UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

IRISH CARBONIC COMPANY,

Plaintiff,

v.

ARCHER-DANIELS-MIDLAND COMPANY and TERRANCE S. WILSON,

Defendants.

DECISION AND ORDER
97-CV-293S

INTRODUCTION

1. Before this Court are both parties' motions in limine. This case is scheduled to start trial on October 10, 2000. On July 19, 2000, Defendant filed a Motion in Limine (Docket No. 82). On July 19, 2000 and July 21, 2000, Plaintiff filed its Motion in Limine (Docket Nos. 81 & 84).[1] This Decision and Order will first address Defendant's Motion in Limine and will then proceed to Plaintiff's Motion in Limine. In considering each motion, this Court will rule on the admissibility of the given evidence in the order presented by that particular motion. In addition, this Court will discuss the parties' proposed jury charges.

DEFENDANT'S MOTION IN LIMINE

PRIOR CONVICTIONS

2. Defendant's first request for relief involves the use of criminal convictions for price-fixing. Plaintiff concedes that it intends to introduce evidence regarding the

[1]These motions cover the same request for relief. Plaintiff filed the second motion because no "Notice of Motion" was filed with its first Motion in Limine.

criminal convictions of ADM, Micheal Andreas, and Terrance Wilson for price-fixing in the sale of lysine and citric acid products. Defendant seeks to preclude any evidence regarding these criminal convictions.

3. This Court will exclude ADM's conviction from evidence at trial. ADM, as a corporation, is not a witness and, therefore, cannot be impeached with this conviction. Moveover, ADM's criminal conviction cannot be used under Federal Rule of Evidence 609 to impeach the credibility of any ADM employee who will testify at trial as long as the potential witnesses were not "directly connected to the underlying criminal act." Walden v. Georgia-Pacific Corp., 126 F.3d 506, 510 (3rd Cir. 1997), cert. denied, 523 U.S. 1074, 118 S.Ct. 1516, 140 L.Ed.2d 669 (1998). As the Third Circuit has stated, "it strains logic to argue that an employee's credibility is properly brought into question by the mere fact that he or she is presently employed by a corporation that in some unrelated manner was guilty of dishonest acts, no matter how egregious those acts may have been." Walden, 126 F.3d at 523-24.

4. This Court will also exclude the conviction of Michael Andreas. Neither party has listed Andreas as a potential witness; therefore, any evidence regarding his criminal conviction is excluded. See United States v. Eason, 920 F.2d 731, 735 (11th Cir. 1990)("It is clear that a conviction other than that of the witness himself is not admissible on the issue of the witnesses' credibility."); United States v. Austin, 786 F.2d 986, 992 (10th Cir. 1986)("We have found no case . . . in which a conviction other than that of the witness himself was properly admitted on the issue of his

credibility."); United States v. Lipps, 659 F.2d 960, 962 (9th Cir. 1981)(Rule 609(a) "does not authorize the introduction of a defendant's prior convictions to impeach another witness.").

5. With regards to Terrance Wilson, this Court notes that all claims against Wilson as an individual were dismissed in this Court's March 31, 2000 Decision and Order. ADM does not intend to call Wilson as a witness, but Plaintiff has Wilson listed as a potential witness and has also earmarked his deposition testimony to be read at trial. From the parties' submissions, it seems clear that the Defendant is incarcerated and will be unavailable to testify at trial.

6. Under Federal Rule of Civil Procedure 32(a)(3)(C), Plaintiff may be able introduce Wilson's deposition testimony at trial, subject to the normal evidentiary rules. See Federal Rule of Civil Procedure 32(a)(3)(c) ("deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds . . . that the witness is unable to attend or testify because of . . . imprisonment."); Federal Rule of Evidence 804(b)(1) (former testimony given at deposition may be exception to hearsay rule). Although Defendant argues that Wilson's testimony is no longer relevant or probative to this case, it has not moved to preclude Wilson's deposition testimony. As no motion to exclude Wilson's testimony is currently pending, this Court will not make a determination as to whether such testimony would be admissible at trial.

