**UNITED STATES DISTRICT COURT**
**DISTRICT OF CONNECTICUT**

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| RETEPROMACA REPRESENTACIONES TECNICAS PROYECTOS Y SISTEMAS, C.A., Plaintiff, | : | CIVIL ACTION NO. 3:98cv1857 (SRU) |
| v. | : | |
| THE ENSIGN-BICKFORD COMPANY, Defendant. | : | |

**RULING ON POST-TRIAL MOTIONS**

Retepromaca Representaciones Technicas Proyectos Y Sistemas C.A. ("Retepromaca") brought this action against The Ensign-Bickford Company ("EBCo") for breach of an alleged contract to have Retepromaca serve as EBCo's exclusive sales representative in Venezuela. Following a three-day trial, the jury returned a verdict in favor of Retepromaca for $249,079. Judgment entered on April 4, 2003. EBCo now moves for judgment as a matter of law – arguing that Retepromaca did not prove the existence of a contract or the amount of damages. In the alternative, EBCo moves for a new trial – arguing that the court improperly instructed the jury that it could find an oral or implied contract. Retepromaca has made its own motions, asking the court to grant pre-judgment interest on its award. For the reasons set forth below, all these motions are denied.

## I. Facts

The following facts were either agreed to by the parties or could reasonably have been found by the jury on the evidence presented at trial.

EBCo manufactures and sells explosive products used in commercial mining and oil exploration. Its mining products are used to destroy rocks in order to expose and extract ore. In oil

exploration, EBCo's seismic products are used to create explosions that facilitate the identification of drill spots likely to yield oil. (Tr.1 64-65; Tr.2 152-56)[1]

Retepromaca is located in Venezuela and is wholly owned by its president, Antonio Cordoba ("Cordoba"). (Tr.1 34-35) Starting in 1981, Retepromaca began to act as EBCo's agent for the sale of certain explosive devices. (Tr.1 36, 79) In 1992 this arrangement was formalized in a letter from EBCo to Cordoba, appointing Retepromaca as EBCo's exclusive agent in Venezuela. (Defendant's Exhibits 1, 2) A second, similar letter of appointment was sent in 1995. (Plaintiff's Exhibit 1)

As EBCo's exclusive agent, Retepromaca performed a number of functions. It served as a liaison between EBCo and various Venezuelan governmental agencies whose approval was needed for sales of explosives. (Tr.1 40, 84-85, Tr.2 150) It hired people to test several of the products sold by EBCo. (Tr.1 69-70) It promoted and distributed information concerning EBCo's products. (Tr.1 76-77) Most importantly, however, Retepromaca had a base of clients – including the Venezuelan army – that it kept informed about EBCo's products and ultimately put in touch with EBCo to effectuate sales. (Tr.2 127-29, 149) When sales were completed, Retepromaca received a commission of between 12 and 17 percent of the sale price, depending on the product sold. (Tr.2 73)

In 1995 EBCo acquired the assets of Trojan, another company engaged in the sale of explosive products. Although Trojan was entirely subsumed into EBCo, Trojan-branded products were still sold in Venezuela through Trojan's former representatives, and not through Retepromaca. (Tr.2 25, 34-35)

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[1] The following notations are used to refer to the transcripts of the three trial days: "Tr.1" for the transcript of March 31, 2003; "Tr.2" for the transcript of April 1, 2003; and "Tr.3" for the transcript of April 2, 2003.

Retepromaca complained to EBCo, contending this arrangement violated the terms of its exclusive engagement. (Tr.2 25-28) Retepromaca's concern arose from the fact that some of the Trojan-branded products were apparently more desirable than other, similar EBCo products – in particular, Trojan had manufactured a type of "booster" explosive called a GeoPrime booster, that was more desirable than the standard boosters sold by EBCo. (Tr.2 15-16; Defendant's Exhibit 9) Consequently, by being denied the opportunity to sell Trojan products, Retepromaca was limited to offering its clients less than the full panoply of EBCo products. Retepromaca could – in certain cases – obtain these products through a third-party but could then only offer them at a higher price, a price not competitive with that offered by the agents who obtained the Trojan products directly from EBCo. (Tr.1 92; Tr.2 23, 167-68; Tr.3 25)

The question whether the parties' agreement applied to the sale of Trojan products in Venezuela was never resolved and, in 1997, EBCo terminated its relationship with Retepromaca.

