



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, )  
)  
v. )  
)  
CARESTREAM HEALTH, INC., )  
a Delaware Corporation, )  
)  
Defendant. )

C.A. No. 07C-11-242 PLA

**Submitted: March 18, 2010**

**Decided: April 21, 2010**

UPON DEFENDANT'S MOTION FOR A NEW TRIAL  
**DENIED**  
UPON PLAINTIFF'S APPLICATION FOR  
ATTORNEYS' FEES AND EXPENSES  
**GRANTED**

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**ABLEMAN, JUDGE**

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## **I. Introduction**

At first glance, this case would appear to be a relatively straightforward breach of contract claim complicated only by its technical terminology. Defendant Carestream Health, Inc. (“Carestream”) produces X-ray and other medical imaging films using a polymer resin called polyethylene terephthalate, or PET. In 2007, the parties entered into a contract under which Carestream was obligated to purchase a significant portion of its requirements for PET resin pellets from Plaintiff M&G Polymers USA, LLC (“M&G”). Carestream failed to meet its ordering obligations under this requirements contract, and M&G filed suit. Carestream has offered several explanations for its refusal to purchase from M&G, including claims that it decided to make a strategic shift to using a powder material in lieu of M&G’s pellets and that M&G’s resin did not work reliably in its manufacturing machinery. M&G maintained that its resin fully complied with the requirements of the contract and that Carestream decided to break the contract because it received a lower-priced offer from another PET supplier.

After extensive pretrial motion practice and a three-week jury trial that resulted in a \$15.5 million verdict in M&G’s favor, this “straightforward” case has been transformed into an object lesson in the convoluting effects of a litigant’s failures to interact in a timely, conscientious, and forthright manner with the opposition. In the final days of trial, this Court found itself in the highly unusual

position of ordering Carestream to produce documents that had not been disclosed during pretrial discovery and of permitting M&G to recall Carestream's final witness to cross-examine him regarding their content. The Court's order was prompted by the mid-trial revelations that Carestream had not identified during discovery certain redactions made on privilege grounds, and that at least one Carestream employee had failed to turn over clearly relevant documents to Carestream's trial counsel during discovery. These late-produced documents undermined Carestream's already tenuous defenses and indicated that certain Carestream witnesses may have offered misleading or false testimony regarding the litigated events.

Carestream has now filed a Motion for a New Trial arguing that the Court's order requiring production of the documents—some of which might have been properly withheld had Carestream timely and properly asserted privilege over them—was a draconian sanction for what Carestream characterizes as wholly inadvertent discovery missteps. Carestream's motion also challenges the viability of M&G's claim for lost profits and the Court's exclusion of evidence pertaining to Carestream's brief post-litigation run of the remainder of its inventory of M&G PET product. M&G disputes Carestream's arguments and has applied for an award of certain attorneys' fees and expenses pursuant to Superior Court Civil Rules 16 and 37, as well as the bad faith exception to the American Rule.

For the reasons explored much more fully herein, the Court finds no basis upon which to grant Carestream's Motion for a New Trial. Because Carestream's discovery omissions were not brought to light until the end of the trial, the Court was left with no feasible alternative but to order production of the withheld documents and permit their introduction into evidence in the final day of trial. Furthermore, the Court concludes that M&G was entitled to pursue a direct damages claim measured by its lost profits under § 2-708(2) of New York's version of the Uniform Commercial Code. Finally, the Court finds that evidence of Carestream's post-litigation run of M&G material was inadmissible, as Carestream's employees acknowledged that the run was not conducted under conditions intended or likely to produce stable operation. Whatever minimal probative value the post-litigation run carried was significantly outweighed by the risk of unfair prejudice.

As to M&G's Application for Attorneys' Fees and Expenses, the Court is satisfied that this case merits the highly unusual remedy of fee-shifting. M&G was burdened with significant unnecessary expenses as a result of Carestream's discovery violation and its bad-faith assertion of defenses based upon testimony from Carestream employees misrepresenting the decision-making process that led to Carestream's breach. The Court's in-trial production order was insufficient to remedy the prejudice to M&G arising from Carestream's pre-trial discovery

violations, which kept crucial information from M&G, including clearly relevant and *non-privileged* documents.

Accordingly, Carestream's Motion for a New Trial is **DENIED**. M&G's Application for Attorneys' Fees and Expenses is **GRANTED**.

## **II. Factual & Procedural History**

### **A. Factual Background**

#### **1. The Parties**

Carestream is a medical imaging company headquartered in Rochester, New York. Carestream was formed in 2007, when Eastman Kodak Company ("Kodak") divested its health imaging group. Carestream's operations include a facility in Windsor, Colorado ("the Windsor facility") that produces medical imaging film.

M&G is North America's largest producer of PET resin. M&G's corporate offices are located in Houston, Texas, and its PET is manufactured at a production facility in Apple Grove, West Virginia. M&G's operations also include a research and development facility in Sharon Center, Ohio.

## 2. Negotiation of the Supply Agreement

M&G's chief negotiator for the litigated contract, Mark Adlam, has likened the relationship between the parties to a marriage.<sup>1</sup> Appropriately enough, their short-lived union was preceded by an extended period of wooing.

Kodak, as predecessor to Carestream, made the first overtures in 2005. At the time, Kodak contemplated ending a twenty-year relationship with its film division's PET supplier, Eastman Chemical Company ("ECC" or "Eastman"). ECC provided PET in the form of a powder prepolymer, which had fallen into disfavor in the plastics manufacturing industry. Indeed, ECC ran the sole manufacturing line in the world still devoted to PET prepolymer powder, and its facilities had been built decades earlier, in the bygone powder heyday. The new world standard was pellet-form PET. Moreover, Kodak's relationship with ECC was troubled, and Kodak believed ECC had violated an extracontractual agreement to force a pricing increase on its prepolymer.<sup>2</sup> At the time Kodak was negotiating with M&G, ECC was threatening to cut off supply to the Windsor facility.<sup>3</sup> Modifying its machinery to process PET pellets would serve both to modernize

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<sup>1</sup> Trial Tr., Test. of Mark Adlam, Sept. 9, 2009 (A.M. Session), at 42:1-6.

<sup>2</sup> Ct. Ex. 2 (Dep. Test. of William J. Ross), at 8.

<sup>3</sup> *Id.*

Kodak's operations and to eliminate the business risks associated with reliance on a single and often mercurial supplier.<sup>4</sup>

M&G had some limited history with Kodak, having supplied Kodak with a plastics resin similar to PET for use in making Advantix cameras. This prior experience was apparently positive enough to inspire Kodak to approach M&G about its PET pellet needs for medical and picture film production.<sup>5</sup>

Kodak's Worldwide Purchasing Commodity Manager William Ross contacted M&G in the summer of 2005 to outline Kodak's general strategy and time-line for switching to pellet PET. Kodak provided specifications that the PET resin needed to fulfill for its intended use in film-casting operations. Finding "definite alignment" between its interests and Kodak's plans,<sup>6</sup> M&G agreed to proceed with contract discussions. As M&G's North American Commercial Manager, Adlam served as M&G's chief negotiator. Kodak was represented throughout the negotiations by Ross and Kodak Film Base Raw Materials Manager Kurt Carlson.

Kodak anticipated using M&G's PET pellets to manufacture film at two different locations: the Kodak Park facility in Rochester, New York ("Kodak

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<sup>4</sup> Trial Tr., Test. of Mark Adlam, Sept. 9, 2009 (A.M. Session), at 21:10-22:15; Trial Tr., Test. of Richard Morabito, Sept. 11, 2009 (A.M. Session), at 18:12-21:2.

<sup>5</sup> Trial Tr., Test. of Mark Adlam, Sept. 9, 2009 (A.M. Session), at 20:8-18; Ct. Ex. 5 (Dep. Test. of Kurt Carlson), at 12.

<sup>6</sup> Trial Tr., Test. of Mark Adlam, Sept. 9, 2009 (A.M. Session), at 26:19-22.

Park”), and the Windsor facility (which was then known as “Kodak Colorado”). Late in the negotiations, Kodak apprised M&G that it planned to spin off the Windsor facility into a separate entity, which would eventually become Carestream Health, Inc. Kodak and M&G anticipated that Carestream would succeed to Kodak’s contractual rights and obligations regarding the Windsor facility, where it would produce medical imaging film. To simplify this process, the parties entered into separate supply agreements for Kodak Park (“the Kodak Park Agreement”) and Windsor (“the Supply Agreement”), although the contracts were essentially negotiated as a package deal. M&G was seeking to sell a high volume of PET in exchange for price discounts, which it could only provide based upon the aggregate demand under the two agreements.<sup>7</sup>

As negotiations began in earnest in November 2005, Kodak and M&G hammered out several key points of contention. The topic that most protracted the discussions was volume, as M&G discovered that its potential new partner appeared to be commitment-phobic. In December 2005, Kodak submitted initial draft language to Adlam that would have made its volume purchase estimates “nonbinding” and further disclaimed that “[n]othing in [the] agreement shall be construed as an obligation to purchase any minimum quantity or to purchase

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<sup>7</sup> Ct. Ex. 2 (Dep. Test. of William Ross), at 4.

Kodak's requirements" of PET from M&G.<sup>8</sup> Such an approach was anathema to M&G, which would have to devote considerable time and expense to developing and producing a custom PET resin formula that met Kodak's specifications.<sup>9</sup> Without a firm and significant purchasing commitment from Kodak, there was no point in M&G pursuing a contract. Adlam quickly informed Ross that M&G "needed to have a volume commitment," because the contract was "absolutely meaningless" without one.<sup>10</sup>

Kodak apparently grasped that any arrangement that would bind M&G to supply product while leaving them unfettered by a reciprocal purchasing obligation was untenable. Ross soon responded to Adlam with new language that obligated Kodak to purchase a percentage of its PET requirements from M&G.<sup>11</sup> Adlam felt secure that M&G understood his earlier concerns.<sup>12</sup> From this starting point, the parties continued to work on significant refinements to the language and specific purchase quantities. Ultimately, M&G achieved its goal of obtaining a binding commitment from Kodak to purchase high volumes of PET product over a four-year contract term commencing in January 2007.

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<sup>8</sup> Trial Tr., Test. of Mark Adlam, Sept. 9, 2009 (A.M. Session), at 37:1-11.

<sup>9</sup> *Id.* at 40:10-41:7.

<sup>10</sup> *Id.* at 37:16-22.

<sup>11</sup> *Id.* at 45:1-13.

<sup>12</sup> *Id.* at 42:23-43:1.

As executed, the Supply Agreement required Kodak to purchase, and M&G to reserve capacity to produce, quantities of PET product set forth in Appendix B.<sup>13</sup> The quantity schedule in Appendix B created both a ceiling and a floor for demand for each year of the contract. For 2007, Kodak was required to place minimum purchases amounting to at least its total PET pellet demand up to twenty million pounds, or 90% of its total demand for PET pellets at the Windsor facility, whichever amount was greater.<sup>14</sup> M&G was not obligated to supply requests in excess of a maximum annual volume, which was set at 55 million pounds for the year.

Kodak's 2007 maximum annual volume commitment was to be "pro-rated to the number of full and partial months of the year" that M&G's 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."<sup>15</sup> Kodak's ability to process its PET demand in pellet form was an issue because of its previous reliance on ECC's powdered prepolymer material. Kodak's transition to pellet PET necessitated the installation of large grinders in its Windsor facility. The grinders would process the pellet PET into powder form at the beginning of the production process.

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<sup>13</sup> See JX 7 [hereinafter "Supply Agreement"], § 3.0.

<sup>14</sup> *Id.*, App. B.

<sup>15</sup> *Id.*, App. B.

Grinding equipment had already been installed at Kodak Park, and Kodak sought and won a one-time payment or rebate from M&G of \$600,000 to defray the estimated \$1.6 million cost of installing grinders at Windsor. From M&G's perspective, this concession not only created an added incentive for Kodak to contract with them, but also permitted them to "frame how [they] were going to negotiate" based upon the understanding that Kodak would definitely abandon ECC's line of powder prepolymer.<sup>16</sup>

M&G's concerns about competition from ECC were evident in the negotiation of the Supply Agreement's price and price-adjustment provisions. The parties agreed to a per-pound pricing formula derived from the prevailing market prices for precursor components used in manufacturing the PET pellets.<sup>17</sup> Any changes to the formula were to be agreed upon in writing, and § 5.2 of the Supply Agreement specifically prohibited either party from taking unilateral action regarding price. During negotiations, Kodak proposed a meet-competition clause, which would keep M&G's price competitive. The meet-competition clause would permit Kodak to present an offer from a competing supplier to M&G, which would either have to match the competitor's price or permit Kodak to exit the contract.

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<sup>16</sup> Trial Tr., Test. of Mark Adlam, Sept. 9, 2009 (A.M. Session), at 24:7-12.

<sup>17</sup> See Supply Agreement, § 5.1 & App. C.

M&G was willing to accede to a meet-competition clause in exchange for the opportunity to win and retain the contract, but it had hesitations about Kodak's initial proposal. Kodak's draft language simply stated that Kodak would give M&G two weeks to match an offer from a competitor to supply a comparable product for the remainder of the contract term at a lower price. Nothing in Kodak's proposed language allowed for verification of the competing price offer. Indeed, Kodak's draft did not even require that the offer be presented in writing. M&G once again found Kodak's "loose" draft language troubling.<sup>18</sup>

Moreover, regardless of how the meet-competition clause was worded, M&G feared that it was an open invitation for ECC to undercut M&G's pricing and end their arrangement with Kodak even before it got off the ground. Kodak was apparently the final customer for ECC's last existing line of prepolymer powder. If Kodak abandoned prepolymer powder, ECC would have little option but to shut down the line. Adlam felt that ECC, like a spurned former intimate with no prospect of finding a new beau, "could maybe become desperate to take the business back."<sup>19</sup>

The parties found a solution by compromising. Kodak would receive its meet-competition provision, albeit with more formalized procedures for presenting

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<sup>18</sup> Trial Tr., Test. of Mark Adlam, Sept. 9, 2009 (A.M. Session), at 55:7-16.

<sup>19</sup> *Id.* at 58:11-13

competitive offers. Under § 13.2 of the Supply Agreement, Kodak could present M&G with a competitor’s offer to supply “products of comparable quality, (including the Specifications [set forth in the Supply Agreement]) . . . and on comparable commercial terms.” The terms of the competitive offer had to be prepared by an outside auditor, and had to include volume terms and a duration that matched or exceeded the existing contract, in order to ensure that the offer could be easily and fairly compared to the Supply Agreement. If Kodak presented a “meet-comp” offer in compliance with § 13.2, M&G had two weeks to match the offer terms. If M&G declined, Kodak could cancel the Supply Agreement.<sup>20</sup>

The § 13.2 meet-competition provision was subject to a major limitation that M&G relied upon to protect its interests: it could not be triggered until January 1, 2008.<sup>21</sup> Thus, M&G would have price exclusivity through the 2007 calendar year—which it hoped would be long enough to head off a “desperate” below-market competing bid from ECC.<sup>22</sup> The price exclusivity period was negotiated in exchange for the \$600,000 grinder installation rebate provided by M&G.<sup>23</sup>

While M&G pressed its concerns regarding volume and pricing, Kodak engaged in an internal debate over qualification. As indicated by the language in

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<sup>20</sup> Supply Agreement, § 13.2.

<sup>21</sup> *Id.*

<sup>22</sup> Trial Tr., Test. of Mark Adlam, Sept. 9, 2009 (A.M. Session), at 58:14-15 (“What we felt was having a period of a year, it was a cooling off period.”).

<sup>23</sup> *Id.* at 53:13-21.

Appendix B requiring M&G's resin to be "qualified for use at the site," the parties contemplated both initial qualification criteria that M&G would have to satisfy as a prerequisite to triggering Kodak's purchase obligations, as well as ongoing performance requirements for the resin over the duration of the contract.<sup>24</sup> The dispute over qualification of M&G's PET resin for use at the Windsor facility stemmed from the fact that Kodak did not expect to finish installing the grinding equipment at Windsor until June 2007, several months after the contract term began.<sup>25</sup> Until grinders were operational at Windsor, all of Kodak's PET grinding would be conducted at the Kodak Park facility in Rochester, which would ship ground material to Windsor. Kodak's negotiating team, which was comprised of Kodak Park personnel, therefore agreed that qualification of M&G's pellet PET for *both* contracts would occur on Kodak Park's machines.

At least some personnel at the Windsor facility objected to this decision. Todd Arndorfer, the Department Manager for Polyester Manufacturing at Windsor, e-mailed Kodak's negotiators in December 2006 to suggest that the contract define specific criteria for qualification on Windsor's equipment.<sup>26</sup> Windsor's film-casting apparatus, known as the 501 machine, was similar to the extrusion machinery used at Kodak Park, but not identical. Among other distinctions,

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<sup>24</sup> *See id.* at 65:20-66:3.

<sup>25</sup> Ct. Ex. 2 (Dep. Test. of William Ross), at 19.

<sup>26</sup> Ct. Ex. 3 (Dep. Test. of Todd Arndorfer), at 2.

Windsor's 501 machine was wider than Kodak Park's 305 machine, and it drew melted PET from two plasticators, versus a single plasticator on the 305 machine. Arndorfer felt that the differences between the two facilities' set-ups merited a separate qualification process at Windsor.<sup>27</sup> Accordingly, he proposed a qualification process consisting of three trials that would assess the performance of M&G's pellet PET in Windsor's film-casting process and the quality of the resulting film product.<sup>28</sup>

Carlson rebuffed Arndorfer's input. Discussions had been ongoing for well over a year, and the Kodak negotiators were growing worried that M&G would back out entirely if a contract was not put in place soon. Carlson told Arndorfer that the performance of M&G's PET on the Kodak Park 305 machine would serve as a suitable predictor for its performance on Windsor's 501 machine. The Kodak negotiating team suggested to Arndorfer that Kodak could discuss a Windsor-specific qualification provision after the agreement was executed and eventually seek to amend the Windsor contract.<sup>29</sup> Stung by the negotiators' approach, Arndorfer complained via a mid-December e-mail to two Windsor colleagues that "[William Ross] is biased" to Kodak Park's interests.<sup>30</sup> Arndorfer believed that the

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<sup>27</sup> *Id.* at 7.

<sup>28</sup> *Id.* at 2-3.

<sup>29</sup> *Id.* at 5.

<sup>30</sup> PX 86.

Rochester-based negotiators were “interested in having [Windsor] sign an M&G contract only because it benefited Kodak Park’s price.”<sup>31</sup>

Ultimately, the Supply Agreement was signed without any Windsor-specific definition for how M&G’s PET pellets were to be “qualified for use” under Appendix B. Instead, the Windsor contract addressed qualification by permitting Kodak to cancel the Supply Agreement if M&G’s pellets did not qualify on the machines at Rochester under the Kodak Park Agreement standards.<sup>32</sup> To Adlam, arranging for qualification to occur solely at Kodak Park in Rochester seemed sensible, “because we were going to start supplying Rochester first.”<sup>33</sup>

Although Windsor had no contractual rights pertaining to initial qualification on its own 501 machine, it did retain the right to terminate the Supply Agreement if M&G’s PET resin did not meet certain performance criteria during the life of the contract. Such performance provisions were not typically part of M&G’s contracts. Rather, Adlam usually would “only negotiate for a [product] specification, because that is what we can control.”<sup>34</sup> Nevertheless, Adlam recounted that when it came to the Kodak contract, M&G was “prepared to go

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<sup>31</sup> Ct. Ex. 3 (Dep. Test. of Todd Arndorfer), at 7.

<sup>32</sup> Supply Agreement, § 12.3.

<sup>33</sup> Trial Tr., Test. of Mark Adlam, Sept. 9, 2009 (A.M. Session), at 18:1-3.

<sup>34</sup> *Id.* at 18:10-16.

above and beyond what was necessary to get this business”<sup>35</sup> and willingly participated in crafting performance provisions.

The resulting performance clauses allowed Kodak to terminate the contract if running M&G’s PET on the 501 machine required frequent intervention from personnel to address either of two types of process upsets. The first possible basis for termination was the appearance of die flow lines, a type of defect formed on the surface of the film as it is extruded through the die, which would have rendered it unsalable.<sup>36</sup> The second was unusually frequent filter changes on the 501 machine, defined as a “filter change throughput event,” which would signal that M&G’s product was not running efficiently.<sup>37</sup> Consistent with M&G’s approach in requiring concrete and verifiable criteria for termination, both provisions precisely detail the performance levels that could trigger termination. Neither performance/termination clause has ever been invoked by either Kodak or Carestream.

The Kodak Park and Windsor contracts were both executed on January 10, 2007. Although they shared a common origin, the two agreements proceeded along very different paths following Kodak’s divestiture of Carestream. M&G’s

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<sup>35</sup> *Id.* at 28:23-29:1.

<sup>36</sup> *See* Trial Tr., Test. of Ralph Olney, Sept. 15, 2009 (P.M. Session), at 111:5-21.

<sup>37</sup> Supply Agreement, §§ 12.1, 12.2; Trial Tr., Test. of Mark Adlam, Sept. 9, 2009 (A.M. Session), at 70:7-71:11.

PET pellets were accredited for use at Kodak Park in Rochester, and the Kodak Park Agreement formed the basis for what has, by all accounts, been a positive ongoing relationship between M&G and Kodak. After Carestream assumed the Windsor Supply Agreement, M&G quickly learned that things would not go so smoothly in Colorado. Within a few months, the provisions that had required the most effort to craft—firm purchasing commitments, the one-year period of price exclusivity, the clear meet-competition clause that permitted independent verification of outside offers, and the plan to qualify M&G’s product in Rochester while providing Windsor with rights pertaining to ongoing performance on its own machinery—would each be undermined as Carestream sought to exit the Supply Agreement in less time than it had taken to negotiate.

### 3. The Windsor Accreditation Process

After the contracts were signed, M&G anticipated a waiting period before it would receive orders from Windsor. The Windsor facility became a part of Carestream when Kodak completed the Carestream divestiture in May 2007.<sup>38</sup> As the Supply Agreement provided, Carestream would not place orders until its grinders became operational so as to trigger Carestream’s purchase obligation, which was expected to occur in early summer. In the meantime, M&G began

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<sup>38</sup> Trial Tr., Test. of Richard Morabito, Sept. 11, 2009 (A.M. Session), at 16:7-17.

supplying PET resin to Kodak Park for qualification. Kodak Park provided Carestream with shipments of M&G PET that had been ground in Rochester, so that internal trials of the M&G product could begin at Windsor.

Carestream's trials were part of the company's materials accreditation process, which is undertaken whenever a change is made in how Carestream manufactures its products.<sup>39</sup> An accreditation plan includes two stages. First, Carestream conducts a product trial to ensure that the change does not adversely affect the completed film. Second, Carestream runs multiple process trials to determine whether any issues arise in its manufacturing process as a result of the modification.<sup>40</sup>

Accreditation of M&G's pellet PET began with a product trial in January 2007. Carestream used ground M&G resin to create film and then artificially aged it to simulate real-world conditions. The results were positive, which meant that the M&G resin could create film that Carestream "would feel comfortable releasing . . . for sale."<sup>41</sup> Accordingly, Carestream planned to proceed with process trials.

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<sup>39</sup> Trial Tr., Test. of Debra Stith, Sept. 18, 2009 (P.M. Session), at 14:14-23.

<sup>40</sup> Trial Tr., Test. of Debra Stith, Sept. 21, 2009 (A.M. Session), at 8:5-9:14.

<sup>41</sup> *Id.* at 9:17-10:4.

Carestream spoke with M&G representatives in late March and early April 2007 to relay their volume requirements for material to run the process trials.<sup>42</sup> During these discussions, Arndorfer outlined Carestream's accreditation plan to Adlam. Arndorfer explained that, following the successful one-day process trial in January, Carestream planned to hold one-day, three-day, and seven-day process trials using M&G's product, followed by two separate three-week runs in the lead-up to full conversion to M&G's pellets. In addition, Carestream would conduct a two-day trial of the grinders after they were installed.<sup>43</sup>

This first process trial, conducted in the last week of May 2007, was terminated short of its three-day goal when the 501 machine began experiencing a problem known as plasticator instability. Plasticator instability refers to unacceptable variations in the flow of melted PET through the plasticator. An unstable flow of melted material at this point in the process can lead to variations in product thickness when it is extruded into a sheet.<sup>44</sup> Because thickness affects how film is developed and read, the variations associated with plasticator instability can render the resulting product unusable.<sup>45</sup>

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<sup>42</sup> Trial Tr., Test. of Todd Arndorfer, Sept. 21, 2009 (A.M. Session), at 136:8-137:21.

<sup>43</sup> *Id.* at 137:13-21.

<sup>44</sup> Trial Tr., Test. of Alan Bopp, Sept. 16, 2009 (P.M. Session), at 10:5-21.

<sup>45</sup> Trial Tr., Test. of Alan Bopp, Sept. 16, 2009 (A.M. Session), at 118:2-119:15.

#### 4. The Extrusion Process and Plasticator Instability

Understanding how the parties addressed this process problem requires a basic awareness of the operation of Carestream's extrusion machinery, which transforms PET resin into continuous rolls of imaging film. The basic principle of extrusion is familiar to anyone who has watched a Play-Doh press or pasta-making apparatus in action: a malleable material is forced through an aperture, which creates an outflow with a particular, uniform shape.

Suppliers ship PET resin or prepolymer in railcars to Carestream, which consumes approximately one million pounds of resin per week.<sup>46</sup> At the outset of the process, raw materials—consisting primarily of PET resin, along with blue dye pellets and edging scraps collected from the manufacturing process for reuse—are conveyed into a section of the machine called the powder feed. As this name suggests, the material is solid at this point, and it must be transformed into a liquid. This task occurs in a plasticator, which is essentially a giant, motorized steel screw that turns within a long barrel. From the powder feed, PET is fed into the narrow space between the screw and the barrel of the plasticator. As the PET is conveyed through the plasticator, it is heated to temperatures in excess of 500 degrees Fahrenheit, whereupon it melts into a liquid plastic. This liquid is degassed to

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<sup>46</sup> Trial Tr., Test. of Mark Adlam, Sept. 9, 2009 (A.M. Session), at 106:16-22.

remove any air bubbles and pressurized so that an even flow of material can be pumped into the next section of the extrusion machinery.<sup>47</sup>

The plasticator is divided into several zones that operate at different temperatures to accomplish the different functions required of the plasticator, from conveyance of unmelted powder as it first enters the screw through the pumping of pressurized liquid plastic into the next section of the machine. A computer-controlled heating and cooling system sets the temperature for each zone. The temperature controls are part of a complex computerized system that monitors and regulates numerous conditions within the 501 machine. Carestream personnel can input operational adjustments from several stations located in the building that houses the equipment.<sup>48</sup>

The plasticator instability observed during Carestream's trials began in the first part of the plasticator when the ground PET stopped advancing properly through the powder feed. A lack of material moving along the screw decreases the normal friction created in the plasticator, which, in turn, leads to a drop in temperature and pressure. This change in conditions triggers the 501 machine's computer control system to increase the speed of the screw's rotation, which should increase the amount of material moving through the plasticator. Instability

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<sup>47</sup> Trial Tr., Test. of Alan Bopp, Sept. 16, 2009 (A.M. Session), at 110:19-112:9.

<sup>48</sup> *Id.* at 116:5-118:6.

arises because the higher speed tends to result in an overcorrection: powder starts entering the system again, but the increased screw speed begins pulling too much material instead, increasing pressure along the plasticator screw and triggering the computer to slow the screw's speed. The decrease in screw speed causes PET to stop advancing in the powder feed, thereby restarting the original problem. The system perpetuates a feedback loop of increasing and decreasing flow through the plasticator, resulting in thickness variations in the extruded film.<sup>49</sup>

## 5. The May Process Trial

Carestream first experienced plasticator instability using M&G's resin midway into the May 2007 process trial. The first day of the trial ran smoothly. At about ten o'clock on the second night, one of the machine's two plasticators became unstable. Alan Bopp, Carestream's 501 Machine Process Engineer, went into the plant to oversee attempts to settle the system.<sup>50</sup>

Bopp tried several solutions. Because all reuse material from the manufacturing process was being directed to the plasticator that was experiencing instability, Bopp shifted the entire flow of reuse material to the other plasticator.

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<sup>49</sup> Trial Tr., Test. of Alan Bopp, Sept. 16, 2009 (P.M. Session), at 13:7-14:21.

<sup>50</sup> *Id.* at 15:11-17.

This stopped the problems in the first plasticator, but the instability followed the reuse material to the other plasticator.<sup>51</sup>

Next, Bopp raised temperatures in the screw of the unstable plasticator, which ordinarily eases the conveyance of powder. When that adjustment failed to eliminate the instability, Bopp diverted all reuse to a silo so that the plasticators were fed only fresh material. This final change fixed the instability.<sup>52</sup>

At a scheduled production meeting in the morning, Arndorfer decided to terminate the trial.<sup>53</sup> Because the instability that had occurred the previous night was serious enough to make the film unusable, Carestream's technical team did not want to run more M&G resin until it had a plan to address the instability. Removing any direct reuse from the materials mix was not a viable long-term operating condition. The materials mix fed into the 501 machine usually included approximately 10.5% direct reuse. Without the ability to recycle edging in this way, "raw material costs would go up almost that much."<sup>54</sup>

Carestream's technical team reviewed data from the suspended trial but was at a loss to explain the instability, especially given that the system had run smoothly for the first half of the trial. It was possible that the instability had been

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<sup>51</sup> *Id.* at 15:20-16:10.

<sup>52</sup> *Id.* at 16:11-21.

<sup>53</sup> *Id.* at 32:4-9.

<sup>54</sup> *Id.* at 17:10-13.

an isolated anomaly that would not reappear. Carestream therefore decided to continue to the next process trial without significantly altering the 501 machine's operating conditions. Carestream's only concession to the instability issue would be to keep reuse split evenly between the two plasticators during the second process trial—which was, in fact, the normal operating condition, even though all reuse had been sent to a single plasticator during the May trial.<sup>55</sup>

Two weeks after the May trial, M&G research chemist Doug Callander heard indirectly, during a conference with a Kodak representative, that Carestream was experiencing feed problems during trials, and that the problems were believed to be “plasticator related.” When Adlam learned of this information, he questioned whether M&G should offer assistance, but Callander informed him that the situation appeared to be in hand, with Kodak personnel offering support to Carestream both on-site in Windsor and by running experiments on similar plasticators at Rochester. Adlam understood the description of a “plasticator related” problem to suggest that the instability stemmed from a problem with the 501 machine, not with M&G's resin.<sup>56</sup> Carestream did not immediately contact M&G regarding problems with the May trial.

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<sup>55</sup> *Id.* at 33:8-34:7.

<sup>56</sup> Trial Tr., Test. of Mark Adlam, Sept. 9, 2009 (A.M. Session), at 99:5-101:10.

