IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL REIS, SR. and LAWRENCE J. KATZ, on Their Own Behalf and as Assignees of Weaver Nut Company, Inc.,	)	Civil Action No. 05-CV-01651
Plaintiffs	)	
vs.	)	
BARLEY, SNYDER, SENFT & COHEN LLC.,	)	
Defendant	)	

O R D E R

NOW, this 3rd day of July, 2008, upon consideration of the Motion to Preclude Plaintiffs' Experts or, in the Alternative, to Extend Deadlines, which motion was filed on behalf of defendant Barley Snyder Senft & Cohen on November 30, 2007; upon consideration of Plaintiffs' Daubert Motion to Bar the Expert Testimony of David Glusman CPA and Thomas Wilkinson, Jr., Esquire to the Extent That Their Opinions Do Not 'Fit' the Facts of the Case, which motion was filed April 23, 2008; upon consideration of the briefs of the parties; after hearing conducted before the undersigned on May 22 and 27, 2008; and for the reasons expressed in the accompanying Memorandum,

IT IS ORDERED that defendant's Motion to Preclude Plaintiffs' Experts or, in the Alternative, to Extend Deadlines in the nature of a Daubert[1] motion is denied.[2]

IT IS FURTHER ORDERED that plaintiffs are not precluded from offering the testimony of their liability expert Professor Geoffrey C. Hazard, Jr. at the trial of this action.

IT IS FURTHER ORDERED that Plaintiffs' Daubert Motion to Bar the Expert Testimony of David Glusman CPA and Thomas Wilkinson, Jr., Esquire to the Extent That Their Opinions Do Not 'Fit' the Facts of the Case is denied.

IT IS FURTHER ORDERED that defendant is not precluded from offering the testimony of either David Glusman, CPA (damages expert) or Thomas Wilkinson, Jr., Esquire (liability expert).

BY THE COURT:

/s/ JAMES KNOLL GARDNER
James Knoll Gardner
United States District Judge

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[1] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 125 L.Ed.2d 469, 113 S.Ct. 2786 (1993).

[2] By my Order dated December 4, 2007 I granted in part and deferred in part defendant's Motion to Preclude Plaintiffs' Experts or, in the Alternative, to Extend Deadlines. Specifically, I denied defendant's motion insofar as it sought to preclude plaintiffs' expert from testifying at trial based upon a violation of my June 29, 2007 Rule 16 Status Conference Order. In addition, I granted defendant an enlargement of time to produce a responsive expert report. Finally, I deferred that portion of defendant's motion in the nature of a Daubert motion, which I now deny by this Order and the accompanying Memorandum.

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Plaintiffs	)	
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BARLEY, SNYDER, SENFT & COHEN LLC.,	)	
Defendant	)	

* * *

APPEARANCES:

LYNANNE B. WESCOTT, ESQUIRE
On behalf of Plaintiffs

ARTHUR W. LEFCO, ESQUIRE
On behalf of Defendant

* * *

M E M O R A N D U M

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on two separate motions brought pursuant to the decision of the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 125 L.Ed.2d 469, 113 S.Ct. 2786 (1993). The Motion to Preclude Plaintiffs' Experts or, in the Alternative, to Extend Deadlines was filed on behalf of defendant Barley Snyder Senft &

Cohen on November 30, 2007;[3] and Plaintiffs' Daubert Motion to Bar the Expert Testimony of David Glusman CPA and Thomas Wilkinson, Jr., Esquire to the Extent That Their Opinions Do Not 'Fit' the Facts of the Case was filed April 23, 2008.

The matter was briefed by the parties. A hearing was conducted before me on May 22 and 27, 2008.

The matter was taken under advisement at the conclusion of closing arguments on May 27, 2008. Hence this Memorandum. For the reasons expressed below, I deny both Daubert motions.