## II. Motion for Judgment as a Matter of Law

### A. Legal Standard

A defendant seeking judgment as a matter of law pursuant to Rule 50 of the Federal Rules has a significant burden. Judgment as a matter of law may not be granted unless the evidence, viewed in the light most favorable to the plaintiff, is insufficient to permit reasonable jurors to find in plaintiff's favor. Caldieri-Ambrosini v. National Realty & Development Corp., 136 F.3d 276, 289 (2d Cir. 1998). Put another way, the court must deny the motion unless the evidence – viewed in the light most favorable to the plaintiff, without weighing the credibility of the witnesses, and without otherwise considering the weight of the evidence – permits only one conclusion. Sir Speedy, Inc. v. L & P Graphics, Inc., 957

F.2d 1033, 1038-39 (2d Cir. 1992). It does not matter that the evidence supporting the plaintiff's case may be weak; in order to grant judgment as a matter of law the evidence must *compel* acceptance of the defendant's view by reasonable jurors. This is Me, Inc. v. Taylor, 157 F.3d 139, 142 (2d Cir. 1998).

B. Agreement

EBCo argues that the evidence was legally insufficient to establish the existence of a contract between EBCo and Retepromaca giving Retepromaca the exclusive right to act as EBCo's representative for the distribution of Trojan products. EBCo argues that the 1995 letter agreement was not a contract giving Retepromaca exclusive representation of EBCo in Venezuela, but instead was either a legally non-binding "agreement to agree" or an unenforceable writing that lacks material terms. EBCo's view of the evidence is one, but not the only, possible view that reasonable jurors could have taken. Consequently, it cannot support judgment as a matter of law.

1. *"Agreement to Agree"*

EBCo contends that Cordoba "admitted" at trial that the letter was only an agreement to agree. EBCo points to the following testimony:

> Q. . . . In the letter it says that you, Retepromaca, you're going to undertake to establish common criteria in order to create a single binding criteria for both parties. What does that mean? What does that sentence mean?
> A. What does this mean? That we have to work together, share arguments and to reach for every step we do, not only for pricing but for goals.
> Q. You have to agree to agree, right?
> A. Yes.
> Q. Sometime in the future you're going to work out those details and you're going to agree to agree on what you're entitled to, right?
> A. In everything.

(Tr.2 184) Cordoba's answers, according to EBCo, would compel reasonable jurors to conclude that the letter was nothing more than an agreement to agree. If this bit of testimony were the only evidence given to the jury on the subject, EBCo's argument might be persuasive. The jury, however, had a much more evidence to consider.

If nothing else, the jury was free to simply reject Cordoba's testimony and read the document on its own, a document that states EBCo "appoints Retepromaca as their exclusive representative for the entire territory of Venezuela." (Plaintiff's Exhibit 1) Based on the contents of that document, the jury could have found that the letter granted Retepromaca exclusive representation of EBCo in Venezuela for the sale of *all* EBCo products.

Even if the jury did not wish to rely solely on the text of the letter, it was free to disregard the statements of Cordoba quoted above[2], and instead rely on his other statements – statements that supported a finding that the parties intended by the 1995 letter to enter into a binding exclusive representation agreement. These would have included, for example, statements by Cordoba that, subsequent to the signing of the 1995 agreement, EBCo treated him as their exclusive representative for all products, directed all sales through him (prior to the Trojan merger), and never informed him that, or acted as if, the letter agreement was subject to limitation. (Tr.1 55-56; Tr.2 176; Tr.3 31)

2. *Lack of Material Terms*

Alternatively, EBCo contends that the 1995 agreement was not enforceable because it lacked a

[2] It is worth noting that Cordoba was not a native English speaker and, though he did use an interpreter for parts of the trial, the jury was in the best position to judge how well he understood the questions put to him by counsel and what he intended by his answers. This determination is much harder to make on the bare trial transcript.

material term. EBCo argues that it is clearly material whether or not the parties intended to extend their agreement to cover Trojan products, and, because the 1995 letter does not include this material term, the agreement is legally insufficient to bind EBCo with respect to Trojan products.

