S. Lunden, as a damages expert in support of its breach of contract claim. Lunden proposes to testify to the amount of direct and consequential damages RBP incurred as a consequence of the Defendants' alleged breach. The Defendants, IMI Cornelius, Inc. ("Cornelius") and Remcor Products, Inc. ("Remcor"), have moved *in limine* to exclude Lunden's testimony as based entirely on conjecture and speculation. The Court held a voir dire hearing on the matter at 9:45 a.m., on the morning of March 31, 1998.

II. *DISCUSSION*

Federal Rule of Evidence 702 governs the admission of expert testimony in federal court. Rule 702 provides:

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

The Rule has three major requirements: (1) the proffered witness must be a qualified expert; (2) the expert must testify about matters requiring scientific, technical, or specialized knowledge; and (3) the expert's testimony must "fit" the facts of the case. *See Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 806 (3d Cir.1997) (citing *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 741–42 (3d Cir.1994)). A Rule 702 determination is a preliminary question of law for the Court, under Federal Rule of Evidence 104(a). *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

Under the Supreme Court's *Daubert* decision, the Court assumes a "gatekeeping" function to protect against the admission of expert testimony that is unreliable or unhelpful to the trier of fact. *See id.* at 592–95; *United States v. Velasquez*, 64 F.3d 844, 850 (3d Cir.1995). "This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592–93. Although the Supreme Court first announced this approach in the context of scientific testimony, *see id* at 590 n. 8, federal courts subsequently have extended it—albeit in a more generalized form—to the evaluation of "technical" forms of expert knowledge. *See, e.g., Tyus v. Urban Search Mgt.*, 102 F.3d 256, 263 (7th Cir.1997) (applying *Daubert* to social science testimony); *Velasquez*, 64 F.3d at 850 (handwriting expert); *Stecyk v. Bell Helicopter Textron, Inc.*, 1998 WL 42302, *1–2 (E.D.Pa. January 5, 1998) (engineering experts); *Lithuanian Commerce Corp. v. Sara Lee Hosiery*, ––F. R.D. ––––, 687 So.2d 1310, 1997 WL 75706, *5 (D.N.J. December 4, 1997) (accountant offered as damages expert). Accordingly, the Court will apply *Daubert* in evaluating the admissibility of Lunden's damages testi-

mony. FN1

FN1. Although an accountant's damages testimony is perhaps even less "scientific" than an engineer's or handwriting analyst's, the Court is obliged to employ the *Daubert* approach in "an exercise of caution." *Velasquez,* 64 F.3d at 850.

***2** Returning to Rule 702, the Rule's first requirement is that the expert be qualified to testify. *See Paoli,* 35 F.3d at 741. The Third Circuit has interpreted this standard liberally, and has "eschewed imposing overly rigorous requirements of expertise." *Id.* A broad range of knowledge, skills and training can qualify an expert as such, and the Court may not exclude proffered testimony merely because it believes a higher degree of expertise would be appropriate. *See id.; Hammond v. International Harvester Co.,* 691 F.2d 646, 652–53 (3d Cir.1982); *Stecyk,* 1998 WL 42302, *2.

The Rule's second requirement is that the expert testimony be reliable. *See Kannankeril,* 128 F.3d at 806. "*Daubert* explains that the language of Rule 702 requiring the expert to testify to *scientific knowledge* means that the expert's opinion must be based on the 'methods and procedures of science' rather than on 'subjective belief or unsupported speculation'; the expert must have 'good grounds' for his or her belief." *Paoli,* 35 F.3d at 742 (emphasis in original). In the context of scientific testimony, a court must consider the scientific validity of the method in dispute, with reference to the factors announced in *Daubert,* 509 U.S. at 593–95, and in *United States v. Downing,* 753 F.2d 1224, 1238–39 (3d Cir.1985). *See Paoli,* 35 F.3d at 742. These factors include:

> (1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the techniques's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; and (8) the non-judicial uses to which the method has been put.
>
> *Kannankeril,* 128 F.3d at 807 n. 6.