## 6. The June Process Trial

The second process trial ran on June 19 and 20, 2007. After about a day, instability recurred in one of the screws, in the same section that had been affected during the May trial. Bopp again experimented with increasing screw temperatures, but to no avail. Switching all direct reuse material to the stable screw ended the instability and allowed the trial to run to completion, but Carestream was dissatisfied with its inability to understand why the instability was occurring or how it could be prevented.<sup>57</sup>

On June 27, one week after this trial, Adlam received a phone call from Mark Malvaso, Carestream's worldwide commodity manager. When Malvaso indicated that Carestream was having problems with its accreditation of M&G's product, Adlam immediately offered technical support. Via an e-mail sent the next day, Malvaso thanked Adlam and the M&G team "for the great support you are providing on our accreditation issues."<sup>58</sup> Malvaso outlined plans for Carestream to send samples of material produced during the trial to Doug Callander at M&G for analysis, which the parties would review, along with any recommendations, the following week. M&G planned to send its technical services head, Mauro Fenoglio, to the Windsor facility. Malvaso also promised to contact Adlam about

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<sup>57</sup> Trial Tr., Test. of Alan Bopp, Sept. 16, 2009 (P.M. Session), at 37:9-39:11.

<sup>58</sup> JX 39.

the next available date for a further trial. The e-mail concluded with a formal notification that M&G should delay manufacturing product for Carestream's first large-scale production order, which would have been for 3 million pounds of resin, "until we have satisfactory findings and results."<sup>59</sup>

Fenoglio visited Carestream on July 5. Fenoglio's visit offered an opportunity for M&G to help Carestream troubleshoot and to gather information. The latter aim was necessary because Carestream's reports of plasticator trouble had included scant data from the trial. All that M&G knew at the time was that its product was working at Kodak Park, but not on similar equipment in Carestream's Windsor facility. M&G therefore adopted the working assumption that Carestream's plasticator problems were either a "machine issue" or a matter of "tuning in" the 501 machine to M&G's resin, which M&G anticipated would require different operational settings from the ECC prepolymer powder that Windsor facility personnel had been accustomed to running for years.<sup>60</sup>

During his time in Colorado, Fenoglio met with Bopp and other Carestream technical personnel to review data and develop recommendations for future trials. Fenoglio agreed that the problem was properly identified as plasticator instability. He suggested that Carestream experiment with even more aggressive screw

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<sup>59</sup> *Id.*

<sup>60</sup> Trial Tr., Test. of Mark Adlam, Sept. 9, 2009 (A.M. Session), at 111:2-13.

temperature increases than had been tried during the previous runs.<sup>61</sup> Carestream provided Fenoglio with samples from the failed trials so that M&G's research scientists could begin analyzing the issue.<sup>62</sup> M&G offered to continue providing technical support to get the resin running successfully, and the parties agreed that M&G personnel would assist Carestream's technical team in an extended experimental run to occur at the end of July.

Even before the joint experiment, however, Alan Bopp made progress by excluding one popular theory for ending the instability. A brief, eight-hour run of M&G resin was to occur on July 13 as part of a separate accreditation process for the newly-installed grinding equipment. Bopp decided to "hijack" a portion of this run because it offered a rare opportunity to deliberately "mess the machine up" by testing extreme settings without disrupting normal production. Bopp wanted to try running M&G resin at the higher screw temperatures that he and Fenoglio had discussed. Bopp was uncertain whether the plasticators would even function at the new temperature ranges, but he believed that "if we were going to have the plasticators fail, it was a good time."<sup>63</sup>

And fail they did. The aggressive temperature exacerbated the instability. But this instability was valuable feedback for Bopp, who "wanted to find out for

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<sup>61</sup> Trial Tr., Test. of Alan Bopp, Sept. 16, 2009 (P.M. Session), at 41:8-14.

<sup>62</sup> Trial Tr., Test. of Mark Adlam, Sept. 9, 2009 (A.M. Session), at 113:8-13.

<sup>63</sup> Trial Tr., Test. of Alan Bopp, Sept. 16, 2009 (P.M. Session), at 42:16-43:23.

once and all, whether raising temperatures was really going to help.”<sup>64</sup> Going forward, Bopp knew a new approach would be required. Eventually, the joint team’s plans grew to include experimenting with lower plasticator temperatures instead.

## 7. A Sudden Crisis

As technical teams from both M&G and Carestream worked collaboratively on possible solutions to the plasticator issue in advance of the joint experiment, the parties’ commercial relationship began to deteriorate. On the morning of Fenoglio’s visit, Mark Adlam had a conference call with Mark Malvaso and Todd Arndorfer. They discussed Fenoglio’s visit and Carestream’s decision to postpone the next accreditation trial.

Then, the tone of the conversation shifted when Malvaso announced that Carestream was “losing confidence” in M&G and its product. Carestream was under time pressure, Malvaso explained, and his management was directing him to “protect our business.”<sup>65</sup>

Adlam’s immediate reaction was to remind Malvaso and Arndorfer that Carestream had a contract with M&G. M&G had been successful in getting its

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<sup>64</sup> *Id.* at 43:12-44:6.

<sup>65</sup> JX 43; Trial Tr., Test. of Mark Adlam, Sept. 9, 2009 (A.M. Session), at 111:23-112:8.

material running at Kodak Park after some early technical hiccups, and Adlam expressed confidence that they could accomplish the same result at Windsor—provided they were given a fair chance to do so. After the effort M&G had invested in building a relationship with Kodak, and now Carestream, they were not going to walk away from the Supply Agreement.<sup>66</sup>

After further reflection, Adlam was befuddled by the sudden change in the tenor of Malvaso’s commentary. Carestream had waited a week after the June 19-20 process trial to contact M&G about its problems.<sup>67</sup> To the best of Adlam’s knowledge, no further developments had occurred between that initial contact and the conference call just a week later. Adlam had difficulty understanding why Carestream was “losing confidence” when M&G had not yet been afforded the opportunity to work on the problem. Moreover, he was confused that Carestream’s “time pressure” had developed in the space of a week, particularly when the joint technical team was developing an experiment that would not be run for nearly a month.<sup>68</sup>

Adlam’s confusion turned to frustration during his next call from Malvaso, on July 11. Malvaso opened the conversation by suggesting that M&G was operating on a misguided belief that a quick fix to the plasticator instability

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<sup>66</sup> Trial Tr., Test. of Mark Adlam, Sept. 9, 2009 (A.M. Session), at 112:23-113:5.

<sup>67</sup> Trial Tr., Test. of Mark Malvaso, Sept. 14, 2009 (P.M. Session), at 78:16-79:4.

<sup>68</sup> Trial Tr., Test. of Mark Adlam, Sept. 9, 2009 (A.M. Session), at 112:2-19.

existed, a possibility that Carestream disavowed. To protect its business interests, Carestream wanted to end the Supply Agreement and discuss compensating M&G for its invested costs.<sup>69</sup>

Adlam heatedly instructed Malvaso to inform Carestream management that M&G would defend its contract. Carestream had provided minimal concrete data on the previous technical trials and zero opportunity for M&G to witness and work on the plasticator issue first-hand. M&G considered Carestream obligated to purchase more than 200 million pounds of product from M&G over the four-year term of the Supply Agreement. M&G would not be able to resell such a high volume of material to other purchasers. M&G would put its full resources into resolving the technical issues Carestream had raised, Adlam explained, but it too would protect its business interests. If Carestream denied M&G the chance to show that its resin could work, M&G would pursue legal action.<sup>70</sup>

Malvaso quickly backpedaled. He framed the conversation as an explanatory discussion of the parties' options. The joint experiment remained in the planning stages, and as tempers cooled somewhat, Adlam and Malvaso agreed

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<sup>69</sup> JX 43; Trial Tr., Test. of Mark Malvaso, Sept. 14, 2009 (P.M. Session), at 82:20-83:3, 84:4-16.

<sup>70</sup> JX 43; Trial Tr., Test. of Mark Malvaso, Sept. 14, 2009 (P.M. Session), at 84:21-86:20; Trial Tr., Test. of Mark Adlam, Sept. 9, 2009 (A.M. Session), at 113:18-114:18.

by the end of the conversation that work on a technical solution should move forward.<sup>71</sup>

#### 8. Carestream's Supplier Event

The following week, Adlam and his boss, M&G Global Marketing and Sales Director Fred Fournier, attended an annual Carestream supplier event, where they finally received the first hint of a possible motivation behind Carestream's perplexing reticence to work collaboratively with M&G. During the event, Adlam and Fournier attended two meetings with Carestream personnel. The first was a technical meeting where the plasticator problem and plans for the joint experiment were the primary topics of discussion. The second session, held on July 17, was a commercial meeting with Arndorfer, Malvaso, and Robert Brunner, Carestream's Director of Medium Materials Purchasing.

During the commercial meeting, Brunner wrote down a PET pricing formula on an envelope or small scrap of paper. He passed it to Fournier and Adlam. Brunner explained that the formula represented a competitive offer from an undisclosed company. The price so undercut what Adlam understood to be the reasonable range for PET that he didn't consider it "credible."<sup>72</sup>

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<sup>71</sup> JX 43; Trial Tr., Test. of Mark Malvaso, Sept. 14, 2009 (P.M. Session), at 86:6-20.

<sup>72</sup> Trial Tr., Test. of Mark Adlam, Sept. 9, 2009 (A.M. Session), at 117:5.

After the fact, Adlam and Brunner would relate drastically different recollections of how this handwritten offer was presented to M&G. Brunner and various Carestream representatives contend that the encounter at the supplier event was a courtesy, meant to notify M&G that a formal meet-comp offer would be presented in 2008, when Carestream would be permitted to do so under § 13.2 of the Supply Agreement. But Adlam and Fournier believed Carestream was demanding that M&G match the competing offer immediately, despite the Supply Agreement's 2007 price exclusivity clause.

M&G responded consistently with its perception that Brunner had attempted to force a 2007 price concession in violation of the contract's pricing and meet-comp provisions—and Carestream did nothing to alter M&G's understanding of Brunner's intent. On July 20, Fournier sent Brunner a letter to express concern that Carestream had not fully accredited M&G's pellets, as well as disappointment that “we were not informed earlier following problems which occurred at trials that were conducted in April.”<sup>73</sup> Nevertheless, Fournier wrote that “we wanted to give you our absolute assurance that since Carestream Health has now included us in the technical trial process, we will use the strength of our company's resources” to accelerate Carestream's accreditation process.<sup>74</sup>

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<sup>73</sup> PX 166.

<sup>74</sup> *Id.*

To that end, Fournier noted that M&G had hired Dr. Stephen Derezinski to assist as an outside consultant for the upcoming joint experiment.<sup>75</sup> Derezinski had been highly lauded by Kodak when M&G sought recommendations for an outside consultant to assist Carestream. Derezinski had worked on PET extrusion processes at Kodak for thirty years, during which time he designed all of the extrusion screw apparatuses for four different Kodak facilities, including Kodak Park and the Windsor facility. After retiring from Kodak in 2002, Derezinski became an independent extrusion consultant. In short, if anyone was qualified to provide the “couples counseling” necessary to get M&G’s resin working on Carestream’s equipment, Derezinski should have been the man for the job.<sup>76</sup>

## 9. The Joint Experiment

The joint technical team worked from July 31 to the morning of August 4. M&G was represented by two of its technical personnel, Callander and Chuck Kern. Callander, Kern, and Derezinski spent much of their time working with Bopp and other Carestream technical personnel to monitor and adjust the 501 machine’s operational settings. Part of the experiment involved reversing the previous efforts to resolve instability by raising temperatures. After carefully

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<sup>75</sup> *Id.*

<sup>76</sup> *See* Trial Tr., Test. of Stephen Derezinski, Sept. 18, 2009 (A.M. Session), at 4:12-5:18.

lowering the temperature in the powder feed zone of the barrel, the team found that the plasticator ran stably through the first day.<sup>77</sup>

Notwithstanding this achievement, the joint team still wanted to explore the plasticator issues, so they decided to try to deliberately induce instability. First, they significantly increased the proportion of direct reuse material being fed into the plasticator, so that the machine was receiving more reuse than it would under normal operating conditions. This caused an instability that was apparently identical to the problems seen in earlier incidents. The new approach of lowering the feed zone temperatures resolved this instability.<sup>78</sup>

Ironically, after reaching this stable condition, the team began to have problems recreating plasticator instability. On the third day of the experiment, they tried several approaches to trigger instability, but to no avail. Tinkering with direct reuse ratios in the material mix started some temperature fluctuations, but the screw recovered before the cycle of instability began. Raising the barrel temperature was similarly unhelpful in forcing a process upset.<sup>79</sup>

By the end of the four-day experiment, with the M&G product running stably despite deliberately-created fluctuations in the 501 machine's operational settings, both M&G's representatives and Derezinski were satisfied that the team

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<sup>77</sup> Trial Tr., Test. of Alan Bopp, Sept. 16, 2009 (P.M. Session), at 47:1-48:17.

<sup>78</sup> *Id.* at 48:18-49:15.

<sup>79</sup> *Id.* at 49:16-50:16.

had identified a profile of settings for the barrel controls that would allow M&G's resin to run "continuously" and "indefinitely" on the 501 machine.<sup>80</sup>

Following completion of the experiment, Eric Adsit, Carestream's Process Engineering Group Technical Lead, wrote an internal e-mail to Brunner, Arndorfer, and other Carestream personnel to summarize the results. Adsit noted, "We did not find the root cause [of the instability] (more analytical testing, experimentation, numerical modelling and run time is needed)," but "[w]e did not find any show stoppers" and felt "comfortable running more M&G resin to get some experience with handling the instability issue."<sup>81</sup> Adsit concluded that "from a technical aspect . . . M&G [material] can be made to work, but only more run time would tell us how well."<sup>82</sup> Adsit's reserved optimism was echoed in Bopp's summary of the experiment results:

We have not seen anything happen this week that would indicate we cannot run M&G ground powder. . . . There is nothing to indicate that we cannot get to a long term robust condition, but we can not conclude that we are able to do that until we have actually done it. . . . We see no technical roadblocks to continuing with additional M&G trials.<sup>83</sup>

Adsit also sent an e-mail to the joint experiment group and other Carestream personnel praising "the level of teamwork and professionalism exhibited by all of

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<sup>80</sup> Trial Tr., Test. of Stephen Derezinski, Sept. 18, 2009 (A.M. Session), at 53:15-17.

<sup>81</sup> JX 53.

<sup>82</sup> *Id.*

<sup>83</sup> JX 56.

the participants.”<sup>84</sup> The visit from M&G representatives and Derezinski, he wrote, “helped us to understand [the plasticator instability] and hopefully remedy it.”<sup>85</sup> Moreover, Adsit continued, “[b]eyond the positive outcome of increased plasticator stability we have established a good working team to evaluate the post-trial analyticals and to deal with any future process disruptions . . . . Well done team!”<sup>86</sup>

As Adsit’s e-mail suggested, members of the joint team planned to engage in further analysis of the experiment and its results. For Alan Bopp, “[i]t was encouraging” that the experiment eliminated the instability, but “puzzling [that] we couldn’t get it to come back again.”<sup>87</sup> Carestream wanted additional analysis to identify a root cause for the instability.

Derezinski and M&G were prepared to assist in this effort, believing that further run time with the M&G resin would be required before Carestream could feel comfortable that the stable conditions achieved during the joint experiment would hold. But from their perspective, the experiment was intended to demonstrate that the right settings profile would permit M&G’s resin to run smoothly on the 501 machine. Thus, whether or not a root cause for the past

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<sup>84</sup> PX 179.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Trial Tr., Test. of Alan Bopp, Sept. 16, 2009 (P.M. Session), at 50:14-20.

instabilities was discovered, M&G considered the experiment a success. Derezinski analogized his understanding of the experiment's goals to curing a headache: "I take an aspirin. It solved the problem, but I don't know what caused the headache. Okay. So . . . we got the machine to run in a stable way, and it would be interesting to everybody [to know what had caused the past problems]," but "[w]e didn't need to find the root cause" for the experiment to be successful.<sup>88</sup> After the experiment, Derezinski felt the next logical step for Carestream "was just [to] run lots of M&G resin, and . . . from the adjustments I made [to the 501 machine] that was going to be fine."<sup>89</sup>

#### 10. ECC Re-Enters the Picture

As it turned out, Carestream never purchased another pound of resin from M&G. On August 9, Brunner informed Fournier and Adlam that Carestream planned to reduce its 2007 demand for M&G's product to zero in favor of purchasing PET from another supplier: ECC. According to Adlam, Brunner suggested that the only way Carestream would purchase from M&G was if M&G

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<sup>88</sup> Trial Tr., Test. of Stephen Derezinski, Sept. 18, 2009 (A.M. Session), at 52:19-53:2.

<sup>89</sup> *Id.* at 57:9-12.

matched ECC's price and provided, in writing, new performance guarantees additional to those contained in the Supply Agreement.<sup>90</sup>

Unbeknownst to M&G, Carestream's business-side decision-makers had been in discussions with ECC for months. As M&G put forth significant efforts to assist Carestream in completing an internal accreditation process that appeared nowhere in the parties' contract, Carestream employees had been searching for ways to break the Supply Agreement that would insulate them from legal consequences. M&G's dedication to customer satisfaction made the search difficult—and indeed, the jury verdict in this case reflects that it was ultimately fruitless.

During his dealings with Carestream, Adlam often felt that there was a “good people/bad people” divide between the technical and commercial personnel.<sup>91</sup> Carestream's technical employees came off as “straight-shooters” who worked collaboratively with M&G's technical team on resolving the instability, whereas the commercial team appeared more interested in raising problems with M&G's resin than in accepting proffered solutions.<sup>92</sup> To understand why Carestream presented itself to M&G as a company with a split personality—and why M&G came to believe that Carestream's conduct was in bad faith—

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<sup>90</sup> Trial Tr., Test. of Mark Adlam, Sept. 9, 2009 (A.M. Session), at 123:13-22.

<sup>91</sup> *Id.* at 60:9-13; Trial Tr., Test. of Mark Adlam, Sept. 10, 2009 (P.M. Session), at 34:3-7.

<sup>92</sup> Trial Tr., Test. of Mark Adlam, Sept. 10, 2009 (A.M. Session), at 64:7-9.

requires revisiting the events of the spring and summer of 2007 with knowledge of the information Carestream was withholding from M&G.

### 11. Carestream's Negotiations with ECC

M&G's concerns that ECC might seek to rekindle its relationship with the Windsor facility proved well-founded. In March or April 2007, Brunner entered into discussions with ECC regarding a possible purchase agreement for cellulose acetate butyrate (CAB), another resin used at the Windsor facility. ECC representative Rick Plummer suggested a package deal in which ECC would also resume its role as the Windsor facility's PET supplier.<sup>93</sup> Brunner agreed to meet with Plummer on May 15, after Carestream was formally divested from Kodak, to discuss Carestream's PET needs.<sup>94</sup>

Following the meeting, ECC made an oral offer to supply Carestream with both CAB and PET resins. The PET portion of the offer included a new pricing formula for prepolymer material.<sup>95</sup> Arndorfer compared the ECC offer to the pricing formula in the M&G Supply Agreement. Assuming an annual order volume of fifty million pounds, his analysis suggested that ECC's price would undercut M&G by more than \$4 million in 2008. He reported his conclusion to

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<sup>93</sup> Trial Tr., Test. of Robert Brunner, Sept. 11, 2009 (P.M. Session), at 73:14-18.

<sup>94</sup> PX 130.

<sup>95</sup> Trial Tr., Test. of Todd Arndorfer, Sept. 21, 2009 (A.M. Session), at 144:4-6.

Brunner, Malvaso, and other Carestream personnel by e-mail on June 1, and added, “This is an extremely attractive offer. Especially given that ECC’s [w]aste performance, quality and delivery are known quantities and currently better than M&G.”<sup>96</sup>

Brunner responded on the same day, agreeing that ECC had submitted “a very interesting offer.”<sup>97</sup> Brunner had familiarized himself with the Supply Agreement, however, and he was concerned that the ECC proposal could not be compared directly to Carestream’s Supply Agreement with M&G, nor would it provide the basis for a true “meet-comp” offer under § 13.2. The ECC offer included agreements for both PET and CAB, and it covered only a three-year term, versus the four-year length of the Supply Agreement. Brunner noted several of these problems in his e-mail, which outlined a “path forward” for Carestream:

1. Need to have this offer in writing . . . .
2. Need to understand how this can be fairly presented to M&G per the meet competition clause of the contract. . . . I need to understand how to present the full value of this deal to M&G but allow an apples to apples comparison without the complication of CAB.
3. Need to present to M&G to give them a chance to match.
4. If they do match I will go back to [ECC] for their reaction.
5. If they do not match, Mark [Malvaso] and I will work to enhance the deal with [ECC]: a. relief of the \$.05 penalty in 2007, b. perhaps a longer term, c. better deal on CAB.<sup>98</sup>

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<sup>96</sup> JX 29.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

In addition, Brunner faced another major stumbling block to transforming ECC's proposal into a valid meet-comp offer: ECC's offer expired before 2008, when the meet-competition provision could first be triggered.<sup>99</sup>

Brunner negotiated with ECC, suggesting changes to ECC's initial proposals that would permit an "apples to apples" comparison with the M&G Supply Agreement. By June 21, Plummer had submitted a PET-only proposed agreement that responded to most of Brunner's requests.<sup>100</sup> ECC's prepolymer pricing formula remained well below M&G's price for PET pellets under the Supply Agreement.

Brunner e-mailed Arndorfer and Malvaso on June 21 to report that he was "making progress" with ECC.<sup>101</sup> "We need to start moving on [M&G]," Brunner exhorted his colleagues.<sup>102</sup> He sought an update from Arndorfer regarding the progress of accreditation trials, noting that "If we are having even a hint of trouble I will ask [Malvaso] to communicate concern to [M&G] on Friday." The e-mail concluded ominously: "This small indication will be the first water drop to them."<sup>103</sup>

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<sup>99</sup> Trial Tr., Test. of Robert Brunner, Sept. 11, 2009 (P.M. Session), at 85:2-3.

<sup>100</sup> JX 33; PX 144.

<sup>101</sup> PX 144.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

Arndorfer provided the requested update on the accreditation trials the following week. In an e-mail to Brunner, Malvaso, and other Carestream employees, Arndorfer summarized the three trials that had occurred to that date and noted the plasticator instability that arose during the process trials.<sup>104</sup> The summary erroneously indicated that the second process trial ran stably only under conditions that resulted in a 9% yield loss, which Arndorfer stated “would clearly trigger the performance clauses in the contract.”<sup>105</sup> In fact, as Arndorfer conceded at trial, he was mistaken on both points. Because the direct reuse was not discontinued during the second process trial, there had been no recorded yield loss.<sup>106</sup> Furthermore, yield loss was not a basis on which Carestream could then have triggered any “performance clause” in the Supply Agreement. Rather, a yield loss metric was being discussed with M&G as a possible criterion for additional performance clauses as part of a prospective set of amendments to the contract that were never agreed upon between the parties.<sup>107</sup>

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<sup>104</sup> JX 37.

<sup>105</sup> *Id.*

<sup>106</sup> Arndorfer explained that some yield loss may have occurred because the instability during the trial resulted in product with thickness variations, but any loss attributable to this problem was not recorded. His erroneous suggestion of a “9% yield loss” had been based upon and referred to his mistaken belief that all reuse had been diverted to scrap. Trial Tr., Test. of Todd Arndorfer, Sept. 22, 2009 (A.M. Session), at 17:5-8.

<sup>107</sup> *Id.* at 16:11-18:16.

On June 27, Brunner received another offer from ECC, this one with a four-year term that made its duration comparable to the M&G Supply Agreement. The new offer came with a July 20, 2007 expiration date.<sup>108</sup> Approximately ninety minutes after receiving the latest ECC offer and its deadline, Brunner e-mailed Arndorfer and Malvaso to set a highly suggestive timeline:

[W]e should try to target July 20 as a date we can exit our commitment contract from M&G so we can get more favorable pricing from Eastman sooner. I will talk to Eastman today to tell them that if we do accept their offer after review, we expect a four [sic] contract to start January 1 but the new pricing formula to start immediately. That would mean at least a \$1.3M gain for us in 2007 over what I understand to be the M&G supply and current Eastman price blended.<sup>109</sup>

Thus, Malvaso's June 27 call to Adlam to discuss Carestream's plasticator problems was placed on the same day that Brunner set a target date for Carestream's "exit" from the Supply Agreement. The next day, Brunner had Malvaso cancel the 3 million pound buy that was to have been Carestream's first major production order from M&G. Carestream apparently felt it had identified the "hint of trouble" it needed to justify changing suppliers. Nonetheless, not everyone at Carestream was content to rely upon a single "water drop" as the company's entire exit strategy.

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<sup>108</sup> JX 36.

<sup>109</sup> PX 148.

## 12. Carestream Plans Ahead

On July 10, Arndorfer e-mailed Carestream technical personnel with a suggestion: “Another tact we may pursue . . . in trying to break the M&G contract is to prove their material does not meet specification. What data do we have from the first three trials that can be compared to these specs?”<sup>110</sup> Follow-up was prompt, and within four days, Arndorfer was reporting to Malvaso and Brunner that he could not “find any data that shows M&G is violating any of the product specs.”<sup>111</sup> But Arndorfer was not out of ideas. Despite the lack of data to support that M &G had violated the contractual specifications, he proposed that Carestream might procure evidence of a violation if it undertook to “sample various points within a railcar and find points that don’t meet spec since blending is always less than perfect.”<sup>112</sup> While it is unclear whether Carestream ever resorted to sampling the railcars, it never found M&G’s resin to be out of specification.<sup>113</sup>

Carestream’s internal discussions of tactics to justify an early exit from the M&G Supply Agreement coincided with Brunner’s preparations for Carestream’s supplier event in mid-July. Brunner’s agenda for the supplier event did not only include meetings with M&G’s Adlam and Fournier; he was also scheduled to

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<sup>110</sup> PX 159.

<sup>111</sup> PX 236.

<sup>112</sup> *Id.*

<sup>113</sup> Trial Tr., Test. of Robert Brunner, Sept. 14, 2009 (A.M. Session), at 10:9-15.

speak with ECC representatives, and the July 20 deadline in ECC's most recent proposal was looming.<sup>114</sup> Before Brunner met with Adlam and Fournier, he had Adsit send him an updated comparison of the most recent ECC proposal and M&G's contract price on a purchase volume of 50 million pounds of resin.<sup>115</sup> Brunner entered the M&G commercial meeting armed with the precise amount Carestream stood to save on a year's estimated resin purchases under ECC's formula: \$4.23 million.

ECC remained in contact with Brunner after the supplier event.<sup>116</sup> On August 3, the final day of the joint experiment with M&G, Brunner e-mailed ECC's Rick Plummer and requested a written extension of time on ECC's most recent offer of PET purchase terms, which had been set to expire in July.<sup>117</sup> Brunner also indicated that once ECC reported back on a draft contract for CAB, "then we can start prepolymer drafts."<sup>118</sup> ECC readily obliged, sending Brunner a new PET proposal that stated it would expire either on December 31, 2007, or on the first day following any quarter in which Carestream's purchases from ECC fell below 7 million pounds, whichever came first.<sup>119</sup>

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<sup>114</sup> *Id.* at 11:14-12:3.

<sup>115</sup> PX 163.

<sup>116</sup> *See, e.g.*, PX 173.

<sup>117</sup> PX 180; PX 182.

<sup>118</sup> PX 180.

<sup>119</sup> PX 184.

The latter deadline alternative reflected the fact that Carestream had been purchasing prepolymer from ECC since the Kodak divestiture. In his trial testimony, Morabito contended that Carestream's plan was "to accredit the material from M&G during the summer and start using the M&G material in the fourth quarter of 2007"<sup>120</sup>—despite the string of documents suggesting that Carestream planned to "exit" the M&G Supply Agreement and had in fact calculated the savings it would accrue by purchasing from ECC throughout 2007. Whatever Carestream's long-term plans, it found itself running low on resin during the summer and conducted "spot buys" from ECC on July 16 and August 17 for 7.5 million pounds of material.<sup>121</sup> In an e-mail to ECC regarding prepolymer shipments and payment arrangements sent on July 25, the week prior to the joint experiment, Todd Arndorfer mentioned that Carestream anticipated that it would "continue to work with you . . . on the possibilities for September and beyond during the next week."<sup>122</sup>

As events progressed in August 2007, M&G was no longer interacting with Carestream's technical-side personnel, and the last vestiges of hope for the parties' relationship quickly dissipated. In the wake of Brunner's August 9 phone call

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<sup>120</sup> Trial Tr., Test. of Richard Morabito, Sept. 11, 2009 (A.M. Session), at 31:18-22.

<sup>121</sup> *Id.* at 33:22-35:14. Carestream made three additional 2007 purchases from ECC in October and November.

<sup>122</sup> JX 171.

threatening to reduce Carestream's demand for M&G's pellets to zero, M&G contacted its counsel.

### 13. The August Letters

M&G's counsel sent a letter to Brunner on August 13, 2007, responding in part to Brunner's August 9 phone call. The letter detailed Carestream's 2007 purchase obligation under Appendix B of the Supply Agreement and presented M&G's concerns regarding Carestream's persistent delay in placing orders:

Carestream initially raised processing quality issues with M&G as a potential justification for not meeting its 2007 Purchase Quantity obligations under the Supply Agreement. Now that M&G sufficiently has addressed those processing quality issues on a priority basis, Carestream has sought to reduce its Purchasing Quantity obligations under the Supply Agreement by unilaterally reducing its demand for PET pellet material and substituting competing and less expensive PET powder unless M&G will accede to its demand to reduce the Appendix C pricing for the Product, despite the clear prohibition in section 5.2 that "[n]either party may take unilateral action regarding price" and despite the fact that the meeting competition price protections in the Supply Agreement do not become effective until after January 1, 2008.<sup>123</sup>

The letter went on to suggest that "Carestream's position evidences a lack of good faith and an attempt to renegotiate the Supply Agreement unilaterally to obtain more favorable terms."<sup>124</sup> M&G therefore gave formal notification of a dispute,

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<sup>123</sup> PX 188.

<sup>124</sup> *Id.*

which was provided for under § 30.2 of the Supply Agreement. The letter concluded with a demand for written assurances, to be provided within seven days, that Carestream “will perform in accordance with its obligations” under the Supply Agreement.<sup>125</sup>

Rather than providing assurances, Carestream responded by introducing a new explanation for why it would not be purchasing M&G’s resin. In a letter dated August 21, Carestream’s corporate counsel wrote that

Carestream Health is considering a shift in its manufacturing strategy away from the grinding of PET pellets which would require that it use a material that is different and distinguishable from the Product [as defined by the Supply Agreement]. The alternative material may be purchased from another vendor . . . and prospective purchase of the alternative material from a third party in no way violates the Agreement.<sup>126</sup>

The letter described Carestream’s “request for M&G to reconsider pricing” as “not only an act of good faith, but an attempt at giving M&G the opportunity to lower its Product price to provide M&G with the opportunity to sell the Product to Carestream Health, given the option Carestream Health has to purchase a different and less expensive material to satisfy the demand of a changed manufacturing strategy.”<sup>127</sup> Carestream clarified that its so-called “request” was not a meet-competition offer pursuant to § 13.2 of the Supply Agreement, but rather reflected

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<sup>125</sup> *Id.*

<sup>126</sup> PX 195.

