

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

<i>NET 2 PRESS, INC.,</i>)	
)	
<i>Plaintiff</i>)	
)	
<i>v.</i>)	<i>Docket No. 03-124-P-H</i>
)	
<i>EMPLOYERS FIRE INSURANCE</i>)	
<i>COMPANY et al.,</i>)	
)	
<i>Defendants</i>)	

**RECOMMENDED DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT
AND MEMORANDUM DECISION ON MOTION TO EXCLUDE**

The defendants have moved for summary judgment on all counts of the complaint and the plaintiff has moved for summary judgment on Count III. The plaintiff has moved to exclude the testimony of two expert witnesses designated by the defendants. Because the motions for summary judgment do not rely on any of the proposed expert testimony that is the subject of the motion to exclude, I will first address the motions for summary judgment.

I. Motions for Summary Judgment

A. Applicable Legal Standard

Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token,

‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.’” *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must “produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue.” *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). “As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party.” *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

The mere fact that both parties seek summary judgment does not render summary judgment inappropriate. 10A Charles Wright, Arthur Miller & Mary Kane, *Federal Practice and Procedure* (“Wright, Miller & Kane”) § 2720 at 327-28 (3d ed. 1998). For those issues subject to cross-motions for summary judgment, “the court must consider each motion separately, drawing inferences against each movant in turn.” *Merchants Ins. Co. of New Hampshire, Inc. v. United States Fidelity & Guar. Co.*, 143 F.3d 5, 7 (1st Cir. 1998) (citation omitted). If there are any genuine issues of material fact, the opposing motions must be denied as to the affected issue or issues of law; if not, one moving party is entitled to judgment as a matter of law. 10A Wright, Miller & Kane § 2720.

B. Factual Background

The following undisputed material facts are appropriately presented under this court's Local Rule 56 in the parties' respective statements of material facts.

The plaintiff is a commercial printing shop which had a facility in Glens Falls, New York in 2001. Statement of Undisputed Material Facts in Support of Defendants' Motion for Summary Judgment ("Defendants' First SMF") (Docket No. 56) ¶ 1; Plaintiff's Statement of Disputed Material Facts in Response to Defendant's [sic] Motion for Summary Judgment, etc. ("Plaintiff's First Responsive SMF") (Docket No. 66) ¶ 1. On or about July 5, 2001 defendant Employers Fire Insurance Company¹ issued a commercial insurance policy (the "Policy") to the plaintiff. *Id.* ¶ 2. The Policy included boiler and machinery form coverage. *Id.* In its complaint, the plaintiff alleges that it experienced a power surge at its Glens Falls facility on or about September 10, 2001. *Id.* ¶ 3. The plaintiff alleges that a Heidelberg printing press located at the Glens Falls facility was damaged as a result of the power surge. *Id.* ¶ 5. According to the plaintiff, the power surge caused the electrical lubrication control system on the press to fail, which in turn caused cylinder bearings on the press to seize due to lack of lubrication. *Id.* Garth Grandchamp, appearing as the plaintiff's designated Rule 30(b)(6) deposition witness,² testified that the damage was discovered on September 10, 2001. *Id.* ¶ 7.

On or about October 12, 2001 the defendants received notice that the plaintiff had discovered damage to equipment from lightning and that the manager of the Glens Falls facility was trying to determine

¹ The parties' statements of material facts do not identify the relationship between the two defendants, but an earlier, superceded statement of material facts made clear that defendant One Beacon Insurance Group is the corporate parent of Employers Fire Insurance Company. Statement of Undisputed Material Facts in Support of Defendants' Motion for Summary Judgment (Docket No. 27) ¶ 10; Plaintiff's Statement of Disputed Material Facts in Response to Defendant's [sic] Motion for Summary Judgment and Additional Relevant Facts (Docket No. 39) ¶ 10. I see no reason not to assume that this essential fact remains undisputed at this stage of the litigation.