Of course, these factors were designed to test the reliability of *scientific* methods of proof. In the context of more technical testimony, like the validity of an accountant's assessment of contractual damages, the *Daubert* approach must be applied in a more general manner. *See Tyus,* 102 F.3d at 263. *See generally* 29 Charles A. Wright & Victor J. Gold, Federal Practice and Procedure: Evidence § 6266 nn. 62–63 (1997) (noting areas in which courts have extended and refused to extend the *Daubert* analysis). Therefore, the Court must consider the above factors—to the extent they are applicable—in an effort to determine whether Lunden's opinion is based on "good grounds," with an emphasis on the process employed rather than the conclusions reached. *See Kannankeril,* 128 F.3d at 806; *Paoli,* 35 F.3d at 742.FN2

FN2. However, the Court must not be overly concerned with reliability where expert testimony will truly help a jury. "[T]he reliability requirement must not be used as a tool by which the court excludes all questionably reliable evidence. The ultimate touchstone [of admissibility] is helpfulness to the trier of fact." *Velasquez,* 64 F.3d at 849–50.

***3** Finally, Rule 702's third requirement is that the testimony must "fit" under the facts of the case. *See Velasquez,* 64 F.3d at 850. This means that the expert's testimony must actually assist the jury, by providing it with relevant information, necessary to a reasoned decision of the case. *See Paoli,* 35 F.3d at 743.

A. *Qualifications*

Turning to the present question of admissibility, the Court must first consider Lunden's qualific-

ations as a damages expert.

At voir dire, the Court learned that Lunden is a 1980 graduate of University of Pennsylvania's Wharton School of Business, with a B.S. in economics. Lunden has sixteen years experience as a certified public accountant in the Commonwealth of Pennsylvania, and has acquired a number of professional designations in that capacity, including sponsorship by the American Institute of Certified Public Accountants and accreditation as an expert in business valuations, management accounting, fraud examining and life insurance underwriting. In the course of his continuing professional training as an accountant, Lunden has attended at least six annual conferences on the calculation of damages in civil litigation. At one of these conferences, Lunden presented a speech on the computation of damages in a commercial setting. Finally, Lunden has appeared as a damages expert in previous litigation before the Honorable Eduardo C. Robreno of this Court. In that case, Lunden computed profits a business claimed to have lost when an employee left with some of its customers. Given the above, and the Third Circuit's liberal qualification standards, the Court has no difficulty finding that Lunden is qualified to testify as an expert on damages. *See Paoli,* 35 F.3d at 741.

B. *Reliability*

Under Rule 702's reliability prong, the Court must inquire into Lunden's methodology. Lunden testified that in preparing his damages report he interviewed Robert Billet, and reviewed documents produced in the course of this litigation, beverage industry documents, the treatise Dunn on Damages, and accounting rules for measuring damages to a new venture. For direct damages, Lunden constructed a model that would arrive at a figure of loss per Drink Tank unit. For consequential damages, Lunden estimated the potential promotions market, and projected the number and value of promotion opportunities lost as a consequence of the alleged breach.

In general, the Court is satisfied that Lunden has applied an appropriate methodology, upon which businessmen and accountants would rely in the ordinary course of their trades. There are, however, some aspects of Lunden's proffered testimony that give the Court pause. First, Lunden has based his calculations on the July 21 draft, a document that the Plaintiff has already conceded to be an unenforceable draft agreement. The Court will indulge Lunden's use of this document, however, because the Plaintiff's litigation position is that the parties' oral contract contains substantially the same terms as those enumerated in the July 21 draft.

***4** Lunden's second major assumption is that, under the terms of the July 21 draft, Cornelius would have renewed the agreement for a second term. Nothing in the text of the unenforceable draft agreement suggests an obligation to do so. At voir dire, however, Lunden represented that the text Dunn on Damages allows a damage assessor to make this assumption under the financial circumstances present in this case. As an expert, Lunden is entitled to rely on the Dunn treatise, if reasonably relied upon by experts in his field in the ordinary course of business. *See* Fed.R.Evid. 703. Therefore, the Court will defer to Lunden on this point and permit the testimony.