However, "when a hearsay statement . . . has been admitted into evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness." Federal Rule of Evidence 806. See also United States v. Saada, 212 F.3d 210, 221-22 (3rd Cir. 2000)(noting that the credibility of a hearsay declarant may be impeached with evidence of criminal convictions under Rule 609). Further, "[t]he credibility of a witness may be attacked by any party, including the party calling the witness." Federal Rule of Evidence 607. See also United States v. Freeman, 302 F.2d 347, 351 (2d Cir. 1962), 375 U.S. 958, 84 S.Ct. 448, 11 L.Ed.2d 316 (1963). Therefore, if such testimony is admissible at trial, then Wilson is considered a "witness" who may be impeached even if called by Plaintiff and not Defendant. However, as discussed above, Wilson's testimony cannot be used to impeach any other witness.

7. Whether or not Wilson's conviction would be admissible as impeachment evidence, however, must be determined by a review of Federal Rule of Evidence 609 ("Rule 609"). Plaintiff suggests that Wilson's prior conviction is admissible under Rule 609(a)(2) or, in the alternative, Rule 609(a)(1). The main difference between these sections is that a Rule 609(a)(2) crime is not subject to exclusion because its prejudicial effect outweighs its probative value. To qualify as a Rule 609(a)(2) crime, the crime for which Wilson was convicted must involve "dishonesty or false statement." Rule 609. Where falsity or deceit is not an element of the crime, courts

may "look beyond the elements of the offense to determine whether the conviction rested upon facts establishing dishonesty or false statement." United States v. Payton, 159 F.3d 49, 56 (2nd Cir. 1998), citing, United States v. Hayes, 553 F.2d 824, 827 (2d Cir.1977), cert. denied, 434 U.S. 867, 98 S.Ct. 204, 54 L.Ed.2d 143 (1977). However, the party offering the conviction as evidence bears the burden of showing that the circumstances of the crime involved deceit or falsity. See Hayes, 553 F.2d at 827.

8. In this case, Plaintiff has submitted the Seventh Circuit's June 26, 2000 Decision and Order discussing Wilson's appeal of his conviction to show that the underlying crime did in fact involve falsity and deceit. Wilson's participation in the price-fixing scheme involved attending meetings purposefully set in cities outside of the jurisdiction of Untied States antitrust laws. In addition, Wilson participated in disguising the purpose of price-fixing meetings by creating fake agendas and a fictitious trade association so that the suspicions of customers and law enforcement agencies would not be raised. See United States v. Andreas, 2000 WL 816078 (7th Cir. June 26, 2000)(affirming convictions of Michael Andreas and Terrance Wilson and remanding for resentencing with enhancement for leadership roles for both defendants). Under these facts, this Court finds that Wilson's conviction would be admissible for impeachment purposes under Rule 609(a)(2).

Even if this conviction does not rise to the level of a Rule 609(a)(2) crime, this Court finds that it would be admissible under Rule 609(a)(1) because its probative

value outweighs any prejudicial effect. Several factors lead to this conclusion: (1) this conviction is very recent and, therefore, has greater probative value; (2) this conviction has great probative value on Wilson's credibility as his crime includes various forms of deceit employed to break antitrust laws and to hide this illegal conduct; (3) Wilson's conviction was for a crime substantially different from the instant contract action so as not to prejudice the Defendant. See Hayes, 553 F.2d at 827-28 (internal citations omitted). See also Daniels v. Loizzo, 986 F.Supp. 245, 250 (S.D.N.Y.1997)(Courts have often identified four factors that should be considered in balancing probative against prejudicial effect: (1) the impeachment value of the prior crime, (2) the remoteness of the prior conviction, (3) the similarity between the past crime and the conduct at issue, and (4) the importance of the credibility of the witness). The only other factor for consideration is the importance of the witness' credibility. Here, Defendant argues that Wilson's testimony is irrelevant, but Plaintiff points to Wilson's dealings with BOC and his role in finalizing the sale of ADM's CO_2 to BOC. Although the parties did not brief this issue at any length, a review of their exhibits leads me to believe that, Wilson's testimony is not critical to Plaintiff's case. For these reasons, this Court will preliminarily allow Wilson's conviction into evidence only as impeachment material provided that his deposition testimony is otherwise admissible under the Federal Rules of Evidence. However, this Court will not allow Wilson's conviction as direct evidence of any wrongdoing or as impeachment evidence of any other witness. Further, this Court will allow Defendant to formally object to Wilson's