JURISDICTION

This action is before the court on diversity jurisdiction. Plaintiff Michael Reis, Sr. is a resident of the State of Illinois and plaintiff Lawrence J. Katz is a resident of the State of New Jersey. Defendant Barley, Snyder, Senft & Cohen, LLC is a Pennsylvania limited liability company. The amount in controversy is in excess of $75,000. See 28 U.S.C. § 1332.

VENUE

Venue is proper because plaintiffs allege that the facts and circumstances giving rise to the cause of action

[3] By my Order dated December 4, 2007 I granted in part and deferred in part defendant's Motion to Preclude Plaintiffs' Experts or, in the Alternative, to Extend Deadlines. Specifically, I denied defendant's motion insofar as it sought to preclude plaintiffs' expert from testifying at trial based upon a violation of my June 29, 2007 Rule 16 Status Conference Order. More specifically, I granted defendant an enlargement of time to produce a responsive expert report. Finally, I deferred that portion of defendant's motion in the nature of a Daubert motion, which I address below.

occurred in Lancaster County, Pennsylvania, which is in this judicial district. 28 U.S.C. §§ 118, 1391.

PROCEDURAL HISTORY

Examining the non-exhaustive list of factors set forth by the Supreme Court in Daubert and its progeny, discussed below, requires a short recitation of the procedural history of this case.

On April 10, 2005 plaintiffs Reis and Katz, on their own behalf and as assignees of Weaver Nut Company, Inc., filed their initial Complaint in this matter. The original Complaint alleged five causes of action: breach of fiduciary duty (Count I); professional negligence (Count II); abuse of process (Count III); interference with a contractual relationship (Count IV); and conversion (Count V).

On June 23, 2005 defendant filed its initial motion to dismiss. On July 7, 2005 plaintiffs responded, which included a request to amend the Complaint. My Order dated March 17, 2006 and filed March 20, 2006 granted plaintiffs' request.

On April 12, 2006 plaintiffs filed their Amended Complaint. The Amended Complaint contains the original five causes of action and an additional cause of action for breach of contract (Count VI). On May 2, 2006 defendant filed its second motion to dismiss. On May 19, 2006 plaintiffs responded.

By my Order and Opinion dated March 30, 2007 I granted in part and denied in part defendant's motion to dismiss plaintiffs' Amended Complaint.

As a result of my rulings on defendant's motion to dismiss, the following six claims against defendant Barley Snyder remain in this lawsuit: Count I: (1) breach of fiduciary duty brought by plaintiffs as assignees of the Company; (2) aiding and abetting breach of a fiduciary duty brought by plaintiffs individually; (3) aiding and abetting breach of a fiduciary duty brought by plaintiffs as assignees of the Company. Count II: (4) professional negligence brought by plaintiffs as assignees of the Company. Count IV: (5) tortious interference with contractual relations brought by plaintiffs as assignees of the Company. Count VI: (6) breach of contract brought by plaintiffs as assignees of the Company.

FACTS

Based upon the allegations contained in plaintiffs' Amended Complaint, the operative facts underlying this case are as follows:[4]

Weaver Nut Company, Inc., is a Pennsylvania corporation which until mid-2001 was owned exclusively by E. Paul Weaver, III and his wife, Miriam J. Weaver. In 2001 the Company was in significant financial trouble and was in default on loan

[4] I note that defendant disputes many of the allegations contained in plaintiffs' Amended Complaint.

agreements with its bank and others. The bank ultimately exercised its rights under numerous forbearance agreements and appointed a trustee over the Company's affairs.

The Trustee explored options to reduce the bank's financial exposure. The Trustee ultimately became aware of the firm Summit Private Capital Group ("Summit") with which plaintiffs Reis and Katz were affiliated. On June 12, 2001 the Company, engaged Summit as a financial consultant to turn the company around financially. On that date the Company, through Mr. Weaver, executed a Merchant Banking and Corporate Development Agreement ("Development Agreement") with Summit. The Company passed a corporate resolution ratifying the Development Agreement. The resolution provided, in part, that the Development Agreement was for the Company's benefit.