an estimate for repairs. Net 2 Press, Inc’s Statement of Material Facts (“Plaintiff’s Second SMF”) (Docket No. 60) ¶ 2; Defendants’ Opposition to Plaintiff’s Statement of Material Facts, etc. (“Defendant’s Second Responsive SMF”) (Docket No. 63) ¶ 2. On October 15, 2001 One Beacon Insurance Group opened its claim file, assigned a claims adjuster to handle the claim and left a message with the plaintiff and its insurance agent acknowledging receipt of the claim and informing them of the claim number and the name of the assigned adjuster. Defendants’ Statement of Additional Material Facts (“Defendants’ Second SMF”) (included in Defendant’s Second Responsive SMF starting at page 5) ¶ 16; Plaintiff’s Reply Statement of Disputed Material Facts to Defendant’s [sic] Statement of Additional Material Facts, etc. (“Plaintiff’s Second Responsive SMF”) (Docket No. 72) ¶ 16. On October 15, 2001 the assigned adjuster contacted Steve Webber, general manager of the plaintiff’s Glens Falls facility, to request information on the claim. *Id.* ¶ 17.³ Webber informed the adjuster that he would look into the matter and call back the next day. *Id.* On November 5, 2001 the adjuster left a message for Webber. *Id.* ¶ 18.⁴ On November 6, 2001 Webber told the adjuster that he still knew nothing about the loss and referred the adjuster to Brett Grandchamp, the plaintiff’s Chief Technology Officer. *Id.* ¶ 19.⁵ The adjuster called and left a message for Brett Grandchamp, who returned the call on November 13, 2001. *Id.* ¶¶ 19-20. Brett Grandchamp informed the adjuster that a power surge had caused extensive damage to the press but that he had no specific

² All future references to Garth Grandchamp’s testimony are to deposition testimony given by him on behalf of the plaintiff.

³ The plaintiff objects to this paragraph of the defendants’ second statement of material facts on the grounds that it “contains hearsay and is inadmissible under FED 802.” Plaintiff’s Second Responsive SMF ¶ 17. However, that portion of the paragraph from which the sentences included in the text are taken contains no hearsay. Because they are supported by the citation given to the summary judgment record, the sentences are deemed admitted.

⁴ See n. 6.

⁵ The plaintiff objects to paragraph 19 of the defendants’ second statement of material facts on the grounds that it “contains hearsay and is inadmissible under FRE 802.” Plaintiff’s Second Responsive SMF ¶ 19. To the extent that the paragraph presents statements allegedly made by Mr. Webber for the truth of the matter asserted, Webber was the general manager of the plaintiff’s Glens Falls facility and as such was in a position to bind the plaintiff by his admissions. (*continued on next page*)

information. *Id.* ¶ 20. The adjuster requested that Brett Grandchamp fax him the applicable information as soon as possible. *Id.*

On November 15, 2001 an adjuster for Hartford called Webber, who told her that he still did not know what had happened and referred her to Andrew Moreau at the plaintiff's Glens Falls facility. *Id.* ¶ 24.⁶ Moreau told the Hartford adjuster that his preliminary figures for the loss showed invoices of \$2,000 to \$2,500 but that he was told that the total costs were going to be \$25,000 to \$30,000. *Id.*⁷ He said that he would call back as soon as possible with more information. *Id.*

Brett Grandchamp faxed a letter dated November 19, 2001 to a claims adjuster at One Beacon Insurance Group; the letter stated, *inter alia*:

In September we had a power surge that caused minor damage to several pieces of equipment at our Coneco Litho Graphics facility in Glens Fall[s], New York. Unfortunately it also caused undiscovered damage to the lubrication control unit on one of the towers of the 5 color, 40" Heidelberg press. Subsequently, the tower ran without lubrication and caused the bearing on one of the cylinders to fail and resulted in damage to the surface of the cylinder and associated mounting hardware. . . .

The documents included in this fax include the repair bill from Orbit Electrical Services for the lubrication control unit, an estimate for parts from Heidelberg, their service rate schedule and finally, a sheet from our in house mechanic that shows the breakout of the hours and parts from Heidelberg.

We would like to resolve this and have the press repaired as soon as possible. We are currently operating the press in a state of degraded performance. If you have any questions or would like to schedule a visit by your adjuster please contact Steve Webber or me

The objection is overruled.