The most serious flaw in Lunden's methodology is his assumption of the number of Drink Tank units to be sold under the contract. Although the Court accepts Lunden's method of computing loss per unit, it finds his method of arriving at units sold to be unacceptably speculative for the purpose of direct damages. Assuming, as Mr. Lunden has, that the July 21 draft reflects the terms of an enforceable oral agreement, the number of units for which Cornelius has *committed itself* cannot possibly exceed 3,750—1,250 for the first term and 2,500 for the second term. Lunden, however, intends to testify that the parties expected to sell 8,000 units in the course of the contract period. He derived this figure from Cornelius' business justification documents, internal financial projections through which Cornelius determined that a relationship with the

Plaintiff might be worth pursuing. These documents, however, are not alleged to have been part of the contract. Although they may reflect in fact the number of units that might have been sold, they are irrelevant to the parties' contractual obligations under the alleged agreement. Assuming that the July 21 draft does reflect the terms of an enforceable contract, the greatest production obligation Cornelius undertook was for the 3,750 units that appear within the four corners of the agreement.

In voir dire, Lunden acknowledged as much. Although he dismissed the numbers that actually appear as "floor" figures, these figures represent the limit of Cornelius' potential contractual obligation. If the parties did indeed reach a bargain, they quite deliberately used these floor figures to protect Cornelius against the risk that the Drink Tank would be a dud. Given these "floor" figures—the only hard numbers to which the parties could have agreed—the Court finds that Lunden's reliance on Cornelius' extra-contractual business justification documents to arrive at the number of units sold was methodologically unsound. *See Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 568 (D.C.Cir.1993) (damage expert excluded due to wholly speculative assumptions about the decedent's future business plans and their potential for success); *Boyar v. Korean Airlines Co.*, 954 F.Supp. 4, 9 (D.D.C.1996) (noting line of cases excluding expert testimony that is "plainly contradicted by the evidence"); *Nakajima v. General Motors Corp.*, 857 F.Supp. 100, 105 (D.D.C.1994) (excluding expert's testimony grounded on counterfactual assumption that the plaintiff would earn future income in United States rather than Japan). Therefore, the Court finds this particular aspect of the proffered testimony unreliable. However, it would be unduly harsh to exclude the whole of Lunden's expert testimony on this basis. Accordingly, the Court will permit Lunden to testify as to direct damages based on a maximum of 3,750 units sold.

***5** The fourth, and last, significant flaw in Lunden's proffered testimony lies in his computation of consequential damages. Although Lunden consulted a number of industry sources to arrive at the potential market for the Plaintiff's promotion and vending services, he ultimately relies on discussions he had with Robert Billet. Although the Defendants argue that Lunden's assumptions in reaching these figures are also speculative, and that Lunden is merely "parroting the Plaintiff's claimed damages," (Def.'s Supp. Mem. of Law at 2), the Court finds that they are sufficiently straight-forward that the proper remedy is in cross-examination rather than exclusion. *See Diaz v. Delchamps, Inc.*, 1998 WL 57068, *3 (E.D.La. February 9, 1998); *Boyar*, 954 F.Supp. at 9. Accordingly, Lunden's testimony as to consequential damages will be admitted.

C. *Fit*

The final Rule 702 criterion is fit. The Court has no difficulty concluding that Lunden's proffered testimony will assist the jury in determining the amount of damages, if any, that the Plaintiff incurred as a consequence of the alleged breach of contract.

III. *CONCLUSION*

In sum, the Court finds that Lunden should be admitted to testify as an expert as to the Plaintiff's alleged breach of contract damages. However, Lunden may not offer direct damage computations based on a number of units in excess of 3,750, the greatest number that may be derived from the July 21 draft. In all other respects, Lunden may testify as proffered.

An appropriate Order follows.

ORDER

AND NOW, this 1st day of April, 1998, upon consideration of the Defendants' Motion in Limine to Preclude the Testimony of Charles S. Lunden as Plaintiff's Expert on Damages, the Plaintiff's Response, and the Defendants' Supplemental Memorandum of Law, IT IS HEREBY ORDERED that the Motion is GRANTED in part and DENIED in part.

IT IS FURTHER ORDERED that the expert witness shall be precluded from testifying to direct damages based on a number of units sold in excess of 3,750.

E.D.Pa.,1998.
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