<sup>127</sup> *Id.*

Carestream's position that if it "elects not to purchase any Product, it is under no obligation to purchase from M&G under the Agreement."<sup>128</sup>

With this development, Carestream was juggling so many explanations for its refusal to purchase that it barely seemed to notice that it had dropped at least one: its August 21 letter never mentioned quality issues with M&G's resin, nor did it even obliquely reference Carestream's accreditation process.<sup>129</sup> The omission was particularly remarkable given that M&G's original letter discussed its response to the quality issues Carestream had pressed throughout the preceding two months.

M&G was no more convinced by Carestream's purported "shift in manufacturing strategy" than it had been by Carestream's attempts to force concessions using quality qualms, "time pressure," or hand-written competing offers. In a reply letter sent on August 27, counsel for M&G accused Carestream of manifesting bad faith by its "price-driven announcement of [a] potential shift in manufacturing strategy":

We disagree with the assertion . . . that Carestream's unilateral alteration of its manufacturing strategy to substitute lower priced PET powder for PET pellets supplied by M&G to satisfy Carestream's estimated demand of 55 million pounds of polyethylene terephthalate resin polymer products, as stated in the Supply Agreement, somehow relieves Carestream of its commitment and obligation under the

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<sup>128</sup> *Id.*

<sup>129</sup> *See* Trial Tr., Test. of Richard Morabito, Sept. 11, 2009 (A.M. Session), at 70:7-13.

Supply Agreement . . . . Your revisionist interpretation would render meaningless the contractual expectations of the parties.<sup>130</sup>

M&G's counsel noted a projection of his client's recoverable damages if Carestream did not meet its purchase commitment, and proposed a meeting "to determine whether Carestream is willing to reconsider the repudiation of its contractual obligations."<sup>131</sup>

The parties agreed to conduct this meeting telephonically. On September 6, a conference call was held between Fournier, Adlam, and M&G's counsel, and Morabito, Brunner, Malvaso, and corporate counsel for Carestream. With his inimitably brusque style, Morabito opened the discussions by proclaiming that he was not in the business of "screwing suppliers."<sup>132</sup> Nevertheless, he then told M&G's representatives that he would "buy 100 percent of the material from M&G if they met the price and met the quality" of the ECC prepolymer offer.<sup>133</sup> If M&G would not match ECC's rates on prepolymer, Carestream would simply execute the threatened shift in "manufacturing strategy" and eliminate its demand for pellet-form PET.<sup>134</sup>

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<sup>130</sup> PX 200.

<sup>131</sup> *Id.*

<sup>132</sup> Trial Tr., Test. of Mark Adlam, Sept. 9, 2009 (A.M. Session), at 136:6-9; Trial Tr., Test. of Richard Morabito, Sept. 11, 2009 (A.M. Session), at 60:12-14.

<sup>133</sup> Trial Tr., Test. of Richard Morabito, Sept. 11, 2009 (A.M. Session), at 41:10-13.

<sup>134</sup> Trial Tr., Test. of Mark Adlam, Sept. 9, 2009 (A.M. Session), at 136:16-137:5; Trial Tr., Test. of Richard Morabito, Sept. 11, 2009 (A.M. Session), at 65:7-13.

M&G declined this reimagining of the parties' pricing arrangements, but participated in the dispute resolution mechanisms provided under the Supply Agreement in a last-ditch hope of saving the contract.<sup>135</sup> The mediation process dictated by § 30.2 failed to resolve the parties' differences, however, and on November 30, 2007, M&G filed suit in this Court for breach of contract, alleging that Carestream wrongfully refused to perform under the Supply Agreement, wrongfully terminated the Supply Agreement, and violated various provisions of New York's UCC.<sup>136</sup>

#### 14. The December Run

In December 2007, several weeks after this suit was filed, Carestream conducted a final run of its remaining M&G material. Arndorfer originated the idea of the December run as a way "to use up the M&G material before the end of the year to reduce [Carestream's] year-end inventory."<sup>137</sup> Due to the pending litigation, Brunner instructed Arndorfer not to involve M&G.<sup>138</sup>

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<sup>135</sup> Trial Tr., Test. of Mark Adlam, Sept. 9, 2009 (A.M. Session), at 139:2-140:5.

<sup>136</sup> See Pl.'s Compl. An additional count alleging fraud in the inducement was dismissed by the Court on July 30, 2008.

<sup>137</sup> Pl.'s Mot. in Limine, Transmittal Aff. Ex. 2 (Dep. Test. of Todd Arndorfer), at 533:11-17; see also *id.*, Transmittal Aff. Ex. 3 (Dep. Test. of Eric Adsit), at 152:12-13.

<sup>138</sup> *Id.*, Transmittal Aff. Ex. 2 (Dep. Test. of Todd Arndorfer), at 129:18-130:6.

The December run began on or about December 21, which was the Friday before the Christmas holiday long weekend. Because of the holiday, key technical personnel who had been involved in previous runs of M&G material were not on-hand. Alan Bopp, who would be on vacation during the December run, left instructions specifying the zone temperatures and other machine settings to be used. Bopp returned the plasticator to the settings that had allowed the machine to run stably in the July/August joint experiment.<sup>139</sup>

The December run was neither part of Carestream's accreditation process nor an "experiment" in various running conditions like the one conducted the previous summer.<sup>140</sup> Because the goal was "literally . . . to get [the M&G material] off the books before year-end," Adsit described the approach as "leave it at the conditions we left it in [during the joint experiment] and hope for the best."<sup>141</sup> Carestream recognized in advance that the colder air temperatures in December would make the plasticator "more vulnerable to having problems,"<sup>142</sup> but made no accommodations for this vulnerability. In addition, the top screw

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<sup>139</sup> Def.'s Resp. to Pl.'s Mot. in Limine, App., Ex. C (Dep. Test. of Alan Bopp), at 532:6-21.

<sup>140</sup> See Pl.'s Mot. in Limine, Transmittal Aff., Ex. 3 (Dep. Test. of Eric Adsit), at 152:8-13.

<sup>141</sup> Pl.'s Mot. in Limine, Transmittal Aff. Ex. 3 (Dep. Test. of Eric Adsit), at 152:12-25.

<sup>142</sup> *Id.*, Transmittal Aff. Ex. 5 (Dep. Test. of Alan Bopp), at 545:7-16.

speed would be lower than it had been in the previous trials, which also increased the risk of instability.<sup>143</sup>

The December run resulted in extreme plasticator instability, which resolved when direct reuse was eliminated from the material mix and the screw temperatures were decreased. Both Carestream employees and Carestream trial counsel subsequently portrayed the outcome as “catastrophic,”<sup>144</sup> leading the Court to wonder whether that term had a specific technical meaning, or whether there had been collaboration on the dire descriptor Carestream would use.<sup>145</sup> The two-part fix of lowering temperatures and scrapping one-hundred percent of direct reuse was the only solution tried, despite the fact that eliminating reuse from the material mix is prohibitively expensive as a long-term operating condition.

Even if the December run had been staffed by personnel knowledgeable enough to attempt other approaches—such as trying lowered temperatures alone, which had stabilized the plasticator during the joint experiment—Carestream was not willing to use the December run to try for optimal running conditions. In Bopp’s words, the December run had been scheduled for “Friday night going into Christmas weekend,” and, quite understandably, technical personnel “did not want

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<sup>143</sup> *Id.*, Transmittal Aff. Ex. 5 (Dep. Test. of Alan Bopp), at 546:17-547:7.

<sup>144</sup> *See* Def.’s Resp. to Pl.’s Mot. in Limine, at 2 & Ex. C (Dep. Test. of Alan Bopp), at 536:22.

<sup>145</sup> *See* Pretrial Conference Tr., Aug. 6, 2009, at 8:4-12.

to spend Christmas weekend in observing the machine and trying to see what was going on and making adjustments . . . that was not going to happen.”<sup>146</sup>

## **B. Procedural History**

### 1. The Discovery Process

Although the Court is not privy to the details of the parties’ pretrial discovery process, certain events have come to light in connection with the instant motions. In particular, counsel for both parties discussed privilege-based redactions to certain documents, including stenographic notebooks kept by Arndorfer throughout 2007. These notebooks recorded Arndorfer’s thoughts and observations regarding Carestream business matters during that time, and included notes about key meetings and events.

M&G’s counsel apparently raised concerns in the fall of 2008 that not all relevant entries had been produced from Arndorfer’s notebooks, and that some of the produced entries might have been “cut off” with relevant information omitted. M&G’s counsel requested production of the missing pages and an explanation for Carestream’s redactions.<sup>147</sup> Trial counsel for Carestream responded by e-mail on October 24, 2008, that they had “reviewed all of Todd Arndorfer’s notebooks as produced for entries that look like they may not have been copied in their entirety”

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<sup>146</sup> Pl.’s Mot. in Limine, Transmittal Aff. Ex. 5 (Dep. Test. of Alan Bopp), at 550:16-551:5.

<sup>147</sup> Pl.’s Application for Attorneys’ Fees and Expenses, Transmittal Aff. Ex. 1.

and then “reviewed the originals.”<sup>148</sup> Carestream’s trial counsel then asserted that “[b]ased on our review, we believe that only one page is missing,” which Carestream produced as an attachment.<sup>149</sup>

In February 2009, counsel for M&G e-mailed Carestream’s trial counsel to confirm certain agreements worked out between the parties to resolve discovery disputes. That e-mail memorialized M&G’s understanding that “Carestream will log *on its privilege log* those redactions in Todd Arndorfer’s steno notepads that were based on a claim of privilege.”<sup>150</sup> In a follow-up response letter, Carestream’s counsel stated that “[t]he redactions at issue in Mr. Arndorfer’s notebook were to remove irrelevant entries (Mr. Arndorfer kept notes on other issues besides M&G, Eastman Chemical and/or PET supply issues) or a record of privileged conversations. As noted above, we are producing a privilege log and will detail the nature of the redactions.”<sup>151</sup>

On February 20, 2009, Carestream produced its privilege log, which spanned nearly forty pages. The privilege log was accompanied by a cover letter explaining that Carestream had prepared a “separate redaction log we will be sending

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<sup>148</sup> *Id.*, Transmittal Aff. Ex. 4.

<sup>149</sup> *Id.*

<sup>150</sup> Pl.’s Supplemental Br., Transmittal Aff. Ex. D (emphasis added).

<sup>151</sup> Pl.’s Application for Attorneys’ Fees and Expenses, Transmittal Aff. Ex. 5.

separately on Monday.”<sup>152</sup> That redaction log—a six-page document detailing redactions made from forty-four separate items, including Arndorfer’s notebooks—was never sent to M&G’s counsel. Not until trial would it become clear to M&G that the redaction log included redactions that had been made on privilege grounds and that were *not* listed on the privilege log. The trial would also reveal that certain pages in Arndorfer’s notebook were not listed on either log because they had never been produced to Carestream’s own trial team during pretrial discovery.

## 2. Pre-Trial Motions

The parties each submitted pretrial summary judgment and evidentiary motions that have a bearing on the instant post-trial filings. Both parties filed for summary judgment regarding their positions as to Carestream’s contractual obligations: Carestream sought a ruling that it was under no legal obligation to purchase M&G’s product because the M&G PET pellets were not qualified for use on the 501 machine, whereas M&G asked the Court to hold as a matter of law that Carestream was obligated to begin purchasing product from it as of June 12, 2007, the date the Windsor grinders were accredited. The Court denied these portions of the parties’ summary judgment motions, holding that material factual disputes

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<sup>152</sup> PX 242.

existed regarding how the M&G product was to be “qualified for use at the site” pursuant to Appendix B of the Supply Agreement and whether that qualification process had been achieved.<sup>153</sup> The Court also denied Carestream’s request that it exclude M&G’s lost profits claim pursuant to § 23.0 of the Supply Agreement, which stated that neither party would be liable for “lost profits . . . arising out of or in connection with supply of goods provided for under this agreement or for termination of this agreement as provided for herein.”

Both parties also raised *Daubert* challenges to each other’s expert witnesses. Although the Court limited the testimony of M&G’s expert to exclude non-recoverable items of damage, it found no basis to exclude either expert. Of particular note to the matters currently at issue, the Court held that M&G’s expert Robert Reilly would be permitted to present his analysis of lost profits arising from a possible renewal term of the Supply Agreement. Although the Court agreed with Carestream that a renewal would not have been automatic in the absence of a breach, the Court found that there was a sufficient factual basis that M&G’s expectation of a renewal was more than pure speculation or conjecture.

Finally, at the pretrial conference, the Court granted M&G’s motion *in limine* to exclude evidence pertaining to the December run. The Court held that,

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<sup>153</sup> The Court granted in part M&G’s partial summary judgment motion by holding that Carestream had not invoked the meet-competition clause during 2007.

given the circumstances under which it had been conducted, the December run was irrelevant to the issues remaining for trial.

### 3. The Trial

Trial took place from September 8 to September 24, 2009. During three weeks of testimony, remarkably little dispute arose over the basic sequence of events that has been set forth above. Rather, the areas of contention involved the legal consequences of those events, and in particular whether a legal justification existed for Carestream's actions during the summer of 2007. For every Carestream document or statement that M&G painted as questionable, Carestream took pains to offer an explanation. First, Carestream emphasized that its communications and negotiations with ECC were part of the normal course of business, and that it would have been foolhardy from a business perspective for Carestream to ignore a competitive offer for a major supply item, particularly when its Supply Agreement with M&G included a meet-competition provision. Thus, Carestream employees repeatedly asserted that their discussions with M&G about price reductions during July, August, and September concerned a forthcoming meet-comp offer for 2008 onward, and did not violate the Supply Agreement's 2007 price exclusivity provision.

Carestream advanced the position that it could not purchase M&G's resin for production because the M&G product had not been accredited on the 501 machine and had not demonstrated consistent stable operation. Carestream's employees testified that Carestream was fully prepared to continue with further trials until Carestream received the August 13, 2007 letter from M&G's counsel. Carestream's witnesses characterized the August 13 letter as a notification of M&G's intent to sue. But for that letter, Carestream's witnesses indicated that Carestream wanted to proceed in good faith with further efforts to accredit the M&G resin.

Carestream's primary defense faltered as its own employees offered testimony suggesting that the entire issue of accreditation was a red herring. Although Carestream's internal accreditation process was not directly referenced in the Supply Agreement, the language in Appendix B of the Supply Agreement was ambiguous as to what the parties intended by requiring that M&G's resin be "qualified for use at the site" before Carestream's 2007 purchasing obligation began. Therefore, the Court ruled at the summary judgment stage that Carestream could present evidence at trial that either the mutual understanding of the parties or trade custom and usage supported that the phrase "qualified for use at the site" was intended to mean that M&G's resin had to meet additional qualification or performance criteria beyond those specifically provided in the contract. At trial,

however, it became apparent that Carestream would have little success trying to bootstrap its accreditation process or other performance terms into the contract through Appendix B or evidence of trade usage and custom.

The testimony of both Kodak and Carestream employees made clear that Carestream wanted additional performance clauses in the Supply Agreement, but had not agreed with M&G to an anticipated amendment of the contract before the parties' relationship fell apart. In negotiating the Supply Agreement, Kurt Carlson and William Ross focused on what they considered the "critical tests around the performance of resin on the 501 machine," which were the die flow line and filter change throughput events.<sup>154</sup> At the time the contract was signed, the Kodak negotiators and personnel at the Windsor facility understood "qualification at the site" under Appendix B to mean that M&G's resin had to qualify on the machines at Kodak Park in Rochester, pursuant to the qualification provisions in the Kodak Park Agreement.<sup>155</sup> Carestream's employees testified at trial that Carestream's accreditation process was an internal matter, and that the accreditation parameters were not in the Supply Agreement.<sup>156</sup> Indeed, M&G was not even informed of the steps in Carestream's accreditation process until April or May 2007, months after

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<sup>154</sup> Ct. Ex. 2 (Dep. Test. of William Ross), at 27.

<sup>155</sup> Trial Tr., Test. of Todd Arndorfer, Sept. 21, 2009 (P.M. Session) at 56:22-58:3, 62:13-18.

<sup>156</sup> Trial Tr., Test. of Robert Brunner, Sept. 14, 2009 (A.M. Session), at 56:16-57:23; Trial Tr., Test. of Todd Arndorfer, Sept. 21, 2009 (P.M. Session), at 56:22-62:15.

the Supply Agreement went into effect. The *lack* of additional Windsor-specific qualification or performance criteria was precisely why Todd Arndorfer had proposed changes to the contract before it was signed. As he conceded at trial, those proposals were never made part of the Supply Agreement.<sup>157</sup>

Carestream offered testimony from its chemical industry expert, Charles Mikulka, that M&G's resin was a performance chemical (as opposed to a commodity chemical), and that the custom and practice in the industry required that performance chemicals be qualified or accredited to perform in their intended applications. Based upon the various trials and experiments that occurred in 2007, Mikulka opined that Carestream had not qualified or accredited M&G's resin. But by the time Mikulka offered his view of qualification or accreditation, the jury had already heard testimony from Arndorfer, Adlam, and others that both parties understood "qualification" under the Supply Agreement to involve the resin's performance in Kodak Park only, and Mikulka admitted that his opinion had not been based on the specific negotiating history between the parties.<sup>158</sup>

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<sup>157</sup> Trial Tr., Test. of Todd Arndorfer, Sept. 21, 2009 (P.M. Session), at 62:16-18.

<sup>158</sup> Trial Tr., Test. of Charles Mikulka, Sept. 23, 2009 (P.M. Session), at 61:22-62:1. The gulf between Mikulka's testimony regarding industry practice and the statements by Kodak and Carestream employees establishing that Carestream understood that the Supply Agreement only required "qualification" on the Kodak Park machines was wide enough that the Court considered excluding Mikulka's testimony. Under New York law, a party that "seeks to use trade usage to define language or annex a term to a contract must show either that the other party to the contract is actually aware of the usage, or that the existence of the usage in the business to which the transaction relates is so notorious that a person of ordinary prudence in the exercise of reasonable care would be aware of it." *Reuters Ltd. v. Dow Jones Telerate, Inc.*, 662 N.Y.S.2d 450, 454

Furthermore, Mikulka’s opinions were necessarily limited to reviewing the trials and experiments that had actually occurred. He did not suggest that M&G’s resin could *never* have passed Carestream’s internal accreditation process or other industry standards for “qualification”—and the evidence adduced at trial indicated that it was Carestream’s conduct, not M&G’s, that precipitated the end of efforts to reach long-term stable operation on the 501 machine. The oft-mentioned August 13, 2007 letter from M&G’s counsel was not, as Carestream’s employees testified, tantamount to notification of M&G’s intent to sue.<sup>159</sup> Rather, the letter was a textbook demand for assurances, accompanied by a notification of dispute as provided for under the Supply Agreement. In fact, the letter stated that M&G anticipated that Carestream would start making production orders—and while it is clear that Carestream would *now* disagree with the letter’s suggestion that the

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(N.Y. App. Div. 1997). Trade usage is not admissible to “influence the construction of a contract unless it appears that it be so well settled, so uniformly acted upon, and so long continued as to raise a fair presumption that it was known to both contracting parties and that they contracted in reference thereto.” *Id.* (quoting *Schlanger v. Heyman*, 173 N.Y.S. 231, 232 (N.Y. App. Div. 1918)). The mere fact that one party “had knowledge of the usage, and supposed that it would enter into the contract, is not sufficient.” *Id.* at \*454-55 (quoting *Schlanger*, 173 N.Y.S. at 232). Because trial testimony indicated that Carestream was not relying upon trade usage to require additional performance criteria, nor to give meaning to the ambiguous “qualified for use” language, its suggestions that M&G should be presumed to have understood the contract to include implicit performance requirements fell flat.

<sup>159</sup> Carestream’s lead trial counsel incorporated this assertion into his opening statement. Trial Tr., Sept. 8, 2009 (P.M. Session), at 46:4-8 (“So on August 13 . . . a letter comes from M&G’s counsel, saying we think you [i.e., Carestream] are in breach of the agreement. *We are going to sue you.*” (emphasis added)). Although M&G’s counsel did not object, this stretched characterization of the August 13 letter should not have been presented by Carestream’s counsel as an unqualified fact during opening statements.

major technical impediments to accreditation had been cleared by the joint experiment, it did not voice that disagreement in its response at the time.

Thus, while M&G dedicated its case to demonstrating Carestream's breach of the Supply Agreement that the parties actually executed, Carestream devoted extensive time to arguing that M&G failed to perform under hypothetical performance provisions that Carestream would, with the benefit of hindsight, have liked to include in the contract, but admittedly did not. There were clearly "Colorado Cassandras" at Kodak who recognized before the agreement was signed that the lack of Windsor-based accreditation or qualification requirements might prove problematic. During 2007, M&G was apparently open to negotiating such clauses as amendments to the contract. But M&G's resin was not required to pass any accreditation process under the Supply Agreement as signed. As a result, Carestream's accreditation evidence quickly began to look like an untenable "would've, could've, should've" defense.

The Court had expressed concern prior to trial about whether Carestream had an objective view of the potential weaknesses of its defenses, which included what the Court described as the "smoking gun e-mails" in which Carestream personnel discussed their plans to exit the Supply Agreement.<sup>160</sup> In an unusual turn of events, trial brought to light previously unknown documents not produced

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<sup>160</sup> Pretrial Conference Tr., Aug. 6, 2009, at 81:2-8.

during the normal course of pretrial discovery. These documents served to further erode Carestream's defenses.

On the eleventh day of the trial, which was already in its third week and had by then extended longer than originally represented to the jury, Todd Arndorfer referred during his testimony to a document—specifically, an e-mail summarizing a June 25, 2007 telephone conversation—that had not been previously produced to M&G.<sup>161</sup> That testimony prompted an immediate request by M&G counsel for a sidebar conference based upon M&G's concern that the witness had reviewed a document previously unknown to M&G. Carestream's counsel disclosed that Arndorfer had reviewed the e-mail, but stated that it had not been disclosed because it was privileged. The e-mail document in turn referred to notes made by Arndorfer, which presumably he had recorded in one of the many notebooks he kept during the litigated events. A partial copy of the notebook from the relevant time-period had been provided to M&G during pretrial discovery, but that production did not include the entry referred to in the unproduced e-mail. Indeed, that particular entry was not contained in either the redaction or privilege logs that Carestream had created during discovery. Because Arndorfer's testimony about the conversation implicated the e-mail and notebook entry, the Court ordered that

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<sup>161</sup> Trial Tr., Test. of Todd Arndorfer, Sept. 22, 2009 (A.M. Session), at 22:18-23:3.

the steno notebook should be provided to M&G for its use during the remaining few days of trial.

Following a recess, Carestream counsel advised the Court that it had not produced the document but instead had reviewed the notebook in its entirety. Carestream's counsel then represented to the Court that the notebook did not contain any entry referring to a June 25, 2007 telephone conversation. Based upon these representations, the parties stipulated to have the Court instruct the jury that it should disregard Arndorfer's statement regarding the e-mail because "Carestream has checked, and there are no notes of a June 25th conversation between Mr. Adlam and Mr. Arndorfer."<sup>162</sup>

This single revelation heightened M&G's longstanding concern that there may have been other relevant, non-privileged entries in Arndorfer's notebooks that had not been produced, despite the fact that M&G had repeatedly voiced concerns regarding the completeness of Carestream's discovery production. Prior to trial, Carestream had offered M&G assurances that the privilege log it provided covered all withheld and redacted entries not produced on the grounds of attorney-client or work product privilege, and promised that the other redactions at issue were made

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<sup>162</sup> Trial Tr., Sept. 22, 2009 (A.M. Session), at 63:15-17.

to remove irrelevant material.<sup>163</sup> Those assurances, however, soon proved to be empty promises.

By revealing that he had reviewed an undisclosed, non-logged entry in his notebook, Arndorfer opened a Pandora's box from which sprung forth a multitude of unexpected discovery woes. Understandably suspicious of the completeness of the discovery it had received, M&G asked for additional confirmation that Carestream's privilege log fully identified any and all privileged entries in the Arndorfer notebooks that had been withheld from production, or in the absence of such confirmation, requested that the original notebooks be turned over to M&G. Later that same afternoon, Carestream's counsel referred to the "redaction log" that they had compiled during discovery.<sup>164</sup> This redaction log had never been provided to M&G. Although it had been mentioned during the discovery process, M&G was under the impression that the privilege log Carestream had produced in advance of trial contained *all* of Carestream's privilege-based redactions; as it turned out, this was not the case, and the redaction log included redactions made on the basis of the attorney-client and work product privileges. M&G therefore asked the Court to require Carestream to produce the withheld documents and information that Carestream had not previously identified to M&G as privileged.

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<sup>163</sup> *See id.* at 53:19-54:17.

<sup>164</sup> Trial Tr., Sept. 22, 2009 (P.M. Session), at 97:17-98:6.

What followed was an eleventh-hour effort to salvage a discovery process that had gone horribly wrong. Shortly after M&G first learned of notebook entries that had neither been produced nor logged, Arndorfer admitted in his testimony that until August 13, 2007, the date of M&G's counsel's letter to Brunner, litigation was the "farthest thing" from his mind,<sup>165</sup> thereby significantly narrowing the scope of Carestream's claims of work product privilege over his notes. M&G thereupon made an additional mid-trial request for all documents authored by Arndorfer prior to mid-August 2007 that had been previously withheld based on a claim of work product privilege. The Court ordered these documents to be produced, reasoning that it was improper for Carestream to have asserted work product based upon Arndorfer's own testimony that litigation was neither contemplated nor imminent, but rather "the farthest thing" from Arndorfer's mind. The Court deferred ruling on the production of documents that had been withheld but not identified as privileged so that the parties could assess the extent and status of the document production request during the overnight trial recess.

That night, Carestream produced two items: first, the six-page redaction log that had not been previously provided to M&G; and second, the documents that the Court had ordered produced as no longer qualifying for work product protection in light of Arndorfer's testimony. The documents included unredacted copies of the

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<sup>165</sup> Trial Tr., Test. of Todd Arndorfer, Sept. 22, 2009 (A.M. Session), at 72:21-23.

pages of Arndorfer's notebooks, which Carestream had turned over in redacted form during pretrial discovery, but did *not* include any of the notebook pages that Carestream had withheld altogether rather than merely redacted. Carestream also withheld an August 16, 2007 entry over which it claimed attorney-client privilege, even though this document was not included on any log provided during discovery.<sup>166</sup>

The following morning, before the trial testimony resumed, M&G renewed its request for all documents that had previously been withheld but not disclosed as privileged. The Court ordered immediate production of documents for which privilege had not been previously asserted.<sup>167</sup>

During the luncheon recess, Carestream produced complete unredacted versions of three of Arndorfer's four notebooks, which contained additional entries not previously disclosed to M&G. Notably, M&G's concern regarding the scope and completeness of Carestream's pretrial production was no longer based upon suspicion, but had been fully borne out in reality: the full notebooks contained relevant entries that had not only been withheld, but were never logged anywhere, even on the redaction log that was produced in the midst of trial. Of even greater concern to M&G, and to the Court, was the fact that the full notebooks also

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<sup>166</sup> Trial Tr., Sept. 23, 2009 (A.M. Session), at 4:9-16.

<sup>167</sup> *See id.* at 16:3-19, 21:22-22:13.

contained entries to which no claim of privilege could possibly attach, including the June 25, 2007 entry that Carestream had earlier stipulated did not exist and which the Court had instructed the jury to disregard as non-existent. Finally, on the evening of September 23, 2009, after the twelfth day of trial, Carestream produced all documents on the redaction log in unredacted form, as required by the Court's Order. The following morning, the fourth and final Arndorfer notebook was produced in full.

Included in the late production of previously missing entries from Arndorfer's notebook were statements directly contrary to previous testimony from several of Carestream's witnesses. The content of the late-produced entries will be discussed in greater detail below. Among other revelations, the previously withheld entries included notes that indicated Carestream personnel were considering as early as June 7, 2007, that "we may need to buy M&G off," but were not willing to do so for "more than \$1.0M."<sup>168</sup> The entries also reflected that Carestream employees discussed with their in-house counsel prior to the joint experiment that even if Carestream considered the trial an unqualified success, it would consider other justifications to avoid ordering M&G product.<sup>169</sup>

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<sup>168</sup> PX 249.

<sup>169</sup> PX 251.

Although most or all of the other Carestream witnesses had returned to Colorado, the Court permitted M&G to recall Arndorfer on the final morning of trial to question him regarding the late-produced entries. M&G had not received the final notebook until that morning. Because of the timing of this belated production, Arndorfer would be the final witness to appear before closing arguments. Following several hours of deliberation, the jury returned a verdict in M&G's favor and awarded \$15.5 million in damages.

### **III. Parties' Contentions**

Carestream's Motion for a New Trial challenges the propriety of M&G's claim for lost profits, the disclosure remedy ordered by the Court in response to its discovery violations, and the Court's decision to exclude evidence of the December run.

In response, M&G argues that it was entitled to seek lost profits under New York's version of Uniform Commercial Code (UCC) § 2-708(2). M&G contends that Carestream's mid-trial attempts to assert privilege over documents not listed on the privilege log provided before trial were far too late to be effective, making production the proper remedy for Carestream's discovery violations, regardless of whether they were inadvertent. As to the evidence of the December run, M&G reiterates the position it adopted in its motion *in limine* that the run was not

probative of the issues to be litigated at trial, which concerned Carestream's conduct during the spring, summer, and fall of 2007. M&G further adds that Carestream's trial counsel expressed the view during pretrial discovery that the December run was "irrelevant."

In its Application for Attorneys' Fees and Expenses, M&G argues that Carestream's discovery failures seriously prejudiced its pretrial and trial strategies, and ultimately forced M&G to litigate defenses that were raised in bad faith, particularly Carestream's assertions that it eliminated its requirements because of technical problems with M&G's resin. Carestream counters that an award of fees is inappropriate under the Superior Court Civil Rules because the discovery violations in this case were inadvertent. Furthermore, Carestream urges that the bad faith exception to the American Rule is inapplicable because its conduct in this litigation has not risen to the high level of subjective bad faith necessary to justify fee-shifting.

#### **IV. Discussion**

In applying Superior Court Civil Rule 59(a), this Court will not disturb a jury's verdict unless it is against the great weight of the evidence, resulted from the jury's disregard for applicable rules of law, or was tainted by legal error committed

by the Court during trial.<sup>170</sup> After considering the record, relevant authorities,<sup>171</sup> and the parties' submissions, which included expanded briefing and oral argument regarding the discovery issues raised in Carestream's motion and M&G's application, the Court is satisfied that a new trial is not merited. Furthermore, because Carestream forced M&G to respond to shifting counterfactual and even contradictory defenses while at an unfair disadvantage due to Carestream's discovery violations, M&G is entitled to recover attorneys' fees and expenses under Civil Rules 16 and 37, as well as the bad faith exception to the American Rule.