⁶ See n.8.

⁷ The plaintiff objects to this paragraph of the defendants' second statement of material facts as hearsay but makes no attempt to show that Moreau did not hold a position with the plaintiff sufficient to allow his statements to bind the plaintiff as admissions. Plaintiff's Second Responsive SMF ¶ 24. The objection is overruled.

Defendants' First SMF ¶¶ 11, 16, 24; Plaintiff's First Responsive SMF ¶¶ 11, 16, 24. Attached to this letter were two invoices from Orbit Electrical Services totaling \$2,549.50 and an estimate for repairs to be done by Heidelberg USA totaling \$67,679.34. *Id.* ¶ 26. On November 14, 2001 the Hartford Steam Boiler Inspection and Insurance Company ("Hartford") assumed responsibility for investigating and handling the claim. *Id.* ¶ 17. A portion of Brett Grandchamp's November 19, 2001 letter was missing from the November 20 fax to One Beacon; the complete letter was received by One Beacon on November 27, 2001 and forward to Hartford. *Id.* ¶¶ 16-17.

On November 21, 2001 Michael Sjovall, who had taken over as the claims adjuster for Hartford, called and left a message for Brett Grandchamp. Defendant's Second SMF ¶ 27; Plaintiff's Second Responsive SMF ¶ 27. After reviewing the seven-page fax, Sjovall again left a message for Brett Grandchamp on December 11, 2001. *Id.* ¶ 35. The parties dispute the nature and extent of further contact between Sjovall and Brett Grandchamp.

Garth Grandchamp testified that operators of the press were instructed to slow down its speed from 7,500 impressions per hour to 5,000 impressions per hour due to the degraded performance. Defendant's First SMF ¶ 28; Plaintiff's First Responsive SMF ¶ 28. The primary operator of the press, Douglas Vaughn, testified that he was never instructed to slow down the speed of the press; he operated it at an average speed of 8,000 impressions per hour. *Id.* ¶ 30.

Until the press was shut down, the extent of the alleged damage and the scope of any needed repairs could not be known. *Id.* ¶ 34. During the period from September 2001 to May 2002, Mr. Sjovall, a claims adjuster for Hartford, set reserves on the claim for \$68,000. *Id.* ¶¶ 22, 35.⁸

⁸ The plaintiff purports to deny paragraph 35 of the defendants' first statement of material facts, Plaintiff's First (*continued on next page*)

On June 10, 2002 the plaintiff wrote a letter to Sjovall that stated, *inter alia*:

In November of 2001, Brett Grandchamp, Chief Technology Officer faxed a letter to Scott Demarest at Beacon One Insurance [sic] filing a claim for damage to our five color 40" Heidelberg press. A copy is attached.

Although Net 2 Press Inc., has made the printing press available for inspection, the insurer has failed to complete any inspection.

In order to expedite resolution of this claim enclosed please find enclosed documents:

Emergency Repairs	\$11,000.26
Lost Press Time*	\$20,000.00
Heidelberg Repair Estimate	\$67,679.34
Estimated Lost Press Time during Repair**	\$60,000.00
Total	<hr/> \$158,679.60

* 5 days x \$20.00 [sic] hours per day x \$200.00 per hour

** 15 days x 20.00 hours per day x \$200.00 per hour

Please be as kind as to advise me as to when we can expect a final resolution of this matter.

Id. ¶ 37. In connection with this letter, the plaintiff provided the defendants with repair invoices from Orbit Electrical Services and Heidelberg USA. *Id.* ¶ 38. The actual repair costs were less than \$11,000.26 because the plaintiff had improperly accounted for a credit received from Heidelberg USA. *Id.* ¶¶ 39-40. According to the invoices attached to the June 10 letter, the actual cost of repairs incurred by the plaintiff was \$8,790.40. *Id.* ¶ 41. Garth Grandchamp testified that he did not know whether some of the Heidelberg USA invoices related to other issues. *Id.* ¶ 44. Brett Grandchamp assumed at his deposition that all of the Heidelberg USA invoices related to the damage caused by the power surge because they had been sent to Hartford. *Id.* ¶ 46. He indicated that one of the Heidelberg USA invoices pre-dated the

Responsive SMF ¶ 35, but its denial does not address the factual assertions set forth in the text, which are supported by (continued on next page)

plaintiff's discovery of the alleged damage to the press. *Id.* ¶ 47. Garth Grandchamp testified that two of the Heidelberg USA invoices pre-dated the plaintiff's discovery of the alleged damage. *Id.* ¶ 49.