Mr. Reis was named Secretary, Treasurer and Chief Financial Officer ("CFO") of the Company. Mr. Katz secured a funding source to provide corporate restructuring and financial management advice to the Company and helped implement new management policies, systems and controls to improve the profitability of the Company. Reis and Katz became 50% shareholders in the Company (25% each) and Mr. and Mrs. Weaver retained the remaining 50% of the shares (25% each).

Throughout 2001 and 2002, Reis and Katz helped the Company restructure its debt, obtain a new revolving line of

credit in the amount of $1,500,000, hire competent senior managers and implement a state-of-the-art inventory control system. By the beginning of 2003 the Company was operating at a profit after having lost one million dollars in 1999-2000 under the direction of E. Paul Weaver, III. Furthermore, the marketability value of the Company rose to in excess of $6,000,000, and it was on track to achieve a $1,500,000 operating profit without any additional acquisitions.

A key factor in the successful turnaround of the Company was the continuing effort to minimize or eliminate Mr. Weaver's unsound prior business practices including below-cost sales to customers, irrational purchasing without regard to existing inventory and anticipated demand, sale of "out of date" inventory as current product, misleading marketing techniques, questionable self-dealing and related-party transactions and maintenance of a hostile workplace.

In the beginning of 2003, Mr. Weaver began secret negotiations with defendant law firm, Barley Snyder, concerning the future of the Company. In addition, Mr. Weaver and John Maksel met with Barley Snyder attorneys. Mr. Maksel would later become the new CFO of the Company after Reis and Katz were fired. Mr. Weaver retained Barley Snyder on both his own and the Company's behalf and paid the firm's retainer fee with Company funds. Mr. Reis and Mr. Katz did not know about these

discussions, meetings or the retention of Barley Snyder as the attorneys for Mr. Weaver and the Company.

Barley Snyder never investigated the impact upon the Company of its actions on behalf of Mr. Weaver. Furthermore, because of the fiduciary duties Mr. Weaver owed to the Company and the other shareholders (Reis and Katz), Barley Snyder should have investigated the impact of its actions on its client (the Company) prior to acting at the direction of Mr. Weaver.

Barley Snyder attorneys worked with Mr. Weaver, his son and others to escape the obligations of the Development Agreement, which had saved the Company from financial ruin, and to conduct business in the manner previously perpetrated by Mr. Weaver, which had caused the Company's previous financial difficulties. Barley Snyder's representation of both Mr. Weaver and the Company was a conflict of interest because the personal interests of Mr. Weaver were detrimental to both the Company, and Reis and Katz.

On April 11, 2003, acting on behalf of Mr. Weaver and the Company, Barley Snyder attorney Shawn M. Long, terminated the Development Agreement, fired Mr. Reis as Company CFO and soon thereafter terminated key members of the management team put in place by Reis and Katz. Moreover, on that same day, Barley Snyder threatened Reis and Katz with criminal sanctions if they entered the Company's premises again.

By firing Reis and Katz, Barley Snyder placed the Company in violation of the Development Agreement and jeopardized the finances of its client (the Company). Credit extensions were reviewed and altered to the detriment of the Company. Moreover, the Company's financing had to be renegotiated.

After the firing of Reis as CFO and the termination of of Reis and Katz as consultants, various consultants were hired with the assistance and direction of Barley Snyder attorneys. The new consultants took direction from Barley Snyder. The new consultants were paid large sums of money with Company funds and were unable to properly operate the Company. Moreover, other employees who filled positions vacated by the terminations took direction directly from Barley Snyder attorneys.

The Company suffered from the actions of Mr. Weaver and Barley Snyder. The amount of accounts payable by the Company increased to over one million dollars. Funding advances were obtained at less than favorable interest rates. Deliveries could not be made because raw materials could not be purchased, and the computer system was compromised by staff terminations to the point that the Company was unable to track its financial position.

Moreover, Mr. Weaver, with the advice and assistance of Barley Snyder, opened a new bank account, changed the address on purchase orders from the outside inventory financing firm to the

address for the Company, and diverted tens of thousand of dollars from the Company. All of these acts reduced the value of the Company's equity.