deposition testimony as long as it identifies the rule or rules under which it makes its objection and files with the Clerk of the Court and serves its objection by Monday, September 11, 2000. Plaintiff can file with the Clerk of the Court and serve a response to any such objection by Monday, September 18, 2000. Defendant may file with the Clerk of the Court and serve any reply thereto by Monday, September 25, 2000. Because of the limited amount of time available to resolve this motion before trial, this Court requests that the parties to deliver a courtesy copy of their submissions to Chambers.

SIZE AND WEALTH OF ADM

9. Next, Defendant argues that Plaintiff should be precluded from offering any evidence regarding the size and wealth of ADM because such evidence is irrelevant. Plaintiff argues that ADM's size and wealth are relevant to determining whether it's reliance was upon ADM's representations was reasonable. As ADM's punitive damages claims have been dismissed, this Court finds that evidence of ADM's wealth is not relevant to a determination of reasonable reliance and, even if relevant, such evidence is unduly prejudicial. Therefore, this Court will exclude any evidence of ADM's wealth. This Court will not, however, exclude all evidence regarding the size of ADM. For example, evidence that Defendant was only using 22% of its available CO_2 supply or that Defendant's CO_2 sales were only a small portion of its overall

business would be relevant to this case, but the fact that it had $13 billion dollars in gross sales would not.

SIMILAR TREATMENT OF OTHER CO_2 DISTRIBUTORS

10. Defendant's third request for relief seeks to exclude any evidence regarding "business dealings between ADM and any other CO_2 distributor." Plaintiff agrees that it will not offer evidence about misrepresentations made to other distributors, but will offer evidence of ADM's prior negotiations with other CO_2 suppliers as well as ADM's prior attempts to sell its CO_2. Plaintiff asserts that such evidence is relevant to the truth or falsity of representations made by Mr. Baroni as well as his duty to inquire into ADM's intentions in the market. Without more information, this Court will not exclude evidence regarding ADM's prior negotiations with other CO_2 suppliers and its attempts to sell its CO_2 at this time. However, all such evidence must comport with the Federal Rules of Evidence. For example, Robert Irish's testimony that he "heard" ADM had made certain representations to two other CO_2 distributors would be excluded as hearsay evidence unless Plaintiff can show that it fits a specific exception under the rules.

EXPERT TESTIMONY OF ROBERT IRISH

11. This Court will now address the Defendant's fourth request for relief seeking to preclude Robert Irish from testifying as an expert. Irish is expected to render

expert testimony on three issues: (1) that Plaintiff would have sold nine million pounds of dry ice block per year for the remainder of its contract with ADM; (2) Plaintiff's expected selling prices for 1996 through 1999; and (3) ADM's estimated sales price of CO_2. Defendant argues that Plaintiff's first two opinions are irrelevant because Plaintiff's damages are limited to the maximum quantity term under the contract. Defendant also argues that Plaintiff is not competent to render his third opinion as to ADM's estimated sales price and that this opinion is speculative and unreliable.

12. This Court will allow Robert Irish to testify as to Irish's dry ice block business as it is relevant to whether Irish Carbonic reasonably relied upon ADM's representations when making investments in its Clinton Street facility.

13. This Court will also allow Irish to testify as to Irish Carbonic's selling prices for the years of 1996 through 1999. However, as the actual selling prices are available, this Court finds that Irish's prior predictions as to the selling prices for these years are relevant. First, Mr. Irish's prior predictions are the same as Irish Carbonic's actual selling prices for these years. Second, Plaintiff's theory of damages is based upon the difference between its purchase price from BOC as compared to that of ADM under the contract. Thus, Irish Carbonic can rely upon its actual selling prices to prove its damages instead of prior predictions.