According to Dale Hangland, the Heidelberg USA service technician who actually performed the repair work, the only Heidelberg USA invoices that related to the damage to the press caused by the power surge totaled \$4,358.73. *Id.* ¶ 50.

In the June 10 letter the plaintiff claimed that it experienced press down-time while the repairs had been done, which it estimated as five days. *Id.* ¶ 52.⁹ The plaintiff has not specified the exact dates on which the press was out of service and has been unable to pinpoint the exact number of days during which it was down. *Id.* ¶ 53. It has not provided any evidence showing the value of any allegedly lost print jobs. *Id.* ¶ 57.

When the plaintiff discovered the alleged damage to the press it immediately made an emergency service call to Heidelberg USA. *Id.* ¶ 55. According to Heidelberg USA's records, it received the service call from the plaintiff on September 6, 2001 and performed the repairs on September 10, 2001. *Id.*

The plaintiff has never paid for the additional repairs projected in its June 10 letter because no additional repair work was ever done on the press. *Id.* ¶¶ 58-59. The plaintiff has not experienced any additional press down-time. *Id.* ¶ 60.

On July 10, 2002, in response to the June 10 letter, James Sutton, a senior claims adjuster for Hartford, sent a letter to the plaintiff which stated, *inter alia*:

We are presently reviewing the invoices and the repair estimate. Once I have the results of this review, I will pass them along. However, based on a quick review

the citations to the summary judgment record given by the defendants.

⁹ The plaintiff purports to deny this paragraph of the defendants' first statement of material facts, but in fact it only denies the phrase "for the first time" that is included in that paragraph of the defendants' statement of material facts. Plaintiff's First Responsive SMF ¶ 52. I do not include that temporal qualification in my recitation of the undisputed material facts.

of the documents, it appears the invoice for the completed repair is missing. As such, please forward a copy of the invoice for final completed repair.

In addition, your letter indicates you suffered a business interruption loss. The Boiler & Machinery Form Coverage can address the following,

- a. *Your actual loss from a total or partial interruption of business; and*
- b. *The reasonable extra expense to run your business during the interruption, caused solely by an “accident” to any covered equipment. . . .*

To measure the actual loss we will need to review copies of the plant Profit and Loss statements from January 2001 up through two months after the final repairs were completed. In addition, we will need an itemized list of any sales orders that were lost solely due to the accident to the printing press. Once we have a chance to review these documents, we will be able to assign an accountant to audit the actual loss addressed by the Boiler & Machinery Form Coverage.

The requested documents should be sent to PO Box 604 Gilbertsville, PA 19525-0604.

Id. ¶ 61. The plaintiff did not provide any of the requested documentation in response to this letter. *Id.* ¶ 62.¹⁰ The plaintiff could not provide invoices for “completed repairs” because the projected repairs by Heidelberg USA were never done. *Id.* ¶ 63. The plaintiff has not analyzed whether it has lost profits or business as a result of the alleged damage to the press. *Id.* ¶ 65.¹¹

On July 24, 2002 Sutton sent a fax to the plaintiff stating that “we have requested a consultant to visit the plant in Glen [sic] Falls to gather additional information concerning the damage to the printing press.

The consultants [sic] name is Lou Benbow and he will make arrangements with the plant to visit next

¹⁰ The plaintiff responds to this paragraph of the defendants’ statement of material facts with a qualification, contending that the information sought by Sutton “was irrelevant to the evaluation of the claim for business interruption as it would not show the loss incurred by” the plaintiff, and suggesting a “better means of measuring this loss.” Plaintiff’s First Responsive SMF ¶ 62. In the absence of any citation to authority or even argument suggesting that the defendants were not entitled to determine the amount of the claimed loss in the manner they chose, this qualification lacks merit.