### **A. M&G's Lost Profits Claim**

#### **1. M&G Was Not Barred by the Supply Agreement or New York Law from Seeking Lost Profits**

In its Motion for a New Trial, Carestream raises a multi-faceted challenge to M&G's lost profits claim. Carestream's first argument posits that the Supply Agreement's § 23.0 liability limitation provision was intended to deny either party recovery for lost profits in the event of a breach, and that it was therefore error for the Court to deny Carestream the opportunity to marshal evidence regarding the

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<sup>170</sup> *E.g.*, *Crist v. Connor*, 2007 WL 2473322, at \*1 (Del. Super. Aug. 31, 2007).

<sup>171</sup> Pursuant to a valid choice-of-law provision in the Supply Agreement, New York law governs the substance of M&G's claim.

meaning of that contractual provision. Furthermore, Carestream argues that M&G was not entitled under New York law to recover lost profits in any event, because lost profits were not “contemplated” by the parties at the time of contracting.

Carestream’s Motion for Summary Judgment argued that § 23.0 of the Supply Agreement excluded M&G’s recovery for “lost profits or consequential loss” and that the Supply Agreement therefore “limits damages for breach to M&G’s direct damages.”<sup>172</sup> In response, M&G denied that the Supply Agreement’s § 23.0 liability limitation provision applied to its claims. M&G emphasized the language of § 23.0, which states that “neither party shall be responsible or liable to the other for lost profits . . . or for indirect, special, punitive or consequential damages arising out of or in connection with supply of goods provided for under this agreement or for termination of this agreement as provided for herein.” M&G argued that its claims did not arise “from or in connection with” either the “supply of goods” or the triggering of one of the contractual termination clauses, but rather stemmed from the “non-supply of goods because Carestream repudiated the Agreement (in bad faith) before M&G could perform.”<sup>173</sup> Thus, M&G took the position that § 23.0’s limitation on lost profits would protect it from having to pay Carestream for lost profits related to business arrangements separate

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<sup>172</sup> Def.’s Mot. for Summ. J., at 3-4.

<sup>173</sup> Pl.’s Resp. to Def.’s Mot. for Summ. J., at 3-4 (emphasis in original).

from the Supply Agreement in the event M&G had breached the contract, for instance by supplying defective PET pellets; however, M&G contended that § 23.0 in no way prohibited it from recovering lost profits as a measure of *direct* damages for Carestream’s breach of the Supply Agreement. A contrary reading would, M&G urged, “render M&G’s contractual expectancy illusory, barring damages for Carestream’s non-performance even while obligating M&G under the Agreement to reserve capacity.”<sup>174</sup>

The Court denied summary judgment to Carestream on the basis that § 23.0’s “plain language . . . does not contemplate a breach by either party involving or resulting in the *non*-supply of goods, nor does it address repudiation or termination of the Supply Agreement by means other than those provided in the contract.”<sup>175</sup> The Court noted that Carestream supported its argument by citations to cases in which the “damage limitation provisions . . . were clearly applicable to the plaintiff’s claims and sufficiently broad that they would have limited damages for *any* breach of the contracts at issue.”<sup>176</sup> Those cases involved, by way of example, liability limitation clauses that by their terms applied to “all breaches of

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<sup>174</sup> *Id.* at 4.

<sup>175</sup> 2009 WL 3535465, at \*7 (Del. Super. June 3, 2009).

<sup>176</sup> *Id.* at \*6.

any provisions” of the contract at issue,<sup>177</sup> or that stated that the defendant “[i]n no event shall . . . be liable for any incidental, indirect, special, or consequential damages . . . regardless of the cause or foreseeability thereof.”<sup>178</sup> In comparison to these expansive provisions, the Court concluded that § 23.0 of the Supply Agreement was limited to the two types of breaches it described: those arising from the actual supply of product or from the triggering of one of the termination clauses.

Two months after the Court’s decision, the limitation of liability provision was raised as an issue in Carestream’s portions of the joint pretrial stipulation. Numerous statements in the stipulation indicated that Carestream perceived that the factual and legal questions remaining to be litigated in the case included “[w]hether, if Carestream Health breached the Agreement, M&G is entitled to recover lost profits[.]”<sup>179</sup> At the pretrial conference, the Court expressed that it considered M&G’s ability to recover lost profits to be controlled by its ruling on Carestream’s summary judgment motion: because M&G properly brought a claim for lost profits as a measure of damages under UCC § 2-708(2), and because the Supply Agreement’s § 23.0 damages limitations provision did not apply to its

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<sup>177</sup> *Id.* at \*6, n.33 (quoting *Tradex Europe SPRL v. Conair Corp.*, 2008 WL 1990464, at \*1, 3 (S.D.N.Y. May 7, 2008)).

<sup>178</sup> *Id.* (quoting *Net2Globe Int’l, Inc. v. Time Warner Telecom of N.Y.*, 283 F. Supp. 2d 436, 449 (S.D.N.Y. 2003)).

<sup>179</sup> Corrected Joint Pretrial Stipulation, at 7.

direct damages claim, M&G would be permitted to present its lost profits evidence to the jury.<sup>180</sup>

Carestream explained that it believed the phrase “arising out of or in connection with” used in § 23.0 was expansive, and that because “the Uniform Commercial Code applies whether goods are delivered or not,” the provision’s liability limitations should apply by extension to both the “supply of goods” and their non-supply.<sup>181</sup> Noting that neither party had timely filed for reargument concerning its summary judgment opinion, the Court considered that decision to be controlling.

In its Motion for a New Trial, Carestream argues that the Court erred in prohibiting it from presenting evidence at trial that the parties intended § 23.0 to bar M&G from lost profits, or in the alternative, that M&G’s lost profits were not recoverable under New York law, which “precludes lost profits damages unless the contract at issue specifically contemplates lost profits or there is evidence establishing that such liability was fairly within the contemplation of the parties.”<sup>182</sup>

M&G suggests that Carestream’s argument is inappropriate under Rule 59, because it challenges a pretrial ruling rather than an alleged error during the trial.

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<sup>180</sup> Pretrial Conference Tr., Aug. 6, 2009, at 20:4-21:11.

<sup>181</sup> *Id.* at 21:12-22:5.

<sup>182</sup> Def.’s Mot. for New Trial, at 3-4.

Nevertheless, because Carestream’s motion is at least partially a challenge to the effect the Court’s pretrial legal rulings had on the admission of evidence and to the sufficiency of the evidence M&G offered at trial in support of its damages claim, the Court will address Carestream’s contentions.

New York law recognizes that the basic goal of fixing damages for breach of contract is to fulfill the parties’ expectations by placing the nonbreaching party “in as good a position as if the other party had fully performed.”<sup>183</sup> In the event a buyer wrongfully refuses acceptance or repudiates a contract for the sale of goods, § 2-708 of the UCC provides the aggrieved seller with the following measures of damages:

(1) Subject to subsection (2) and to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-acceptance or repudiation by the buyer is the difference between market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Article (Section 2-710), but less expenses saved in consequence of the buyer’s breach.

(2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article (Section 2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

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<sup>183</sup> U.C.C. § 1-106; *see, e.g., Fertico Belgium, S.A. v. Phosphate Chems. Exp. Ass’n, Inc.*, 510 N.E.2d 334, 338 (N.Y. 1987).

Where a buyer in a requirements contract has breached that contract by purchasing goods elsewhere before the seller has completed manufacture, the lost profits measure of damages under § 2-708(2) permits the seller to “recover lost profits on the lost sales” that would have been made to the buyer.<sup>184</sup>

Even if the Court accepted Carestream’s argument as to the expansiveness of § 23.0 and was willing to read the phrase “arising out of or in connection with the supply of goods” so broadly that it would apply to *any* breach of the Supply Agreement, Carestream has a much bigger problem in attempting to apply § 23.0 to M&G’s lost profits claim: doing so would render M&G’s contractual expectancy illusory by eliminating *any* seller’s remedies under the Supply Agreement.

Given the cases relied upon by Carestream, it bears emphasizing that § 2-708(2) utilizes lost profits as a measure of direct damages, and only applies when damages based upon market price are inadequate. The Second Circuit, in *Tractebel Energy Marketing, Inc. v. AEP Power Marketing, Inc.*, offered a cogent summary of the distinction between lost profits as a consequential damages claim and lost profits as a measure of direct damages:

Lost profits are consequential damages when, as a result of the breach, the non-breaching party suffers loss of profits on collateral business arrangements. In the typical case, the ability of the non-

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<sup>184</sup> *Honeywell Int’l Inc. v. Air Prods. & Chems., Inc.*, 858 A.2d 392, 422-23 (Del. Ch. 2004), *aff’d in part and rev’d in part on other grounds*, 872 A.2d 944 (Del. 2005).

breaching party to operate his business, and thereby generate profits on collateral transactions, is contingent on the performance of the primary contract. When the breaching party does not perform, the non-breaching party's business is in some way hindered, and the profits from potential collateral exchanges are "lost." . . .

By contrast, when the non-breaching party seeks only to recover money that the breaching party agreed to pay under the contract, the damages sought are general damages. The damages may still be characterized as lost profits since, had the contract been performed, the non-breaching party would have profited to the extent that his cost of performance was less than the total value of the breaching party's promised payments. But [in such a case,] . . . [t]he profits are precisely what the non-breaching party bargained for, and only an award of damages equal to lost profits will put the non-breaching party in the same position he would have occupied had the contract been performed.<sup>185</sup>

This distinction is crucial because it means that Carestream's assertion that M&G was unable to recover lost profits due either to § 23.0 of the Supply Agreement or to Carestream's alleged failure to "contemplate" that measure of damages is tantamount to stating that Carestream's obligations under the Supply Agreement were *never* enforceable, because M&G was foreclosed from pursuing the only adequate measure of direct damages available to remedy a breach by Carestream. As M&G argued upon Carestream's summary judgment motion, Carestream's position completely ignores M&G's contractual expectancy.

Accordingly, even if § 23.0 of the Supply Agreement purported clearly and explicitly to bar M&G from recovering lost profits under any circumstance whatsoever, the Court would have been unable to enforce that limitation against

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<sup>185</sup> 487 F.3d 89, 109-10 (2nd Cir. 2007) (internal citations omitted).

M&G's direct damages claim. The Supply Agreement contains no liquidated damages clause or other alternative remedies for M&G in the event of a breach by Carestream. Carestream has invoked UCC § 2-719 as support for its contention that parties' agreed-upon damages limitation provisions are permissible and enforceable, but the comments to § 2-719 add an important caveat that it has not heeded:

Under this section parties are left free to shape their remedies to their particular requirements and reasonable agreements limiting or modifying remedies are to be given effect.

However, it is of the very essence of a sales contract that *at least minimum adequate remedies be available*. If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract. Thus any clause purporting to modify or limit the remedial provisions of this Article in an unconscionable manner is subject to deletion and in that event the remedies made available by this Article are applicable as if the stricken clause had never existed. Similarly, under subsection (2) [stating that "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act"], where an apparently fair and reasonable cause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this article.<sup>186</sup>

Thus, Carestream's argument that § 23.0 of the Supply Agreement should bar M&G's lost profits recovery for a "non-supply" situation caused by its refusal to order its requirements does not ultimately provide Carestream with a means to avoid M&G's lost profits claim. The Court does not perceive, and Carestream has

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<sup>186</sup> U.C.C. § 2-719 cmt. 1 (emphasis added).

not identified, any provision in the Supply Agreement that effectively limits or excludes M&G's recovery for direct damages on the basis of its contractual expectancy. If the Court construed § 23.0 as Carestream urges, the provision would deprive M&G of the benefit of its bargain and would have to “give way” to the general remedy provision of UCC § 2-708.

Carestream's next argument—that the Court erred in refusing to allow the question of whether M&G was barred from recovering lost profits because they were not necessarily within the parties' contemplation at the time of contracting—is similarly unavailing. Carestream bases its argument on *Kenford Co. v. Erie County*,<sup>187</sup> in which the New York Court of Appeals rejected a plaintiff's claim for lost profits based upon a contract in which it agreed to undertake the operation and management of a stadium that Erie County was supposed to construct on land donated to it by the plaintiff. Because the county never built the stadium, the plaintiff sought to recover the prospective profits that it projected would have accrued to it over the twenty-year management term set forth in the parties' contract, based upon its projections of the stadium's hypothetical revenues.<sup>188</sup>

The *Kenford* Court delineated three prerequisites to the recovery of lost profits in a breach of contract action under New York law: (1) a causal link

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<sup>187</sup> 593 N.E.2d 234 (N.Y. 1986).

<sup>188</sup> *Id.* at 235.

between the breach and the damages sought; (2) proof of the alleged loss to a reasonable certainty; and (3) “a showing that the particular damages were fairly within the contemplation of the parties to the contract at the time it was made.”<sup>189</sup>

The Court determined that the plaintiff’s claim failed the second and third requirements. The plaintiff’s projected profits for the venture were overly speculative, given the significant number of uncertain variables associated with forecasting the success of a new venture, the long time-frame, and the paucity of comparable operations against which the projections could be benchmarked. Further, the parties’ contract contained remedy provisions that did not “suggest or provide for such a heavy responsibility” to be imposed on the defendant in the event of breach.<sup>190</sup> Because the contract did not explicitly address the circumstances of the breach, the *Kenford* Court suggested that “the commonsense rule to apply is to consider what the parties would have concluded had they considered the subject.”<sup>191</sup> The Court found that the plaintiff had failed to demonstrate that the parties would have contemplated the remedy it sought had the issue been addressed at the time of contracting.<sup>192</sup>

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 236.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

*Kenford* cited *Witherbee v. Meyer*<sup>193</sup> for the proposition that lost profits are not recoverable unless the plaintiff demonstrates that they were contemplated by the parties at the time of contracting. In *Witherbee*, the plaintiffs claimed that their gristmill operation lost profits as a result of the defendant's breach of a contractual agreement to provide adequate water power to permit the mill's machinery to operate at full power. The New York Court of Appeals overturned the trial court's award of lost profits from collateral business agreements, and explained the rationale for excluding recovery of lost profits:

The grounds upon which is founded the general rule of excluding profits in estimating damages are (1) that in the greater number of cases such profits are too dependent upon numerous and changing contingencies to constitute a definite and trustworthy measure of damages; (2) because such loss of profits is ordinarily remote, and not the direct and immediate result of a nonfulfillment of the contract; (3) the engagement to pay such loss of profits in cases of default in performance does not form a part of the contract, nor can it be said, from its nature and terms, that it was within the contemplation of the parties.<sup>194</sup>

As this language makes evident, the lost profits claim in *Witherbee* was for consequential damages related to collateral arrangements affected by the contractual breach. By contrast, a seller's claim for lost profits under UCC § 2-708(2) is a "definite and trustworthy measure of damages" because its amount can be fixed with reasonable certainty by reference to the contract and the contracting

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<sup>193</sup> 50 N.E. 58 (N.Y. 1898).

<sup>194</sup> *Id.* at 60.

parties' relationship, arises as a "direct and immediate result of a nonfulfillment of the contract" by the buyer, and forms "part of the contract" unless the parties have specifically and properly agreed to modify the UCC's default remedy rules.

As to the final rationale articulated in *Witherbee*, Carestream and M&G dispute whether an aggrieved seller must show that lost profits were within the parties' contemplation at the time of contracting to recover general damages under UCC § 2-708(2). Both *Kenford* and *Witherbee* were non-UCC cases addressing claims for lost profits derived in whole or in part from collateral business arrangements.<sup>195</sup> M&G points out that the Second Circuit in *Tractebel Energy* indicated that it would only apply the three-prong rule of *Kenford* to claims for lost

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<sup>195</sup> Carestream has argued that the lost profits claim in *Kenford* was for direct damages, and that the three *Kenford* requirements for lost profits recovery therefore must apply to all direct damages claims. As an earlier opinion in the *Kenford* litigation establishes, however, the lost profits the plaintiff sought on its twenty-year management contract ultimately derived from the gross revenue that would have been earned from its operation of the stadium, which was an entirely new venture not readily comparable to any existing operations. *See Kenford Co. v. Erie County*, 489 N.Y.S.2d 939, 947 (N.Y. App. Div. 1985) ("The management contract provided that [plaintiff] would receive 11% of gross revenues from major events (i.e., professional baseball and football) and 89% of gross revenues on 'open time' events."). Thus, although the plaintiff in *Kenford* was seeking lost profits on an expectancy theory, its claim was intrinsically different from the usual aggrieved seller's claim under § 2-708(2) of the UCC. Those differences brought *Kenford* within the purview of the "contemplation" requirement articulated in *Witherbee* for consequential lost profits claims arising from collateral business arrangements not directly referable to the contract. It is difficult to shoehorn *Kenford* into the general/consequential dichotomy, which is what led this Court to refer to it as an "outlier" when it was raised at trial. The key point for present purposes is that none of the qualities that rendered the lost profits claim in *Kenford* unusual are present in M&G's general damages claim for lost profits. M&G's claim is directly traceable to the payments Carestream would have owed under the Supply Agreement, does not seek revenue that would have been generated by uncertain collateral business dealings, and can be estimated to a reasonable certainty.

profits in the form of consequential damages related to collateral business arrangements.<sup>196</sup>

Another New York Court of Appeals opinion in the protracted *Kenford Co. v. Eerie County* saga<sup>197</sup> provides some support for the Second Circuit's holding that an aggrieved seller entitled to lost profits as general damages need not show that this form of recovery was within the parties' contemplation absent exceptional circumstances. Rejecting the plaintiff's claim for loss of the projected appreciation in value of the land it was to provide to the stadium venture, the court recognized a distinction between general damages and "extraordinary" damages:

It is well established that in actions for breach of contract, the nonbreaching party may recover general damages which are the natural and probable consequence of the breach. "[I]n order to impose on the defaulting party a further liability than for damages [which] naturally and directly [flow from the breach], i.e., in the ordinary course of things, arising from a breach of contract, such unusual or extraordinary damages must have been brought within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting."<sup>198</sup>

The foregoing language would seem to indicate that under New York law the "contemplation of the parties" is in essence a heightened foreseeability requirement imposed only upon "unusual or extraordinary damages" (i.e.,

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<sup>196</sup> 487 F.3d at 109-10.

<sup>197</sup> 537 N.E.2d 176 (N.Y. 1989).

<sup>198</sup> *Id.* at 178 (quoting *Chapman v. Fargo*, 119 N.E. 76 (N.Y. 1918)).

consequential damages), and not an evidentiary hurdle to a plaintiff's general damages claim.<sup>199</sup>

In *Honeywell International Inc. v. Air Products & Chemicals, Inc.*,<sup>200</sup> the Delaware Court of Chancery, applying New York law, rejected this distinction. The Chancery Court held that *Kenford* applies to a claim for lost profits under § 2-708(2), such that an aggrieved seller must show that lost profit recovery was in the parties' contemplation as a measure of direct damages. The Chancery Court's opinion observed that New York courts have discussed *Kenford* in the context of buyers' UCC remedies under § 2-713, thereby "undermining the argument that basic common law rules of contract damages have no application" to contracts governed by the UCC.<sup>201</sup>

Although the two cases appear irreconcilable, the Court is persuaded, not only by *Tractebel Energy* but by a close reading of *Honeywell*, that a seller who meets all of the prerequisites for an award of direct damages under § 2-708(2) need not offer proof that the parties specifically or expressly "contemplated" that its damages would be measured by lost profits. Parties to a contract for the sale of goods are governed by the UCC's Article 2 remedy provisions and their underlying

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<sup>199</sup> See also *Am. List Corp. v. U.S. News and World Report, Inc.*, 549 N.E.2d 1161, 1163-64 (N.Y. 1989).

<sup>200</sup> 858 A.2d 392 (Del. Ch. 2004).

<sup>201</sup> *Id.* at 423 n.108.

principles, including § 1-106's requirement that remedies "be liberally administered" to honor parties' contractual expectancies. Unless the parties effectively exclude, limit, liquidate, or modify the remedies available in the event of a breach, the UCC generally provides that direct damages are available to restore the nonbreaching party's expectancy. To use the parlance of *Witherbee*, the "nature and terms" of a contract for the sale of goods, in the absence of a proper modification of the remedies available under Article 2, can be said to "contemplate" expectancy damages. If *Kenford* applies at all to a claim for direct damages—and the Court is far from convinced that it does—it makes little sense to construe it so rigidly as to require an aggrieved seller otherwise entitled to proceed under § 2-708(2) to show that the parties specifically contemplated that its direct damages were to be calculated based upon lost profits.

Although the *Honeywell* case broadly states that direct damages claims are not exempted from *Kenford*'s "contemplation" requirement, upon a close reading it also implicitly suggests that a seller-plaintiff bringing a *proper* § 2-708(2) claim for lost damages will automatically satisfy *Kenford*. *Honeywell* arose from the breach of a contractual strategic alliance ("the Alliance") between Honeywell, which manufactured wet process chemicals used in producing semiconductor chips, and Air Products, which supplied goods and facilities management services to semiconductor manufacturers. The parties agreed, among other arrangements,

that Air Products would purchase from Honeywell all of its requirements for certain wet process chemicals arising from orders placed by particular semiconductor manufacturers identified in an appendix to the contract. Air Products was also obligated to make reasonable efforts to promote sales of the products covered by the alliance agreement to those designated customers. Profits from the sales were shared between Honeywell and Air Products, with allowances for Honeywell's costs to manufacture the chemicals.

The Alliance, which was supposed to have a ten-year initial term, proved less financially successful than the parties anticipated. Although the joint venture continued to make sales, Honeywell and Air Products informally tinkered with the Alliance operating terms, including altering which semiconductor manufacturers were to be considered Alliance customers, without updating the contractual list.

After the Alliance had been in place for several years, both Honeywell and Air Products were approached with an opportunity to purchase the electronic chemicals division of Ashland Chemicals ("Ashland ECD"), which was the largest wet process chemical producer in the industry. Air Products decided to pursue the purchase. Honeywell took the position that Air Products' acquisition of Ashland ECD violated its obligations under the Alliance to purchase all of its requirements of particular wet process chemicals from Honeywell and to use reasonable efforts to promote the sale of those chemicals covered by the agreement to Alliance

customers. Air Products nevertheless completed the acquisition and began manufacturing a significant volume of the wet process chemicals that it was supposed to obtain from Honeywell for supply to Alliance customers. In addition, Air Products took over sales to Ashland ECD customers that had never been Alliance customers.

Honeywell filed suit for breach of the Alliance agreement, and the Chancery Court determined after a trial that it was entitled to damages for Air Products' failure to fulfill its obligation to purchase its total requirements of particular wet process chemicals from Honeywell. Honeywell invoked the lost profits damages provision of UCC § 2-708(2), which the Chancery Court agreed was applicable to its claim.<sup>202</sup>

However, as the Chancery Court's opinion makes clear, Honeywell's concept of what constituted "lost profits" within the meaning of § 2-708(2) was glaringly overambitious:

Honeywell does not merely seek lost profits on those sales that the Alliance would have made had Air Products never purchased Ashland ECD and simply continued to perform under the Alliance until the end of the Agreement's term ("Future Alliance Sales"). Rather, Honeywell contends that *every* future sale of "Products" to "Customers" that will be sourced through Air Products' newly purchased Ashland ECD business, rather than Honeywell, will constitute a breach[,] . . . even those sales that will arise solely because of the Ashland ECD purchase itself ("Ashland Sales"). . . . Honeywell thus asserts that in determining what profits it would have made "but-for" the breach, the

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<sup>202</sup> *Id.* at 422-23.

“but-for world” must assume that Air Products purchased Ashland ECD and then sourced all of its requirements, including those arising from the Ashland Sales, through Honeywell. *As Honeywell concedes, awarding this measure of damages would make it significantly better off than it would have been had the Ashland ECD acquisition never occurred.*<sup>203</sup>

In other words, Honeywell sought to recover not merely the benefit of its bargain (the profits it would have earned in the absence of the breach), but the benefit of the breach (the profits Air Products earned from supplying the new customers it obtained as the result of purchasing Ashland ECD).

Unsurprisingly, the Chancery Court rejected the portion of Honeywell’s lost profits claim attributable to the Ashland Sales. The Court held that Air Products’ increased need for chemicals attributable to the Ashland Sales was not a part of its “requirements” within the context of the Alliance agreement.<sup>204</sup> Moreover, the Court applied *Kenford* and concluded that “Honeywell . . . failed to show that it was ‘fairly within the contemplation of the parties to the contract at the time it was made’ that if Air Products purchased the largest wet process chemical seller in the

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<sup>203</sup> *Id.* at 421 (emphasis added).

<sup>204</sup> *Id.* at 422 (“When an increase in requirements is due to the combination of two entities that both have ‘requirements’ for a particular product, an earlier agreement by one of those entities to fill those requirements exclusively from one supplier does not obligate the combined entity to purchase all of its requirements from that supplier, but only the ‘actual good faith . . . requirements under the normal operation of the enterprise prior to sale. The sale itself is not grounds for sudden expansion . . .’” (quoting N.Y.U.C.C. § 2-306 cmt. 4)).

industry, Air Products would be liable for the ‘lost profits’ caused by failure to fill all the requirements that arose from that sale through Honeywell.”<sup>205</sup>

Although the Chancery Court in *Honeywell* adopted the position that *Kenford* applies to an aggrieved seller’s § 2-708(2) claim for lost profits, the Court believes it may have overstated this point in arriving at the correct outcome. The concept of prior contemplation of remedies barred Honeywell from recovering profits “lost” on the Ashland Sales not because *Kenford* applies to every claim for lost profits as general damages, but because Honeywell’s demand for recovery of the Ashland Sales profits was not a proper § 2-708(2) claim. By its terms, § 2-708(2) only permits a seller to recover the profits that it “would have made from full performance by the buyer.” Honeywell admitted that its theory of recovery would place it in a *better* position than it would have been in had Air Products fully performed. Honeywell’s pursuit of a windfall under the auspices of “lost profits” was thus untethered from its contractual expectancy, and more akin to a claim for consequential or punitive damages than the direct damages measure § 2-708(2) provides.<sup>206</sup> The Chancery Court’s statement that “courts applying New York law have discussed the requirements of *Kenford* in the context of cases

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<sup>205</sup> *Id.* at 423 (quoting *Kenford*, 493 N.E.2d at 235).

<sup>206</sup> Notably, the Delaware Supreme Court affirmed this portion of the Chancery Court’s opinion in a thorough discussion of the “foreseeability” of the Ashland Sales lost profits that made no reference or citation to UCC § 2-708(2). See *Honeywell Int’l Inc. v. Air Prods. & Chems., Inc.*, 872 A.2d 944, 952-54 (Del. 2005).

governed by [§ 2-713], the counterpart to § 2-708 which governs ‘Buyer's Damages for Non-Delivery or Repudiation’”<sup>207</sup> highlights the point. A buyer proceeding under § 2-713 would be seeking lost profits arising from an impairment to its collateral business transactions—the very type of claim *Kenford* and *Witherbee* directly addressed.

This Court therefore agrees with the *Honeywell* decision that *Kenford* applies to UCC Article 2 contracts, but considers it of limited or no relevance to a claim for direct damages under § 2-708(2). Perhaps the most crucial point to be drawn from *Honeywell* for the purposes of this case is one that Carestream ignores entirely: the Chancery Court awarded *Honeywell* damages based upon the profits it would have earned from future Alliance sales lost as a result of Air Products’ breach, without any discussion of the parties’ contemplation of that form of recovery beyond a recognition that the contract was governed by Article 2. The Court does not read *Kenford* to impose a heightened evidentiary burden on aggrieved sellers who are otherwise entitled to § 2-708(2) damages. No parallel foreseeability or contemplation requirement exists as an obstacle to an aggrieved buyer’s direct damages claim. *Kenford*’s contemplation requirement derives from the concerns expressed in *Witherbee* about requiring a breaching party to pay potentially speculative, remote, and unforeseen lost profits on collateral business

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<sup>207</sup> *Honeywell*, 848 A.2d at 423, n.108 (citing *Canusa Corp. v. A & R Lobosco, Inc.*, 986 F. Supp. 723, 731-32 (E.D.N.Y. 1997)).

arrangements unrelated to the contracting parties' agreement. These concerns are minimized or absent when an aggrieved seller qualifies for damages under § 2-708(2).

In this case, M&G's direct damages claim was properly limited to the recovery necessary to place it in as good a position as it would have been in had Carestream fully performed under the Supply Agreement. As will be discussed further below, market price recovery would not have redressed its expectancy, and so this amount was appropriately measured on the basis of the profits M&G lost on prospective sales to Carestream. The loss of those sales was a "natural and probable consequence" of Carestream's breach, and related directly to the parties' contract. Moreover, the amount of M&G's loss was susceptible to reasonably certain estimation by reference to the contract itself and the surrounding circumstances of the parties. Unlike Honeywell, M&G therefore brought a direct damages claim that was within the permissible scope of recovery under § 2-708(2).

The Supply Agreement was a contract for the sale of goods that the parties agreed would be governed by New York substantive law, which includes the remedy provisions contained in New York's version of the UCC. As discussed above, the liability limitation of § 23.0 did not by its terms apply to the circumstances of Carestream's breach, and could not be applied to deprive M&G of a minimum adequate remedy even if it contained broader language purporting to

do so. M&G was not required to present any further evidence supporting that the parties considered at the time of contracting that its direct damages for a breach would take the form of lost profits, nor was Carestream entitled to any opportunity to suggest to the jury that it should be relieved from having to pay direct damages because it did not “contemplate” having to fulfill M&G’s contractual expectancy. Accordingly, the Court’s decision precluding Carestream from presenting evidence “on the parties’ understanding as to the recoverability of lost profits” offers no basis for a new trial.

## 2. The Verdict Did Not Award Impermissible “Consequential” Seller’s Damages

In its Reply Brief in support of its Motion for a New Trial, Carestream raised for the first time the alternative argument that part of M&G’s lost profits claim sought consequential damages. In particular, Carestream argues that lost profits based upon sales in excess of 90% of Carestream’s PET requirements or upon sales arising from a renewal term are “not required” by the contract and thus “would, at best, be considered consequential.”<sup>208</sup> Because the UCC does not provide an aggrieved seller with the right to recover consequential damages,<sup>209</sup> Carestream

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<sup>208</sup> Def.’s Reply Br. on Points II and III of Def.’s Mot. for New Trial, at 3-4 n.7.

<sup>209</sup> See Def.’s Letter Enclosing Additional Authority (Mar. 4, 2010) (citing *Marion Mills, L.L.C. v. Delta Mills Mktg. Co.*, 2001 WL 1019422, at \*6-7 (W.D.N.C. Jan. 5, 2001)).

claims that the Court erred in allowing the jury to consider and award damages for lost profits arising from these projected sales.