On April 24, 2003, Reis and Katz were notified that Frank McSorley, formerly of Packaged Foods, was now in a top management position at the Company. On April 30, 2003 Barley Snyder commenced a legal action in the Court of Common Pleas of Lancaster County, Pennsylvania alleging that what could be deemed to be criminal acts were committed by Reis and Katz. The purpose of the lawsuit was to harass Reis and Katz, cause them injury and force them out of the Company.

Mr. Weaver owed fiduciary duties to Reis and Katz as 50% shareholders of the Company, and Barley Snyder aided and abetted the breach of Mr. Weaver's fiduciary duties. Barley Snyder entered into its professional relationship with Mr. Weaver, to the detriment of the Company, for the purpose of acquiring large legal fees.

On December 15, 2003, Reis and Katz settled their differences with Mr. Weaver and returned their 50% interest in the Company in return for the assignment to Reis and Katz of any claims that the Company might have, or that Reis and Katz might have as shareholders, against Barley Snyder. No specific claims of either Reis, Katz or the Company against Barley Snyder were released. However, specific claims against Mr. and Mrs. Weaver

were released by Reis and Katz, including claims for breach of fiduciary duty, shareholder oppression, and any other misconduct by the Weavers.

DISCUSSION

Expert testimony is considered by the trier of fact only if it is first determined that the testimony will assist the trier of fact. Daubert, supra. Where the evidence sought to be precluded is of a non-scientific nature, "the relevant reliability concerns will focus upon [an expert's] personal knowledge and experience." Roberson v. City of Philadelphia, 2001 U.S.Dist. LEXIS 2163, at *9-10 (E.D.Pa. 2001)(Shapiro, S.J.), citing Kumho Tire Company, Ltd. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

A district court must examine the expert's conclusions in order to determine whether they could reliably follow from the facts known to the expert and the methodology used. This connection has been described as “a fit between the testimony offered and the facts of the case.” Roberson, at *8. The Court is to act as the gatekeeper and preclude the admission of expert opinions which are not tied to the facts of the case. The “gatekeeping inquiry must be tied to the facts of a particular case." See Kumho Tire, 526 U.S. at 149, 119 S.Ct. at 251, 143 L.Ed.2d at 1175.

Under Rule 703 of the Federal Rules of Evidence, experts may rely on facts from firsthand knowledge or observation, information learned at the hearing or trial, and facts learned out of court. Rule 705 provides for the disclosure of facts underlying the expert's opinion. See also Fed.R.Civ.P. 26(a)(2)(B) and 26(e)(1) relating to disclosure in advance of trial of the basis and reasons for an expert's opinion. It is an abuse of discretion to admit expert testimony which is based on assumptions lacking any factual foundation in the record. Stecyk v. Bell Helicopter Textron, Inc., 295 F.3d 408, 414 (3d Cir. 2002); citing Elcock v. Kmart Corp., 233 F.3d 734, 756 n.13 (3d Cir. 2000).

The Third Circuit has set forth a non-exhaustive list of factors which should be looked at when the court inquires into the reliability of proposed expert testimony. Those factors include: (1) whether a method consists of a testable hypothesis; (2) whether the method has been subjected to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique’s operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based upon the methodology; and (8) the non-judicial uses to which the method has been put. Oddi v.

Commonwealth of Pennsylvania, Department of Transportation, 234 F.3d 136, 145 (3d Cir. 2000).

In Elcock, the Third Circuit stated:

> Kumho Tire makes clear that this list is non-exclusive and that each factor need not be applied in every case. As noted above, it also resolves the question whether these same factors should be applied when testing the reliability of a non-scientific method:
>
> > Daubert's gatekeeping requirement....makes certain that an expert, whether basing testimony upon 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....The trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. That is to say, a trial court should consider the specific factors identified in Daubert where they are reasonable measures of the reliability of expert testimony.

