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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CHEMIPAL LTD.,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 03-550-KAJ
)	
SLIM-FAST NUTRITIONAL FOODS)	
INTERNATIONAL, INC.,)	
)	
Defendant.)	

MEMORANDUM ORDER

I. Introduction & Background

Presently before me is a Motion for Reargument (Docket Item ["D.I."] 145; the "Motion") filed by plaintiff Chemipal Ltd. ("Chemipal") pursuant to Delaware Local Rule 7.1.5 and Federal Rule of Civil Procedure 59(e). Chemipal's Motion comes in response to my December 22, 2004 Opinion, in which I granted summary judgment for defendant Slim-Fast Nutritional Foods International, Inc. ("Slim-Fast") after finding that Chemipal's evidence in support of its claim for damages was speculative and that Chemipal could therefore not recover on its claims.¹ (D.I. 143 at 22-25.) More specifically, I found that the expert report and proffered testimony by Chemipal's expert, Dr. Shuv-Ami, was unreliable under *Daubert* and should be excluded from evidence. (D.I. 143 at 11-21.)

¹ Under Delaware law, "[i]t is axiomatic that a plaintiff, in order to recover damages from a defendant for breach of contract, must demonstrate with *reasonable certainty* that [the] defendant's breach caused the loss." *Tanner v. Exxon Corp.*, No. 79C-JA-5, 1981 WL 191389, at *1 (Del. Super. Ct. July 23, 1981) (emphasis in original) (internal citations omitted).

Because Chemipal relied exclusively on Dr. Shuv-Ami's opinion to prove its damages, I found that the remaining record evidence was too speculative to provide a basis for Chemipal's assertion of damages. (*Id.* at 22-25.)

II. Standard of Review

The decision to grant a motion for reargument lies within the discretion of the district court, and should only be granted sparingly. *Kavanagh v. Keiper Recaro Seating, Inc.*, No. Civ.A. 98-556-JJF, 2003 WL 22939281, at *1 (D. Del. July 24, 2003) (internal citation omitted). A motion for reargument "should not be used to rehash arguments already briefed or to allow a 'never-ending polemic between the litigants and the Court.'" *Dentsply Int'l, Inc. v. Kerr Mfg. Co.*, 42 F. Supp. 2d 385, 419 (D. Del. 1999) (citing *Ogelsby v. Penn Mut. Life Ins. Co.*, 877 F. Supp. 872, 892 (D. Del. 1995)). "As such, a motion for reargument may only be granted in three narrow circumstances: (1) where the court has patently misunderstood a party, (2) where the court has made an error not of reasoning, but of apprehension, or (3) where the court has made a decision outside the scope of the issues presented to the court by the parties." *Kavanagh*, 2003 WL 22939281, at *1 (internal citations omitted).

III. Discussion

In this Motion, Chemipal makes three principal arguments in support of its request for reconsideration. First, Chemipal asserts that I misunderstood its argument on damages. (D.I. 145 at 2.) Chemipal argues that the 1997 Grey Plan was "made by an agent of Slim-Fast in connection with and in anticipation of a distributorship agreement between Slim-Fast and Chemipal." (*Id.*) Chemipal asserts that the 1997

Grey Plan is therefore “a statement against the interest of Slim-Fast,” which Dr. Shuv-Ami was entitled to rely on. (*Id.* at 2-3.) Additionally, Chemipal asserts that because the defendant’s “wrongful conduct has rendered it difficult to assess the precise damages suffered by the plaintiff, the defendant should bear the risk of uncertainty that [its] own conduct has created.” (*Id.* at 3 (internal citations omitted). Second, Chemipal requests an opportunity to present Dr. Shuv-Ami in a *Daubert* hearing such that I may reconsider my ruling with respect to the reliability of his opinions on damages. (*Id.*) Third, Chemipal asserts that even if Dr. Shuv-Ami’s testimony is precluded, there is sufficient evidence of record to support its claim for damages. (*Id.* at 4.) Chemipal argues that the testimony of four witnesses, Mr. Weingarten, Dr. Frishberg, Mr. Paviluk, and Mr. Gal, provides sufficient evidence to support Chemipal’s claim for damages. (*Id.* at 4-6.) Additionally, Chemipal asserts that “granting ... summary judgment based solely on the exclusion of Dr. Shuv-Ami’s testimony was inappropriate, and not the focus or scope of the issue presented to the Court.” (*Id.* at 5.)

In response, Slim-Fast asserts that Dr. Shuv-Ami was correctly excluded and that Chemipal cannot estimate its damages with reasonable certainty. (D.I. 147 at 2.) First, Slim-Fast argues that the Grey 1997 Plan is “a marketing objective,” which is “*inherently speculative.*” (*Id.*) Second, Slim-Fast argues that Chemipal is not entitled to a *Daubert* hearing because there is “[n]o material disputed issue of fact ... [which] requires facts to be found or credibility assessments to be made,” because Dr. Shuv-Ami was “deposed extensively about his reasons, qualifications, and opinions. (*Id.* at 5.) Third, Slim-Fast asserts that because Chemipal did not present the testimony of the

four identified witnesses in its Opposition to Slim-Fast's Motion for Summary Judgment (see D.I. 131), Chemipal cannot assert that the Court "misunderstood" its arguments by "failing to consider evidence that [Chemipal] did not present." (D.I. 147 at 3.)