14. This Court will exclude any testimony by Mr. Irish as to ADM's possible selling price under the remaining years of the contract. While such an opinion may be relevant to the issue of damages, Mr. Irish is not qualified to testify as to what ADM

may or may not have done. However, Mr. Irish may testify to any relevant matters to which he has personal knowledge such as his business dealings with ADM, the actual prices that Irish Carbonic paid under the contract, and his reasons for entering into the contract with ADM. Mr. Irish may also testify as to his knowledge of the CO_2 market as a salesman and purchaser, his knowledge and dealings with the "Big 3" suppliers, and the effect of ADM's entry into and exit out of the CO_2 market. This Court finds that Mr. Irish's personal knowledge of the events at issue and his practical experience in the industry qualify him to testify as to these matters.

EXPERT TESTIMONY OF LAWRENCE SOUTHWICK

15. This Court will now address the Defendant's fifth request for relief seeking to exclude the expert testimony of Lawrence Southwick pursuant to Federal Rule of Evidence 702. Defendant argues that Southwick's testimony is not relevant to any issue in this case. Defendant also stated that it would not contest the reliability of Southwick's report at this time, but would challenge its reliability at trial if necessary. Plaintiff argues that Southwick's testimony is relevant to damages and its reasonable reliance. Southwick is expected to offer three opinions: (1) that ADM's removal form the market caused a 20% increase in the CO_2 price index, thereby increasing Irish's purchase price of CO_2; (2) that Irish Carbonic's sales would have grown as a result of its relationship with ADM; and (3) that Irish Carbonic suffered damages as a result of the increase in its purchase price because of its status as a

"discriminating monopolist." After reviewing Southwick's expert report, this Court finds that his testimony is relevant to the amount of damages due to breach of contract and to the Plaintiff's reasonable reliance upon representations made by the Defendant. For these reasons, this Court will allow Southwick's expert report.

ROBERT IRISH'S "DIARY"

16. In its sixth request for relief, Defendant moves to exclude Robert Irish's "diary" from direct evidence while seeking permission to use this diary as impeachment evidence. On July 1, 1999, this Court issued a decision from the bench denying Defendant's Motion to Dismiss the Complaint for bad faith conduct. However, I noted that a primary aspect of a court's inherent power is "the ability to fashion an appropriate sanction for conduct which abuses the judicial process." Chambers v. NASCO, Inc., 501 U.S. 32, 44-45, 111 S. Ct. 2123, 2133, 115 L. Ed. 2d 27 (1991) Although this Court chose not to dismiss Plaintiff's Complaint, this Court did note that Robert Irish's conduct raised "serious concerns." Further, this Court recognized that Mr. Irish's conduct—in the preparation of Exhibit 25, the disposal of his original, contemporaneous notes, and his less-than-forthcoming answers during his deposition—could not be excused.

17. In order to sanction this conduct, this Court will exclude Mr. Irish's diary from direct evidence. Thus, Plaintiff cannot rely upon this diary to prove its claims. However, this Court will allow this diary into evidence as impeachment evidence

bearing directly on Mr. Irish's credibility. This Court will also consider an appropriate charge to the jury on evidence admitted for a limited purpose. Defendant may file with the Clerk of the Court and serve such a charge accompanied by legal authority by Monday, September 11, 2000. Although Plaintiff should not rehash its arguments against this sanction, this Court will allow Plaintiff to file with the Clerk of the Court and serve any objections to this charge on Monday, September 18, 2000.

MARCH 31 D&O: CONTRACT PRICE TERM

18. This Court will now move to Defendant's seventh request for relief. In this request, Defendant argues that this Court's March 31, 2000 Decision and Order decided only that there were triable issues of fact regarding what the parties intended with respect to the price term in the contract and, therefore, both parties should be allowed to submit evidence on this issue at trial. Plaintiff argues that this Court definitively found that the five-year contract between the parties was enforceable as written. This Court agrees with Plaintiff's position.