¹¹ The plaintiff responds to this paragraph of the defendant’s statement of material facts with a purported qualification that includes the assertion that “Mr. Dean acknowledges that Net 2 Press, Inc. has done an analysis of whether it sustained lost business or lost profits as a result of the damage to the press.” Plaintiff’s First Responsive SMF ¶ 65. However, the authority cited by the plaintiff in support of that assertion, pages 44-45 of the deposition of Timothy Dean, *id.*, actually constitutes an acknowledgement that the plaintiff has *not* done such an analysis, Exh. 10 to Plaintiff’s First (continued on next page)

week.” *Id.* ¶ 69. On August 2, 2002 Benbow went to the plaintiff’s Glens Falls facility to inspect the press, but, because of a lack of advance notice, the plaintiff did not allow him to inspect the press at that time, instructing him to arrange to come back later. *Id.* ¶ 70

On March 10, 2003, without having inspected the press, Benbow faxed a report to Sutton recommending payment of two invoices from Orbit Electric in the amounts of \$611.50 and \$1,938.00 and two invoices from Heidelberg USA in the amounts of \$3,189.00 and \$2,209.87. *Id.* ¶ 72. On March 19, 2003 Sutton wrote to the plaintiff, stating *inter alia*:

I am writing to confirm we have received no additional documentation concerning this reported loss. Per the attached report from L. Allan Benbow, the policy can address the following costs: [the total of the two Orbit invoices and two Heidelberg invoices minus a \$500 deductible, *to wit* \$7,448.37].

The remaining invoices provided address maintenance and betterment related work on the press. In addition, we have received no documentation of any lost sales resulting from the accident to the oil control system.

In the absence of any additional documentation that would change the loss measurement, we will be requesting Employers Fire Insurance Company to issue their draft in the amount of \$7448.37. Please forward any additional documents you would like us to review to PO Box 604 Gilbertsville, PA 19525-0604. As such, we will hold the file open for another 30 days.

Id. ¶ 73. The plaintiff did not respond to this letter or send any additional documentation to the defendants.

Id. ¶ 74.¹²

In May 2003, having received no additional documentation from the plaintiff, the defendants issued a settlement check to the plaintiff in the amount of \$7,448.37. *Id.* ¶ 75. The plaintiff rejected the settlement payment. *Id.* ¶ 76. On May 19, 2003, together with a letter stating that the settlement payment “does not

Responsive SMF at 44-45.

¹² The plaintiff purports to deny this paragraph of the defendants’ first statement of material facts, Plaintiff’s First Responsive SMF ¶ 74, but its denial refers to a letter dated August 29, 2002, which could not possibly be a response to a (*continued on next page*)

begin to address the damage Net 2 Press, Inc. sustained as a result of an admittedly covered loss,” the plaintiff faxed a courtesy copy of the complaint in this action, which had already been filed, to Sutton at Hartford. *Id.* ¶ 77.

C. Discussion

1. Breach of Contract (Count I). This count alleges breach of the contract of insurance “by failing to pay for the full extent of Net 2 Press Inc.’s covered [loss].” Complaint and Demand for Jury Trial (Docket No. 1) ¶ 33. The defendants contend that they are entitled to summary judgment on this count for several reasons: because they offered to pay the plaintiff for all repair costs actually incurred; because the plaintiff has not produced any evidence of a business interruption loss; because the plaintiff has not produced any evidence of lost profits resulting from the allegedly degraded performance of the press; and because the policy at issue provides no coverage for the plaintiff’s claim for diminution in the value of the press. Defendants’ Motion for Summary Judgment, etc. (“Defendants’ Motion”) (Docket No. 55) at 13-20. The plaintiff responds that the repairs for which costs were incurred were only temporary and the defendants indicated that the costs of the proposed permanent repairs were covered; that it is entitled to reimbursement for estimated business interruption costs under the circumstances; that its calculation of lost profits comports with Hartford’s claims-handling manual; and that it is entitled to recover the diminished value of the press as damages resulting from the breach of the contract even though such damages are not contemplated by the terms of the contract. Net 2 Press, Inc.’s Memorandum of Law in Opposition to Defendants [sic] Motion for Summary Judgment (“Plaintiff’s Opposition”) (Docket No. 65) at 8-18.

a. Repairs

letter dated March 19, 2003. Because the paragraph is supported by the citation given, it is deemed admitted.