Elcock, 233 F.3d at 746 citing Kumho Tire, 526 U.S. at 152, 119 S.Ct. at 1176, 143 L.Ed.2d at 252.

Defendant's Daubert Motion

Defendant's Contentions

Defendant contests the admissibility of the opinions of plaintiffs' liability expert Professor Geoffrey C. Hazard, Jr. Plaintiffs are offering Dr. Hazard as an expert in the field of legal ethics. Specifically, defendant contends that Professor Hazard's report is based entirely on assumptions which are not based on the factual record in this matter. Defendant further

contends that it is improper for an expert to assume all of the facts necessary to reach his conclusions and then to opine on such conclusions. Defendant relies on the Third Circuit's decision in Stecyk for the proposition that an expert's opinions must be based on the factual record of the case. Stecyk, 295 F.3d at 414.

Defendant argues that to permit an opinion which is not based on the factual record of a case constitutes an abuse of judicial discretion. Id. In particular, defendant asserts that it is improper for Mr. Hazard to assume that the interests of E. Paul Weaver, III and Weaver Nut Company were materially adverse and then to opine that, based on such material adversity, defendant breached a "recognized standard of professional conduct" by concurrently representing two or more parties in the same matter whose interests are materially adverse to each other.

Similarly, defendant contends that it is improper for Professor Hazard to assume that there was substantial evidence that seeking immediate change of control by E. Paul Weaver, III would be materially adverse to the interests of Weaver Nut Company and, based on that assumption, opine that defendant could not have represented Weaver Nut Company under those circumstances. Defendant asserts that it is further improper for Professor Hazard to assume that facts will be established by evidence that defendant assisted a client in conduct affecting a

third party that involves fraud or other civil illegality and, on the basis of that assumption, to opine that defendant failed to conform to recognized standards of professional conduct by assisting Mr. Weaver in conduct violating his fiduciary obligations to Weaver Nut, Mr. Reis, Mr. Katz and Summit.

In addition, defendant contends that Professor Hazard's opinion completely omits any discussion of the origin, nature and extent of such alleged fiduciary obligations to those parties. Rather, Professor Hazard's report refers repeatedly to "recognized standards of professional conduct," but he does not discriminate between standards of conduct applicable to civil liability and standards of conduct applicable to other matters such as lawyer discipline, which standards are inapplicable under the Pennsylvania Rules of Professional Conduct to establish civil liability or to augment substantive legal duties of lawyers. Absent references to the standard to which civil liability could conceivably apply to defendant, defendant argues that Professor Hazard's opinion is meaningless.

Finally, defendant argues that Professor Hazard's report is not signed, does not identify the data or other information considered by him in forming his opinion, does not include any exhibits and does not disclose the expert's compensation to be paid for the study and testimony. Defendant

contends that each of these items is explicitly required by Fed.R.Civ.P. 26(a)(2)(B).

Plaintiffs' Contentions

Plaintiffs assert that they should not be precluded from offering the testimony of Professor Hazard. Initially, plaintiffs assert that they have provided Professor Hazard with a list of documents which defendant has produced in this case, together with the deposition transcripts in this case and a previous case between plaintiffs and the Weavers.

Next, plaintiffs contend that they have disclosed Professor Hazard's billing rates and compensation. Furthermore, they have now provided a signed expert report. (The original disclosure was by e-mail and did not contain his signature.)

Plaintiffs further contend that it is not improper for Professor Hazard to have assumed facts, because the assumed facts are those which plaintiffs intend to prove at trial, and will ultimately support Professor Hazard's conclusions. Plaintiffs contend that defendant's recourse regarding the testimony of Professor Hazard is to highlight any perceived weaknesses in cross-examination. Plaintiffs contend that all of Professor Hazard's opinions are based upon his review of the relevant documents, information imparted to him by counsel and are all

proper opinions under Daubert and its progeny.

For the following reasons I agree with plaintiffs.