As Carestream first presented this ground in the Reply to its own Motion for a New Trial—and there relegated it to a brief footnote—M&G has not been afforded any opportunity to respond. Before trial, Carestream timely raised a *Daubert* challenge to M&G’s economic expert’s assumption of a renewal term, which the Court denied on the basis that Carestream’s objections went to the weight of M&G’s expert’s testimony, not its admissibility. Carestream’s allegation that parts of M&G’s claimed lost profits would constitute consequential damages is similar to the argument presented in the *Daubert* motion, but conceptually distinct. Carestream also raised broad concerns about M&G’s ability to recover lost profits and consequential damages in the Pretrial Stipulation, but without arguing that any of M&G’s lost profits should be considered consequential damages.

Carestream has not offered any explanation for why this particular issue was not raised and addressed by motion prior to trial or, at the very latest, during trial, nor is any reason for this omission readily apparent. Therefore, although the Court will address the substance of Carestream’s position due to the connection between

Carestream's new argument and its previous objections to M&G's lost profits evidence, the Court considers this late-raised ground to be waived.<sup>210</sup>

Turning to the merits of Carestream's position, the challenged portions of M&G's lost profits claim are aspects of its general damages claim, rather than consequential damages. Lost profits, and particularly lost future profits, are "inherently problematical and difficult of proof."<sup>211</sup> An aggrieved seller seeking lost profits bears the burden of presenting non-speculative evidence as to the extent of its loss, but is not required to demonstrate the exact amount of lost profits with absolute precision; a reasonable estimation is permissible, as a degree of contingency and uncertainty must be expected in projecting how the parties' relationship would have proceeded in the absence of a breach.<sup>212</sup>

M&G's economic expert, Robert Reilly, based his lost profits analysis on certain assumptions or predictions about what Carestream's requirements for M&G product would have been had Carestream performed under the contract and about the possibility of a renewal term of the Supply Agreement. Reilly's demand assumptions were made with reference to the contract itself. For each year of the

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<sup>210</sup> See D.R.E. 103(a).

<sup>211</sup> *R & I Elecs., Inc. v. Neuman*, 411 N.Y.S.2d 401, 404 (N.Y. App. Div. 1978), *modified upon appeal after remand*, 438 N.Y.S.2d 832 (N.Y. App. Div. 1981).

<sup>212</sup> See U.C.C. § 1-106 cmt. 1 ("The third purpose of subsection (1) is to reject any doctrine that damages must be calculable with mathematical accuracy. Compensatory damages are often at best approximate: they have to be proved with whatever definiteness and accuracy the facts permit, but no more."); 67A AM. JUR. 2D *Sales* § 1009.

contract, Appendix B of the Supply Agreement set Carestream’s minimum volume purchase obligations (a “required annual purchase volume”), as well as a “ceiling” on Carestream’s demand, representing the largest volume that M&G would have been contractually obligated to supply (“maximum annual volume”). For example, Appendix B stated that Carestream “shall purchase” product from M&G during 2008 in an amount

equal to at least the greater of 100% of [the Windsor facility’s total demand] up to 30,000,000 lb of demand for PET pellets, or 90% of [the Windsor facility’s] total demand for PET pellets (“the 2008 Required Annual Purchase Volume”), *not to exceed the 2009 Maximum Annual Volume* [of 55,000,000 lbs] . . . .<sup>213</sup>

Reilly, who issued his expert report in January of 2009, calculated M&G’s damages with the assumption that Carestream would have purchased the maximum annual volume for each year the Supply Agreement was in effect. At the time of trial, data based upon Carestream’s actual orders from ECC for 2007 and 2008 established that Carestream’s prepolymer purchase volume fell short of the Supply Agreement maximum annual volume figures for those years.

Carestream suggests that by calculating lost profits with the assumption that Carestream would have ordered the maximum annual volume—rather than using the applicable percentages of Carestream’s actual demand for ECC’s material—Reilly’s analysis awarded M&G “consequential” damages for non-required

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<sup>213</sup> Supply Agreement, App. B (emphasis added).

purchases. Carestream also argues that Reilly's projection of lost profits from a possible renewal term is a form of consequential damage recovery.

Carestream has pointed out potential weaknesses in parts of M&G's direct damages claim that were ripe for cross-examination and tried to cast them as fatal flaws. A plaintiff bears the burden of establishing damages, but the causal link between the claimed damages and the breach, as well as the amount of any damages to which the plaintiff is entitled, are both factual questions for the jury. The line between direct and consequential damages is not always crystal clear, and the UCC provides no concrete definition of "consequential damages" as guidance.<sup>214</sup> Black's Dictionary defines consequential damages as "[l]osses that do not flow directly and immediately from an injurious act but that result indirectly from the act."<sup>215</sup>

In the context of this case, the lost profits Carestream contests were for sales M&G anticipated making to Carestream pursuant to the Supply Agreement, and thus were directly related to Carestream's breach. In other words, M&G contended that the sales in question were part of the contractual expectancy for which it bargained. Under the circumstances, M&G was entitled to present its evidence and argue that it lost the challenged sales as a direct result of

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<sup>214</sup> Section 2-715 of the UCC illustrates two examples of buyers' consequential damages, but inasmuch as these illustrations are frequently referred to as Article 2's "definition" of consequential damages, they are unhelpful in the context of sellers' damages.

<sup>215</sup> BLACK'S LAW DICTIONARY 416 (8th ed. 2004).

Carestream's breach—just as Carestream was free to cross-examine Reilly regarding the factual assumptions underlying his estimates. To the extent that the jury awarded M&G damages based upon the challenged sales—and, in fact, the verdict reflects that the jury did not wholly accept M&G's lost profits evidence—they arose from and were traceable to the parties' contractual arrangements, not collateral business dealings.

Carestream's present position to some extent revisits its argument, raised in its pretrial *Daubert* challenge to Reilly's expert report, that Reilly's factual assumptions were unduly speculative because they are unsupported by the record. As to Reilly's inclusion of a projected renewal term in his lost profits analysis, the Court addressed Carestream's concerns in its *Daubert* opinion, where it noted that the assumption of a single renewal term had some basis in the surrounding circumstances and thus was sufficiently supported to go to the jury:

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 be proven "with reasonable certainty" and are more than merely speculative. 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. 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 . . . . 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 non-renewal or single-term renewal.<sup>216</sup>

Thus, the Court concluded that the question of the duration of the parties' contractual relationship in the absence of a breach and the credibility of Reilly's opinions were matters the jury should decide as trier of fact.

Similarly, Reilly's use of the maximum annual volume figures to project Carestream's hypothetical demand for M&G's product may have been optimistic, but was more than mere conjecture and did not encompass "consequential" collateral business transactions. When a buyer breaches a requirements contract by obtaining goods elsewhere, calculating the seller's lost profits requires an expert to pick *some* figure or range of figures as to what the buyer's demand would have been. Crucially, the maximum annual volume figures Reilly used were drawn from the contract. M&G's figures may therefore have been hopeful, but they were sufficiently grounded in the parties' expectations at the time of contracting that they were not impermissibly fanciful.

The fact that Carestream's actual demand for ECC powder before and after Reilly's report was issued fell below his projections does not imply that Reilly's

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<sup>216</sup> 2009 WL 3535466, at \*9 (Del. Super. Aug. 5, 2009) (citations omitted).

projection of lost profits from sales above 90% of Carestream's actual demand constituted consequential damages, nor would it have merited excluding that portion of his testimony. At the time Reilly completed his analysis in January 2009, no data existed about Carestream's 2009 or 2010 PET demand, and it is uncertain how much data he had about Carestream's actual purchases from ECC or other suppliers in 2008. There is also ample reason to question whether Carestream's actual 2007 demand for ECC powder was a meaningful gauge of what its demand for M&G's product would have been in the absence of a breach, given that Carestream employees testified that ECC was charging a hefty premium on Carestream's spot buys and that Carestream was limiting the quantity of its purchases while its PET supply situation was unstable and ECC's prices were high.<sup>217</sup> Moreover, after Carestream repeatedly asserted at various points in this litigation that ECC's prepolymer powder is a different type of product than M&G's PET, the Court has not found any conclusive evidence in the record as to whether Carestream's actual demand for ECC's powder would necessarily have translated into an identical volume demand for M&G's pellets.

Thus, while Reilly's analysis did rely upon certain assumptions, they were neither counterfactual nor so speculative as to preclude his opinions from the jury's

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<sup>217</sup> Trial Tr., Test. of Richard Morabito, Sept. 11, 2009 (A.M. Session), 39:5-9; Trial Tr., Test. of Richard Morabito, Sept. 11, 2009 (P.M. Session), 31:8-10; Trial Tr., Test. of Robert Brunner, Sept. 11, 2009 (P.M. Session), 109:7-17.

consideration. Reilly's analysis accounted for lost profits that M&G contended were directly caused by Carestream's breach, and the merits of that contention were a factual question for the jury. The jury was instructed that in the event a breach was found, M&G was to be awarded only those damages, if any, that it found were caused by and resulted from the breach. Consistent with language agreed upon by the parties and incorporated in Delaware's pattern jury instructions, the instructions further explained that any damages should be compensatory in nature, placing M&G in "as good a position as it would have been" had Carestream fully performed.<sup>218</sup> Further, the Court utilized Carestream's proposed wording to explain that damages "should not be based on speculation," and that "the assumptions forming the basis of the [damages] claims should be demonstrable with reasonable certainty."<sup>219</sup>

Carestream vigorously pursued its argument that M&G's lost profits claim ran afoul of these precepts by cross-examining Reilly about his assumptions, including his use of the maximum annual volume figures to project Carestream's demand and his inclusion of lost profits from a renewal term,<sup>220</sup> and by presenting their own expert to impugn Reilly's analysis. The result of these efforts was that the jury did not accept in full Reilly's calculation of M&G's total lost profits as

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<sup>218</sup> Trial Tr., Sept. 24, 2009, at 190:5-20.

<sup>219</sup> *Id.*

<sup>220</sup> Trial Tr., Test. of Robert Reilly, Sept. 15, 2009 (P.M. Session), at 59:1-67:17.

amounting to \$18.3 million,<sup>221</sup> and instead awarded M&G \$15.5 million. However, Carestream's success on this point does not imply that M&G should have been barred from arguing, based upon the facts and certain inferences or estimates that could be drawn from them, that its direct lost profits were more extensive.

### 3. M&G Was Not Required to Present Evidence Regarding the Inadequacy of Market Price Damages

Carestream utilized the Reply Brief in support of its new-trial motion to present a previously-unraised argument regarding M&G's lost profits evidence, contending that M&G failed to carry its burden of showing that market price damages under UCC § 2-708(1) were inadequate as a prerequisite to its recovery of lost profits under § 2-708(2). Furthermore, Carestream contends, based upon *Tigg Corp. v. Dow Corning Corp.*,<sup>222</sup> that the Court erred in failing to instruct the jury "that it needed to find that the contract/market measure of damages was inadequate before it could award lost profits damages."<sup>223</sup>

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<sup>221</sup> *Id.* at 16:23-17:6.

<sup>222</sup> 962 F.2d 1119 (3rd Cir. 1992) (holding that trial court erred in awarding aggrieved seller lost profits damages under UCC § 2-708(1) without asking jury to determine if market price damages were inadequate where there was no apparent basis to conclude that lost profit recovery was necessary).

<sup>223</sup> Def.'s Reply Br. on Points II and III of Def.'s Mot. for New Trial, at 4.

Carestream again has not explained its failure to raise this issue at an earlier point in the litigation, and the Court notes that Carestream's proposed jury instructions did not include any instruction regarding M&G's burden to demonstrate the inadequacy of the market price measure of damages. The Court therefore considers Carestream to have waived any objection. Moreover, the undisputed facts in this case made clear that in the event a breach was found, market price damages would not have provided an adequate redress to M&G.

Where a seller has possession of completed goods at the time of a buyer's breach, the market price measure of damages under § 2-708(1) generally vindicates the seller's expectancy because the seller is able to sell the goods on the market, thereby recovering the portion of its expected profit consisting of the difference between the market price and the seller's production or procurement costs. The buyer is then liable for the difference between the market price and the contract price, so that the seller ultimately receives the full lost profit it expected to earn from the buyer. The UCC therefore makes the difference between the market price for the goods and the outstanding contract price the "default" measure of damages for a buyer's non-acceptance or repudiation, and permits an aggrieved seller to recover its lost profits from the buyer only in circumstances where the market price

remedy is “inadequate to put the seller in as good a position as performance would have done.”<sup>224</sup>

As a number of authorities have observed, it is often illogical to apply the § 2-708(1) market price remedy when a buyer repudiates a contract before or during the seller’s manufacture of the goods, as occurred in this case.<sup>225</sup> If goods are unfinished at the time of a buyer’s breach, the aggrieved seller is authorized to exercise “reasonable commercial judgment for the purposes of avoiding loss and of effective realization” in deciding whether to complete manufacture and identify goods to the contract, to cease manufacturing the goods, or to “proceed in any

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<sup>224</sup> U.C.C. § 2-708(2).

<sup>225</sup> See *Am. Metal Climax, Inc. v. Essex Int’l, Inc.*, 1974 WL 21702 (S.D.N.Y. Nov. 25, 1974) (observing in context of claim brought by lost-volume seller that “[w]here the requirements of mitigation, foreseeability and certainty have been met . . . valuation of damages where manufacturing has been halted is by reference to the seller’s lost profits. . . [C]ompensatory damages as provided in the contract-market formula of § 2-708(1) are realistic only where the seller continues to be in a position to sell the product to other customers in the market.” (internal citation omitted)); *Capital Steel Co. v. Foster and Creighton Co.*, 574 S.W.2d 256, 259 (Ark. 1978) (holding that market price damages under state’s version of UCC § 2-708(1) were “not applicable” where aggrieved seller had not yet fabricated goods “and so could not have made a tender of actual performance,” and that the court accordingly would apply “subsection (2), which governs when subsection (1) is not applicable”); *Cesco Mfg. Corp. v. Norcross, Inc.*, 391 N.E.2d 270, 274 (Mass. App. Ct. 1979) (noting that “[t]he legislative history of § 2-708(2) shows that it was intended to cover the situation where a seller learns of the buyer’s breach while in the process of manufacture” and that its application should not be limited to “situations where the lack of a reasonably accessible market is attributable to the uniqueness of the article”); 24 RICHARD A. LORD, WILLISTON ON CONTRACTS § 66:26 (4th ed. & Supp. 2009) (“[R]ecovery of profit and incidental damages under [§ 2-708(2)] has generally been deemed appropriate in the situation where the seller learns of the buyer’s breach while still engaged in manufacturing the goods in question, especially where the goods were to be specially manufactured for the buyer.” (footnote omitted)); 67A AM. JUR. 2D *Sales* § 1010; Roy Ryden Anderson, *Damages for Sellers Under the Code’s Profit Formula*, 40 SW. L.J. 1021, 1025 (1986).

other reasonable manner.”<sup>226</sup> When the seller reasonably stops manufacturing the goods or opts not to begin production—as may be necessary to avoid economic waste—the market price measure of damages ordinarily fails to vindicate the seller’s expectations, because the seller cannot enter the market to recoup the portion of its expected profits consisting of the difference between market price and the costs of production or procurement. In this so-called “incomplete goods” or “unfinished goods” scenario, the lost profits remedy of § 2-708(2) must be applied to place the seller in as good a position as it would have enjoyed if the buyer fully performed.

The Court strongly suspects that neither party timely raised the issue of whether M&G might be limited to damages under § 2-708(1) because it is evident on the undisputed facts that it was not. Carestream first notified M&G that it would not be making anticipated full-scale production orders in late June 2007. The evidence adduced at trial strongly supports that M&G acted reasonably after receiving that notification by discontinuing manufacture of PET pellets for Carestream in favor of using its production capacity to fulfill orders from other customers. Had M&G done otherwise, Carestream could justifiably have accused M&G of failing to mitigate its damages. The Carestream PET resin, although chemically similar to resins that M&G had produced in the past, was a different

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<sup>226</sup> U.C.C. § 2-704(2).

product developed to match Carestream's particular specifications.<sup>227</sup> The PET purchased by M&G's other customers was primarily used to manufacture plastic bottles and trays, with the Kodak and Carestream agreements representing M&G's first foray into supplying resin for use in film manufacturing.<sup>228</sup> Thus, there is no basis to assume that M&G had access to any market for PET manufactured to Carestream's specifications, if such a market existed. The Court cannot conceive of a colorable argument that it would have been reasonable for M&G to undertake production of PET meeting Carestream's particular specifications when it knew Carestream orders would not be forthcoming—and Carestream has never adopted that position.

The clear inapplicability of market price damages under § 2-708(1) distinguishes this case from *Tigg*. *Tigg* involved the breach of a requirements contract in which Tigg agreed to supply Dow Corning's requirements of a product called RetroSil, which removed toxic polychlorinated biphenyls (PCBs) that leached into transformers which had been injected with PCB-containing coolants. The parties' agreement was prompted by EPA regulations that imposed restrictions on PCB-tainted transformers, and thereby created incentives for Dow Corning and other companies to remove PCBs from existing transformers. Under the parties'

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<sup>227</sup> Trial Tr., Test. of Mark Adlam, Sept. 9, 2009 (P.M. Session), at 16:16-17:5, 41:20-42:7.

<sup>228</sup> *Id.* at 16:21-17:3.

contract, Dow Corning was to purchase specified minimum quantities of RetroSil components from Tigg over the course of three years, with minimum and expected purchase amounts for an additional two years to be provided during the third year. If Dow Corning failed to purchase the stated minimum of a particular component in a given year, Tigg could sell the units to other customers.<sup>229</sup> In the first three years, Dow Corning purchased significantly fewer components than the agreement required, and for the final two years it discontinued its purchases entirely on the basis of alleged “technical failures” in the RetroSil product.<sup>230</sup>

The trial court in *Tigg* instructed the jury over timely objections by Dow Corning that Tigg’s damages were to be measured by “lost profit; that is[,] the contract price of each piece of equipment less all expenses not incurred because production never took place.”<sup>231</sup> Following a jury verdict in favor of Tigg on the issue of Dow Corning’s liability, the trial court entered judgment based upon Tigg’s lost profits evidence.

The Third Circuit Court of Appeals reversed the award and remanded for a new trial on the issue of damages, holding that the trial court erred in failing to submit the question of “whether contract/market damages were ‘inadequate’” as

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<sup>229</sup> *Tigg*, 962 F.2d at 1122.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 1129.

defined by Michigan’s version of § 2-708.<sup>232</sup> Moreover, the Third Circuit noted that “the district court provided no explanation for this omission,” and although *Tigg* might have been able to demonstrate that market price damages were inadequate on the basis that it was a lost-volume seller or a producer of specialty goods that could not be resold, the trial court could not determine as a matter of law that either situation applied.<sup>233</sup>

*Tigg* did not address an incomplete goods situation, but rather two other scenarios in which § 2-708(1) damages are inadequate—that of the lost-volume seller and the producer of specially manufactured goods. The *Tigg* opinion does not clarify whether *Tigg* ceased production of RetroSil units as Dow Corning’s orders tailed off, though its discussion of the specially manufactured goods situation strongly suggests that *Tigg* continued manufacturing RetroSil *after* Dow Corning’s breach. This Court reads *Tigg* as supporting the proposition that the inadequacy of § 2-708(1) market price damages is usually a question for the trier of fact. Nevertheless, the *Tigg* opinion notes that the jury would not have needed to determine whether lost profits damages applied because the plaintiff produced specialty items not subject to resale if “the evidence was so overwhelming that a

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<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 1130-31.

reasonable jury would have been compelled to conclude” that the goods were specially produced.<sup>234</sup>

In this case, the undisputed evidence supported that this was an incomplete or unfinished goods situation in which Carestream breached the Supply Agreement before production of the PET resin was completed or undertaken,<sup>235</sup> and no rational jury could have concluded otherwise. Carestream has not contested the reasonableness of M&G’s decision not to produce resin meeting Carestream’s specifications. The Court is therefore persuaded that market price damages under § 2-708(1) are inapplicable. Under the circumstances of this case, neither M&G’s failure to present market price damages evidence as an alternative to its lost profits evidence, nor the Court’s failure to submit to the jury the question of whether § 2-708(1) damages were inadequate, constituted errors entitling Carestream to a new trial.

### **B. Exclusion of the December Run**

Carestream’s next basis for seeking a new trial is the Court’s decision, upon M&G’s motion *in limine*, to exclude evidence of Carestream’s December 2007 run

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<sup>234</sup> *Id.*

<sup>235</sup> M&G did of course complete production of the resin used for the qualification and accreditation trials, the joint experiment, and the December run. This resin, at least some of which was sent from Kodak Park, was accepted and apparently paid for prior to Carestream’s breach, and is not relevant to M&G’s suit.

of its remaining inventory of M&G pellets. The Court held that the December run was not relevant to the parties' dispute, as it took place nearly two months after litigation had been filed and could not have informed the parties' decision-making in August and September 2007, when their contractual relationship disintegrated.

Carestream now argues that the Court's ruling was erroneous because the timing of the December run did not affect its relevancy to the "vital question of whether or not M&G's product could work" in the 501 machine.<sup>236</sup> Carestream's argument is premised on the principle expressed by the United States Supreme Court in *College Point Boat Corp. v. United States*, that the defendant in a breach of contract action "may ordinarily defend on the ground that there existed, at the time [of the breach], a legal excuse for nonperformance by him, although he was then ignorant of the fact. He may, likewise, justify an asserted termination, rescission, or repudiation . . . by proving that there was, at the time, an adequate cause, although it did not become known to him until later."<sup>237</sup> Carestream submits that the December run "spoke directly to the heart" of its defense that M&G's resin was unusable to manufacture consumer product on the Windsor machinery.<sup>238</sup>

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<sup>236</sup> Def.'s Mot. for New Trial, at 4.

<sup>237</sup> 267 U.S. 12, 15-16 (1925) (footnotes omitted).

<sup>238</sup> Def.'s Mot. for New Trial, at 4.

The problem with Carestream's position is that every Carestream employee deposed about the December run testified that it was *not* intended to gauge "whether or not M&G's product could work" at the Windsor facility. Rather, the December run was an inventory burn-off meant to clear M&G's pellets from Carestream's books before the calendar year closed and free up the railcars occupied by the remaining M&G product.<sup>239</sup>

In support of its argument, Carestream cites to *Brywil, Inc. v. STP Corp.*,<sup>240</sup> in which a defendant was permitted to justify his termination of a contract against a claim of breach using facts discovered after the termination occurred. In *Brywil*, the defendant manufacturer, STP, terminated a commercial transportation and

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<sup>239</sup> See Pl.'s Mot. in Limine, Transmittal Aff. Ex. 2 (Dep. Test. of Todd Arndorfer), at 533:12-14 ("It was done to use up the M&G material before the end of the year to reduce our year-end inventory."); *Id.*, Transmittal Aff. Ex. 3 (Dep. Test. of Eric Adsit), at 152:6-25 (noting that December run was not an experiment but Carestream "just literally trying to get [M&G's resin] off the books before year-end," and therefore was not preceded by discussions of running conditions); *Id.*, Transmittal Aff. Ex. 4 (Dep. Test. of Debra Stith), at 133:10-20, 274:4-15 (stating that December run was not part of the process of accrediting M&G's resin for use on Carestream's machinery, as "[w]hat we were doing pretty much toward the end of December is running the material out. . . . We had been getting significant pressure to return the railcars."); *Id.*, Transmittal Aff. Ex. 5 (Dep. Test. of Alan Bopp), at 545:12-16 ("We knew that we potentially could be more vulnerable to having problems [because temperatures during December run would be colder than during the summertime joint experiment], but we thought it prudent to start with the best set of conditions that had been previously established rather than try to guess at something new."), 546:8-547:18 (stating that 501 machine was set at lower screw speed during December run than in earlier M&G product trials, which posed "potentially a significant difference in solids conveyance issues . . . the lower the speed of the screws, the more likely you are to have a problem"), & 550:22-552:5 (responding to question about whether Carestream intended the December run to "get the M&G resin operating in robust conditions" by explaining that the December run's objective "was to use up the material" and had "nothing to do with continued understanding of how to run the material").

<sup>240</sup> 1980 WL 77945 (Del. Ch. 1980).

distribution agreement with plaintiff Brywil pursuant to a clause in the contract that permitted it to end the contract if Brywil failed to achieve certain savings over STP's standard costs. Brywil alleged that the termination was in fact undertaken for reasons wholly unconnected to the contract, relating to a change in the defendant's management. Prior to the termination, STP's chief financial officer had notified management that Brywil would not be able to meet the savings requirement because Brywil's costs were exceeding STP's standard costs. After Brywil threatened to litigate, STP's accountant was instructed to "work up the figures" to support STP's case that Brywil had failed the savings objective.<sup>241</sup> STP notified Brywil that it was terminating the contract based upon Brywil's failure to realize the required annual savings over STP's standard costs. During discovery in Brywil's suit, it became apparent that the accountant's figures miscalculated the amount by which Brywil's actual costs fell short of the savings objective. Because both the pre-termination and post-termination calculations still supported the defendant's right to trigger the termination clause, however, the plaintiff's allegations of extracontractual motives were deemed irrelevant.<sup>242</sup>

For present purposes, the crucial distinction between *Brywil* and the case at bar is that the defendant in *Brywil* presented *relevant* evidence to support the

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<sup>241</sup> *Id.* at \*6.

<sup>242</sup> *Id.* at \*9-10.

existence of a legal justification for terminating the contract.<sup>243</sup> Delaware Rule of Evidence 401 defines “relevant evidence” as that evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” The conditions of the December run rendered it of miniscule or no potential assistance to the jury in determining whether M&G’s pellet PET was more or less likely to function in the Windsor facility’s normal production process. M&G never submitted before or during this litigation that its product would run flawlessly without any calibration of the Windsor equipment to achieve a long-term stable operating condition—nor was instant stable performance on the 501 machine a requirement of the Supply Agreement. No adjustments were made before or during the December run to account for differences in condition from the joint experiment, even though Carestream knew that both colder weather conditions and a lower screw speed than was used in the previous trials would increase the likelihood of instability. When instability occurred, Carestream did not try any intermediate corrective steps before deciding to turn off direct reuse, even though doing so is prohibitively expensive as a long-term condition. If Carestream had simply dumped M&G’s resin in its unextruded pellet form, there would be little

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<sup>243</sup> See also *College Point Boat Corp.*, 267 U.S. at 15-16 (holding that where Navy Department cancelled contract for manufacture of collision mats due to conclusion of a war effort, it was entitled in the ensuing suit for breach to defend itself based upon an unqualified statutory cancellation right that was unknown to it at the time it actually canceled).

argument that this act lacked any probative value with regard to the issues before the jury. That Carestream ran the remainder of the resin through the 501 machine as part of what was essentially a disposal process does not confer relevance.

This case demanded that the jury digest a large amount of technical information that was well outside the layperson's ken. M&G's concerns that the jury could become confused into believing that the December run was part of the qualification, accreditation, or experimentation runs were well founded. During their depositions, Carestream's personnel described the results of the December run as "catastrophic," a term that is far more powerful than the efforts Carestream exerted at the time to pursue a better outcome. The Court agrees with M&G that there was a significant risk that it would be unfairly prejudiced by testimony about such an apparently dire "failure" of its product that occurred under circumstances in which Carestream concedes it was unconcerned with success. Whatever minimal probative value the December run evidence may have held was therefore substantially outweighed by the threats of unfair prejudice to M&G and juror confusion.<sup>244</sup>

Between contracting parties, the implied duty of good faith and fair dealing extends "to the assertion . . . and litigation of contract claims and defenses."<sup>245</sup> If

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<sup>244</sup> See D.R.E. 403.

<sup>245</sup> RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. e.

Carestream wished to conduct post-litigation testing and analysis of the viability of M&G's resin on the 501 machine, it had the ability to undertake such an endeavor, and the admissibility of such post-litigation testing might be a closer question than the December run presented.<sup>246</sup> But M&G cannot reframe the December run as probative evidence of the performance of M&G resin on the 501 machine when the run was neither designed nor executed as a good faith effort to test the product's usability.

Indeed, it appears that Carestream's attempt to recast the import of the December run occurred late in this litigation. M&G has provided a February 2009 letter addressed to its attorneys from Carestream's trial counsel stating that Carestream did not consider the December 2007 run relevant because it occurred after M&G's suit was filed. Carestream now suggests that this letter is "inconsequential" because Carestream provided complete discovery in response to

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<sup>246</sup> The Court would not go so far as to say that admissibility of such evidence would be a foregone conclusion. Carestream's argument under *College Point Boat Corp.* and subsequent cases that a party accused of breaching a contract action may ordinarily support the legitimacy of its conduct with facts or theories developed post-litigation raises potential questions about whether the mend-the-hold doctrine might apply to limit this "ordinary" rule, as Carestream has presented M&G with a lengthy succession of sometimes contradictory defenses before and during this litigation. See *Railway Co. v. McCarthy*, 96 U.S. 258, 267-68 (1877) ("Where a party gives a reason for his conduct and decision touching any thing involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration."); *Harbor Ins. Co. v. Cont'l Bank Corp.*, 922 F.2d 357, 363-64 (7th Cir. 1991) ("A party who hokes up a phony defense to the performance of his contractual duties and then when that defense fails (at some expense to the other party) tries on another defense for size can properly be said to be acting in bad faith."); see also *ABA Distribs., Inc. v. Adolph Coors Co.*, 542 F. Supp. 1272, 1282-84 (W.D. Mo. 1982) (holding that defendant's termination of distributorship contract could not be supported by facts consistent with reasons originally offered for termination but not discovered until after notice of termination was given).

M&G's requests regarding the December run, and because M&G "understood" it was an issue for trial.<sup>247</sup> How M&G would have understood this based upon a plain assertion by Carestream's counsel that the December run was irrelevant is beyond the Court's understanding. Discovery often extends far beyond the realm of admissibility, and the Court can conceive of reasons why M&G might have pursued thorough discovery on the December run without necessarily "understanding" that Carestream would attempt to introduce it at trial. M&G may have been attempting to anticipate Carestream's defenses pertaining to the quality or performance of M&G's resins or exploring whether those defenses should have been subject to pretrial motions. The Court does not know when in 2009 Carestream switched from viewing the December run as "irrelevant" to considering the run part of the "heart" of its case. But that turnaround was not a basis of the Court's original decision, and it was ill-advised given the requirements of good faith in contract litigation and the risk that trial counsel's declarations of irrelevance could have provided M&G with alternative estoppel or waiver arguments.

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<sup>247</sup> Def.'s Reply on Points II and III of Mot. for New Trial, at 4 n.8.

### C. The Court's Production Order

#### 1. The Court's Order Requiring Production During Trial of Previously Withheld Documents Was Proper and the Only Appropriate Remedy Under the Circumstances

In its Motion for a New Trial, Carestream asserts that the Court's order requiring it to produce all documents that had previously been withheld and listed on a redaction log that was not produced to M&G during pretrial discovery constituted an improper, "draconian," and "extraordinary" sanction, and was not "just and reasonable." Carestream premises its characterization of the Court's order on the claims that its failure to produce several responsive documents was "inadvertent," and that it "possibly failed to provide" M&G with a complete log of all redactions and assertions of privilege.<sup>248</sup>

Carestream further contends that the Court's order requiring production was erroneously based upon a determination by the Court that Carestream had made a "deliberate effort to conceal" that is unsupported by the record. Carestream submits that the Court "had the opportunity to examine the unredacted documents *in camera*," which the Court "recognized"<sup>249</sup> during trial and which should have

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<sup>248</sup> Def.'s Mot. for New Trial, at 1-3.

