

IN THE UNITED STATES DISTRICT COURT FOR THE  
 DISTRICT OF NEBRASKA

|                         |   |                    |
|-------------------------|---|--------------------|
| KAAPA ETHANOL, LLC,     | ) |                    |
|                         | ) |                    |
| Plaintiff,              | ) | 7:05CV5010         |
|                         | ) |                    |
| v.                      | ) |                    |
|                         | ) |                    |
| AFFILIATED FM INSURANCE | ) | MEMORANDUM OPINION |
| COMPANY,                | ) |                    |
|                         | ) |                    |
| Defendant.              | ) |                    |
| _____                   | ) |                    |

This matter is before the Court for entry of judgment, Affiliated FM's renewed motion for judgment as a matter of law or, in the alternative, for a new trial (Filing No. [405](#)), Affiliated FM's motion requesting reduction of recoverable mitigation costs or, in the alternative, ownership of KAAPA's extra tank (Filing No. [408](#)), and other various pending matters.

**BACKGROUND**

After a nine-day jury trial, the jury returned a verdict in favor of the plaintiff. The jury awarded plaintiff damages in the amount of \$3,981,471.20 for property damage and \$1,796,569.00 for mitigation expenses. The Court now enters judgment in favor of the plaintiff on the jury verdict, except as modified below.

## DISCUSSION

### **I. Affiliated FM's renewed motion for judgment as a matter of law (renewed) or, in the alternative, for a new trial (Filing No. [405](#))**

The Court has reviewed defendant's motion (Filing No. [405](#)), defendant's brief and index in support of the motion (Filing Nos. [406](#), [407](#)), plaintiff's brief and index in opposition (Filing Nos. [415](#), [416](#)), and defendant's reply brief and supplemental index (Filing Nos. [434](#), [435](#)). Upon review, the Court finds defendant's renewed motion for judgment as a matter of law or, in the alternative, for a new trial should be denied.

### **II. Affiliated FM's motion requesting reduction of recoverable mitigation costs or, in the alternative, ownership of KAAPA's extra tank (Filing No. [408](#))**

Affiliated FM requests that if its motion for judgment as a matter of law is denied, the Court reduce the amount the jury awarded as mitigation costs to \$179,656.90, or in the alternative, grant Affiliated FM ownership of the extra fermentation tank KAAPA built in 2006.

#### **Background**

The jury awarded KAAPA "mitigation expenses" in the amount of \$1,796,569. This is the exact amount stipulated by the parties as the amount expended by KAAPA to construct an additional fermentation tank in 2006. The parties stipulated that the amount KAAPA is entitled to recover for the additional fermentation tank or whether KAAPA is entitled to keep the tank were issues for the Court's determination (Filing No. [354](#)).

Accordingly, the jury's award of mitigation expenses is advisory to the Court.

Because KAAPA has retained the additional fermentation tank in the post-repair period, Affiliated FM contends the amount KAAPA can recover for the additional fermentation tank as "mitigation costs" must be reduced by the substantial value of the tank remaining after repairs were completed. Stated another way, Affiliated FM contends that KAAPA's "mitigation costs" must be limited to the tank's value during the period of time KAAPA used the tank to mitigate its business income losses in 2006-2007. The Court agrees.

### **Discussion**

The cost of the additional fermentation tank represents an additional expense KAAPA incurred to avoid covered business income losses during the 2006-2007 repairs. While KAAPA is entitled to recover this expense in part, it cannot be put in a better position than it would have been if it did not conduct the repairs. See *Omaha Paper Stock Co. v. Harbor Ins. Co.*, 596 F.2d 283, 288 (8th Cir. 1979) ("Business interruption insurance generally puts the insured into the monetary position it would have been in but for the interruption of its business.") In this case, the additional tank KAAPA constructed retains substantial value in the post-repair period, and therefore, the jury's award of "mitigation expenses" must be reduced to account for that value.

Viewing the record very favorably to KAAPA, the useful life of a tank like the one constructed by KAAPA is 20 years, and KAAPA used the tank for a maximum period of two years to avoid business income loss while it conducted repairs.<sup>1</sup> It is appropriate to award KAAPA an amount equal to the value of the tank during the repair period. Affiliated FM's suggested method of calculating the tank's value during the repair period is reasonable. Because the repair period lasted for 10% of the useful life of the tank, KAAPA is entitled to recover 10% of the cost of the tank or \$179,656.90.

Accordingly, Affiliated FM's motion requesting reduction of recoverable mitigation costs will be granted. The jury's award of "mitigation expenses" will be reduced to \$179,656.90.

### **III. Other pending matters**

The stipulations contained in Filing Nos. [352](#) and [354](#) are adopted. The objections contained in Filing Nos. [368](#), [369](#), [372](#), and [375](#) will be denied as moot.

Plaintiff has filed a motion for attorney fees and prejudgment interest pursuant to Nebraska law (Filing No. [401](#)). Pursuant to the Court's phone conference with the parties on Wednesday, March 17, 2010, plaintiff shall file all unredacted

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<sup>1</sup> Affiliated FM proposed using these particular numbers in its motion.

billing statements that support its claim for attorney fees on or before April 9, 2010. Plaintiff may file such statements under seal. Defendant shall have until May 3, 2010, to respond to plaintiff's additional materials.

A separate order and judgment will be entered in accordance with this memorandum opinion.

DATED this 25th day of March, 2010.

BY THE COURT:

/s/ Lyle E. Strom

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LYLE E. STROM, Senior Judge  
United States District Court