UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

JON SIGUR, INDIVIDUALLY AND AS PRESIDENT ON BEHALF OF SURPLUS SALES, WIN VALCO, LTD. AND CONTROL VALVE SERVICES, INC.	**CIVIL ACTION**
VERSUS	
EMERSON PROCESS MANAGEMENT AND/OR FISHER ROSEMOUNT, ET AL	**NO. 05-1323-A-M2**

RULING & ORDER

This matter is before the Court on the Motion to Exclude Testimony of Expert, Philip A. Garrett, CPA (R. Doc. 50) filed by defendants, Emerson Process Management, LLP and Fisher Services Co. (collectively "defendants"). Plaintiff, Jon Sigur ("Sigur"), individually and as president on behalf of Surplus Sales, Win Valco, Ltd., and Control Valve Services, Inc., has filed an opposition to this motion. (R. Doc. 60).

FACTS & PROCEDURAL BACKGROUND

Sigur filed this lawsuit against the defendants, alleging that he and his companies lost sales because the defendants, direct business competitors in the selling of re-manufactured valves and instruments, disseminated defamatory material to his clients.[1] The defendants answered Sigur's lawsuit and asserted that there is no evidence supporting Sigur's claim that they authored or disseminated the allegedly damaging material or that

[1] The defamatory material allegedly disseminated included a CD with twenty-four files on it (also referred to as a "PowerPoint presentation") and various emails.

it damaged Sigur's business.

Through discovery in this matter, Sigur has identified five (5) companies which purportedly received the defamatory CD and emails:[2] Windalco, Aluminum Partners in Jamaica, AT Specialties, Jamaica Aluminum Co., and Jamaica Public Service. However, at the time of both of his depositions in this matter, Sigur has conceded that no one with any of those companies has told him that they would no longer do business with him, or that his sales would be adversely impacted, as a result of the defamatory material. *See*, Depositions of Sigur, attached to defendants' motion, Vol. I, p. 225, 228-229, 234-238; Vol. II, p. 144-148; Vol. III, p. 87-91, 156-157.[3]

In addition, in their present motion, defendants point to a lack of evidence on plaintiff's part concerning whether or not the above-mentioned companies even received the defamatory material or, if they did, whether they received it from defendants and whether it impacted their sales with Sigur's companies. For example, according to defendants, while Windalco witnesses indicate that they have seen the CD in question, they

[2] Although Sigur has listed over 350 customers on the sales summary for Surplus Sales, he has only identified five (5) companies, in his latest discovery responses, as having received the defamatory material in question.

[3] During both of his depositions, Sigur has indicated that he "plans to contact" his customers to find out whether they decreased/ceased (or plan to decrease/cease) business with him as a result of viewing the defamatory materials. However, this litigation has been pending for a year and a half, and as of his last deposition, Sigur still could not provide the names of the specific customers who he "allegedly lost sales to" or who "had decreased sales to" as a result of them having seen the CD or video in question, nor had anyone from those companies "ever told him that they were not going to do business or that they were going to do less business with him as a result of anything they saw in the CD or video." *See*, Vol. III of Sigur's deposition, p. 91, 156-157.

testified that a third party and employee of H.L. Hall, Trevor Hall, showed them the CD.[4] Furthermore, although Sigur identified Ronald Robertson of Aluminum Partners in Jamaica as a person who received the CD from defendants, Robertson indicated in his deposition that he has never seen the CD in question and that he was never shown any pictures or documents pertaining to Sigur or his companies by Trevor Hall or by the defendants.[5] Robertson further testified that he still does business with Sigur, that nothing has happened in the last several years which has in any way changed or hurt the amount of business he does with Sigur, and that he has done as much business with Sigur in 2005 and 2006 as he was doing with him previously. *See*, Deposition of Ronald Robertson, p. 6-7, 9. Finally, Tony Asberry of AT Specialties has signed an affidavit indicating that he was never shown any defamatory material concerning Sigur's companies by the defendants.[6]

Despite what appears to be a lack of evidence indicating that the identified customers received the defamatory materials in question and that the materials impacted Sigur's sales,[7] Sigur retained Phillip A. Garrett ("Garrett"), a certified public accountant and forensic economist, to quantify the amount of damages he allegedly sustained as a result

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[4] Defendants also note, in their reply memorandum relative to this motion, that, despite receiving the alleged defamatory materials, Windalco's sales with Sigur's companies nevertheless increased from $129,360 in 2004 to $242,895 in 2005.