Analysis

Initially, I note that of the non-exhaustive eight factors set forth by the Third Circuit in Oddi, supra, only factor seven, the qualifications of the expert witness testifying are applicable to the proposed testimony of Professor Hazard.[5] Upon review of Professor Hazard's curriculum vitae, I conclude that he is clearly qualified to express his opinions in this case. These qualifications include that Professor Hazard is a current and former professor at a number of top law schools such as Yale University, the University of Chicago and the University of California at Berkley. He has received numerous professional awards has authored over 20 books and over 100 articles, many of which deal with the topic of legal ethics and professional responsibility.

Moreover, based upon the questioning and testimony during the hearing, it is clear that defendant has knowledge of his qualifications, are now in possession of a signed expert report, know what documents he reviewed and relied upon in coming to his opinions and have now been provided all of the exhibits in

[5] I note that at the hearing on this motion defendant indicated that it does not contest the qualifications of Professor Hazard. The other seven Oddi factors are not applicable because Professor Hazard's opinions and conclusions do not involve scientific evidence or involve principles that are amenable to methodological scrutiny.

support of his conclusions. This leave one last question, whether Professor Hazard's opinions "fit" the facts of this case.

It is clear that defendant disagrees with Professor Hazard's opinions and conclusions. However, those opinions and conclusions do "fit" the facts of plaintiffs' contentions in this case. It will be the court's responsibility in this non-jury case to ultimately find the facts and determine what weight to give Professor Hazard's opinions and conclusions based upon the facts proven or not proven at trial.

Defendant is free to point out what it perceives as deficiencies in Professor Hazard's trial testimony by way of cross-examination of plaintiffs' expert, direct examination of defendant's expert and closing argument. Defendant may object at trial and move to strike any opinions based upon hypothetical assumptions not established in the record. However, at this point, Professor Hazard's opinions and conclusions may assist the trier of fact in making its determinations. Daubert, supra.

Accordingly, based upon the foregoing, I deny defendant's motion to preclude the trial testimony of Professor Geoffrey Hazard.

Plaintiffs' Daubert Motions

Plaintiffs attack the proposed expert testimony of defendant's liability expert witness Thomas Wilkinson, Jr.,

Esquire, and defendant's damages expert witness, David Glusman, CPA. Attorney Wilkinson is offered as an expert in the field of legal ethics. Mr. Glusman is offered as an expert in the field of forensic accounting. Specifically, plaintiffs assert that the testimony of neither defense expert "fits" the facts of this case.

Defendant's Liability Expert

Plaintiffs attack the proposed testimony of defendant's legal expert Thomas Wilkinson, Jr., Esquire. In this regard, plaintiffs contend that Attorney Wilkinson's opinions are based upon less than a full review of all the necessary documents, on self-serving affidavits and that there is no acknowledgment of the 50% stake which plaintiffs had in the company. Therefore, plaintiffs contend that because of a complete lack of review of the essential documents in this case, the opinions of defendant's liability expert does not "fit" the facts of the case.

Defendant asserts that this liability expert was retained to rebut the testimony of Professor Hazard and that plaintiffs' motion is simply a "tit for tat" in response to the Daubert motion filed by defendant.

Based upon my December 4, 2007 Order, defendant contends that plaintiffs' motion is untimely. Defendant acknowledges that a separate Non-Jury Trial Attachment Order was issued on March 28, 2008 which includes a new Daubert motion

deadline, but argues that the court's form attachment Order should be ignored and that the prior December 4, 2007 Order should take precedence. For the following reason, I agree with defendant in part concerning plaintiffs' liability expert Thomas Wilkinson, Jr., Esquire.

For many of the same reasons expressed above regarding Professor Hazard, I agree with defendant that the proposed testimony of Attorney Wilkinson is admissible under Daubert. However, I disagree that plaintiffs' motion is untimely.