The plaintiff does not contend that the language of the insurance policy is ambiguous. Its contention that the defendants should be bound by their actions rather than by the language of the policy, Plaintiff's Opposition at 9-10, is inappropriate in connection with a claim of breach of contract. Under Maine law, if the policy language is not ambiguous, that language governs resolution of the claim of breach. *See, e.g., Western World Ins. Co. v. American & Foreign Ins. Co.*, 180 F.Supp.2d 224, 230 (D. Me. 2002). The defendants rely on the following language from Section IV ("Boiler & Machinery Insurance"), Exh. 8 to Defendant's First SMF at D0098, of the policy at issue:

We will pay you the amount you spend to repair or replace Covered Property directly damaged by the "accident." Our payment will be the smallest of:

- (a) The cost at the time of the "accident" to repair the damaged property with new property of like kind, capacity, size and quality;
- (b) The cost at the time of the "accident" to replace the damaged property on the same site, with other new property:
 - (i) Of like kind, capacity, size and quality; and
 - (ii) Used for the same purpose; or
- (c) The amount you actually spend that is necessary to repair or replace the damaged property.

Defendants' First SMF ¶¶ 2, 80; Plaintiff's First Responsive SMF ¶¶ 2, 80; Exh. 15 to Defendants' SMF.

The defendants contend that their proffer of \$7,948.37, minus a \$500 deductible, as reimbursement for the plaintiff's incurred costs to repair the press, is sufficient under this language. Defendants' Motion at 13-14.

The plaintiff responds that it undertook the repairs at issue "even though the manufacturer's mechanic . . . advised . . . that it should not attempt the temporary emergency repair because it would compromise the integrity of the press" and that it ran the press at "reduced production rates" due to this advice. Plaintiff's Opposition at 8. It contends that the press was not "repaired," but rather "rendered operational," *id.* at 9, and that the defendants are obligated by the policy language to pay the cost of

“permanent and complete” repair of the press, *id.* at 8, which, from all that appears in the summary judgment record, the plaintiff contends has not yet been accomplished. First, it should be noted that the policy provides payment only for the smallest of three alternatives. Next, the language cannot reasonably be read to differentiate between temporary and permanent repairs. The term “repair” is not defined in the policy made available to the court by the defendants. The dictionary definition of the word is “to restore by replacing a part or putting together what is torn or broken; fix, mend.” *Webster’s Third New Int’l Dictionary* (1981) at 1923. *See also Hall v. Acadia Ins. Co.*, 801 A.2d 993, 995 (Me. 2002) (using same definition of “repair”). It is undisputed that the press continued to run after it was “rendered operational.” It was “put together” or “mended.” This conclusion is reinforced by the fact that, by the terms of the plaintiff’s own argument, it chose to run the press after the repairs despite the warning from the mechanic that further damage was likely. Any further damage therefore arose from the plaintiff’s actions rather than from the “accident” for which coverage was provided under the policy. The fact that the defendants considered paying for further repairs or replacement, Plaintiff’s Opposition at 9, does not mean that the policy language required them to do so. The policy language specifies that coverage is provided for the cost of repair or replacement “at the time of the ‘accident,’” not at some time thereafter.