19. In this Court's March 31, 2000 Decision and Order, this Court found that the contract was enforceable as written from the plain meaning of the language of the agreement. See Tique v. Commerical Life Ins. Co., 219 A.D.2d 820, 821, 631 N.Y.S.2d 974, 975 (4th Dep't 1995)("[T]he court must ascertain the intent of the parties from the plain meaning of the language employed, giving terms their plain, ordinary, popular and non-technical meanings."); American Express Bank Ltd. v.

Uniroyal, Inc., 164 A.D.2d 275, 277, 562 N.Y.S.2d 613, 614 (1st Dep't 1990)(internal quotations omitted), appeal denied, 77 N.Y.2d 807, 569 N.Y.S.2d 611, 572 N.E.2d 52 (1991) (where 'the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law', and a claim turning on that interpretation may thus be determined by summary judgment or by dismissal).

20. Further, Defendant's argument that the parties' intent is an issue under New York's Uniform Commercial Code § 2-305(4) is misplaced. Defendant relied upon this same subsection in its argument for summary judgment and this Court rejected its argument. Therefore, the only issue remaining for trial is whether ADM breached its contract with Irish Carbonic. The parties may, of course, submit evidence on the issue of whether ADM would have increased it prices under the contract and if Irish Carbonic would have accepted these prices. This Court also notes that under New York's U.C.C. § 2-305(2) states that "[a] price to be fixed by the seller or by the buyer means a price for him to fix in good faith."

MARCH 31 D&O: MAXIMUM ANNUAL QUANTITY

21. In its eighth and last request, Defendant argues that although this Court decided that Plaintiff's damages are limited to the quantity term of the contract, it did not decide how much the parties intended the maximum quantity term to be. Plaintiff argues that this Court determined the maximum quantity term to be 15,000 tons per year.

22. In its summary judgment motion, ADM sought to limit its damages to the "unambiguous maximum quantity term in the contract." (Docket No. 53, pp. 14-16; Docket No. 65, p. 3). ADM also noted that 1, 250 monthly limit in the contract equaled 15, 000 tons per year. (Docket No. 77, pp. 2-3). In its March 31, 2000 Decision and Order, this Court noted that: "When annualized, the monthly maximum equals 15, 000 tons per year. Defendants argue that this figure represents the extent of its obligations under the contract." (March 31, 2000 Decision and Order, p. 29). This Court then went on to hold that the Plaintiff's claims of damages would be limited to the quantity term. Defendant never filed a motion for reconsideration or objected to this determination in any other manner. Now, however, the Defendant seeks to introduce evidence at trial regarding what the parties intended the maximum quantity term to be.

23. Before discussing the contract and my decision, this Court notes that Defendant, in support of its argument, failed to submit any evidentiary materials that would suggest extrinsic evidence is necessary for a determination on this issue. In fact, Plaintiff points out that this Court rejected its argument, made in opposition to summary judgment on this issue, that the parties intended that ADM would supply more than the contract limit and that the maximum quantity was a question of fact.

24. The contract between ADM and Irish Carbonic specifies that: "Buyer shall purchase during the term of this contract 80 percent of its requirements at its facility(s) located at Buffalo, NY. Said requirements are estimated to be 10, 000 tons

per year with peak requirements not exceeding 1250 tons in any single month." (Hogan Affidavit, Exhibit B). The contract clearly states the quantity to be purchased: 80% of the buyer's (Irish Carbonic) requirements.

25. This Court finds that the doctrine of law of the case bars re-litigating the question of the maximum amount of CO_2 under the quantity term of the contract. See Liona Corp. v. PCH Assocs. (In Re PCH Assocs.), 949 F.2d 585, 592 (2d Cir. 1991)("Law of the case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. These rules do not involve preclusion by final judgment; instead, they regulate judicial affairs before final judgment.")

