IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CALLAWAY GOLF COMPANY, Plaintiff,	)	
v.	)	Civil Action No. 01-669 KAJ
DUNLOP SLAZENGER, Defendant.	)	

MEMORANDUM ORDER

This case is scheduled for a jury trial beginning Monday, August 2, 2004. Before me are several issues presented in the parties' form of pretrial order, including plaintiff Callaway's motion to bifurcate and both parties' motions in limine.

I. *Bifurcation Motion*

Callaway's motion to bifurcate is GRANTED in part and DENIED in part. Callaway claims, without citation to any authority, that the California statute, Cal. Civ. Code § 3426.3, stating that "the court may award exemplary damages" in the event of willful and malicious misappropriation, means that there must be a bifurcation of the trial to prevent the jury from hearing the punitive damages evidence. (Docket Item ["D.I."] 372 at 28.) Callaway also argues that, if the jury hears evidence of Callaway's healthy financial condition, the jury will be biased in its determination on the question of liability. (*Id.* at 28-29.) Finally, Callaway tries to couch its request for bifurcation in terms of judicial efficiency. (*Id.* at 29-30.) Dunlop responds simply by offering that the jury should not hear evidence of Callaway's financial condition in the first instance but should be asked whether exemplary damages should be assessed, and then, if the

answer to that is "yes," the jury should be given the financial information and deliberate again. (*Id.* at 30.)

My judgment of the most efficient and appropriate way to handle this question is to have the jury hear the evidence pertinent to the question of punitive damages except for the single topic of Callaway's financial status, which, according to both Dunlop and Callaway, the parties would prefer not be before the jury in the first instance. I will, as suggested by Dunlop, pose to the jury the question of whether punitive damages should be awarded against Callaway, and I will take their answer to that question as at least an advisory opinion. *Cf. Robert L. Cloud & Associates, Inc. v. Mikesell,* 69 Cal. App. 4th 1141,1148, 1154 (Cal. Ct. App. 1999) (noting that trial court took up question of whether to impose punitive damages after the jury was discharged, and finding it unnecessary to reach question of trial court's authority to impose punitive damages in the absence of a jury finding of willful and malicious prosecution). If, following the discharge of the jury, a motion is made for the imposition of punitive damages, I will take evidence with respect to Callaway's financial status and will require the parties to brief the motion on the same schedule as other motions that may be made post-trial.

II. *In Limine Motions*

A. *Callaway's Motions*

i. Motion to Exclude Certain Correspondence

Callaway's motion is GRANTED in part and DENIED in part. Callaway seeks to exclude three (3) anonymous/unsigned letters produced in this case: the first, an undated and unsigned letter accusing Callaway of using proprietary Dunlop documents, taken by a Callaway employee named Felipe, in developing Callaway's rule 35 golf ball

(the "Felipe Letter"); the second, dated 2001 and subsequently identified as being sent by a man named Liam Hayes, accusing Callaway of using Dunlop proprietary information in the development of Callaway golf balls and attaching documents allegedly supporting that assertion (the "Hayes Letter"); and the third, an undated and unsigned note accusing another Callaway employee, P.J. Dewanjee, of falsifying entries in his Callaway golf lab notebook (the "Dewanjee Note"). Callaway's motion is granted as to the Felipe Letter and the Dewanjee Note; it is denied as to the Hayes Letter.

Callaway claims that all three documents are inadmissible hearsay and, in any event, that their unfair prejudicial impact outweighs any potential relevance they may have. In response, Dunlop argues that the letters are not hearsay because they constitute party admissions by Callaway, because they are not offered for the truth of the matter asserted, and finally because they fall within the residual hearsay exception in Federal Rule of Evidence 807. Dunlop also argues, of course, that the letters are more probative than prejudicial and, therefore, not excludable under Federal Rule of Evidence 403.

The first question is whether the documents are exempted from the definition of hearsay because they are attributable to Callaway as admissions. Dunlop asserts that the Felipe Letter and Dewanjee Note must have been written by Callaway insiders, but, to Dunlop's admitted frustration (*see* D.I. 372 at 34-35), it has not been able to secure any evidence about who the authors are. Under these circumstances, it simply cannot be said that either of those documents are admissions to be laid at Callaway's door.