The problem with EBCo's argument is that it attempts to characterize the application of the 1995 agreement to Trojan products as an "extension." If Retepromaca had claimed – or at least, if it had only claimed – that the 1995 agreement was *extended* to cover Trojan products, EBCo's argument might have some merit. As it stands, however, Retepromaca claimed – and the jury could have found – that the 1995 agreement (and all prior agreements) gave Retepromaca the right to distribute *all* EBCo products in Venezuela. All EBCo products reasonably includes products EBCo came to sell following its acquisition of another company's product line as well as products EBCo developed itself – however those products may have been branded.

As a preliminary matter, the undisputed evidence showed that Trojan was completely absorbed into EBCo. That is, all Trojan's assets were assumed by EBCo, and Trojan ceased to exist as a separate entity. The only vestige of Trojan that remained following the merger was the label "Trojan," which remained on some products. (Tr.2 41-43) Consequently, there was little room for the jury to conclude anything other than that Trojan-branded products, after the merger, were as much EBCo products as any other EBCo product, and so, an agreement to distribute *all* EBCo products would include Trojan-branded products as well.

There was plenty of evidence to support a finding that the 1995 agreement gave Retepromaca

the exclusive right to sell *all* products. The letter itself is ambiguous[3] and probably amenable to either interpretation. That fact alone would suggest that judgment as a matter of law is inappropriate, because, when deciding the matter, all inferences must be drawn in Retepromaca's favor. Even putting the text of the letter aside, there was much more evidence from which the jury could have inferred that the agreement covered all EBCo products.

Cordoba testified that he had, from 1981 to 1996, engaged in the unrestricted, unlimited sale of EBCo products in Venezuela. He testified that this included sales of products similar to those manufactured by Trojan. (Tr.1 95) He testified that, over the course of their fifteen-year relationship, EBCo and Retepromaca had established commission rates for various categories of products. (Tr.2 73; Tr.3 77-78) And, as noted above, he testified that EBCo had never attempted to, or expressed any desire to, limit the scope of Retepromaca's representation. (Tr.1 55-56; Tr.2 176; Tr.3 31) Moreover, he testified that, when new products were added to EBCo's line, Retepromaca was always allowed to sell them. (Tr.3 60)

Similarly, Frank Lucca, EBCo's manager of Venezuelan operations from 1994 to 1996,

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[3] The fact that the 1995 letter did not specify other arguably material terms – particularly commission rates – is also not fatal to its enforcement, particularly given the large amount of evidence about the parties' history of interactions. The law is clear that an agreement will not be rejected for missing terms when the terms can be ascertained, either from the express terms of the agreement or by fair implication. Augeri v. C.F. Wooding Co., 173 Conn. 426, 430 (1977). More specifically, when an agreement is silent with respect to the amount of compensation, a jury can find that a reasonable fee was intended and it can ascertain this fee, among other things, by reference to the parties' course of dealing. See Presidential Capital Corp. v. Reale, 231 Conn. 500, 506 (1994) ("defendant's promise to pay a commission is not made unenforceable merely because he did not include the amount of the commission"); Restatement (Second) Contracts § 223 (course of dealing may be used to interpret parties' expressions and other conduct).

testified that Retepromaca was EBCo's exclusive agent in Venezuela (Tr.3 164) and that, as far as he knew, no sales went through anyone other than Retepromaca (Tr.3 169).

On the basis of this evidence – the letter coupled with the extensive course of dealing between the parties – the jury could have concluded that Retepromaca and EBCo had an actual agreement providing that Retepromaca was EBCo's exclusive agent for the sale of all products – including Trojan products – in Venezuela. Consequently, EBCo's argument, that the jury was compelled to conclude that there was no binding agreement, fails, and EBCo's motion for judgment as a matter of law on that ground is denied.