[5] In fact, Robertson specifically indicated that the pictures in question were shown to him by Sigur probably three years ago. *See*, Deposition of Robertson, p. 9.

[6] The affidavit is signed but has not been notarized.

[7] Sigur's own expert, Garret, has conceded that, if the five companies identified by Sigur during discovery are the only customers considered, Sigur did not sustain any sales losses during the relevant time period because Sigur's sales to those companies actually increased by approximately $93,000 from January 1, 2005 to December 31, 2005. *See*, Deposition of Garrett, p. 46-54.

of lost sales brought about by the defendants' conduct.[8] Defendants now move to have the Court strike Garrett's testimony on the grounds that his opinions are based on insufficient facts and data and because they are unreliable, speculative and fail to meet the standard required by Fed. R. Evid. 702 and *Daubert v. Merrill-Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 11 S.Ct. 2786 (1993).

LAW & ANALYSIS

I. Legal Standards for Admissibility of Expert Testimony:

A. Federal Rule of Evidence 702:

Federal Rule of Evidence 702 governs the admissibility of expert testimony and provides the following:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. of Evid. 702. Thus, before expert testimony may be admitted under this rule, the district court must conduct a preliminary inquiry to ensure that the testimony is both *relevant* and *reliable*. *Vargas v. Lee*, 2003 WL 41936, p.1 (5th Cir. 2003), *citing Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-49, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) and *Pipitone v. Biomatrix, Inc.*, 288 F.3d 234, 244 (5th Cir. 2002). The objective of this gatekeeping requirement is to ensure that an expert, whether basing testimony on

[8] Specifically, Garret's report and testimony quantify the decrease in Sigur's sales from January 1, 2005 to December 31, 2005.

professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. *Id.*

In *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 593-94, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the United States Supreme Court provided an illustrative list of factors that a district court may consider in determining whether expert testimony is sufficiently reliable. Those factors include whether the expert's theory or technique:

> (1) can be and has been tested;
>
> (2) has been subjected to peer review and publication;
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> (3) has a high known or potential rate of error and standards controlling its operation; and
>
> (4) is generally accepted within the relevant scientific or technical community.

Whether these factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine. *Vargas*, supra, at p. 1, citing *Kumho*, 526 U.S. at 153. Although Rule 702 does not require absolute certainty, it does require that the expert testimony be based on good grounds. *Poly-America, Inc. v. Serrot International, Inc.*, 2002 WL 1996561, p. 12 (N.D.Tex. 2002), citing *United States v. Posado*, 57 F.3d 428, 433 (5th Cir. 1995). The testimony must constitute more than belief or unsupported speculation. *Id.*, p. 13, citing *Daubert*, 509 U.S. at 590.

The burden is on the party offering the expert testimony to prove by a preponderance of the evidence that the testimony satisfies Rule 702 and the *Daubert-Kumho* standard. *Cunningham v. Bienfang*, 2002 WL 31553976 (N.D.Tex. 2002), citing *Kumho*, 526 U.S. at 147, and *Mathis v. Exxon Corp.*, 302 F.3d 448, 459-60 (5th Cir. 2002). However, the *Daubert* analysis should not supplant trial on the merits. *Mathis*, 302 F.3d