The Hayes Letter presents a much more challenging question. Dunlop offers no argument or evidence that Callaway adopted the statements in the Hayes Letter, nor

does it provide any basis for concluding that Mr. Hayes was an agent of Callaway authorized to make the statements made in the letter. But, while Dunlop did not specifically articulate it, a sound basis does exist for arguing that the Hayes Letter is non-hearsay because it is a vicarious admission under Rule 801(d)(2)(D). Hayes was employed by Callaway at the time he sent the letter, and the letter does bear on things that appear to be within the scope of his employment, i.e., Callaway's research and development efforts on new golf balls. Rule 801(d)(2)(D) does not require that the declarant be authorized to make the statements in question, only that he be speaking on a matter that was within the scope of his employment or agency. *See Nekolny v. Painter*, 653 F.2d 1164, 1168, 1172 (7th Cir. 1981) (an employee's comment about employer's improper motive for firing other employees was admissible as vicarious admission because "Rule 801(d)(2)(D) takes the broader view that an agent or servant who speaks on any matter within the scope of his agency or employment during the existence of that relationship, is unlikely to make statements damaging to his principal or employer unless those statements are true"). Accordingly, the Hayes Letter is a vicarious admission by Callaway and does not constitute hearsay.

As to the two documents that are hearsay, the next questions are what use Dunlop intends to make of them and whether they fall within any hearsay exception. Dunlop apparently wants to use the letters for the truth of the matters asserted within them, except, perhaps, with respect to the statute of limitations defense which is discussed further herein. To the extent Dunlop does seek to use the Felipe Letter and Dewanjee Note for the truth of the assertions within them, they are, of course, not properly admitted without a hearsay exception.

Dunlop cites only Rule 807 as an applicable exception and asserts that all of the documents should be admitted under that residual hearsay exception because they are "(1) ... evidence of material facts, (2) more probative on the points offered than any other evidence Dunlop has been able to procure through reasonable efforts, and (3) should be admitted into evidence to best serve the purposes of the Federal Rules of Evidence and interests of justice." (D.I. 372 at 34.) Dunlop fails, however, to address a central tenet of all the hearsay exceptions and one which is clearly implicit in the residual exception provided in Rule 807: reliability. There is no way for me to gauge the reliability of the Felipe Letter and the Dewanjee Note. Those two documents came over the transom and have no inherent indicia of reliability, despite Dunlop's protestations to the contrary. They will therefore not be admitted.[1] This does not, however, rule out the possibility that reference to the existence of those documents may be appropriate for non-hearsay purposes, such as to establish Dunlop's state of mind as it pertains to any statute of limitations defense by Callaway or to place in context other properly admitted

[1]I note that if the Hayes Letter were not a vicarious admission, I would be inclined to admit it anyway under Rule 807. Unlike the Felipe Letter and Dewanjee Note, that document does have important and highly persuasive indicia of reliability. As the subsequently developed evidence demonstrates, including Mr. Hayes's deposition testimony, he wrote the letter anonymously because his actions involved significant personal risk to his career. As a Callaway employee blowing the whistle on what he perceived to be Callaway's unlawful and unethical conduct, he was apparently aware that he could lose his job. Nevertheless he undertook to write and send the letter. Under the unusual circumstances of this case, where a non-party employee acts as a whistle-blower and later is identified and deposed, and where that employee is apparently not available to testify in person, and where ample advance notice has been given to the opposing party that the proponent of the document will seek its admission, I find that the prerequisites for admission of the Hayes Letter under Rule 807 have been satisfied. Moreover, the Hayes letter is a necessary adjunct to Mr. Hayes's deposition testimony, since a great deal of that testimony consists of close questioning about the content of the letter itself.

evidence. That the Felipe Letter and Dewanjee Note were received and were taken by Dunlop as alerting it to misuse of its proprietary information is not, in itself, inadmissible hearsay, nor is it unfairly prejudicial to Callaway, which has had ample opportunity to investigate and develop evidence in response to those alleged facts.