26. This Court will now specify the import of its holding based upon the contract and the representations made by the parties. First, the maximum amount of 15, 000 tons per year refers to the Irish Carbonic's requirements. Thus, the contract specifies that Irish Carbonic's maximum requirement is 1250 tons in a single month or 15, 000 per year. Based on these conditions, Irish Carbonic was required to buy 80% of its requirements from ADM. Thus, Irish Carbonic was required to purchase from ADM anywhere from 8,000 tons of CO^2 per year to 12, 000 tons of CO_2 per year. Thus, this Court reiterates that Plaintiff's damages for lost profits due to breach of contract are limited to the quantity term of the contract. The parties may, however, offer evidence at trial as the extent of Plaintiff's alleged damages within these confines.

PLAINTIFF'S MOTION IN LIMINE

EXPERT TESTIMONY OF ERICH SPECKIN; INK ANALYSIS

27. This Court will now resolve Plaintiff's Motion in Limine. Pursuant to Federal Rules of Evidence 403, 608(a), and 702, Plaintiff seeks to exclude the expert testimony of Erich Speckin. Speckin is expected to testify as to the results of ink-dating and impression analyses that he performed on Robert Irish's "diary." Plaintiff argues that Speckin's expert opinion testimony is unreliable, irrelevant, likely to mislead and confuse the jury, not offered as to "character for truthfulness or untruthfulness," and that its probative value is outweighed by its prejudicial effect.

28. In light of this Court's decision to allow Defendant to impeach Robert Irish on his diary and after reviewing the expert reports and other materials submitted by Speckin, this Court will allow Speckin to testify as an expert. First, this Court finds that ink-dating analysis and an Electro Static Detection Apparatus ("ESDA") impression analysis are reliable methods under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Second, this Court finds that the results of such testing are competent evidence. See Calloway v. Richter, No. 97-CV-617, December 30, 1998 Decision and Order, p. 7(Docket No. 35)(dating of documents by the use of experts analyzing the ink is competent evidence)(Scott, MJ)[2]; Janopoulos v. Harvey L. Walner & Assoc., Ltd., 866 F.Supp. 1086, 1095-96 (N.D. Ill. 1994)(same); Aptix Corp. v. Quickturn Design

[2]The actual filed copy of this decision uses "97CV067" in the caption. The correct case number is 97-CV-617.

Systems, Inc., NO. 98-00762, 2000 WL 852813, *8-9, 24 (N.D.Cal. Jun 14, 2000)(relying upon ESDA impression analysis performed by Expert Speckin). Third, after reviewing his qualifications, this Court finds that Erich Speckin is competent to testify as an expert in these matters. Fourth, this Court finds this testimony highly relevant to the credibility of Robert Irish. However, although Speckin will be allowed to testify as to his conclusions contained in his expert reports, he will not be allowed to testify as to whether he believes Robert Irish to be credible. For example, Speckin can testify that missing or out-of-sequence impressions are inconsistent with copying over a consecutive chronological diary in the manner stated by Robert Irish, but he cannot say that Robert Irish was untruthful in his testimony. For the foregoing reasons, this Court will allow Erich Speckin to testify as an expert in this case.

PROPOSED JURY CHARGES

29. This Court has reviewed the parties' proposed jury charges and would like the parties to review the following additional charges from Bender's New York Forms of Jury Instruction:

Uniform Commercial Code Charges

Definitions	Formation of Contracts
• §39.04 Seller	• §39.50 Formation of Contracts/Sale
• §39.05 Buyer	• §39.51 Offer and Acceptance Generally
• §39.08 Contract/Contract of Sale	• §39.52 Offer Defined

- §39.10 Contract Terms
- §39.11 Good Faith
- §39.12 Course of Dealing
- §39.14 Course of Performance
- §39.54 Acceptance Generally

Open Terms

- §39.130 One Party to Set Price (second paragraph: set price in good faith)

Contracts Generally

Formation of Contract

- §2.01 Contract
- §2.02 Oral Contracts
- §2.03 Written/Oral Contracts
- §2.20 Offer and Acceptance
- §2.21 Offer Defined
- §2.24 Acceptance Defined
- §2.40 Consideration

Implied Covenant of Good Faith

- §5.80 Implied Covenant of Good Faith

Damages

- §6.01 Introductory Instruction
- §6.02 General Measure of Damages
- §6.04 Damages/Proximate Cause

In reviewing these charges, the parties should consider whether these charges are applicable to this case and, if applicable, whether these charges are necessary or, at least, would be useful to the jury. Further, the parties should compare the U.C.C. charge with those under "Contracts Generally" to see which charges would be more beneficial in this case. For example, both the U.C.C. section and the "Contracts Generally" section have charges on "good faith" and "acceptance." The parties should determine which language is more appropriate in this case.