C. Damages

EBCo next argues that, even if a contract was proven, Retepromaca did not offer evidence of its actual damages sufficient to allow the jury to award an amount that was anything other than speculative. Specifically, EBCo contends that, although Retepromaca offered evidence tending to establish the amount of lost sales and the rate of commission it would have earned on those sales, it did not offer any evidence to establish the expenses it would have incurred in making those sales. EBCo concludes that, on the record evidence, there was no way the jury could have arrived at a calculation of Retepromaca's expected *net* gain on the contract. Consequently, EBCo asks for judgment as a matter of law or, in the alternative, a reduction of the jury's award to nominal damages.

EBCo does not dispute that there was sufficient evidence from which the jury could have calculated EBCo's lost commissions. Retepromaca offered documentary and testimonial evidence establishing the amount of sales of Trojan products made by other EBCo representatives in Venezuela

during the time when Retepromaca was entitled to those sales. (Tr.2 78-86) Additionally, Retepromaca offered evidence of the commission rates that it ordinarily received for sales of comparable products. Id. Multiplying the first number (lost sales) by the second (rate of commission) would have given the jury the amount of Retepromaca's lost commissions.

EBCo argues that this number alone does not permit a damage calculation because it only represents gross profits, whereas an award of damages can only be an award of net profits. Net profits, EBCo contends, can only be calculated by reducing the sales commission amount by the expenses that would have been incurred in making those sales. Evidence of the amount of these expenses, however, was not presented to the jury, and so, EBCo concludes, there is no possible way the jury could have calculated net profits.

EBCo is correct that the jury was required to award net profits; it is incorrect that the only way the jury could have calculated net profits was by subtracting expenses from sales commissions. An award of total profits need not be reduced by expenses if the evidence tends to show that the plaintiff would have incurred no *additional* expenses in making the future sales. In such a case net profits are gross profits, because the marginal cost of an additional sale is zero.[4] See, e.g. Barnard v. Compugraphic Corp., 35 Wash. App. 414, 418 (1983); Automatic Vending Co. v. Wisdom, 182 Cal.

[4] Arguably overhead must always be deducted from gross profits, even if a given sale has a marginal cost of zero, because overhead is properly allocated on an average basis to each sale. Thus, one could argue, even the profit on these hypothetical sales should be reduced by the *average* cost required to make the sale (as opposed to the *marginal* cost). The use of this analysis would not change anything because, under Connecticut law, overhead expenditures are recoverable as an element of damages. See Coast Industries, Inc. v. Noonan, 4 Conn. Cir. Ct. 333, 337 (1967). Thus, even if profit was reduced by overhead this would be offset by the overhead being recoverable as damages. See generally Overhead Expense as Recoverable Element of Damages, 3 A.L.R.3d 689 §§ 3, 5.

App. 2d 354, 358 (1960).

EBCo, of course, claims that the sale of additional products would have required Retepromaca to incur additional expenses. This is a possible inference from the evidence, but it is not the only one.

Cordoba did testify that in order to make sales of Trojan products he would have been required to make phone calls, book flights and hotel rooms for EBCo employees, and arrange for meals. (Tr.2 157-58, Tr.3 19-21) He testified that in some cases he would pay for these expenses out of his own pocket. The jury could have inferred from this testimony that, had Retepromaca been allowed to sell Trojan products, it would have incurred additional expenses of this nature. However, a jury could just as easily have inferred that those expenses were essentially the fixed costs of routine sales trips made by Retepromaca during which a number of products were sold, and that the ability to sell Trojan products would simply have increased the number of products that could have been offered during those trips and not increased the number of trips. On this view of the evidence, the addition of new products to Retepromaca's "catalog" would not have required it to incur new expenses. This view is consistent with the evidence tending to show that the Trojan products in question were simply enhanced versions of products already offered by Retepromaca, indicating that it would have taken little or no additional effort or expense to offer these additional products to Retepromaca's existing customers. (Tr.1 95)

Similarly, the jury could have found that Retepromaca did offer Trojan products through a third-party – and thus incurred the expense of offering them – only it could not consummate sales, because, lacking the ability to sell directly from EBCo, Retepromaca could not offer competitive prices. (Tr.1 92; Tr.2 23, 69-75, 167-68; Tr.3 25, 47) On this view of the evidence, Retepromaca's

expenses would also have remained constant; it simply would have been more competitive if it had been able to make direct sales of Trojan-branded products.