at 461. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. *Id.*

II. Application of Legal Standards to Testimony of Garrett:

A. Did Garrett rely on "sufficient facts and data" as required by Rule 702:[9]

As mentioned above, Fed. R. Evid. 702 requires that an expert's testimony be based upon "sufficient facts and data." In their motion, defendants contend that Garrett's testimony should be excluded because he did not rely upon sufficient facts and data, in that he "erroneously assumed that Sigur's numerous customers received the defamatory material from the defendants and that this material resulted in his clients purchasing less valves from him." In other words, defendants argue that Garrett's testimony is inadmissible because his opinions regarding Sigur's lost sales/damages are based upon incorrect assumptions concerning the cause of such losses. In opposition, Sigur contends that Garrett's opinions should not be excluded on that basis because Garrett was hired solely to analyze financial records and determine the losses Sigur incurred due to decreased sales, not to determine the causation of such losses. *See*, Garrett's Deposition, attached as Exhibit "B" to plaintiffs' opposition, pp. 29 and 31 (where Garrett indicated that he was not "opining on the causation of the damages" but instead "asked the question of, What was the dip in sales").

While it is certainly permissible for an expert to be retained solely for the purpose

[9] Defendants have not disputed that Garrett is qualified to testify as an expert in accounting and forensic economics and/or that an expert opinion concerning the quantification of plaintiffs' damages could assist the trier of fact. Accordingly, the Court need not address those issues under Fed. R. Evid. 702.

of opining on the issue of lost sales or damages, such an opinion is only relevant if it is based upon correct causal assumptions. Put another way, Garrett's opinion concerning the quantity of Sigur's lost sales from January 1, 2005 to December 31, 2005 lacks the "relevance" to this lawsuit, required by Fed. R. Evid. 702, if it is not based upon a correct assumption that such losses in sales were caused by the alleged conduct of the defendants. A similar scenario was faced by the Southern District of New York in *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 75 F.Supp.2d 235 (S.D.N.Y. 1999). In that case, a franchisee brought suit against its franchisor for business slander and disparagement of goods, and the franchisee retained an economics expert to determine the lost value of the franchisee's retail business when the franchisee closed the business, allegedly because of the disparaging acts by the franchisor. *Id.*, at 237. The franchisee based its claims upon evidence of nine isolated, oral statements made by employees of the franchisor and a decline in its sales between December 1989 and July 1991. The court found that evidence of declining sales alone is not a substitute for proof of causation in a case in which there is no evidence that the disparaging statements in question were widely disseminated by the defendant. *Id.*

With respect to the franchisee's expert opinion concerning the lost value of the franchisee's business, the *Fashion Boutique* court held that such opinion was irrelevant if the franchisee could not prove that the isolated defamatory statements caused its loss. *Id.*, at 238-39. Specifically, the court noted that the expert's testimony was premised on his assumption that the sharp decline in the plaintiff's sales was caused by a "campaign of disparagement" by the defendants, and "without proof of the causation that [the expert] assumes, his estimate of the value of [the franchisee's] business is not the measure of

damages for the defamatory statements that plaintiff can prove." The court concluded that the expert's opinion was based upon an "irrational assumption" and was inadmissible because it would not assist the jury. *Id.*

Similarly, in *MapInfo Corp. v. Spatial Re-engineering Consultants*, a plaintiff sought to exclude the report and testimony of the defendant's expert concerning the defendant's lost sales/damages which allegedly resulted from certain disparaging conduct engaged in by the plaintiff. *MapInfo*, at *2. Specifically, the defendant alleged that the plaintiff's personnel made false, disparaging statements to resellers and customers in an attempt to harm the defendant. However, in his deposition, the defendant's president conceded that the only proof he had that the twelve customers named in the defendant's answer were affected by the alleged disparagement and that the defendant "lost or potentially lost customers" as a result of the disparagement was that the defendant was "sometimes given the 'cold shoulder' when [it] attempted to sell to th[o]se customers." *Id.*, at *5. The court found that the defendant's "mere speculation" as to why certain customers gave SRC the "cold shoulder," without any further proof, was insufficient to demonstrate that the named customers were affected by the alleged disparagement. *Id.*