Both parties should file with the Clerk of the Court and serve on or before September 11, 2000 supplemental submissions discussing whether these additional charges (or other supplemental charges) should be included this Court's final charge and, if so, providing copies of such charges in the format outlined in this Court's pretrial letter. In addition, the parties should note where such charges should be placed in the overall charge and should provide this Court with copies of any new proposed charges on computer disk in the format specified in this Court's pretrial letter. Any objections to new proposed charges may be filed with the Clerk of the Court and served on or before, Monday, September 18, 2000. Defendant may include its proposed charge on "evidence for a limited purpose" regarding Robert Irish's "diary" in this submission.

ORDER

IT HEREBY IS ORDERED THAT Defendant's Motion in Limine (Docket No. 82) is GRANTED IN PART and DENIED IN PART as follows:

(1) ADM's prior felony conviction for price-fixing is excluded from evidence;

(2) Michael Andreas' prior felony conviction for price-fixing is excluded from evidence;

(3) Terrance Wilson's prior felony conviction for price-fixing may only be introduced into evidence to impeach his deposition testimony if such testimony is allowed into evidence;

(4) Evidence regarding ADM's wealth is excluded;

(5) Evidence regarding the size of ADM will be allowed subject to the restrictions discussed above;

(6) Evidence regarding ADM's business dealings with other carbon dioxide distributors will be allowed as long as such evidence complies with the Federal Rules of Evidence;

(7) Robert Irish will be allowed to testify as to Irish Carbonic's dry ice block business;

(8) Robert Irish will be allowed to testify as to Irish Carbonic's actual selling prices for the years of 1996 through 1999;

(9) Robert Irish will be precluded from testifying as to ADM's possible selling price under the remaining years of its contract with the exceptions discussed above;

(10) Lawrence Southwick will be allowed to testify as an expert;

(11) Robert Irish's diary will be excluded from direct evidence, but Defendant will be allowed to introduce this diary as impeachment evidence;

(12) Evidence regarding the parties' intent as to the price term in the contract is excluded;

(13) Evidence regarding the parties' intent as to the quantity term in the contract is excluded with the exceptions discussed above;

FURTHER, Plaintiff's Motion in Limine (Docket No. 81 & 84) is DENIED and Erich Speckin with be allowed to testify as an expert in this case.

FURTHER, Defendant may object to the admission of Terrance Wilson's deposition testimony into evidence as long as it identifies the rule or rules under which it makes its objection and files with the Clerk of the Court and serves its objection on or before Monday, September 11, 2000.

FURTHER, Plaintiff shall file with the Clerk of the Court and serve a response to Defendant's objection on or before Monday, September 18, 2000.

FURTHER, Defendant shall file with the Clerk of the Court and serve any reply thereto on or before Monday, September 25, 2000.

FURTHER, Defendant shall file with the Clerk of the Court and serve a jury charge on evidence admitted for a limited purpose regarding Robert Irish's diary on or before Monday, September 11, 2000.

FURTHER, Plaintiff shall file with the Clerk of the Court and serve any objections to Defendant's proposed jury charge on evidence admitted for a limited purpose regarding Robert Irish's diary on or before Monday, September 18, 2000.

FURTHER, both parties shall file with the Clerk of the Court their supplemental proposed jury charge submissions, as detailed above, on or before Monday, September 11, 2000.

FURTHER, the parties shall file with the Clerk of the Court and serve any objections to new proposed charges on or before Monday, September 18, 2000.

Dated: August 31, 2000
Buffalo, New York

WILLIAM M. SKRETNY
United States District Judge