Moreover, Cordoba testified that he continued to pay all the overhead costs associated with his business, e.g., rent, salaries, and utilities. (Tr.2 75-76) Nothing in his testimony suggested that these expenses would have increased had he been permitted to offer Trojan products along with the other products he sold.

Accordingly, there was a good deal of evidence from which reasonable jurors could have concluded that Retepromaca would have incurred no additional expense had it been permitted to offer Trojan products for sale directly from EBCo.

In short, EBCo starts with the premise that there would have been incremental costs associated with the sale of Trojan products. It then argues that, because the amount of these costs was not proved, Retepromaca did not prove its case. The fatal flaw in this argument is that reasonable jurors would not be compelled to accept EBCo's premise. A defendant cannot merely assert the existence of a category of expenses and then argue that, since the plaintiff did not prove the amount of those expenses, the jury's verdict must be set aside. See, e.g., Katz Communications, Inc. v. Evening News Assoc., 705 F.2d 20, 26 (2d Cir. 1983) ("Nor is there merit in appellants' contention that Katz's recoverable damages should be diminished by the amount of salaries, wages, and other overhead or indirect or fixed costs . . . the burden is on the appellants to prove any potential item in mitigation of damages inasmuch as it is *pro tanto* a defense to the claim of the wronged party."). Because reasonable jurors could have found that the expenses EBCo assumes existed did not exist, there is no reason to set aside the jury's award.

"It is incumbent on a plaintiff in a contract action to prove his damages with all the certainty which is reasonably possible, but where exactness is not possible, he is not therefore to be precluded from a recovery, and the best approximation to certainty is all that is required." Southern New England Contracting, Co. v. Connecticut, 165 Conn. 644, 661 (1974). Because Retepromaca gave the jury enough evidence to make a reasonably certain damage calculation, EBCo's motion for judgment as a matter of law on the ground of insufficient proof of damages is denied.

**III. Motion for New Trial**

EBCo argues that errors in the jury instructions require a new trial. EBCo has less of a burden in seeking a new trial than it does in asking for judgment as a matter of law; however, it also has a less compelling argument. A new trial is required if errors in instructing the jury, considered as a whole, prejudiced the objecting party. Jocks v. Tavernier, 316 F.3d 128, 137 (2d Cir. 2003).

The jury instruction at issue read as follows:

> Although Retepromaca alleges that there was a written contract, it is not necessary for there to have been a written contract. Retepromaca could prevail by showing that it had an oral contract to serve as the exclusive distributor for Ensign-Bickford in Venezuela. An oral contract can either be express or implied. An express contract is expressed, or stated, in words. To determine if there was an express contract, you should consider the words exchanged between the parties as well as any written documents relating to the subject matter of the alleged contract.
>
> A contract can also be implied. The material terms and conditions of an implied contract are implied or inferred from the facts and circumstances, or from the conduct of the parties, rather than expressed in words. An implied contract is an agreement that depends on some act or conduct by the party against whom the contract is sought to be enforced – here, Ensign-Bickford. And it arises by inference or implication from circumstances which, according to the ordinary course of dealing and the common understanding of people, show a mutual intent on the part of the parties to contract with each other at that time. The test for determining if there is an implied contract is whether the acts and conduct of the

parties show agreement.

(Jury Charge Transcript 14-15)

EBCo does not dispute that this charge was a correct statement of Connecticut contract law; rather it argues that neither an oral contract nor an implied contract claim was present in the complaint or the evidence, and so neither claim was part of the case. Consequently, argues EBCo, these issues should not have been charged to the jury, and the charge was prejudicial. I am not persuaded

Properly analyzed, EBCo is raising two issues– (1) did the complaint preclude this instruction, and (2) did the evidence at trial preclude this instruction.