Because I did not exceed the scope or focus of the issues previously presented to the Court and I did not misunderstand Chemipal's arguments with respect to damages, Chemipal's Motion for Reargument (D.I. 145) is denied.

First, the express focus of one of the issues raised in Slim-Fast's Motion for Summary Judgment (D.I. 117) was whether the record evidence was sufficient to establish damages with reasonable certainty. In that motion, Slim-Fast argued that "[t]he entire basis of Chemipal's damage case is the expert report of Dr. Shuv-Ami." (D.I. 117 at 30.) In its Memorandum of Law in Opposition to Slim-Fast's Motion for Summary Judgment, Chemipal's argument shows that it recognized the issue being raised by Slim-Fast, stating "[p]laintiff argues that Chemipal's damages are speculative as a matter of law." (D.I. 131 at 16.) Instead of presenting an independent argument on this issue, Chemipal referred to an argument it made in response to a different issue raised by Slim-Fast, namely, whether to preclude the testimony of Dr. Shuv-Ami (D.I. 112), asserting that "[t]his argument was addressed and diffused in Chemipal's Memorandum of Law in Opposition to [Slim-Fast's] Motion to Preclude Dr. Shuv-Ami and will not be repeated here." (D.I. 131 at 16.) Thus, it is clear that the issue of whether the evidence presented by Chemipal could establish damages with reasonable certainty was appropriately before me.

Second, I did not misunderstand Chemipal's arguments with respect to damages. As just noted, Chemipal's arguments on damages essentially incorporated

the arguments made in its Memorandum of Law in Opposition to [Slim-Fast's] Motion to Preclude Dr. Shuv-Ami.² (See *id.*) In that memorandum, Chemipal argued that it would "seek to meet its burden of proving its lost profits by *inter alia* providing the testimony of an expert witness, Dr. Avichai Shuv-Ami." (D.I. 132 at 3.) Yet, Chemipal never argued that it could prove its damages without Dr. Shuv-Ami's testimony. (See D.I. 132.) Instead, Chemipal focused its arguments on the issue of whether Dr. Shuv-Ami should be precluded from testifying. (See *id.* at 6-17.) Additionally, Chemipal has not provided evidence of what it referred to as Slim-Fast's "wrongful conduct," such that Slim-Fast should "bear the risk of uncertainty that [its] own conduct has created." (See D.I. 145 at 3.) Thus, the case law cited by Chemipal is distinguishable from the facts of this case, and the burden was properly on Chemipal to present evidence which would establish its damages with reasonable certainty.

Third, I did not misunderstand Chemipal's assertion that there are four other witnesses whose testimony establishes that Chemipal is not relying exclusively on Dr. Shuv-Ami's testimony to meet its burden to prove damages with reasonable certainty. The problem is that Chemipal never raised that argument before. (See D.I. 131, 132.) Rather, Chemipal raised it for the first time in its Motion for Reargument. (See D.I. 131; D.I. 145 at 4-6.) It is not appropriate to consider such evidence in a motion for reargument because it fails to fit any of the three narrow circumstances, identified in

² In a footnote within its Opposition to Slim-Fast's Motion for Summary Judgment, Chemipal pointed to Mr. Gal's testimony to address a specific assertion that Slim-Fast made pertaining to the preclusion of Dr. Shuv-Ami's testimony. (D.I. 131 at 16 n.8.) Thus, Chemipal did not assert that the Gal testimony itself, without the addition of Dr. Shuv-Ami's testimony, was independent evidence of damages.

Kavanagh, wherein a motion for reconsideration could be granted. (See *supra* at 2.) Chemipal's arguments with respect to the testimony of these other individuals presumably could have been, and thus certainly should have been, presented in the first instance in its response to Slim-Fast's Motion for Summary Judgment.

Finally, it is not necessary to conduct a *Daubert* hearing because Chemipal has not raised a disputed issue of fact about any aspect of Dr. Shuv-Ami's testimony, nor has Chemipal asserted any particular reason why a *Daubert* hearing would otherwise be necessary or appropriate in this case. Therefore, I reject Chemipal's request for a *Daubert* hearing to reconsider the rulings I made with respect to the reliability of Dr. Shuv-Ami's opinions.

IV. Conclusion

For the reasons expressed herein, IT IS HEREBY ORDERED that Chemipal's Motion for Reargument (D.I. 145) is DENIED.


UNITED STATES DISTRICT JUDGE

Wilmington, Delaware
May 12, 2005