Specifically, upon review of the curriculum vitae of Attorney Wilkinson I conclude that he is clearly qualified to express his opinions in the field of legal ethics. These qualifications include that he is an attorney with over 27 years experience. Moreover, he is the Chair of Cozen O'Connor's Professional Responsibility Committee and the former chair of the Pennsylvania Bar Association Legal Ethics and Professional Responsibility Committee. Finally, Attorney Wilkinson has published numerous articles on the subject of legal ethics.

As with defendant's motion regarding Professor Hazard, it is abundantly clear that plaintiffs disagree with the conclusions and opinions of this expert. Once again, that is an appropriate ground for cross-examination and argument, but is not a proper attack under Daubert.

While plaintiffs' contention that Attorney Wilkinson did not review all of the documents is grounds for cross-examination, it does not constitute a proper attack under Daubert. Rather, whether his opinions and conclusions are supported by the facts of the case goes to the weight the court may give to his opinions and conclusions. Plaintiffs are free to argue that they should be given limited or no weight based upon the facts presented at trial.

Accordingly, for all the foregoing reasons, and because I find that Attorney Wilkinson's opinions do "fit" the facts of this case, I deny plaintiffs' Daubert motion to bar the expert testimony of Attorney Wilkinson.

Defendant's Damages Expert

Regarding defendant's damages expert David Glusman, CPA, plaintiffs contend that he does not acknowledge or analyze the financial problems of Weaver Nut Company caused by Paul Weaver which necessitated plaintiffs becoming involved with the business. Moreover, plaintiffs assert that he simply relies on tax returns and financial statements for his conclusions and that such observations do not require expert testimony because it is nothing more than rote recitation of numbers on a form or statement.

Defendant contends that an analysis of the condition of Weaver Nut Company prior to plaintiffs' involvement in the

company's operations is irrelevant to the conclusions provided by Mr. Glusman. Specifically, defendant argues that Mr. Glusman was retained to render opinions regarding the financial condition of Weaver Nut Company after the termination of plaintiffs. Defendant asserts that the issue is whether the Company was better off after plaintiffs were terminated. Defendant claims that Mr. Glusman's opinions are relevant to the issue of whether plaintiffs actually sustained damages.

For the most part, my analysis of the testimony of Mr. Glusman is identical to that of Attorney Weaver. In other words I agree with defendant that the proposed damages testimony of David Glusman, CPA is admissible under Daubert and disagree that plaintiffs' motion is untimely.

Upon reviewing Mr. Glusman's curriculum vitae I conclude that he possesses the necessary qualifications to express his opinions in the field of forensic accounting. These qualifications include over 35 years experience. He has authored or presented over 75 articles and presentations and has previously testified in over 20 cases in both state and federal court. Plaintiffs' disagreement with the conclusions and opinions of Mr. Glusman is also appropriate for cross-examination and argument, but is not a proper Daubert attack.

More specifically, regarding Mr. Glusman, his testimony at the hearing in this matter conclusively reveals that he will

provide more than the "rote recitation of numbers on a form or statement" as alleged by plaintiffs. He specifically analyzed the financial health of Weaver Nut Company from the time plaintiffs were involved in managing the company and thereafter. The analysis was consistent with how members of his field analyze such information.

Mr. Glusman specifically opined that the company has done better financially since plaintiffs left the company than during plaintiffs' tenure with the company. However, the fact that plaintiffs do not agree with Mr. Glusman's opinions and conclusions regarding his analysis of the financial health of Weaver Nut Company, does not lead to the conclusion that his testimony is not a "fit" with the facts of the case or that his testimony will not be helpful to the court at the trial of this matter.

CONCLUSION

For all the forgoing reasons, and after weighing all the factors set forth by the United States Court of Appeals for the Third Circuit in Oddi, supra, I deny both defendant's Motion to Preclude Plaintiffs' Experts or, in the Alternative, to Extend Deadlines and Plaintiffs' Daubert Motion to Bar the Expert Testimony of David Glusman CPA and Thomas Wilkinson, Jr., Esquire to the Extent That Their Opinions Do Not 'Fit' the Facts of the Case.