A. Complaint

The first issue is governed by Rule 8 of the Federal Rules of Civil Procedure. EBCo's argument is that, because no implied or oral contract claim was in the complaint, neither claim was in the case. Whether a complaint is sufficient to raise a claim for relief is determined by Rule 8.[5]

It is well established that Rule 8 only requires simplified notice pleading that gives a defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1975). "All pleadings shall be so construed as to do substantial justice." Fed. R. Civ. P. 8(f). Moreover, the federal rules have abandoned so called "theory pleading," whereby "a complaint must proceed upon some definite theory, and on that theory the plaintiff must succeed, or not succeed at all." C. Wright & A. Miller, Federal Practice and Procedure, § 1219 at 188 (2d ed. 1990).

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[5] EBCo cites to Connecticut state law cases in support of its claim that Retepromaca's case is circumscribed by its complaint. The Second Circuit, however, has unequivocally held that the specificity of pleadings is governed by the Federal Rules. See Stirling Homex Corp. v. Homasote Co., 437 F.2d 87, 88 n.2 (2d Cir. 1971).

The essence of Retepromaca's claim is contained in two statements in the complaint: (1) that, as of 1980, Retepromaca was appointed by EBCo to be its exclusive agent in Venezuela, and (2) that EBCo breached its contractual duties.[6] This was sufficient to state a cause of action and to put the defendant on notice that it was being sued for breaching the representation agreement – either as written, orally stated, or implied.

Moreover, EBCo can hardly claim that it was not given notice that the case included a possible oral or implied contract claim. In my written opinion denying EBCo's motion for summary judgment (doc. # 104), issued June 4, 2002, I found a genuine issue of material fact regarding whether a contract had been formed, based in part on the authority of, accompanied with extensive quotes from, cases describing how an agreement can be implied in fact or by express words. I also noted that, in this case, a contract could be found to exist based on the letters, *past performance, and course of dealing*. At the very least, EBCo had actual notice from the time of the summary judgment ruling – nearly ten months before trial – that the issue of breach of an oral or implied in fact contract was in the case.

B. Evidence

EBCo also argues that there was no evidence at trial to support a charge on an oral or implied contract. This is an odd argument; after all, if there was no evidence to support the charge, it is unlikely that the jury found for Retepromaca on the basis of that charge, and so, hard to see how the charge prejudiced EBCo.

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[6] The complaint also discusses that this relationship was "evidenced" by two written agreements (First Amended Complaint ¶ 9), but this does not in any way negate the above statements, particularly as the first written agreement was dated seven years after the alleged beginning of the representation.

In any event, EBCo's contention is simply not correct. As discussed above in the section addressing EBCo's motion for judgment as a matter of law, there was ample evidence concerning past actions and course of dealing from which a jury could have found the existence of an oral or implied in fact contract with respect to all or part of the terms of Retepromaca's representation of EBCo.

Accordingly, because the jury instruction was a correct statement of the law governing the case, EBCo's motion for a new trial is denied.

## IV. Motions for Pre-Judgment Interest[7]

Retepromaca has moved for an award of prejudgment interest on the judgment pursuant to Connecticut General Statutes § 37-3a. The issue of prejudgment interest was not raised until after judgment had entered, and so, was not charged to the jury. Retepromaca argues that this is immaterial because an award of prejudgment interest lies within the discretion of the court. It is understandable how Retepromaca could have come to this conclusion. The case law on prejudgment interest is confusing and, sometimes, inconsistent. Nevertheless, after a thorough review of relevant state and federal cases, I conclude that the question of whether to award prejudgment interest pursuant to section 37-3a must be decided by the trier of fact – in this case the jury. Because I have no discretion to make such an award, Retepromaca's motions are denied.

The question of prejudgment interest in a diversity case, such as this one, is governed by the law of the forum state – in this case, Connecticut. Trademark Research Corp. v. Maxwell Online Inc., 995 F.2d 326, 342 (2d Cir. 1993). Accordingly, it is the law as established by Connecticut courts, or

[7] Retepromaca made both a motion for prejudgment interest and a related motion to modify the judgment to include prejudgment interest.

as I predict they would establish it, that controls.

A. Connecticut Law

There are two distinct lines of Connecticut cases on the subject of prejudgment interest, reflecting differences between bench trials and jury trials.