<sup>249</sup> The Court would disagree with Carestream's claim that it "recognized" *in camera* review as a preferred or viable option. The Court did mention the possibility that "maybe" it needed to conduct an *in camera* review as it thought out loud about the proper course of action. However, as will be explained in detail below, the Court ultimately determined that *in camera* review was both practically untenable and legally inappropriate, given that Carestream had not properly asserted privilege over the controverted documents. See Trial Tr., Sept. 22, 2009 (A.M. Session), at 39:15-18.

been the appropriate remedy. Further, Carestream objects to the fact that once these documents had been turned over to M&G, the Court permitted M&G's counsel to recall and question Arndorfer about those communications. As a result, Carestream argues that "the jury was left to draw the totally unwarranted and devastating inference that Carestream had withheld documents from production for some nefarious reason."<sup>250</sup> Finally, Carestream objects to the Court allowing M&G's counsel to read the "privileged" communications to the jury during summation and to display a demonstrative copy, thereby making the documents "a crucial component to [M&G's] arguments that Carestream lacked good faith in abandoning the contract."<sup>251</sup>

Simply stated, the basis of the Court's order was the fundamental principle that Carestream had waived any claim of privilege as to those documents by failing to assert it. Once the existence of the withheld materials became known, the Court determined that they should be produced immediately, so that M&G had the benefit of understanding their contents in the limited time remaining in trial, and so that they could be admitted into evidence. The decision turned out not only to be providential in terms of what disclosure ultimately revealed, but also legally appropriate based upon case law that was not available at the time but has since

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<sup>250</sup> Def.'s Supplemental Br., at 9.

<sup>251</sup> Def.'s Mot. for New Trial, at 4.

been reviewed by the parties and the Court. For these entries' contents to come to light during the last days of trial, long after M&G's opportunities to cross-examine Carestream's witnesses concerning the discrepancies had passed, and at a point in the trial when it was far too late to offset the prejudice to M&G, was nothing short of dramatic.

For example, in a June 7, 2007 entry—made long before M&G had even been advised of the results of the first process trial, but shortly after Arndorfer's June 1 e-mail describing ECC's proposal as an “extremely attractive offer”—Arndorfer wrote:

Talked to both Mark [Malvaso] and Robert Brunner  
No written [*sic*] from ECC yet. Mark contacted Plummer [i.e., his  
ECC contact] yesterday  
Robert talked w/Morabito. He thinks we may need to buy M&G off,  
but no more than \$1.0M<sup>252</sup>

The foregoing entry was not copied during document production and was apparently never reviewed by Carestream counsel before trial. Even Carestream admits that there would have been no basis for an assertion of either attorney-client or work product privilege over it.

The implications of this June 7 entry for M&G's case are significant. The entry constitutes the earliest indication that Carestream was considering “buying M&G off”—or in less blunt terms, considering the possibility of an efficient

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<sup>252</sup> PX 249.

breach—and not merely exploring whether it might leverage ECC’s formula as the basis for a future meet-comp offer to be made for 2008. Moreover, that Carestream employees were discussing the “need” to “buy M&G off” was important to M&G’s case because it at least suggests that Carestream recognized M&G had enforceable rights under the Supply Agreement, undermining Carestream’s assertions about defects in M&G’s performance. Furthermore, because the entry is perhaps the earliest evidence that Carestream contemplated a “buy-out,” it could greatly have affected how M&G questioned Carestream witnesses about the second process trial and the decision not to contact M&G until after that trial also experienced problems.

Similarly, another previously withheld entry, dated June 27, 2007, was contained in a notebook page not copied during document production and thus never received by M&G before trial. The entry, to which no claim of privilege could attach, states as follows:

Plummer told Brunner  
ECC offered supply for Q4  
    min 7.5 M lbs  
    new formula price w/a vol. discount  
New 4 year offer is good for as long  
    as we continue to buy new material  
\*Bob will ask for in writing<sup>253</sup>

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<sup>253</sup> PX 251.

What is most striking about this entry is its connection to Brunner's e-mail sent the same day to Arndorfer and Malvaso regarding the updated four-year offer from ECC, which was to expire a month later. That e-mail recommended that Carestream "should try to target July 20 as a date we can exit our commitment contract from M&G so we can get more favorable pricing from Eastman sooner."<sup>254</sup> Brunner also indicated that Carestream would expect its new contract "to start January 1 but the new pricing formula to start immediately. That would mean at least a \$1.3M gain for us *in 2007* over what I understand to be the M&G supply and current Eastman price blended."<sup>255</sup> The June 27 notebook entry is thus particularly devastating to Carestream's assertions that it was making good faith efforts with regard to its internal accreditation process because it confirms that Carestream was contemplating both a "Q4" of 2007 purchase and a much longer-term contractual relationship with ECC even before the joint experiment began.

The second portion of the same late-produced notebook page appears to memorialize a telephone call in which an attorney was involved, but was never listed on *any* log because it was not produced to Carestream's own trial counsel during pretrial discovery. Thus, it was not only omitted from the privilege log timely provided to M&G during discovery, but was never part of the redaction log

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<sup>254</sup> PX 148.

<sup>255</sup> *Id.* (emphasis added).

turned over during trial. It does not take any special insight or knowledge to appreciate why Arndorfer unilaterally kept this extremely damaging entry to himself:

7/30 Call with Bob + Glen [Carestream in-house counsel]  
Wait til Wed before deciding on next buy from ECC based on [experiment] results

Three possible outcomes

1. Trial fails
  - > Notify M&G with a letter that we want to end the contract
  - > Buy more ECC
2. Trial works
  - > Consider whether to push Meet Comp or not same product
3. Somewhere in between
  - ?<sup>256</sup>

The ramifications for the joint experiment are telling: whether the trial was an abject failure or a complete success, Carestream did not appear interested in continuing its relationship with M&G. The quality and performance of M&G's resin would affect Carestream's decision-making only inasmuch as Carestream believed it might foreclose certain justifications for its pre-existing plans to exit the Supply Agreement.

Interestingly, Arndorfer also decided not to turn over a July 5, 2007 notebook entry that highlighted the disparity between Carestream and M&G's

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<sup>256</sup> *Id.*

levels of commitment to the Supply Agreement. That entry described a dinner meeting Arndorfer had with M&G's Mauro Fenoglio and notes, "Mark Adlam very vested in these contracts. He spent 2+ yrs. getting them signed."<sup>257</sup> Although not as damaging to Carestream as some of the other late-produced entries, this entry was clearly non-privileged and within the scope of M&G's discovery production requests. The Court can little doubt that Arndorfer's failure to copy it during the pretrial document production process went beyond mere carelessness.

One particular example of the unlogged notebook entries that had previously been withheld is perhaps of greatest concern to Carestream, not only because it would likely have been privileged had Carestream asserted privilege over it prior to trial, but also because its substance exposes many of Carestream's witnesses as having given false or misleading testimony. The August 8, 2007 entry memorializes a conference call Arndorfer had with three key Carestream managers—Brunner, Malvaso, and Morabito—and two Carestream attorneys concerning the "best path forward" with regard to the ongoing M&G situation.

The entry states as follows:

8/8 Call w/ Brunner, Malvaso, Dahl, Morabito + Glen's litigator  
M&G can have 2M lbs pellets to us in 30 days. Run 2 wks leading to shutdown.  
Decided best path forward:  
    We don't have obligation to buy pellets if we buy prepolymer.

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<sup>257</sup> PX 250.

However, since we have a signed contract w/M&G, we want to be fair.

Tell M&G we won't go forward w/ the next test unless they agree to meet ECC's new price offer, plus some discount for expected 2-3% yield loss

This is not a "meet comp" situation just polymer vs. prepoly

-If M&G agrees, go forward with next test

-If not, it may go to litigation, offer to cover or settle based on their fixed cost. Judge should not penalize us for giving M&G the opportunity to meet offer to continue business.

In any case, we need to order more ECC for October. Need to verify their delivery schedule.<sup>258</sup>

As the note indicates, Carestream planned to tell M&G that it would only proceed with its accreditation process if M&G matched ECC's price and gave an additional discount on an expected "2-3% yield loss." Arndorfer noted that this would not be a proper meet-comp offer within the Supply Agreement, but would be presented based upon the "polymer versus prepolymer" distinction, as Carestream maintained that it had no obligation to purchase M&G pellets if it used ECC prepolymer powder. Arndorfer's notes further reveal that Carestream might offer to settle but that the "Judge should not penalize us for giving M&G the opportunity to meet offer to continue business."

During oral argument, Carestream counsel proposed an elaborate alternative procedure that the Court should have utilized to assess its in-trial assertions of attorney-client and work product privilege and to protect its documents from

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<sup>258</sup> PX 247.

disclosure if they were eventually determined to be privileged. Carestream submits that the Court could have recessed the trial, and instructed counsel for both parties to confer and single out five or six entries that presented disputes as to whether privilege applied. Thereafter, the Court would review those five or six documents *in camera* to resolve the privilege disputes.

Aside from the fact that such an unprecedented process was never suggested at trial, had it been proposed, the Court would have dismissed the idea as an extraordinary reversal of the purpose of its remedy, and one that would serve more to protect Carestream from its own discovery violations than to alleviate the obvious prejudice to M&G. In no way would it have been fair for the Court to limit M&G in terms of the number of challenges it could make to Carestream's privilege assertions, nor could Carestream's proposed scheme have been accomplished without great disruption to the trial process, serious inconvenience to the jury and the Court, and a grave risk of mistrial from juror attrition. Carestream's unusual suggestion that the Court could have limited its review to a "handful of documents" would not have accomplished the real purpose for its imposition of the sanction—that is, to level the playing field for M&G in an attempt to salvage the nearly three weeks of trial during which important and relevant information had been withheld from it. Carestream's use of the term "draconian" would, in the Court's view, have been far more appropriate had the

Court *not* required disclosure; leaving Carestream's significant discovery violations unremedied would certainly have opened the Court up to valid accusations from *M&G* that it was acting in an unjust and unreasonable manner.

The Court does not reach such a bold conclusion lightly, and recognizes that its production order during trial was less informed than the decision it now reaches confirming that the course it chose in the midst of trial was the correct one. During trial, the Court was hearing witnesses for the first time, and seeing only snippets of depositions and documents as they were presented on-screen during cross-examination. The Court has now had the luxury, which it did not have during trial, of undertaking a more thorough and painstaking review of all of the evidence, so that its present rulings can be made with the benefit of a full and complete understanding of how the pre-trial discovery process occurred and how the documents it ordered produced during trial fit into this case's lengthy factual and legal history. After expending countless hours re-examining the issues before it, the Court is satisfied, even in retrospect, that its decision to order production was the *only* fair, reasonable, and practical sanction it could have imposed.

The Court is further convinced that its remedy only scratches the surface in terms of making *M&G* whole for the prejudice it has suffered as a result of Carestream's so-called "possible" or "inadvertent" failures to turn over either its privilege log or, more critically, key documents over which no claim of privilege

could reasonably be asserted. This last concept will be addressed more fully in this Opinion in the context of M&G's Application for Attorneys' Fees. For the time being, the Court will focus upon the propriety of its production order.

## 2. Disclosure Was the Only Practical Remedy

For a number of reasons, the Court rejects all of Carestream's arguments regarding the sanction imposed by the Court. In the first place, regardless of the panoply of remedies that could, in the Court's discretion, have been imposed—as somewhat disingenuously listed in Carestream's supplemental brief—the Court imposed the only practical sanction available to it given the *timing* of when the misconduct came to light. The trial was in its third week, having already extended one week longer than had been anticipated, with jurors' expectations as to their time commitment already frustrated. By the time the discovery abuse had been exposed, three jurors had left the panel, meaning that only one out of the four original alternate jurors remained. Faced with an extraordinary situation where the trial was virtually concluded, the Court could ill afford a lengthy recess for *in camera* review, particularly given, as is now evident, that the review process would almost certainly have necessitated an evidentiary hearing requiring testimony from witnesses who had already testified and returned to Colorado, as well as individuals, such as Carestream's in-house counsel, who were not even anticipated

as trial witnesses at all. Moreover, Carestream is misguided in its assertion that the Court was required to determine the question of whether Carestream or its counsel acted deliberately in failing to turn over the notebook entries or the redaction log before finding that the privilege had been waived. If that were true, the Court would have been compelled to recess the trial for a second hearing during which trial counsel, among others, would be called to testify. That prospect, during the final days of a three-week jury trial, would have been both unworkable and unprecedented.

To imply or suggest that the Court had the time or the resources in the midst of a jury trial to determine whether forty-four separate documents—including “documents” such as Arndorfer’s notebooks, which consisted of numerous pages counted as a single item—were entitled to work product or attorney-client privilege protection is also to assume, mistakenly, that the process of making such decisions would be easy and straightforward, and would not require briefing or oral argument. Even in the cases that Carestream cites in which a court has conducted *in camera* review of challenged documents,<sup>259</sup> the review process required painstaking, careful, and thorough analysis—and in most cases, the court’s findings were rendered only after briefing and oral argument. None of the cases

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<sup>259</sup> See *Grand River Enters. Six Nations, Ltd. v. King*, 2009 WL 63461 (S.D.N.Y. 2009); *Tracinda Corp. v. DaimlerChrysler AG*, 2005 WL 927187 (D. Del. Apr. 20, 2005), *aff’d*, 502 F.3d 212 (3d Cir. 2007); *In re Rinehardt*, 575 A.2d 1079 (Del. 1990); *Rembrandt Techs., L.P. v. Harris Corp.*, 2009 WL 402332 (Del. Super. Feb. 12, 2009).

involved *in camera* review during the twilight of a jury trial. A perusal of these cases establishes that the decision-making process is elaborate and time-consuming, and could not have been accomplished during a luncheon or even an evening recess during trial. The cases relied upon by Carestream accurately suggest that *in camera* review of a significant corpus of documents requires weeks or even months of time. Here, *in camera* review would have required a protracted recess in the midst of a jury trial, which was an extraordinary and unacceptable prospect.

In the final analysis, the Court's decision to order production of all previously withheld documents—whether or not Carestream would contend they were potentially subject to a claim of privilege—did not require anything further than a recognition of the well-settled principle that Carestream's failure to assert privilege over all the documents it withheld constituted a waiver of any such claims. This fact is inherent in the plain language of Superior Court Civil Rule 26(b)(5):

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party *shall* make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed *in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.*<sup>260</sup>

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<sup>260</sup> Del. Super. Ct. Civ. R. 26(b)(5) (emphasis added); *see also Applied Biosystems, Inc. v. Cruachem, Inc.*, 1990 WL 495458, at \*2 (D. Del. Aug. 3, 1990); *Council of Unit Owners of Sea*

Indeed, Carestream acknowledged at trial, and again in its briefing, that this obligation applied to redactions made on privilege grounds, and it even prepared a redaction log, separate from and supplemental to the privilege log that it prepared and timely provided to M&G. Unfortunately, the redaction log, despite its title, included redactions made for purposes of privilege but *not* included on the privilege log.

What is more, because Carestream *did* timely produce a privilege log that also contained notes on detailed redactions based on privilege claims, M&G was lured into believing that it had in fact received information as to *all* documents withheld entirely or redacted by Carestream on the basis of privilege. This belief seems entirely reasonable in light of the circumstances, which included statements from Carestream's counsel that "we are producing a privilege log and will detail the nature of the redactions [to Arndorfer's notebooks]."<sup>261</sup> Carestream's failure to furnish a complete and detailed log of its privilege claims by the deadlines imposed in the Trial Scheduling Order constituted a waiver of privilege as to all documents not listed.<sup>262</sup>

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*Colony E. v. Carl M. Freeman Assocs.*, 1990 WL 161169, at \*2 (Del. Super. Sept. 26, 1990) (citing *Reese v. Klair*, 1985 WL 21127, at \*5 (Del. Ch. Feb. 20, 1985)).

<sup>261</sup> Pl.'s Application for Attorneys' Fees and Expenses, Transmittal Aff. Ex. 5.

<sup>262</sup> *Reese*, 1985 WL 21127, at \*5-6 ("An improperly asserted claim of privilege is no claim of privilege at all. The documents must be precisely enough described to bring them within the rule or the court has no basis upon which to weigh the application of the privilege. A bare allegation

### 3. Counsel's Purported Oral Claims of Privilege Were Insufficient

Carestream's after-the-fact assurances to the Court that it had discussed with M&G's counsel the withheld documents listed on the belatedly-produced redaction log and the reasons for the privilege claims do not satisfy the Court that Carestream fulfilled its obligations under Rule 26(b)(5) to provide timely and proper assertion of the privilege such that the claims could be assessed by M&G. As defense counsel's assertion in this regard is less than convincing, the Court cannot conclude with any degree of certainty that such discussions took place. Much as Carestream has repeatedly used the qualifying terms "inadvertent," "possible," and "apparent" to describe its discovery failures, Carestream's lead trial counsel states that "I *believe* I reviewed every notebook redaction with M&G's counsel as to relevance and privilege at Arndorfer's deposition."

In the Court's judgment, the foregoing statement hardly substitutes for the provision of a complete written log of Carestream's privilege claims for the numerous documents it withheld by the deadline set forth in the Court's scheduling order. And, while Carestream's counsel "believes" he reviewed each and every entry that was described on the late-produced redaction log, M&G's counsel was quite obviously surprised by the mid-trial revelation of the existence of such a log,

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that information contained in the requested documents is privileged is insufficient without making more information available." (internal citations omitted)).

and denied that any discussion that occurred was thorough enough to encompass the log's content. An oral discussion cannot reasonably be relied upon to meaningfully convey the contents of six-page redaction log consisting of more than forty entries. In view of the amount of material contained in the log, an oral conversation was wholly insufficient to satisfy the requirements of Rule 26(b)(5).<sup>263</sup>

#### 4. Ample Case Law Supports the Court's In-Trial Ruling

Numerous courts confronting circumstances similar to the case at the bar have held that a failure to disclose documents on a privilege log or by other means constitutes a waiver of any privilege that might otherwise exist over those items. For example, in *Get-A-Grip, II, Inc. v. Hornell Brewing Co.*, the federal District Court for the Eastern District of Pennsylvania found waiver where a complete

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<sup>263</sup> Along similar lines, the Court will not expend much space in this already lengthy opinion on Carestream's contention that a finding of waiver as to the documents listed in the late-produced redaction log or not included on any log was inappropriate because "Courts have recognized that identification of privileged documents by 'categori[es]'" rather than document by document may be sufficient where circumstances warrant." Def.'s Supplemental Br., at 4 (citing *Orbit One Commc'ns, Inc. v. Numerex Corp.*, 255 F.R.D. 98, 109 (S.D.N.Y. 2008); *Jicarilla Apache Nation v. United States*, 88 Fed. Cl. 1, 16 n.20 (2009)). While there may be cases in which an itemized log would not more meaningfully assist the opposing party and a approach will alleviate an unduly burdensome logging process, see *Orbit One Commc'ns*, 255 F.R.D. at 109, there can be no argument that this was not such a case, because Carestream's counsel actually prepared the itemized, document-by-document redaction log (at least as to those items that were provided in full by Carestream during pretrial discovery). Moreover, a party that has provided a traditional itemized privilege log that proves to be deficient or incomplete cannot salvage it by claiming that it was categorical when the party seeking discovery had no reason to believe that the log was not comprehensive and had no opportunity to challenge the use of a categorical approach.

privilege log was produced approximately two months late,<sup>264</sup> a transgression that would certainly have caused far less prejudice to the opposing party than the mid-trial production in this case.

As the District Court for the Southern District of New York expressed in *Sheikhan v. Lenox Hill Hospital*, “[w]here a party seeks to assert a privilege as to certain documents, that party bears the burden of providing a privilege log to support its claim of privilege. A general assertion of privilege is insufficient.”<sup>265</sup> It follows, then, that Carestream’s counsel’s “belief” that he orally communicated the details of a six-page, single-spaced log relating to forty-four documents would not pass muster in federal court, just as it did not in this case.

Nor does the fact that the log was eventually produced in the final days of the trial cure Carestream’s waiver of privilege.<sup>266</sup> By the time the trial was in progress, the prejudice to M&G was so widespread as to become virtually immeasurable. M&G had no opportunity to prepare a considered response to Carestream’s privilege assertions. Aside from its last-minute recall of Arndorfer, M&G never had the opportunity to cross-examine any of Carestream’s witnesses

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<sup>264</sup> 2000 WL 1201385, at \*3 (E.D. Pa. Aug. 8, 2000).

<sup>265</sup> 1999 WL 386714, at \*2 (S.D.N.Y. June 11, 1999) (internal citation omitted).

<sup>266</sup> *Sheikhan*, 1999 WL 386714, at \*3; *see also Allstate Life Ins. Co. v. First Trust Nat’l Ass’n*, 1993 WL 138844, at \*3 (S.D.N.Y. Apr. 27, 1993) (“Having waived the documents’ immunity, [a party] cannot . . . resurrect their allegedly privileged status, by simply complying with the rules.”).

either at deposition or at trial regarding the withheld documents, some of which directly contradicted the sworn testimony of those very witnesses. Thus, contrary to Carestream's assertions, the Court's in-trial remedy of disclosure of the affected documents was not only proper, but was the *only* appropriate remedy the Court could craft. Carestream's behavior, which was at the best a negligent violation of the Court's rules and at the worst an effort to hide documents that revealed the real reasons for its breach of the Supply Agreement, hardly justifies the white-glove approach that it now contends would have been proper—or, for that matter, *any* effort on the part of the Court to protect it from the consequences of its own errors.

Carestream's argument that the Court should have allowed M&G's counsel additional time to review material that was "inadvertently not disclosed," select a "handful" of documents to contest, and present those few documents to the Court for *in camera* review might have made sense had a discovery dispute arisen in the pretrial phase of this case, but fails to account for the fact that the Court was making decisions in the third week of a "two-week" jury trial. It would have been unfair to M&G to require it to settle on only a "handful" of the forty-four previously unproduced documents to dispute. The Court could not recess a jury for the length of time that would have been required for M&G's counsel to evaluate the logs, for the Court to review the documents, and for the parties to engage in motion practice with respect to Carestream's privilege claims.

Furthermore, Carestream's proposal would have completely deprived M&G of the ability to re-call Carestream's witnesses, many of whom had returned to their homes in Colorado after completing their trial testimony.<sup>267</sup> Thus, Carestream's suggested alternatives ignore the realities and practicalities inherent in a jury trial. Even more importantly, they overlook the fact that the circumstances giving rise to the Court's order were entirely of Carestream's own making and would not have existed had Carestream's witnesses and its attorneys been more forthright and careful.

In essence, Carestream has proposed a solution that demonstrates little or no regard for the jury's time, the Court's inconvenience, or the likelihood that a recess would have led to a loss of jurors and the specter of a mistrial. Most of all, Carestream's proposal overlooks the fact that it was M&G that was most prejudiced by Carestream's violations. By arguing that the Court should have conducted an *in camera* review to address privilege issues that ought to have been properly raised and resolved months before trial, Carestream suggests that it should suffer no sanction or consequence for mistakes wholly attributable to it that seriously affected M&G. It was not incumbent upon the Court to craft a remedy

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<sup>267</sup> The Court can presume that depositions would have been necessary because at least one of the documents turned over as a result of its order were relevant and damaging notes made by Arndorfer of meetings not involving Carestream's counsel that occurred during the time period in which litigation was the "farthest thing" from his mind—in other words, an item over which Carestream had no colorable argument for privilege, and which counsel for Carestream could never have designated as privileged in any event, because even they had not seen it prior to trial.

that would protect Carestream from the consequences of its own missteps. The disregard Carestream demonstrated for the judicial process by providing incomplete discovery responses and a misleading log deserves neither to be rewarded nor overlooked.

Carestream is incorrect in its assertion that the Court's only rationale for requiring disclosure of the documents was a determination that Carestream made a deliberate effort to conceal the redaction log. Although the Court was and remains concerned about the concealment, it did not need to reach the issue of motive. The Court's decision was based instead upon the principle, described above, that any claim of privilege was waived in the absence of an adequate explanation of the nature of the documents or things not produced and the basis for the assertion of privilege, such as would enable the plaintiff to challenge the claims of privilege if it wished to do so. As the federal District Court of Maryland stated in *Victor Stanley, Inc. v. Creative Pipe, Inc.*:

*In camera* review . . . can be an enormous burden to the court, about which the parties and their attorneys often seem to be blissfully unconcerned. . . . Often times . . . it is impossible to determine if [a] privilege applies without extrinsic evidence . . . The time it takes the court to review this extrinsic evidence on a document-by-document basis can be extensive, particularly given the tendency of lawyers to be over-inclusive in the assertion of privilege/protection in the first place. It should go without saying that the court should never be required to undertake *in camera* review unless the parties have first properly asserted privilege/protection, then provided sufficient factual information to justify the privilege/protection claimed for each

document, and, finally, met and conferred in good faith effort to resolve any disputes without court intervention.<sup>268</sup>

Here, Carestream's failure to provide a complete log of *all* documents withheld or redacted for privilege in advance of trial more than justified the Court ordering immediate production, irrespective of whether the omission was deliberate or inadvertent, and regardless of the nature of the documents that were required to be produced to M&G as a result.

#### 5. Carestream's References to Cases Imposing Lesser Sanctions Are Misplaced

Carestream insists that because it did not intentionally withhold the redaction log, the Court's sanction requiring the production of "clearly" privileged documents was extreme and unwarranted. It relies upon decisions from other courts where the relief granted for similar discovery violations was less severe and, in Carestream's view, more protective of the attorney-client and work product privileges.<sup>269</sup>

It is significant that none of the cases cited by Carestream to support its argument involved a situation remotely similar to the circumstances encountered in this case. It is also interesting that after this Court specifically requested both

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<sup>268</sup> 250 F.R.D. 251, 265-66 (D. Md. 2008).

<sup>269</sup> See *Lehman Capital v. Lofland*, 906 A.2d 122, 131 (Del. 2006); *Rembrandt Techs.*, 2009 WL 402332, at \*10; *Playtex, Inc. v. Columbia Cas. Co.*, 1989 WL 5197, at \*3-4 (Del. Super. Jan. 5, 1989); *eBay Domestic Holdings, Inc. v. Newmark*, 2009 WL 3494348, at \*5 (Del. Ch. Oct. 29, 2009).

parties to consider the potential differences between pretrial and in-trial exposure of discovery violations, the single case documenting an in-trial identification of discovery violations cited by Carestream involved a federal District Court *bench* trial, in which the court was able to recess for more than a month to allow a special master to address the issues—a fact that Carestream did not mention in its briefing.<sup>270</sup>

Thus, for example, Carestream relies upon *Playtex, Inc. v. Columbia Casualty Co.* because the court in that case found no waiver of the attorney-client privilege despite what it termed a “misdated,” “fragmented,” and “puzzling” privilege log.<sup>271</sup> Carestream conveniently omits that the ruling in that case was made on a pretrial motion to compel with sufficient time for the trial court to conduct an *in camera* review. Moreover, as the *Playtex* opinion’s derisive references to the privilege logs makes clear, the case involved documents that *were* logged. Notably, the court in that case awarded attorneys’ fees in litigating the discovery motion.<sup>272</sup> No jury was anxiously waiting in the wings while the court engaged in an elaborate and thorough inquiry, as would have been required here.

The *Rembrandt Technologies v. Harris Corp.* case further highlights the extensive analysis that would have been required had the Court recessed the trial to

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<sup>270</sup> See *Tracinda Corp.*, 2005 WL 927187, at \*1.

<sup>271</sup> 1989 WL 5197, at \*10.

<sup>272</sup> *Id.*

engage in a review of the previously unproduced documents listed on the redaction log. Its facts are also in sharp contrast to the case at bar. Carestream relies upon *Rembrandt Technologies* to argue that

[t]he attorney-client privilege . . . recognizes the extraordinary importance of “encourag[ing] full and frank communication between attorneys and their clients.” . . . Strict adherence to this rule is justified because “[a]n uncertain privilege, or one . . . [that] results in widely varying applications by the courts, is little better than no privilege at all.”<sup>273</sup>

In considering the foregoing language, however, it is worth noting that *Rembrandt Technologies* addressed a pretrial challenge to a timely assertion of privilege on the basis that it was not clear whether an attorney-client relationship existed.<sup>274</sup> The assertion of the privilege was not at issue, and the motion prompted full briefing, oral argument, and a lengthy and detailed analysis by the Superior Court of the application of the work product and attorney-client privileges.

In the absence of a finding of waiver based upon Carestream’s failure to assert privilege over the late-produced documents, it would have been necessary for this Court to engage in an extensive analysis of the applicability of the privileges, just as was required in the *Rembrandt Technologies* decision. For instance, the issues Carestream and M&G now raise regarding the August 8, 2007 notebook entry, in terms of whether work product protection applies to notes

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<sup>273</sup> 2009 WL 402332, at \*5 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

<sup>274</sup> *Id.*

generated by an individual who was not anticipating litigation at the time, are sufficiently complex that a cursory review in the “hour or so” Carestream contends this Court could have accomplished it would not have settled the issue. Carestream argues that even if Arndorfer was not personally anticipating litigation until August 13, the hotly disputed August 8 notebook entry recorded a conversation he had with other Carestream employees who *did* anticipate litigation by that point, as well as with two Carestream attorneys who were actually discussing “going to litigation.” Even now, it is not clear to the Court whether the work product privilege would have applied to the entire entry if timely asserted, and so the Court can categorically confirm that it was not at all familiar with the relevant case law when the entry was produced during trial. Without the time to cultivate an intimate understanding of how the work product privilege might apply in view of the facts of this case and the law governing the privilege, this Court was clearly not prepared to render an immediate, informed decision.

Furthermore, Carestream’s reliance upon *Rembrandt Technology’s* discussion of the critical importance of the attorney-client privilege does not alter the Court’s finding of waiver and its assessment of the propriety of the sanction it imposed. By enforcing the requirement that a privilege must be affirmatively and clearly asserted, as was done here, the Court did not increase the uncertainty or unpredictability of the attorney-client or work product privileges. To the contrary,

the Court's order was a means of ensuring that privilege issues *are* properly raised and litigated. The discovery rules provide that the failure to timely assert a privilege constitutes waiver in part to avoid forcing *ad hoc* decisions on matters as important as the attorney-client and work product privileges. As *Rembrandt Technologies* notes, consistent outcomes on the applicability of privileges are crucial—and where factually or legally complex privilege issues arise, consistency can only be achieved if the courts are provided with time to render fully-informed decisions with the benefit of thorough research and careful reflection.