In *MapInfo*, unlike the present case, the defendant was seeking to use its economic expert as both an expert on causation and on damages. The court held that the expert's testimony should be excluded on both issues. *Id.*, at *6. As to causation, the testimony was excluded because the expert repeatedly testified that he "assumed" that the alleged disparagement occurred and that it impacted the customers in the marketplace; furthermore, he indicated that he did not know when the first alleged act of disparagement took place or for how long the disparagement lasted. *Id.* As to the expert's testimony on

damages, the court found that such testimony should be excluded as irrelevant because of the defendant's failure to prove the causation assumption upon which the expert relied. *Id.*

Fashion Boutique and *MapInfo* can be compared to *International Adhesive Coating Co., Inc. v. Bolton Emerson International, Inc.*, 851 F.2d 540 (1st Cir. 1988), wherein the buyer of a boiler, used in melting adhesive for creation of adhesive tape, sued the manufacturer of the boiler due to defects in the boiler. Among the claims asserted by the buyer was that it sustained business losses as a result of boiler breakdowns. The buyer retained an accounting expert to quantify such business losses, and the manufacturer sought to exclude the expert's opinions on the ground of insufficient factual basis. In *International Adhesive*, the court found that the expert's opinions were admissible. *Id.* at 545.

The *International Adhesive* court noted that the expert was not an expert on the process of manufacturing industrial adhesives and could not and did not set forth opinions concerning causation. *Id.* Instead, he assumed that the areas of loss claimed by the plaintiff were valid and legally cognizable and assigned dollar amounts to the claimed losses based upon the financial documents he reviewed. *Id.* The court found that the expert report did not have to establish the validity of the disputed factual claims in order to have a factual basis and be admissible since the factual basis for his opinions lay in the plaintiff's business documents. *Id.*, at 545-46. However, the court also determined that the plaintiff had produced sufficient evidence establishing the disputed facts which the expert had assumed in reaching his opinions. *Id.*, at 546. For example, the court found that the plaintiff supplied evidence demonstrating that lost profits and overhead, as well as the need

for repairs and a second boiler, were indeed caused by the defective boiler. Thus, because sufficient evidence of causation was produced by the plaintiff, an adequate factual basis existed to support the plaintiff's expert's testimony, and the trial court's decision to admit the testimony was held not to be clear error. *Id.*

In contrast to *International Adhesive*, the plaintiff in the present case has failed to submit any competent evidence demonstrating a causal link between the alleged defamatory acts of the defendants and his declining sales from January 1, 2005 to December 31, 2005 and has instead simply argued that Garrett is solely a damages expert who did not, and was not required to, address causation issues. However, Garrett's February 16, 2007 report (attached to Sigur's opposition) and his deposition testimony clearly indicate that, in issuing his opinion on lost sales/damages, Garrett relied upon the underlying assumption that such losses were caused by the defendants' conduct.[10] *See*, Garrett's deposition, p. 32 (where he stated, "I think the assumption I'm making is basically that because of the PowerPoint presentation being out in the marketplace that the sales

[10] For example, Garrett specifically states in his report that he was engaged to analyze the financial records of Surplus Sales and Control Valve Services "to determine losses *incurred due to decreased sales as a result of the actions of [defendants].*" In addition, the factual "background" section of Garrett's February 16, 2007 report contains certain underlying assumptions which he used in rendering his opinions. In that section, Garrett states that Sigur's company, Surplus Sales, was a "competitive threat" to Emerson/Fisher and that, around July 2004, a representative of Emerson/Fisher approached Sigur and proposed to purchase Sigur's businesses so they would not have to be in competition. When Sigur refused to consider the offer, Emerson/Fisher created marketing tools, including a PowerPoint presentation that contained the name and pictures of Sigur's company, Surplus Sales. It is alleged that the contents of that presentation misrepresented Surplus Sales by providing false and misleading information that has resulted in lost sales for Surplus Sales. Finally, in calculating Sigur's alleged lost sales, Garrett applied a 10% growth rate to Surplus Sales' 2004 sales amount of $2,586,808 and calculated that its sales totals in 2005 would have been $2,845,489, as compared to its actual sales of $2,069,730, "had the alleged actions of the defendant[s] not occurred." *See*, Garrett's report, attached to plaintiff's opposition as Exhibit "B."