Again on the issue of unfair prejudice, Callaway argues that, even if otherwise admissible, the Hayes Letter should not be permitted in evidence because it is more prejudicial than probative. *See* Fed. R. Evid. 403. While the document obviously has the potential of being significantly prejudicial to Callaway's interests, it is not unfairly so. If the jury accepts the assertions that Mr. Hayes made, it is unlikely to look upon Callaway in a favorable light. That, however, does not constitute unfair prejudice. Callaway had the opportunity to depose Mr. Hayes and attack the assertions he made. Callaway will have an opportunity to present those cross-examination questions and answers to the jury. It has been adequately protected against unfair prejudice.

ii. Motion to exclude portions of Mr. Hayes's deposition testimony

Callaway's motion is DENIED, without prejudice. Callaway argues that portions of Mr. Hayes's deposition testimony must be excluded as speculative and unreliable lay opinion. (D.I. 372 at 36-37.) Dunlop responds that it may be able to concede to certain redactions but that Callaway has thrown its net much too broadly. (*Id.* at 37-38.) I agree with Dunlop. While Mr. Hayes gave answers which may allow Callaway to attack his credibility and the truth and accuracy of his assertions, his answers generally did not render his testimony so speculative and unreliable as to be inadmissible on the broad scale that Callaway's proposed redactions seek. The parties should engage in further negotiations in an effort to reach agreement on the deposition designations.

iii. Motion to exclude Dr. Jepson from opining in any way on Dr. Koppel's damages calculations

Callaway's motion is GRANTED. Callaway seeks an order to prevent one of Dunlop's experts, Dr. John Jepson, from commenting on the damages calculations of another of Dunlop's experts, Dr. Lewis M. Koppel. (*Id.* at 39-40.) Dunlop opposes the motion as a belated *Daubert*[2] challenge. (*Id.* at 40.) Regardless of how the motion is characterized, it is well-founded and Dunlop points to no unfair prejudice it will suffer by the issue being raised at this time. For the same reasons that I earlier ruled that Dr. Jepson could not quantify the value of Dunlop's alleged trade secrets (*see* D.I. 363 at 8), I hold that Dr. Jepson may not make a generalized statement about Dr. Koppel's testimony on Dunlop's alleged damages.

iv. Motion to exclude to any reference to Dunlop's Polyurethane research

Callaway's motion is DENIED. Relying on my earlier summary judgment ruling in its favor, Callaway argues that any evidence about Dunlop's Polyurethane research is now irrelevant and therefore inadmissible. (D.I. 372 at 41.) Suffice it to say that evidence may be relevant to more than one topic. The fact that one aspect of the case has now been decided does not make all the evidence relevant to that aspect irrelevant for all other purposes. I will wait and see if and how Dunlop offers evidence of the Polyurethane research before making any final determination about the admissibility of the evidence in the specific context in which it is offered.

B. *Dunlop's Motions*

---

[2]The reference is to the Supreme Court's opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993).

i. Motion to exclude Callaway's consumer survey

Dunlop's motion is DENIED. Dunlop seeks an order under Federal Rule of Evidence 403 preventing Callaway from relying on a consumer survey conducted on Callaway's behalf and focused on Dunlop's claim that its Maxfli A10 golf ball is the "Longest Ball on the Tour." (D.I. 372 at 44-48.) While couched in terms of prejudice outweighing probative value, Dunlop's motion is, ironically, exactly the kind of belated *Daubert* challenge that Dunlop has accused Callaway of making, *supra* at 7. Unlike the Callaway motion that Dunlop opposed, however, this belated Dunlop motion would indeed result in unfair prejudice were it to be considered and granted now, on the eve of trial. Dunlop has clearly been on notice for a very long time that Callaway would be relying on its consumer survey. To have failed to raise a challenge to the survey until now is in derogation of the responsibility to adhere to the Court's scheduling order, which is designed in part to prevent unfair surprise on matters of such obvious importance as a central piece of expert evidence and testimony. Moreover, as Dunlop itself notes (D.I. 372 at 47), complaints about a survey's methodology, such as the complaints Dunlop raises here, are typically viewed as going to the weight rather than the admissibility of the evidence. Dunlop has failed to demonstrate that the methodology in question was so flawed as to render the survey inadmissible under Rule 403.

ii. Motion to exclude evidence of certain communications involving Messrs. Rider and Lorusso during the Summer of 1997

Dunlop's motion is DENIED without prejudice. Dunlop argues that any evidence of communications that its former patent counsel, the late Anthony Lorusso, Esq., had

with Callaway representatives in the Summer of 1997, and particularly with Callaway's Associate General Counsel Michael Rider, should be excluded because they are hearsay and are more prejudicial than probative. (D.I. 372 at 55-57.) Callaway counters that the communications between Lorusso and Rider are not hearsay because Mr. Lorusso was clearly authorized to represent Dunlop and his statements are thus admissions binding on Dunlop. (*Id.* at 59.) Moreover, it asserts, evidence of the communications is highly relevant to its statute of limitations and promissory estoppel defenses, because Mr. Lorusso made statements from which the inference can be drawn that Dunlop should have known that trade secret misappropriation was at issue between the parties and because Mr. Lorusso made statements on which Callaway was justified in relying with respect to the introduction of its golf balls to the market. (*See id.* at 57-58.)