Carestream's citation to *Applied Biosystems, Inc. v. Cruachem, Inc.*<sup>275</sup> as support for its claim that the Court should not have compelled production of privileged documents similarly undermines its argument. While the federal District Court in that case allowed a party to maintain the privilege for documents on a *draft* log, even though the log was factually insufficient, it prohibited the party from asserting privilege as to other documents not timely listed in the draft log.<sup>276</sup> That ruling is precisely what the Court ordered here with regard to the late-produced log entries: it permitted the privilege to be asserted over documents listed on the timely-produced privilege log, but disallowed any claim of privilege as to those documents not included on the log provided to M&G prior to trial.

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<sup>275</sup> 1990 WL 495458, at \*2.

<sup>276</sup> *Id.* at \*2.

Even Carestream’s reliance upon *Grand River Enterprises Six Nations Ltd. v. King* for the proposition that “the failure to produce a privilege log alone does not warrant a waiver of the attorney client privilege”<sup>277</sup> falls short in persuading the Court that its sanction was heavy-handed. The District Court for the Southern District of New York noted in the same paragraph partially quoted by Carestream that the failure *may* result in a waiver, although “only flagrant violations require such an outcome.”<sup>278</sup> In *Grand River*, the District Court determined that privilege logs were not untimely produced when they were provided before trial, albeit late, since the delay was not entirely attributable to the producing party.<sup>279</sup>

Carestream has urged that a discovery violation’s “flagrancy” (or “egregiousness,” another term often used in opinions but rarely defined with precision) must be measured solely in terms of intent. The Court agrees that in the ordinary context in which motions to compel are raised—i.e., *before trial*—a party’s intent may prove dispositive. But the timing as to when a discovery violation is revealed must play a role, as it can mean the difference between a minor inconvenience and major endemic prejudice to the party seeking discovery. Moreover, unlike the portion of *Grand River* quoted by Carestream, this case involves more than just the failure to produce a log. Some of the entries produced

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<sup>277</sup> 2009 WL 63461, at \*3.

<sup>278</sup> *Id.* (internal quotation marks omitted).

<sup>279</sup> *Id.*

as a result of the Court order were not on the redaction log because they were never provided to or uncovered by Carestream's counsel at *any* time prior to trial. Thus, regardless of Carestream's intent in failing to produce the redaction log or to log all assertions of privilege on the privilege log that was turned over to M&G during discovery, the Court considers this case to involve egregious and flagrant discovery violations.

Finally, in *Lehman Capital v. Lofland*, the Court's sanction was held to be legal error because "less punitive and more appropriate sanctions . . . were available from the outset."<sup>280</sup> In that case, the trial judge went so far as to dismiss a complaint as a sanction for discovery violations committed by the plaintiff's counsel. The Delaware Supreme Court considered the remedy inappropriate because less drastic measures were available, and there was no indication that the client, who was most directly affected by the sanction, was responsible for the misconduct.<sup>281</sup>

Here, the Court did not punish Carestream by directing a verdict in favor of M&G on the issue of liability, which would be the closest analogous step to that taken by the trial court in *Lehman Capital*. Rather, the Court acted in its discretion by ordering disclosure under the extreme circumstances of this case.

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<sup>280</sup> 906 A.2d at 133.

<sup>281</sup> *Id.*

## 6. The Disclosure Order Caught Carestream “Red-Handed”

What is perhaps most troubling about Carestream’s argument is that it shamelessly continues to describe the Court’s order as unfair or “draconian” when the disclosure itself exposed far more than what may have been an inadvertent failure to turn over the log. Even if the Court accepts the plausible argument that Carestream did not intentionally withhold the redaction log, that oversight was the only misstep, out of many others that were uncovered, for which the Court can conclude that there was neither a deliberate act nor recklessness in the face of obvious “red flags.” Key among these was the fact that Arndorfer persisted in *selectively* producing portions of his own notebooks in such a way as to omit clearly relevant material even after M&G raised concerns to Carestream counsel about the thoroughness of his document production and Carestream counsel promised M&G that it had reviewed the original notebooks. In challenging the Court’s remedy, Carestream conveniently overlooks several quite damaging revelations that would never have come to light but for the Court’s order requiring disclosure. These include the fact that several of the previously withheld documents were not entitled to work product or attorney-client privilege protection in the first place. In addition, the documents produced upon the Court’s order that would never have been subject to a colorable claim of privilege included evidence

of a conscious and intentional scheme by Carestream's employees to avoid its contractual obligations to M&G, not because of quality issues related to M&G's PET pellets, but because Carestream had carefully analyzed the lucrative advantage to be gained if it reneged on the Supply Agreement. Even worse, the documents further revealed, rather strikingly, that Carestream's lack of integrity in its underlying commercial dealings with M&G spilled over into this litigation as well, resulting in Carestream's decision to present defenses that were directly contradicted by the records it withheld.

Whether the failure to produce the log was an inadvertent oversight, as Carestream contends, or a deliberate act of concealment, the law does not distinguish these two situations in determining whether there has been a waiver of privilege.<sup>282</sup> In addition, even assuming that inadvertence would exempt Carestream from the sanction of disclosure, the Court rejects Carestream's efforts to paint all of its transgressions as merely oversights or innocent mistakes.

To the contrary, the Court is firmly convinced, upon review of the trial transcripts and relevant documents, that Arndorfer intentionally withheld pages

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<sup>282</sup> See, e.g., *Carfagno v. Jackson Nat'l Life Ins. Co.*, 2001 WL 34059032, at \*1-2 (W.D. Mich. Feb. 13, 2001) (“[D]efendant asserts that . . . a waiver of objections is essentially a sanction for egregious discovery abuse. . . . [T]his is not an accurate characterization of the waiver doctrine. If the time limits set forth in the discovery rules are to have any meaning, waiver is a necessary consequence of dilatory action in most cases. . . . ‘This rule applies with equal force to all objections, including those based on attorney-client privilege or attorney work product.’” (quoting *Cleveland Indians Baseball Co. v. United States*, 1998 WL 180623, at \*4 (N.D. Ohio Jan. 28, 1998))).

from the notepads with which he catalogued his daily meetings and the actions of Carestream employees during the litigated events because those missing pages would have exposed Carestream's elaborate defenses for what they were—dishonest and contrived—and because pre-trial production of them to M&G would have allowed M&G the opportunity to show that many of Carestream's witnesses were, at best, not credible in light of their own documents, and at worse, perjurious. This conclusion is based not on the Court's own credibility assessments of the witnesses' testimony, but on the substance of the documents themselves, of which the most telling examples will be discussed below.

Although Carestream, for obvious reasons, has taken great pains to distract the Court's attention from the content of the disclosed documents, the fact remains that the June 7, 2007 entry in Arndorfer's notepad, which could never have been protected by the work product or attorney-client privilege, was among the most incriminating documents in this entire case. That entry, discussing a possible "need" to "buy out" M&G, contains evidence that M&G could have used to argue that Carestream recognized during the summer of 2007 that M&G had not sacrificed its contractual entitlements by delivering deficient product. The Court cannot accept that the withholding of this particular entry was mere happenstance, irony, or coincidence. Rather, the circumstances surrounding the late disclosure of this document, which apparently had not even been provided to Carestream's trial

counsel, convince the Court that Arndorfer purposefully removed this (and other similar entries) from the production of his steno notebooks as part of an intentional scheme to cover up the fact that Carestream's decision to eliminate its demand for M&G product stemmed from the far more favorable pricing offered by M&G's competitor, ECC. The June 6, 2007 entry, as well as others—together with a slew of internal Carestream e-mails and other documents that were produced during discovery and used to devastating effect by M&G at trial—were written before crucial experimentation with M&G's product had commenced, and point to no other rational conclusion than that Carestream's efforts to discredit the quality and functionality of M&G's PET pellets was nothing more than “smoke and mirrors.”

Carestream's supplemental brief was accompanied by an affidavit from Todd Arndorfer stating that his failure to copy relevant entries from his notebooks during discovery was inadvertent. Arndorfer's self-serving affidavit, submitted post-trial and thus not subject to cross-examination, does nothing to advance Carestream's argument that his withholding of key notebook entries was unintentional or inadvertent, nor does the Court require an evidentiary hearing to assess Arndorfer's state of mind as to the reasons behind his decision to withhold relevant information. Just as the jury is permitted to reach conclusions based upon circumstantial evidence, so too could the Court and the jury infer this witness's motives and state of mind from all of the facts and circumstances surrounding the

suppression of the documents, including the witness's demeanor on the stand, the fact that both Arndorfer and Carestream counsel purported to have revisited the notebooks after M&G questioned the sufficiency of Carestream's document production, and the contents of the documents Arndorfer withheld, as well as the threat they posed to Carestream's litigation positions.

While the appearance of in-house counsel at the meetings described in the July 30 and August 8 entries might imply that privilege would have existed over them if it had been properly asserted, that fact does not help Carestream, because neither entry was disclosed to M&G on a privilege log of any sort. In fact, it appears that Carestream's trial attorneys never even saw the July 30, 2007 entry until the end of trial. There is no reference to it on the Carestream redaction log produced in the final days of trial. And even after the Court expressly ordered the original notebooks—in full—to be electronically transmitted or shipped overnight from Colorado, that entry was not included in the unredacted pages of Arndorfer's notebooks when they were finally turned over to M&G near the close of trial on September 22, 2009. Production of the August 8, 2007 entry was provided only after Arndorfer defeated any viable claim of work product privilege by confirming that litigation was “the farthest thing” from his mind until August 13.

## 7. M&G's Recall of Arndorfer Was Necessary

Carestream's contention that the Court erred in allowing M&G's counsel to recall Arndorfer to question him about the missing entries is untenable. The Court had to allow Plaintiff's counsel to question Arndorfer regarding the previously withheld documents to probe his motives for omitting certain entries from pretrial document production and to create a record that there was no basis for the failure to produce those entries. More importantly, M&G had already been deprived of the opportunity to depose Arndorfer, as well as other Carestream witnesses, about the wrongfully withheld entries in his notebooks; this was its sole opportunity, albeit belated, to get to the truth concerning Carestream's actions in the spring and summer of 2007. The Court *had* to permit M&G to recall and question Arndorfer about the late-produced entries or it would have appeared to the jury that M&G deliberately took advantage of the witness by springing upon him previously "hidden" documents that it should have presented and used in cross-examining other Carestream witnesses earlier in the trial. Since M&G, not Carestream, was the party unaware of the contents of the withheld documents until the final days of trial, it was M&G that most needed to set the record straight, at least insofar as the single remaining witness was concerned, and that effort had to include clarifying for the jury that it had not been privy to the suppressed documents until trial was almost at an end. While Carestream may have preferred that the jury not know the

full facts, which were indeed highly prejudicial to Carestream's case, that prejudice was not caused by M&G or the Court's ruling, but by the newly produced records, which contradicted Carestream's defenses, and by the circumstances suggesting that some of those documents were deliberately withheld because they would have highlighted M&G's claims of bad faith.

Moreover, Carestream's counsel was provided a full and equal opportunity to question Arndorfer to enable him to reconcile Carestream's story with the contrary statements in his notebooks. Arndorfer's inability to do so does not mean that the Court should not have allowed M&G to recall him. If anything, the Court sanctioned a process that went to the very heart of the purpose of a jury trial—that is, the search for the truth. Absent the Court's intervention to insure that the process was fair to M&G, and that M&G would not be further prejudiced by Carestream's discovery shenanigans, the jury might never have known of non-privileged documents that cast doubt on the veracity of several key Carestream witnesses.

In the final analysis, it ill behoves Carestream to complain of the dramatic effect that M&G's questioning of Arndorfer may have had upon the jury, given that its own suppression of key non-privileged documents, and its strategic decision to present defenses that were contradicted by those documents, ultimately back-fired. Carestream's position ignores that M&G never had any opportunity to

cross-examine the other Carestream witnesses about testimony that the late-produced entries showed to be incredible, if not outright false. That circumstance was undoubtedly far more prejudicial to M&G than any prejudice that Carestream inflicted upon itself by its own wrongdoing both before and during this litigation.

#### **D. M&G's Application for Attorneys' Fees and Expenses**

##### **1. M&G Is Entitled to Counsel Fees as a Result of Carestream's Discovery Violations and Its Bad Faith Presentation of Defenses**

M&G has filed an Application for Attorneys' Fees and Expenses pursuant to Superior Court Civil Rules 16 and 37. It bases its entitlement to this relief upon Carestream's failure to produce its redaction log by the deadline set forth in the Trial Scheduling Order. M&G contends that Carestream also wrongfully withheld relevant documents during discovery. It argues that these two major transgressions had a direct bearing upon the manner in which this litigation was conducted for nearly two years, and substantially and unfairly prejudiced M&G in a myriad of ways.

Carestream's response to M&G's application continues to assert that its failures to produce complete discovery and to timely provide Carestream with an accurate privilege log were inadvertent and unintentional. Much as it criticizes the sanction imposed by the Court, Carestream submits that *it* is the prejudiced party because the Court permitted M&G to use the late-produced documents at trial in

re-examining Arndorfer and to refer to them in closing arguments, obviating any possible prejudice or expense to M&G.

For reasons that may already be evident from the Court's lengthy discussion in the previous section of this opinion concerning the propriety of its production order, the Court is similarly disposed to award counsel fees to M&G. The Court believes that fee-shifting is a proper mechanism to redress the far-reaching prejudice that Carestream's conduct imposed upon M&G during the entire course of this litigation. In the Court's judgment, the Superior Court Rules of Civil Procedure not only justify, but require, an award of fees in these circumstances. And, even if Carestream were able to convince the Court that its conduct was wholly unintentional and inadvertent, which it has not, M&G should not be made to shoulder the burden of legal expenses that it would not have incurred but for Carestream's conduct in this litigation.

Although sanctions under Rules 16 and 37 are customarily imposed pretrial, because the Court is usually made aware of discovery violations long before trial has commenced, an award of counsel fees is even more appropriate where the late production occurred almost at the close of trial.

The notable case of *Qualcomm Inc. v. Broadcom Corp.*<sup>283</sup> presents a strikingly similar set of circumstances to those the Court encountered during trial in this case. Although *Qualcomm* is famed for its discussion of e-discovery issues not relevant to this case, setting aside that electronic overlay, it is helpful to the Court's decision here because it involves a rare instance of discovery violations involving relevant material coming to light during the eleventh hour of a trial.

*Qualcomm* was a patent infringement suit in which Qualcomm sought injunctive relief and compensatory damages as a result of Broadcom's alleged infringement of its patents related to video-compression technology compliant with a particular compression standard known as H.264. One of Broadcom's defenses was that Qualcomm's patents were unenforceable due to waiver. Broadcom based its waiver defense on an allegation that Qualcomm had, during 2002 and early 2003, participated in the Joint Video Team (or "JVT"), which is the standards-setting body that created the H.264 standard and released it in May 2003. The question of whether Qualcomm had participated in the JVT in 2002 and early 2003 was thus crucial to the patent infringement litigation, since Qualcomm would have

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<sup>283</sup> 2008 WL 66932 (S.D. Cal. 2008), *vacated in part on other grounds*, 2008 WL 638108 (S.D. Cal. Mar. 5, 2008), *appeal dismissed*, *Qualcomm Inc. v. Batchelder*, 327 Fed. Appx. 988 (Fed. Cir. 2008), *and on remand*, *Qualcomm Inc. v. Broadcom Corp.*, 2010 WL 1335937 (S.D. Cal. Apr. 2, 2010).

waived the right to enforce its patents had it taken a role in the JVT during the creation of the H.264 standard.<sup>284</sup>

During discovery, Broadcom sought information concerning Qualcomm's participation in and communications with the JVT through interrogatories, requests for production, and Rule 30(b)(6) depositions, but Qualcomm's trial team decided not to produce twenty-one JVT-related e-mails discovered on an employee's laptop during her preparation for trial testimony. Qualcomm's counsel ignored the fact that the presence of the e-mails on the witness's computer undercut Qualcomm's primary argument that it had *not* participated in the JVT in 2002. During trial, however, the witness was forced to admit that she had received the e-mails.<sup>285</sup>

After the jury rendered a verdict in favor of Broadcom, the trial judge found that Qualcomm and its employee witnesses had actively engaged in the wrongful concealment of its patents-in-suit from the JVT while participating in that body, and had then deliberately hidden this concealment from the Court, the jury, and opposing counsel during the course of the Broadcom litigation. The Court therefore concluded that Qualcomm had waived its rights to enforce the patents and further held that its litigation misconduct justified Qualcomm's payment of all "attorneys' fees, court costs, expert witness fees, travel expenses, and any other

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<sup>284</sup> *Id.* at \*1-3.

<sup>285</sup> *Id.* at \*4-5.

litigation costs reasonably incurred by Broadcom” in defense of the case, a sum that was in excess of \$9.2 million.<sup>286</sup>

Even after trial, Qualcomm continued to dispute the relevancy of the late-produced e-mails and, in response to Broadcom’s request that Qualcomm conduct additional searches to determine the scope of Qualcomm’s discovery violations, its counsel noted that “we believe your negative characterization of Qualcomm’s compliance with its discovery obligation to be wholly without merit.”<sup>287</sup> Notwithstanding this protestation, about a month later, Qualcomm’s general counsel advised the court that it had thousands of relevant, unproduced documents and that a review of them “revealed facts that appear to be inconsistent with certain arguments that [counsel] made on Qualcomm’s behalf at trial and in the equitable hearing following trial.”<sup>288</sup>

As it turned out, Qualcomm’s search of the e-mail archives of its employees revealed more than 46,000 documents (totaling more than 300,000 pages) that had been requested but were not produced during discovery. The trial court found that Qualcomm had intentionally engaged in conduct designed to prevent Broadcom from learning that Qualcomm had participated in the JVT during the relevant period. To this end, Qualcomm had

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<sup>286</sup> *Id.* at \*5.

<sup>287</sup> *Id.* at \*6.

<sup>288</sup> *Id.* (alteration in original).

withheld tens of thousands of emails showing that it actively participated in the JVT in 2002 and 2003 and then utilized Broadcom's lack of access to the suppressed evidence to repeatedly and falsely aver that there was "no evidence" that it had participated in the JVT prior to September 2003. Qualcomm's misconduct in hiding the emails and electronic documents prevented Broadcom from correcting the false statements and countering the misleading arguments.<sup>289</sup>

The federal magistrate judge, to whom the trial judge referred Broadcom's motion for sanctions, thoroughly and painstakingly reviewed the discovery rules with respect to the imposition of sanctions for failure to comply with discovery obligations. The magistrate judge concluded that Qualcomm's conduct warranted the imposition of sanctions upon it.<sup>290</sup> In so holding, the magistrate judge recognized that the discovery rules do not anticipate judicial involvement in the discovery process absent an actual dispute, but that it demands that litigants act responsibly and avoid abuse:

For the current "good faith" discovery system to function in the electronic age, attorneys and clients must work together to ensure that both understand how and where electronic documents, records and emails are maintained and to determine how best to locate, review, and produce responsive documents. . . [A]greeing to produce certain

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<sup>289</sup> *Id.*

<sup>290</sup> The magistrate judge also initially sanctioned several of Qualcomm's outside attorneys. These sanctions were vacated and an order to show cause why sanctions should not be imposed was entered to permit the attorneys an opportunity to challenge the propriety of sanctions. The magistrate judge eventually dissolved the order to show cause upon a finding that the sanctioned attorneys had not engaged in bad faith conduct and therefore would not be subject to sanctions. See *Qualcomm Inc. v. Broadcom Corp.*, 2010 WL 1335937, at \*5-7 (S.D. Cal. Apr. 2, 2010).

categories of documents and then not producing all of the documents that fit within such a category is unacceptable.<sup>291</sup>

In determining that Qualcomm violated its discovery obligations by failing to produce the e-mails without presenting any “substantial justification” for its omissions, the Court even went so far as to conclude that “[t]he fact that Qualcomm did not perform . . . basic searches [of testifying employees’ computers or its e-mail databases] at any time before the completion of trial indicates that Qualcomm intentionally withheld the documents.”<sup>292</sup> Moreover, the Court dismissed Qualcomm’s claim that it “inadvertently” failed to find and produce these documents because of the massive volume and direct relevance of the information they contained.<sup>293</sup> The Court also determined that, even if it did not know of the suppressed e-mails, Qualcomm failed to heed several warning signs that should have alerted it to the fact that its document search and production were inadequate, particularly in light of the fact that, as a large corporation with an extensive legal staff, it clearly had the ability to identify its employees and consultants involved in the JVT, to access and review their computers, databases and e-mails, and to produce in good faith all relevant requested discovery.

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<sup>291</sup> *Qualcomm*, 2008 WL 66932, at \*9.

<sup>292</sup> *Id.* at \*10.

<sup>293</sup> *Id.*

While the *Qualcomm* case ultimately involved the *post*-trial revelation of tens of thousands of withheld documents, it is noteworthy that at the time the trial court ordered Qualcomm to pay all of Broadcom's attorneys' fees and related expenses, it was aware of only twenty-one e-mails that had not been produced until trial. Thus, although the discovery violation ultimately encompassed thousands of additional responsive documents that had been withheld, the trial court's sanction obviously was not based upon the sheer quantity of the documents suppressed, but upon the quality and content of the material withheld. The trial court's concern was that the concealment prevented Broadcom from correcting false statements and countering legal arguments that Qualcomm repeatedly presented to the trial court and the jury.

So too is this case troubling from the standpoint of the quality and content of the documents that were not produced, as well as the circumstances under which the discovery omissions occurred. The number of documents withheld here may not approach the volume of those in *Qualcomm* (although the Court cannot be certain that the breadth of Carestream's discovery violation is fully known), but the fact remains that the withheld entries enabled Carestream to present defenses that it could not have successfully asserted had M&G known early on in the litigation of the existence and content of these documents. Similarly, Arndorfer's conduct in hiding the critical nonprivileged entries in his notebook was not only wrong from a

legal perspective under the discovery rules, but also tainted the entire litigation—all to the ultimate prejudice of the truth-seeking process.

## 2. Sanctions Are Required Under Delaware Superior Court Civil Rules 16 and 37

Superior Court Civil Rule 16(f) specifically permits the Court to impose appropriate sanctions, including any of those outlined in Rule 37(b)(2)(B), (C), or (D), if a party or the party's attorney fails to participate in the discovery process in good faith. These provisions have been applied to impose sanctions in situations similar to the one at hand. But more importantly, the Rule *requires* that the Court award attorneys' fees and reasonable expenses, in addition to any other sanction, unless noncompliance was substantially justified or an award would otherwise be unjust:

If a party or party's attorney fails to obey a scheduling or pretrial order . . . the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just . . . In lieu of or in addition to any other sanction, the judge *shall require* the party or the attorney representing the party, or both, to pay the reasonable expenses incurred because of any noncompliance with this Rule, including attorneys' fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.<sup>294</sup>

It is difficult to envision a party more deserving of the benefits of the Rule 16(f) sanction of an award of attorneys fees than the plaintiff in this case. Not only

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<sup>294</sup> Super. Ct. Civ. R. 16(f) (emphasis added). Similar mandatory language is found under Rule 37(b)(2), discussed further below.

does Carestream’s purported inadvertence not constitute “substantial justification” for its noncompliance with the discovery rules and with this Court’s scheduling order, but the magnitude of prejudice arising from M&G’s not having a complete log and discovery production earlier in the litigation makes this case a perfect exemplar of the type of situation in which a fee award is mandated.

Indeed, the rule has been implemented in similar circumstances even where the violation of the trial court’s scheduling order was determined to be inadvertent. In the case of *Tracinda Corp. v. DaimlerChrysler AG*, the District Court for the District of Delaware awarded more than \$500,000 in attorneys’ fees as a sanction for the late production of a total of sixty-seven pages of documents that were not disclosed until the evening of the final day of trial, most likely because of a copying error on the part of outside vendors employed by defense counsel.<sup>295</sup>

Under the District Court’s Rule 16 pretrial order in *Tracinda*, discovery was to have been closed by January 2003. Almost a year later, on the eve of the last day of trial, DaimlerChrysler advised the Court that it had just discovered that it had failed to produce sixty-one pages of documents responsive to Tracinda’s earlier discovery requests.<sup>296</sup> Because the District Court found the documents to be “highly relevant to issues raised throughout this litigation,” the Court recessed the

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<sup>295</sup> 2005 WL 927187, at \*4.

<sup>296</sup> *Id.* at \*1.

bench trial for nearly two months.<sup>297</sup> During that time, a special master conducted an inquiry, which included a full-day hearing regarding the circumstances giving rise to the delay in producing those sixty-one documents, as well as six more pages produced a few days later.

The special master ultimately concluded that although two sets of copy vendors in different cities each made copying mistakes with the same group of documents, mere coincidence was still the most likely explanation for the late production.<sup>298</sup> Although the special master found no evidence of bad faith or intentional misconduct on the part of DaimlerChrysler or its counsel, the trial court nevertheless concluded that monetary sanctions were warranted, citing the inconvenience and expense to Tracinda and the court, the particular relevance of the tardily-produced documents, and the irremediable prejudice suffered by Tracinda in light of the advanced stage of the litigation.<sup>299</sup>

Noting that the plain language of Federal Rule 16(f) requires monetary sanctions for noncompliance with pretrial orders absent a showing that the violation was “substantially justified” or the award “unjust” under the circumstances of the case, the Third Circuit Court of Appeals affirmed the trial

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<sup>297</sup> *Id.* at \*2.

<sup>298</sup> *Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 239 (3d Cir. 2007).

<sup>299</sup> *Tracinda Corp.*, 2005 WL 927187, at \*3.

court's attorneys' fees award, carefully noting that such a sanction does not require a showing of bad faith:

As between DaimlerChrysler and Tracinda, if anyone is to be charged with the significant expenses that Tracinda incurred because of the late and prejudicial production, it does not seem unjust that DaimlerChrysler should bear the expense. . . . We conclude that, under the extreme circumstances of this case, the District Court acted within its discretion by imposing Rule 16(f) sanctions.

This conclusion is consistent with the very broad discretion which district courts have to “use sanctions where necessary” to ensure compliance with pretrial orders . . . Although a finding of bad faith is generally required for a court to impose sanctions pursuant to its inherent authority, no express requirement of intent or negligence exists in the language of Rule 16(f).<sup>300</sup>

The Third Circuit further emphasized that the relevant standard to be applied in determining whether an award is “unjust” is the contrast between the nature of the Rule 16 violation and the impact on the parties caused by the delay.<sup>301</sup> The prejudice caused by DaimlerChrysler's discovery violation was considered to be significant, because the effect on Tracinda's trial preparation could not be directly remedied.<sup>302</sup>

While the facts in *Tracinda* are similar in many ways to those in the case at bar, the inequity faced by the *Tracinda* plaintiff as a result of the late disclosure

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<sup>300</sup> *Tracinda Corp.*, 502 F.3d 212, 242-43 (citations omitted).

<sup>301</sup> *Id.* (“[T]he fact that the party with the obligation to produce documents may have been negligent is a factor to consider. Nevertheless, even if the failure to produce has been inadvertent, sanctions may be called for under Rule 16(f) if the impact is severe on the party who was due the discovery.”).

<sup>302</sup> *Id.* at 243.

was more easily lessened in the context of a bench trial, where the Court could recess the proceedings to refer the discovery matter to a special master and to afford the affected party ample time to review its strategy for the remaining portion of the trial in light of the late-disclosed information. Thus, if the \$500,000 assessment of costs for an *inadvertent* failure to produce documents was proper in *Tracinda*, such an award is more than justified here because the prejudice to M&G could not be similarly minimized during the final days of a jury trial, after the discovery violation had unquestionably affected M&G's entire trial strategy, pretrial motion practice, settlement negotiations, and trial preparation.<sup>303</sup>

The prejudice to M&G occasioned by the late disclosure of documents is manifest in this case. From M&G's perspective, every aspect of this litigation could have been negatively affected by Carestream's discovery violations, which, at least insofar as the costs are concerned, had a huge impact upon the resources that M&G had to bring to bear in preparing for and trying this case.

Because of Carestream's wrongful withholding and late production of relevant non-privileged documents, for instance, M&G never had the opportunity to conduct depositions with full knowledge of the facts of key Carestream

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<sup>303</sup> While Carestream cites *eBay Domestic Holdings, Inc. v. Newmark*, 2009 WL 3494348, at \*5, as authority for the exception to the awarding of fees under Rule 37 "if circumstances make an award of expenses unjust," that opinion addressed the resolution of a discovery dispute upon a pretrial motion to compel, when the expense and prejudice to the party seeking discovery is much more easily limited.

witnesses—including, most significantly, Todd Arndorfer, whose sworn testimony was belied by contrary recordings in the notebooks he kept contemporaneously as meetings and other events were occurring. By not having access to these highly relevant documents earlier, M&G was denied the opportunity to depose Carestream's witnesses about their contents, and its cross-examinations during trial of all of Carestream's witnesses, aside from Arndorfer, were seriously hampered by its ignorance of this evidence, which would have exposed several of Carestream's testifying employees as less than forthright on matters that were crucial to the issues in this litigation. Furthermore, because it learned of the missing notebook entries only at the end of the final week of trial, M&G had no time to recall Carestream witnesses, many of whom were no longer in town, so as to allow the jury to make more intelligent, informed, and careful credibility determinations. It also bears emphasizing that many of the relevant Arndorfer notebook entries recorded not merely *his* statements or thoughts, but conversations held with other Carestream witnesses, who had already been cross-examined by M&G counsel without the benefit of this important information. In that sense, the extremely late production of this material was particularly prejudicial to M&G.

The prejudice to M&G resulting from Carestream's discovery violations also tainted the parties' pretrial motion practice. While the Court may not have been inclined to grant summary judgment in M&G's favor because of the apparent

existence of material disputes of fact raised in the parties' dispositive motions and the responses, many of the factual disputes that colored the Court's decision could have been narrowed or even eliminated altogether had M&G known the content of just the indisputably non-privileged documents withheld by Arndorfer.

What is worse, when M&G finally learned of the substance of the documents that had been withheld, it was forced to direct valuable trial preparation time to addressing the unforeseen issues raised by Carestream's discovery failures. This case involved a vast number of documents, and the defenses raised by Carestream were substantially complex. After months in trial preparation, M&G, through no fault of its own, was left to reevaluate its trial strategy, redevelop its cross-examination of Arndorfer, and scramble to fit new pieces of information into the trial puzzle. Merely because the jury's verdict suggests M&G was successful in this undertaking does not lessen the magnitude of these tasks, nor the unfairness in its having to confront the situation. Since Carestream—and not M&G—was solely responsible for the late document production, the substantial additional expenses incurred by M&G as a result of Carestream's discovery abuses should fairly be borne by Carestream.