were dropping because specific customers may have it"). Accordingly, the Court finds that Garrett's opinions are only "relevant" to this matter to the extent plaintiff can present competent evidence demonstrating that the underlying causation assumption is valid and that other factors which may have impacted Sigur's sales during the relevant time period, such as market conditions and the sales history of the customers at issue, were considered in determining causation.[11]

For example, Sigur has not presented any evidence indicating that the impact of market factors, such as Hurricanes Katrina and Rita, the cyclical nature of "turnaround operations" in the industry, or the impact of competition, were considered in the underlying causal analysis.[12] Furthermore, if such market factors were not considered in determining causation, Sigur has not offered any explanation as to why, under generally accepted methodology, it was permissible for Garrett to assume that such factors did not affect

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[11] Garrett, in his sole capacity as a damages expert, was not necessarily required to gather causation evidence by interviewing Sigur's customers and reviewing depositions or documents to determine whether Sigur's customers actually reviewed the defamatory material, as the defendants suggest. However, in order for Garrett's testimony regarding damages to be relevant, Sigur nevertheless needs to produce some other competent evidence, developed through fact or expert discovery, indicating that the customers actually reviewed the defamatory material in question, that the material was sent to them by the defendants, and that it, rather than other factors such as market conditions, caused the alleged decline in Sigur's sales.

[12]As the defense experts note in their report, which is attached to defendants' motion, the remanufactured valve and repair valve industry is not one where customers consistently purchase items on a repetitive basis, and they instead purchase on an "as needed" basis for purposes of replacement of existing valves. This industry factor further complicates one's ability to establish a causal relationship between defendants' alleged conduct and declining sales in a particular year, since it is difficult to determine whether the declining sales were simply due to a lack of need on the part of Sigur's customers or whether they resulted from other factors. Garrett conceded in his deposition that he did not talk with any of Sigur's customers or conduct any market research or analysis to determine under what circumstances a company might purchase a remanufactured valve. *See*, Garrett's deposition, p. 19. Thus, Sigur must submit some other competent evidence to the Court indicating that such research or analysis was considered in developing the underlying causal assumption upon which Garrett relied in forming his opinions.

Sigur's sales.[13]

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[13]Courts have often found that an expert's opinion is inadmissible under Rule 702 and *Daubert* where the expert's opinions are based upon unjustified assumptions and where there is no evidence that the expert considered other market factors which may have caused the losses in question. *See, Sunlight Suanas, Inc. v. Sundance Sauna, Inc.*, 427 F.Supp.2d 1022 (D.Kan. 2006)(where the court held that an economic expert's testimony should be excluded because the expert did not take into account significant factors, aside from the defendants' conduct, which could have explained the decline in the growth of the plaintiff's sales. The court also found that the expert's methodology was flawed because he did not independently analyze the plaintiff's sales projections, and the plaintiff had not provided a coherent explanation as to how it arrived at the projections. The court noted that the record contained "no data on market share, no market research and no evidence that, absent wrongful conduct by defendants, plaintiff's sales would have increased from 1,906 to 4,775 between July of 2004 and June of 2005." The court also found that the plaintiff failed to present evidence that a reasonable economist would assume that certain issues, such as competition by Chinese manufacturers or loss of internet leads during the historically busiest month of the year, did not impact the plaintiff's sales during the relevant period. Because the expert attributed all lost profits to the defendants, without considering increased competition in the market, other market conditions or alleged wrongdoing by other competitors, the court held that the expert's testimony would not be helpful to the jury in determining the fact or amount of damages).