The hearsay objection is not well-founded. Mr. Lorusso was, by all accounts, the attorney at law representing Dunlop in certain communications with Callaway. At least on the record before me now, I cannot say that the evidence that Callaway wishes to adduce is of statements that Mr. Lorusso was not authorized to make. On the contrary, it appears from the general description given of the intended evidence that Mr. Lorusso clearly was acting within the scope of his representation of Dunlop. Nor has Dunlop borne its burden of showing that the danger of unfair prejudice substantially outweighs the probative value of the proposed evidence. The communications do indeed appear to be highly relevant to two of Callaway's affirmative defenses, and while the passing of Mr. Lorusso will surely make it more difficult than it otherwise would be for Dunlop to

deal with the spin that Callaway may want to put on the evidence, that alone does not warrant the evidence being precluded.

I note, however, that I am reserving decision on Dunlop's objection to this category of evidence to this degree at least: I do not know what testimony Callaway intends to elicit from Mr. Rider, or other Callaway witnesses, about what Mr. Lorusso may have said, as opposed to written, to Callaway. It may be that the proposed testimony is properly objectionable. I therefore direct the parties to arrange for a proffer of such testimony outside the jury's presence.

iii. Motion to exclude testimony of Alan J. Cox on corrective advertising damages and unjust enrichment

Dunlop's motion is DENIED. Dunlop argues that certain damages calculations by Callaway's expert are not supported by the law and that other calculations by the expert are "completely arbitrary, irrelevant, and illogical ... ." (*See id.* at 59-61.) Callaway rightly counters that this another example of Dunlop advancing a belated *Daubert* motion. (*Id.* at 61.) Dunlop had an obligation to bring forward its opposition to this expert's methodology and theory on the schedule that provided for *Daubert* challenges.[3] For whatever reason it chose not to do so and ought not be heard to complain now. In any event, even were I to consider the motion on the merits, it appears that Dunlop's complaints about the expert's methodology go primarily to the weight to be given his testimony, since Dunlop has not provided any evidence to support its hyperbolic denunciation of the methodology. As to the disputed legal theory, Callaway has cited

[3]The argument over the damages theory could also have been advanced in the context of dispositive motions.

contrary authority which is persuasive in demonstrating that there is a legal basis at least for the concept advanced by the witness. (*See id.* at 62.)

iv. Motion to exclude testimony of Michael Tzivanis

Dunlop's motion is DENIED. Dunlop asserts that Michael Tzivanis, a former Dunlop employee who is now employed by a Callaway affiliate, intends to give fact testimony on subjects as to which he professed a lack of memory during his deposition in 2002. (*Id.* at 64-65.) Callaway responds that Dunlop was not prevented from exploring any topic Dunlop wanted to during discovery, that the memory lapses Dunlop cites were in response to questioning by Callaway's counsel, not Dunlop's, and that, in any event, the deposition testimony which Dunlop complains of bears on the Polyurethane aspect of the case which is no longer at issue. (*Id.* at 65.)

On the present record, I cannot say that Dunlop has been so prejudiced by Mr. Tzivanis's allegedly feigned memory lapses that he should be prevented from testifying. If the deposition record is as Dunlop represents, there should be ample ammunition for cross-examination. Dunlop has not demonstrated that its effort to take discovery from Mr. Tzivanis was unfairly frustrated, nor did it seek any relief while the discovery period was open and its complaint could have been remedied by some less draconian means than preventing a witness with relevant information from taking the stand.

III. *Conclusion*

For the foregoing reasons, it is hereby ORDERED that the motion to bifurcate and the *in limine* motions set forth in the parties' form of pretrial order (D.I. 372) are disposed of as set forth herein.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

July 28, 2004
Wilmington, Delaware