The broad discretion afforded courts under Rule 16 to use sanctions where necessary to ensure compliance with pretrial orders has its counterpart in the discovery sanctions of Rule 37(b). Under that rule, the failure to produce

documents in response to discovery requests is considered misconduct for which an award is mandatory:

In lieu of any of the foregoing orders or in addition thereto, the Court *shall require* the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the Court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.<sup>304</sup>

“Substantial justification” under both Rules 16(f) and 37(b)(2) requires Carestream to demonstrate “a genuine dispute concerning compliance,”<sup>305</sup> which it cannot do. Carestream’s claimed inadvertence—which has already been rejected by this Court at least as to those relevant documents Carestream failed to turn over to its own attorneys pretrial, despite M&G’s concerns—does not substantially justify either its own disclosure failures or the failures of its trial counsel to carefully supervise the manner in which Carestream employees conducted discovery collection efforts and to ensure that all responsive non-privileged documents were provided to M&G. Carestream cannot excuse the transgressions of its corporate employees by asserting repeatedly that its outside trial counsel did nothing wrong. Trial counsel’s blind reliance upon non-lawyer employees such as Brunner and Arndorfer to make their own relevance and attorney-client or work

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<sup>304</sup> Super. Ct. Civ. R. 37(b)(2) (emphasis added).

<sup>305</sup> *Tracinda Corp.*, 502 F.3d at 241 (quoting *Fitz, Inc. v. Ralph Wilson Plastics Co.*, 174 F.R.D. 587, 591 (D.N.J. 1997)).

product privilege determinations without proper attorney oversight was at best negligent and at worst intentionally calculated to hide the truth. Moreover, after having had the opportunity to observe these individuals as witnesses, and to learn of the conduct that gave rise to this litigation, the Court is satisfied that counsel's reliance upon them to make *any* decision requiring integrity with regard to Carestream's treatment of M&G was seriously misplaced.

In the final analysis, the Court is convinced that monetary sanctions are not only required by the Rules, but are particularly justified under the circumstances of this case. In fact, an award of fees may be the only means of overcoming the unfair disadvantages under which M&G and its counsel labored during the course of this litigation. As in *Tracinda*, the Court "could not completely obviate the effect" of Carestream's failures on M&G's "ability to develop its case, including most particularly" the impact upon M&G's "decision of who to depose, the order of depositions, and the substance of its deposition questioning, as well as the substance and conduct of the trial prior to the revelation of the documents."<sup>306</sup> Regardless of the reason for non-production, the fault lies with Carestream, whose duty it was to ensure complete document production within the Court's deadlines and to make any assertions of privilege in a timely and meaningful way. Thus, as

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<sup>306</sup> 2005 WL 927187, at \*3.

between Carestream and M&G, the costs resulting from Carestream's failures must fall upon Carestream.

### 3. An Award of Fees is Proper Under the Bad Faith Exception to the American Rule

Under the bad faith exception to the American Rule, Carestream's conduct in perpetuating counterfactual defenses justifies an award to M&G of its attorneys' fees, particularly given that Carestream's assertion of those defenses was made possible by its suppression of documents that would have contradicted its employees' testimony. Given Carestream's egregious misconduct both before and during this litigation, only through an award of counsel fees can M&G be made whole for the additional costs it had to incur to address Carestream's ever-shifting defenses and its obstruction of the judicial process.

Under the American Rule, litigants are expected to bear their own costs of litigation absent some unusual circumstances that justify the extraordinary remedy of fee-shifting.<sup>307</sup> Those special circumstances that constitute exceptions to the American Rule include cases where: (1) the underlying (pre-litigation) conduct of the losing party is so egregious as to justify an award of attorneys' fees as an element of damages, or (2) the litigation is found to have been brought in bad faith,

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<sup>307</sup> *Beck v. Atlantic Coast PLC*, 868 A.2d 840, 850-51 (Del. Ch. 2005); *Barrows v. Bowen*, 1994 WL 514868, at \*1 (Del. Ch. Sept. 7, 1994).

or a party is deemed to have conducted the litigation process itself in bad faith, thereby unfairly increasing the costs of litigation.<sup>308</sup> Bad faith conduct has been found where parties have unnecessarily prolonged or delayed litigation, falsified records or testimony, knowingly asserted frivolous defenses, or changed positions on an issue.<sup>309</sup> Fee-shifting has also been deemed appropriate where a defendant “in bad faith has forced the plaintiff to bring the lawsuit to enforce a legal claim that the defendant knew was valid.”<sup>310</sup> The party seeking a fee award bears a high evidentiary burden of producing “clear evidence” of bad faith conduct.<sup>311</sup>

As the Chancery Court noted in *In re Grupo Dos Chiles, LLC*, “[t]here is not a single standard of bad faith that gives rise to an award of attorneys’ fees; rather, bad faith turns on the particular facts of each case.”<sup>312</sup> In that case, Vice Chancellor Parsons found that there were two components to the responding party’s bad faith:

First, Respondents’ position was so strained and wholly at odds with the operative reality that it fell outside the bounds of good faith advocacy. Second, Respondents could not in good faith aver, under oath, facts directly opposite to those they averred in [related litigation] or change their testimony to suit their needs in this litigation.

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<sup>308</sup> *RHIS, Inc. v. Boyce*, 2001 WL 1192203, at \*7 (Del. Ch. Sept. 26, 2001); *Barrows*, 1994 WL 514868, at \*1.

<sup>309</sup> *Beck*, 868 A.2d at 851; *see also Abex Inc. v. Koll Real Estate Group, Inc.*, 1994 WL 728827, at \*20 (Del. Ch. Dec. 22, 1994).

<sup>310</sup> *Arbitrium (Cayman Is.) Handels AG v. Johnston*, 705 A.2d 225, 231 (Del. Ch. 1997).

<sup>311</sup> *Id.* at 232.

<sup>312</sup> 2006 WL 2507044, at \*1 (Del. Ch. Aug. 17, 2006).

Respondents' violations of these fundamental tenets rise to the level of intentional bad faith conduct that justifies an award of attorneys' fees under the bad faith exception to the American Rule.<sup>313</sup>

In finding that the petitioner had met his burden of producing clear evidence of the respondents' bad faith conduct in connection with the major portion of the litigation, the Vice-Chancellor awarded seventy-five percent of the attorneys' fees the petitioner incurred in prosecuting the action.<sup>314</sup>

Here too, Carestream's conduct in relentlessly asserting defenses that were belied by its own contemporaneous documents, the contents of which were deliberately hidden from M&G, was egregious. As in *In re Grupo Dos Chiles*, Carestream's position was "wholly at odds with the operative reality" and thus clearly fell outside the bounds of good faith advocacy. While the narrow bad faith exception is applied only in egregious instances of fraud or overreaching, the Court concludes that M&G has satisfied even this stringent burden of showing clear evidence of bad faith conduct. Indeed, because Carestream and its counsel have not seriously or successfully refuted any of their challenged behaviors, choosing instead to cast them as well-intentioned oversights, M&G has little to prove to substantiate the relief it seeks.

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<sup>313</sup> *Id.* at \*2.

<sup>314</sup> *Id.*

Carestream's counsel's failure to produce a redaction log within the time required by the Court's scheduling order has already been analyzed in connection with the defendant's challenge to the Court's mid-trial imposition of sanctions. But Arndorfer's failure to produce key entries in his steno notebooks is even more disturbing than Carestream's trial counsel's discovery infraction. It is obvious that Arndorfer's withholding of the most incriminating entries that were in the notebooks was behavior of an entirely calculated, tactical, and inexcusable kind. Arndorfer had to have known that these entries would have exposed Carestream's asserted defenses as false, and his initial failure to turn them over to his counsel was only surpassed by his continued unwillingness to produce them at trial, even after he was expressly ordered to do so by this judge. Arndorfer even went so far as to claim that at least one of the original notebooks was unavailable because it was locked in his desk in Windsor, Colorado, as a last-ditch effort to avoid revealing the contents of highly relevant material that apparently had not even been provided to Carestream's trial counsel.<sup>315</sup> By his conduct, Arndorfer deliberately

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<sup>315</sup> At oral argument, Carestream's counsel asserted that only one of the four notebooks affected by the Court's order remained in Windsor, while the other three had been shipped to trial counsel in Rochester, New York, during the discovery process. Carestream's attorneys further indicated that the only notebook that remained in Arndorfer's control did not include notes from the spring or summer of 2007, but rather related to a later time period not so central to the litigation. This revelation was somewhat surprising to the Court because it raises serious concerns about *counsel's* involvement in the discovery phase of this lawsuit. If, in fact, three out of four of the original notebooks were readily available to Carestream's counsel in Rochester, and as was argued these were the "important" and relevant notebooks, it appears that Carestream's attorneys failed to review them in full to check the accuracy of the relevance determinations they delegated

acted to deny the Court and the jury extremely probative information that was relevant to critical issues in this case.

Undaunted by the fact that the withheld documents exposed far more than technical violations of the discovery rules, Carestream still persists in glossing over the fact that much of the trial testimony elicited from its own employees was directly contrary to the late-produced notebook entries, even though they were contemporaneously recorded by Arndorfer. Even a sampling of the situations in which Carestream's witnesses' trial testimony or deposition testimony was contrary to the written documents suggests that the entire pretrial and trial process were tainted by Carestream's bad faith. Prior to the litigation, Carestream presented M&G with a fluctuating series of reasons for its decision not to buy PET pellets from M&G. Not long after Carestream entered into the Supply Agreement with M&G, it made the calculated decision to go with more favorable pricing from ECC, and thereafter began a course of conduct that consisted of asserting shifting defenses to cover up its intentional breach. At trial, Carestream persisted in

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to Arndorfer, even after M&G suggested that some entries might have been missing from production. While the Court does not intend by this opinion to determine the respective levels of culpability as between Carestream's non-lawyer corporate witnesses and its outside trial counsel, it emphasizes that Carestream's attorneys had a critical responsibility to assure that their clients conducted a comprehensive and appropriate document search and production effort. Indeed, Civil Rule of Procedure 26(d) imposes an affirmative duty upon counsel to engage in pretrial discovery in a manner consistent with the spirit and purpose of the rules by requiring a certification that obliges each attorney to carefully consider the legitimacy of any discovery request, response, or objection. As officers of the Court, counsel have independent obligations to provide adequate supervision, instruction, and guidance to their clients in the discovery phase of every lawsuit. *See, e.g., Qualcomm*, 2008 WL 66932, at \*9.

rotating among these purported excuses, even adding new ones, until the final days of trial, when the previously unproduced documents clearly demonstrated that the testimony of many of its witnesses was false. And even now, long after the jury has returned a verdict that vindicated M&G's claims and rejected all of Carestream's defenses, Carestream continues to force M&G to expend resources to defend its verdict and to counter the very defenses that should never have been presented in the first place.

Carestream's behavior in this litigation clearly rises (or sinks) to the level of subjective bad faith justifying this Court in invoking the exception to the American Rule. Just as that behavior implicates the imposition of sanctions under Rules 16 and 37, it also triggers the Superior Court's inherent equitable authority to order fee-shifting as a sanction for Carestream's egregious actions.<sup>316</sup>

In fact, trial courts not only have the power but the *obligation* to sanction discovery abuse in a case such as this, where the violations were not exposed until the very end of trial. As the Delaware Supreme Court so eloquently expressed in a divorce case involving a physician husband who took extraordinarily oppressive steps to harass his wife, who had lesser resources:

Trial courts should be diligent in the imposition of sanctions upon a party who refuses to comply with discovery orders, not just to penalize those whose conduct warrants such sanctions, but to deter those who may be tempted to abuse the legal system by their

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<sup>316</sup> *Citizens Bank v. Design-A-Drape, Inc.*, 2008 WL 3413329, at \*2 (Del. Super. July 30, 2008).

irresponsible conduct. Discovery abuse has no place in our courts, and the protection of litigants, the public, and the bar demands nothing less than that our trial courts be diligent in promptly and effectively taking corrective action to “secure the just, speedy and inexpensive determination of *every* proceeding” before them.<sup>317</sup>

In this case, Carestream and its counsel would have been comfortable concealing the details of important and highly relevant meetings and allowing the jury to decide the issues ignorant of the true facts. As Vice Chancellor Strine noted in the case of *Beck v. Atlantic Coast PLC*, in which counsel fees were awarded in a similar situation involving what he termed “fraud by concealment” and “a stealthy spoliation of evidence”:

Such conduct is clearly inappropriate, and must be remedied in a manner that will deter future misbehavior of this kind. Every reasonable effort must be made to ensure that conduct of this kind will not be repeated by this plaintiff or by any other. Rule 37 recognizes that the record before a court will only be adequate if clients and counsel responding to discovery requests produce all probative, non-privileged information that is subject to legitimate discovery requests. That is, the integrity of the civil litigation process depends largely on a client and counsel living by an “honor code.” As such, a strong sanction is warranted here.<sup>318</sup>

In the *Beck* case, Vice Chancellor Strine analyzed the plaintiff’s conduct under the rubrics of Delaware Chancery Court Rule 37 (a provision identical to Superior Court Rule 37) and the bad faith exception to the American Rule, as well as Rule

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<sup>317</sup> *Holt v. Holt*, 472 A.2d 820, 824 (Del. 1984) (internal citation omitted) (quoting Del. Super. Ct. Civ. R. 1).

<sup>318</sup> *Beck*, 868 A.2d at 855-56.

11, because plaintiff’s counsel was found to have misled the Court by the filing of false pleadings. The Vice Chancellor entered an order requiring Beck, his lead counsel, and their law firm to pay attorneys’ fees of \$25,000 to Atlantic Coast, out of a requested \$60,000, based “on the charitable assumption that Atlantic Coast would have had to expend over half that amount” to dismiss the case if Beck and his counsel had behaved candidly.<sup>319</sup> Noting that the conduct of Beck and his counsel had also imposed a “needless burden” on the court, the plaintiff was directed to pay the sum of \$2,500 to the court because the conduct resulted in several days of judicial and staff time that could have been devoted to other pending matters.<sup>320</sup>

Just as in *Beck*, an award of fees is warranted in this case under the bad faith exception to the American Rule because of Carestream’s conscious assertion of defenses that it knew to be contradicted by the facts. Carestream maintained these varying defenses in spite of its awareness of documents that were directly contrary to its litigation position, several of which it withheld from pretrial production. This bad faith conduct independently supports an award of attorneys’ fees because it permeated the entire litigation. And, as the Court of Chancery held in similar circumstances in *Arbitrium Handels AG v. Johnston*:

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<sup>319</sup> *Id.* at 856.

<sup>320</sup> *Id.* at 857. The Vice Chancellor also required trial counsel, or any other lawyer in their firm, to enclose copies of his decision in any future applications for admission *pro hac vice*.

[The] conduct also supports the conclusion that the defendants in bad faith forced [the plaintiff] to commence and prosecute this action. The defendants' promiscuous alterations of testimony and wholesale shifting of positions are consistent with their vain quest to find some footing—any basis—upon which to erect a defense. Their fabrication of evidence to present even a semblance of a defense supports the conclusion that their entire defensive position was a sham.<sup>321</sup>

In this case, Carestream has presented M&G with at least five defenses or justifications with regard to its conduct in 2007, and it has shuffled through its positions before and during this litigation as legal and factual flaws have emerged in each. First and foremost, Carestream claimed that M&G's pellets did not perform on the 501 machine. Prior to the disclosure of Arndorfer's unredacted notebooks, this defense was on shaky ground. Both the Kodak negotiators and Carestream employees such as Todd Arndorfer understood the Supply Agreement as requiring that M&G's resin "qualify for use" with reference only to the Kodak Park machinery. Moreover, Carestream employees knew that the only performance requirements in the Supply Agreement were the die flow line and filter change throughput events. As previously discussed, Charles Mikulka's expert opinion that trade usage or custom would impose additional performance or qualification requirements was essentially nullified by this testimony. Furthermore, contemporaneous reports from Carestream technical personnel following the joint experiment acknowledged that accreditation and a long-term

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<sup>321</sup> 705 A.2d at 237.

stable operating condition, though not yet accomplished, were on the horizon—and awaited further purchases to enable expanded run-time with M&G’s product.

The effect of the late-produced notebook entries was to devastate Carestream’s insistence that it was attempting to accredit M&G’s resin in good faith. The June 7 entry discussing a possible “buy off” of M&G not only demonstrated that Carestream considered M&G entitled to recover under the contract at that point, but also cast doubt on Carestream’s conduct of the subsequent runs of M&G product. If Carestream employees believed as of June 7 that M&G was entitled to compensation in the event that Carestream exited the Supply Agreement, their incentives might well have been *against* finding a successful long-term operating condition with M&G’s resin during the June process trial and the joint experiment. Even more cogently, the July 30 entry discussing the alternative bases for eliminating demand to which Carestream might resort if the joint experiment “works,” makes manifest that Carestream was by that time participating in accreditation efforts with the ultimate goal of manufacturing defenses, not film.

Carestream’s second defense was that M&G misconstrued price discussions it initiated to make M&G aware of a forthcoming valid meet-comp offer for 2008.

Despite testimony to the contrary offered by Carestream employees,<sup>322</sup> contemporaneous documents suggested Carestream attempted to force price concessions from M&G for 2007.<sup>323</sup> The late-produced August 8 entry from Arndorfer’s notebook confirmed that Carestream intended to notify M&G that continued testing was contingent on M&G not only meeting ECC’s price, but *exceeding* the requirements of the meet-comp provision by offering “some discount for expected 2-3% yield loss.”<sup>324</sup>

Furthermore, Carestream’s contention that its price discussions related only to a 2008 meet-comp offer is in direct tension with another of its defenses: the idea that it was entitled to eliminate its requirements for M&G’s pellet PET because it purchased ECC’s prepolymer powder instead as part of its “shift in manufacturing strategy.” If Carestream considered ECC’s prepolymer powder to be a sufficiently comparable product for the purposes of a 2008 meet-comp offer—despite the fact that it has different specifications from pellet-form PET—then it would have a hard time contending that its new “manufacturing strategy” constituted a good-faith reduction in its requirements for M&G’s product.<sup>325</sup> Conversely, if

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<sup>322</sup> See, e.g., Trial Tr., Test. of Richard Morabito, Sept. 11, 2009 (A.M. Session), at 57:17-22 (“I had no desire to buy from Eastman Chemical. I was trying to change suppliers. I wanted to do business with M&G . . . and I wanted them to meet the pricing in 2008 so I could meet my obligation to my corporation.”)

<sup>323</sup> See PX 195.

<sup>324</sup> PX 247.

<sup>325</sup> See U.C.C. § 2-306 & cmt. 2.

Carestream believed that shifting its manufacturing strategy back to ECC prepolymer powder constituted a good-faith justification for eliminating its demand under the Supply Agreement, it would have had no need to present a meet-comp offer in 2008—and no basis for doing so.

Finally, Carestream’s contention that M&G’s August 13, 2007 letter relieved Carestream of its obligation to perform by stating M&G’s intent to sue was adequately countered by the text of that letter. However, the late-produced Arndorfer notebook entries confirmed that Carestream would have been unwilling to perform regardless of the letter’s content. The notebook entries therefore belied numerous statements by Carestream’s employees concerning its willingness to carry forward with M&G at that time but for the August 13 letter.<sup>326</sup>

The Court is satisfied that the type of bad faith conduct shown in *Arbitrium* occurred in this case as well. Carestream based its defenses on counterfactual testimony, changed its defenses at various times to suit its needs or to overcome mounting disclosures that revealed its dishonesty and deception, and generally presented its entire case in bad faith. By doing so, it has not only taxed the

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<sup>326</sup> Trial Tr., Test. of Richard Morabito, Sept. 11, 2009 (A.M. Session), at 59:17 (“We continuously wanted to buy material from M&G.”); Trial Tr., Test. of Robert Brunner, Sept. 14, 2009 (P.M. Session), at 33:13-22; Trial Tr., Test. of Todd Arndorfer, Sept. 22, 2009 (A.M. Session), at 97:6-8 (“I [told the Carestream technical team to hold off further M&G trials] after I saw the August 13 letter from [M&G]. I told them that M&G had walked away from the deal and had gotten the lawyers involved.”) & 105:3-5 (“We could only know if [M&G’s resin would work] if we ran more experiments and ran more trials which we were prevented from doing by [M&G’s] legal action [in sending the August 13 letter].”).

resources of this Court, but required M&G to incur excessive costs in litigating a case that never should have made its way into the courtroom. Because Carestream's actions were inconsistent with the rules of this Court and violated the "honor code" that good faith demands, a strong sanction is amply justified under these circumstances.

One final note is in order. The Court recognizes that an award of attorneys' fees is highly exceptional, and that a finding that the defendant acted in bad faith must be based upon clear evidence. Regrettably, the record amply supports the conclusion that Carestream defended this lawsuit in bad faith because it clearly recognized its contractual obligation to M&G, chose to ignore that obligation in favor of an attempt to save the company millions of dollars by returning to ECC as its primary PET supplier, and then concealed its underhanded behavior by concocting numerous defenses that had no basis in the contract between the parties or the surrounding facts.

Many of Carestream's witnesses altered their testimony to conceal the truth, repeatedly changed positions to justify their unscrupulous conduct, and even suppressed evidence at trial—all in an effort to cover up that Carestream decided to break its Supply Agreement with M&G when it had no legal justification for doing so. As Carestream contends, there are circumstances in which a party may develop a defense to an alleged breach of contract based upon facts or theories discovered

after litigation has begun. But neither this principle nor the protections of privilege permit a party to retrospectively misrepresent its pre-litigation actions or motivations.

Quite obviously, what Carestream did in disavowing its contractual obligations to M&G was not fair, and evidence of the breach alone was more than sufficient to support the jury's verdict and to raise questions about the ethics and integrity of Carestream's corporate managers. But that evidence is not the basis of the Court's award of attorneys' fees. Rather, it was Carestream's calculated effort to distort the underlying events *during the ensuing litigation* that supports the invocation of the bad faith exception to the American Rule. Simply stated, this case *is* the exceptional one for which the remedy was designed.

#### 4. The Precise Remedy and Sanctions

In his Affidavit in Support of M&G's Application for Attorneys' Fees and Expenses, Steven P. Hollman, the partner principally responsible for Hogan and Hartson's representation of M&G in this litigation, sets forth his estimate of the financial damages suffered by M&G as a result of Carestream's discovery and

litigation abuses, particularly Carestream's assertion of defenses that were controverted by its own improperly withheld documents.<sup>327</sup>

Hollman justifies his request for an award by asserting that the late-produced documents substantiate M&G's claims by demonstrating that Carestream intended to extract price concessions from M&G for 2007, and that it had been exploring ways to exit the M&G Supply Agreement or force M&G to meet ECC's price *even if* the trials of M&G's resin were successful. In essence, as has been earlier discussed, the withheld documents contradicted or undermined several of Carestream's defenses.

The affidavit spells out the expenditures of time and money that would have been avoided had the documents been disclosed in accordance with the Court's scheduling order or, more crucially, had Carestream not persisted in asserting technical or scientific issues that had little or nothing to do with the reasons for the breach, and had it not maintained positions lacking factual support. The affidavit also points out that even if some portion of the late-produced documents could have properly been withheld on the basis of a pretrial assertion of privilege, the

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<sup>327</sup> Hollman actually filed two affidavits. The most recent affidavit was submitted shortly after oral argument on certain aspects of these motions, and was filed in order to correct the amounts originally asserted as charges to M&G because the first affidavit omitted a five-percent discount on counsel's standard rates in accordance with the billing arrangement that Hogan and Hartson had entered into with M&G. The Court will refer to the totals listed in the second affidavit in connection with this opinion, but has also considered the narrative explanations Hollman provided to support the calculations that are set forth in the first filed affidavit.

fact that Carestream's technical defenses were belied by the content of its own documents placed M&G in the position of unwittingly spending approximately one-third of the total trial time responding to technical issues that proved irrelevant once the truth was known.

Hollman's affidavit reflects the quality, professionalism, and experience of M&G's trial attorneys. Moreover, the Court's own assessment of the manner in which M&G's counsel conducted themselves during the entire trial, particularly in addressing the upheaval resulting from the revelations of Carestream's discovery omissions, is such that they are fully deserving of the market rates charged by attorneys in the so-called AmLaw 100 firms. While the attorneys' hourly rates during the years this litigation has occurred are not insubstantial, the rates reflected in Hollman's affidavit are comparable to the prevailing market rates for the type of complex litigation typically handled by lawyers at Hogan and Hartson. The Court has every reason to conclude that these attorneys did in fact measure up to their premium rates, as the thoroughness of their preparation, the quality of their advocacy, and their command of the facts were impressive.

Counsel's affidavit does not set forth a detailed daily accounting of every minute spent by all attorneys involved for each aspect of this litigation. While Carestream seems to suggest that such detail is required before the Court can award fees under the rubrics of Rules 26(f) or 37 or the bad faith exception to the

American Rule, the Court disagrees. Hollman has set forth his estimate of the time he and other attorneys allotted to their investigation of Carestream's accreditation processes and other performance issues relating to M&G's resin, as well as its competitor PET supplier, Invista. Hollman reasonably estimates that roughly a third of the total *trial* time was devoted to Carestream's technical defenses, which would have been unnecessary had Carestream conducted the litigation more forthrightly.

Hollman has calculated the minimum level of financial damages sustained by M&G due to Carestream's discovery abuses and its assertion of unfounded defenses by tracing the amount of time M&G spent preparing to rebut Carestream's technical or accreditation defense. His estimate of \$133,000 is a conservative amount for reasons that will be mentioned later. This figure includes undertaking the deposition testimony of six technical witnesses whose testimony, as it turned out, was not ultimately relevant and should have been unnecessary, as well as at least half of the deposition of Carestream's expert, Charles Mikulka.

In addition to the attorneys' time, M&G had to retain Dr. Derezinski as a trial expert on extrusion technology and plasticator instability to take advantage of his role as the outside consultant to the joint experiment and his particular expertise. Dr. Derezinski's testimony appeared crucial to rebutting the quality and performance deficiency defenses, but those defenses ultimately turned out to lack

both legal and factual merit for reasons that were known to Carestream well in advance of trial. In addition, it was essential for M&G's case as counsel perceived it at the outset of trial to have Dr. Derezinski present to observe the testimony of other witnesses regarding the qualification and accreditation processes. Dr. Derezinski's costs are estimated—again, conservatively—at \$80,000, exclusive of those costs for the witness's time separately set forth in M&G's Motion for Entry of Order Awarding Costs.

In total, Hollman's estimation of the minimum amount of counsel and expert witness fees for the foregoing purposes is at least \$355,550. According to Hollman, this sum reflects the bare minimum of M&G's entitlement because it does not take into consideration the fact, as supported by the evidence, that Carestream's litigation position was advanced without substantial justification. As a result, Hollman avers in his affidavit that M&G has incurred \$2,078,578.71 in costs, or \$2.1 million rounded, based on each individual attorney's hourly rates during 2006-2009 for work performed through October 8, 2009, which is the actual discounted amount billed to M&G. Hollman submits that these fees were incurred because M&G was required—through no choice of its own—to muster extensive resources to counter Carestream's ever-changing defenses and excuses. M&G maintains that virtually none of the expense would have been necessary but for

Carestream's assertion of litigation positions that lacked foundations in its own records.

This Court accepts Hollman's reasonable approximation of the additional expense to M&G resulting from Carestream's conduct, without requiring a more detailed accounting of every dollar billed. Nor does the Court deem it necessary for M&G to provide any more precise explanations of the labors of its attorneys in connection with its request for an award of fees. There are several reasons why the Court is satisfied that it has before it all of the information necessary for it to reach a conclusion with respect to the appropriate amount to award.

First, Hollman is in a far better position than is the Court or Carestream to assess the time, resources, and efforts of Hogan and Hartson's attorneys associated with this aspect of the litigation, and the Court has no reason whatsoever to doubt the accuracy of Hollman's representations or the integrity of his approximation. Second, the quality of the advocacy provided by Hogan and Hartson's attorneys was indicative of the number of hours they expended, and their hourly rates are commensurate with the extremely high value of their services. Each attorney involved in this litigation had an extensive command of the facts, and each demonstrated impeccable preparation for trial. The cost of this quality of representation is not insignificant, nor should it be.

In addition, in deciding this issue, the Court is mindful of the discounting methods employed by Hollman in providing his estimates. Most notably, Hollman's fee request "writes off" all time worked in a single day by any timekeeper during the course of trial that exceeded fourteen hours. These discretionary write-offs were based solely on Hollman's belief that during very long working days, "efficiency invariably is bound to be impaired," and he chose to err on the side of *not* seeking costs for time periods during which there might be a question about the quality of the legal work being accomplished. Hollman further notes in his affidavit that he also "wrote off or declined to record and bill legal fees [he] regarded as excessive, unproductive, duplicative or otherwise inappropriate for billing to M&G." Again, Hollman's affidavit, and his underlying billing practices, reflect a genuine effort to be conservative.

Even more compelling is the unusual fact that Hollman eliminated entirely any hourly charges for local counsel's time, including time spent by both Steven T. Margolin and Andrew Cordo of Ashby and Geddes, M&G's Delaware counsel, as well as time spent by legal assistants, document reviewers, proofreaders and word-processing staff, and secretarial overtime. In the Court's opinion, this discount is quite substantial, given the Court's own observations of local counsel's extensive involvement in this case and its recognition that Delaware attorneys were a crucial part of the trial team.

The Court also appreciates that Hollman made it a point to submit a second affidavit when he discovered his oversight in not applying the five-percent discount that was part of Hogan and Hartson's contractual billing arrangements with M&G. The Court does not consider the omission of this discount in the first affidavit to be deliberate, and considers the correction admirable given that it did not significantly alter the total fee amount and also in view of the fact that the estimate was so conservative in the first instance. While Carestream has suggested that a more detailed billing breakdown is necessary to check for other mistakes, this is not the type of oversight that suggests endemic problems in Hollman's estimates, nor would anyone but M&G's counsel have been able to identify and correct it.

Finally, it bears noting that nowhere in its briefing or arguments to the Court does Carestream provide any authority whatsoever that requires this Court to engage in a line-by-line analysis of the components of an attorneys' fee application when an award of fees is based upon the bad faith exception to the American Rule. In fact, the Court undertook its own independent research and could find no Delaware precedent that requires the Court to do anything more than use its broad discretionary authority to impose an appropriate sanction. None of the Delaware cases the parties have cited invoking the bad faith exception have based such awards on anything more than a rational assessment of what would be necessary to

remedy the harm occasioned by the misconduct.<sup>328</sup> In this case, the Court is satisfied that the information set forth in Hollman's affidavits is more than sufficient to enable it to calculate the amount of fees that should be awarded to M&G for the unnecessary expenses M&G incurred as a result of Carestream's violations of Rules 26 and 37, and Carestream's bad faith conduct in asserting defenses it knew to be false.

The Court will therefore enter an order requiring Carestream to pay \$850,000 to M&G. The Court has set an amount that, in its judgment, understates the excess expense incurred by M&G as a result of Carestream's discovery violations and assertions of false defenses. It also does not take into consideration the substantial time and resources expended by this Court, which would have been unnecessary had Carestream conducted this litigation honestly and in good faith.

## **V. Conclusion**

For all of the foregoing reasons, the Court is satisfied that the jury's verdict was not tainted by any of the legal errors Carestream has alleged in its Motion for a New Trial. In addition, although M&G would almost certainly have obtained a judgment in its favor even without the belated benefit of the documents produced to it near the end of trial as the result of the Court's order, the Court is convinced

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<sup>328</sup> See *Beck*, 868 A.2d at 856.