See also, First Savings Bank, F.S.B. v. U.S. Bancorp, 117 F.Supp.2d 1078, 1085 (D.Kan. 2000)(improper attribution of all losses to defendants' illegal acts, despite presence of other factors, infects basic methodology); *Bazemore v. Friday*, 478 U.S. 385, 400, n. 10, 106 S.Ct. 3000, 92 L.Ed. 2d 315 (1986)(while failure to include variables normally will affect probativeness of analysis, some regressions may be so incomplete as to be irrelevant); *Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F.2d 410, 415-16 (7th Cir. 1992)(expert should have separated injury due to unlawful conduct from that due to new entry in market); *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906, 911 (2d Cir.)(economist's damage evidence properly excluded where no basis for assumption established, *cert. denied*, 369 U.S. 865, 82 S.Ct. 1031, 8 L.Ed.2d 85 (1962); *Cochrane v. Schneider Nat. Carriers, Inc.*, 980 F.Supp. 374 (D.Kan. 1997)(excluding expert estimates of loss based on unjustified assumptions); *In re Aluminum Phosphide Antitrust Litigation*, 893 F.Supp. 1497, 1507 (D.Kan. 1995)(proposed expert opinions based on unjustified assumptions would not assist the trier of fact and were therefore inadmissible under Rule 702); *Southern Pacific Communications Co. v. American Tel. & Tel. Co.*, 556 F.Supp. 825, 1075-76 (D.D.C. 1982)(damage model based on unreasonable and speculative assumptions not sufficient to support just and reasonable approximation of damages).

Compare, McMillan v. Mass. Soc'y for the Prevention of Cruelty to Animals, 140 F.3d 288, 302 (1st Cir. 1998)(upholding an expert's regression analysis where "her testimony show[ed] solid reasoning in her determinations to exclude certain variables that the defendants argued should have been included"). In the present case, Sigur has failed to provide any explanation whatsoever concerning the underlying causal analysis, including whether or not other market variables were considered as possible causes of his lost sales and if not, the reasoning for failing to consider those variables.

However, because the present motion is not a motion for summary judgment and Sigur may not have thought it necessary to present evidence of causation in opposition to defendants' motion in limine (considering his argument that Garrett is only a damages expert), the Court will allow Sigur additional time to submit such evidence, if any, and related briefing prior to ruling on defendants' motion in limine. If Sigur is able to submit competent, summary judgment-type evidence indicating that there is, at the least, a genuine factual dispute concerning the underlying causal assumptions upon which Garrett relied in forming his opinions, Garrett's opinions as to damages will have relevance to this matter,[14] and the Court can then proceed to determine whether Garrett's methodology in calculating Sigur's damages satisfies the requirements of *Daubert*.

Accordingly;

IT IS ORDERED that the Court will defer issuing a final ruling on the Motion to Exclude Testimony of Expert, Philip A. Garrett, CPA (R. Doc. 50) filed by defendants,

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[14] This approach is compatible with the role of the court in addressing Rule 702 challenges. The Advisory Committee Notes discussing Rule 702(1) provide:

> When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on 'sufficient facts or data' is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.

Advisory Committee Notes to Rule 702(1); *See also, Downeast Ventures Ltd. v. Washington County*, 2007 WL 679887, *2-*3 (D.Me. 2007). In other words, once it has been established that a legitimate factual dispute exists and that there is a plausible evidentiary basis for an expert's opinion, it is not the role of the court to take sides with regard to the factual dispute. At that point, the court determines whether the methodology used by the expert meets the reliability requirements of *Daubert*, and if so, the disputed factual issues are left to be weighed by the jury. However, based upon the evidence submitted thus far in the present case, the Court is unable to determine whether a legitimate factual dispute concerning causation even exists for the jury, and the Court therefore cannot determine whether Garrett's testimony regarding damages would be relevant and helpful to the jury. *Id.*

Emerson Process Management, LLP and Fisher Services Co., for fifteen (15) days to allow plaintiff, Jon Sigur ("Sigur"), individually and as president on behalf of Surplus Sales, Win Valco, Ltd., and Control Valve Services, Inc., to submit evidence and argument supporting the causal assumptions underlying the opinions of Phillip Garrett, CPA.

Signed in chambers in Baton Rouge, Louisiana, April 25, 2007.

MAGISTRATE JUDGE CHRISTINE NOLAND