When a case is tried before a jury, the Connecticut courts have announced the rule – ultimately dispositive of this case – that prejudgment interest, as an element of damages, is a factual question within the province of the jury. See John T. Brady & Co. v. City of Stamford, 220 Conn. 432, 445 (1991); Iseli Co. v. Connecticut Light and Power Co., 211 Conn. 133, 143 (1989). More specifically, Connecticut courts have dealt with the exact issue presented in this case, holding that it was improper for a trial court to award prejudgment interest after a jury verdict that did not include it. See Foley v. Huntington Co., 42 Conn. App. 712, 738 (1996); Iseli, 211 Conn. at 143-44.

When cases are tried without a jury, the Connecticut courts state a slightly different rule. In such cases "the allowance of interest as an element of damages is primarily an equitable determination and a matter within the discretion of the trial court." Middlesex Mutual Assurance Co. v. Walsh, 218 Conn. 681, 701-02 (1991); The Nor'easter Group, Inc. v. Colassale Concrete, Inc., 207 Conn. 468, 482 (1988). The reference to "the trial court" is confusing, as it can be read as a reference to the judge in his legal, rather than fact-finding, capacity. Recently, Connecticut appellate courts have attempted to clarify this by changing the reference to the "trier of fact." See, e.g., Ceci Bros. v. Five Twenty-One Corp., 82 Conn. App. 419 , 427 (2004); Advanced Financial Servies, Inc. v. Associated Appraisal Services, Inc., 79 Conn. App. 22, 31 (2003); Maloney v. PCRE, LLC, 68 Conn. App. 727, 755 (2002).

In Retepromaca's case, any ambiguity in the decisions of Connecticut courts has no practical import – it is settled that the judge in a jury trial has no ability to award prejudgment interest.

B. Federal Court

In light of the ambiguous language used by the Connecticut courts, it is not surprising that some confusion has dogged federal courts attempting to apply Connecticut law in diversity cases.

In Neptune Group, Inc. v. MKT Inc., 205 F.R.D. 81 (D. Conn. 2002), Judge Droney confronted essentially the same situation as the one here and concluded – as I do – that the question of prejudgment interest was for the jury, and not the judge. Similarly, Judge Eginton, in Winnick v. Alvin and Co., 1998 WL 696015 (D. Conn. July 15, 1998), noted that the question of prejudgment interest was one for the trier of fact (in that case, the court).

A few other district court decisions, however, set forth the opposite conclusion, holding – with little or no discussion – that the question of prejudgment interest was one for the "court" – meaning the judge – and not the jury.[8] See, e.g., Gilmore v. Bergin, 1998 WL 1632526, *12 (D. Conn. Sept. 22, 1998) (holding trial court in jury trial had discretion to award prejudgment interest); Kregos v. The Latest Line, Inc., 1998 WL 696007 (D. Conn. Aug. 31, 1998) (holding interest award for the court, not jury, but declining to award it); Brandewiede v. Emery Worldwide, 890 F. Supp. 79, 82 (D. Conn. 1994) (holding not within the jury's discretion to award prejudgment interest, rather that was a question

[8] It is possible that these courts relied on the Second Circuit's statement in Prime Management Co. v. Steinegger, 904 F.2d 811, 817 (2d Cir. 1990), that under Connecticut law prejudgment interest was left to the discretion of the court. Not surprisingly, that case involved a bench trial where "the court" was the trier of fact. The Connecticut case cited by the Second Circuit was Nor'easter (discussed above), also a bench trial.

for the court).

Given this line of federal cases, Retepromaca may have been led astray in understanding how prejudgment interest is awarded under Connecticut law. Based on my review of binding decisions of the Connecticut Supreme Court and Appellate Court, however, I conclude that Retepromaca's request for prejudgment interest must be denied, because prejudgment interest is an issue to be decided by the jury.

## V. Conclusion

For the aforementioned reasons, the Ensign-Bickford Company's motion for judgment as a matter of law or new trial (doc. # 170) is DENIED, and Retepromaca's motion for prejudgment interest (doc. # 159) and motion to modify the judgment (doc. # 164) are DENIED.

It is so ordered.

Dated at Bridgeport, Connecticut, this 30th day of March 2004.

/s/ Stefan R. Underhill
Stefan R. Underhill
United States District Judge