The plaintiff next contends that the defendants were required by the terms of the policy to pay for the cost of repair, as the plaintiff defines it, regardless of whether the insured had actually incurred the cost. Plaintiff’s Opposition at 10-11. It ignores the policy language cited by the defendants, which plainly contemplates that the insured will be reimbursed under the policy for amounts already spent: “We will pay you the amount you spend to repair or replace;” payment will be “[t]he amount you actually spend.” Defendants’ SMF ¶ 80; Plaintiff’s First Responsive SMF ¶ 80. The plaintiff relies instead on the following language from another portion of the policy at issue:

In the event of loss or damage covered by this Coverage Form, at our option, we will either:

- (1) Pay the value of lost or damaged property; [or]
- (2) Pay the cost of repairing or replacing the lost or damaged property

Exh. 8 to Plaintiff's First Responsive SMF, at D 0145. Assuming that this policy language applies to the loss at issue,¹³ it does not contradict the more specific language on which the defendants rely. Contrary to the plaintiff's contention, this language may not reasonably be interpreted to exclude the possibility that payment will be made only after the insured has actually incurred the cost of repairing or replacing the damaged property. When considered together with the more specific language from the boiler and machinery coverage upon which the defendants rely, this language supports the interpretation that the insurer will pay after the insured has actually incurred the cost of repair or replacement.

The plaintiff contends that, "[t]o the extent that the Insurer now argues that payment of loss is premised on something other than completion of the investigation of the claim the Insurer admits a violation of' 24-A M.R.S.A. § 2436-A. Plaintiff's Opposition at 11. This assertion has no apparent bearing on the question whether the defendants breached the contract of insurance. The cited statute merely provides a private cause of action for unfair claims settlement practices; it does not purport to establish a contractual term governing the relationship of insurers and their insureds.

¹³ The plaintiff does not include this policy language in its statement of material facts, but the defendants have not objected to the plaintiff's failure to do so and do not contend that the excerpts provided by the plaintiff in this exhibit are not part of the policy at issue. However, it is impossible to tell from the portions of the policy provided by the plaintiff whether the language on which it relies is intended to apply to all coverages provided under the policy or whether it comes from one of the three other "form coverages," Exh. 8 to Plaintiff's First Responsive SMF, at D 0098, which presumably would not apply to the loss at issue here, which is covered by the Boiler and Machinery Form Coverage. The language quoted by the plaintiff seems more likely to have come from one of the other form coverages rather than language intended to be common to all form coverages, since it refers to "this Coverage Form," but because the cited language does not contradict the more specific language of the form agreed to apply to this claim, that question need not be resolved.

b. Business Interruption

The defendants contend that they have not breached the insurance contract by failing to pay for any business interruption loss incurred by the plaintiff because the plaintiff has not produced any evidence of actual loss or extra expense incurred. Defendants' Motion at 15-18. In response, the plaintiff relies on estimates of down time and explains the lack of documentation in support of its estimates by the defendants' alleged failure to comply with its adjuster's claims handling manual. Plaintiff's Opposition at 12-14.

The policy language on which the defendants rely provides:

We will pay:

- a. Your actual loss from a total or partial interruption of business; and
- b. The reasonable extra expense to run your business during the interruption, caused solely by an "accident" to any covered equipment[.]

Defendants' First SMF ¶ 81; Plaintiff's First Responsive SMF ¶ 81. While some evidence of actual loss from interruption of business and extra expense to run the business is required in order to succeed on a claim that this portion of the insurance policy was breached, as well as proof that such evidence was provided to the defendants, *see, e.g., Net 2 Press, Inc. v. 58 Dix Avenue Corp.*, 266 F.Supp.2d 146, 171 (D. Me. 2003), the law does not require that such evidence be in documentary or any other particular form. In this case, the plaintiff has provided evidence, albeit disputed by the defendants, that it informed the defendants by November 29, 2001 that the press had been down approximately five days for twenty hours per day "calculated at \$200.00 per hour;" Additional Relevant Material Facts Pursuant to Local Rule 56(c) ("Plaintiff's First SMF") (included in Plaintiff's First Responsive SMF beginning at 12) ¶¶ 9-10; that it expected to incur \$60,000 in down time while additional repairs were performed on the press, Defendants' First SMF ¶¶ 56-58; Plaintiff's First Responsive SMF ¶¶ 56-58; and that the press's run rate may have

been reduced after the initial repair, resulting in a financial loss, *id.* ¶ 64.¹⁴ The defendants’ attack focuses on the quality or weight of this evidence, which are not factors to be considered in connection with a motion for summary judgment. On this aspect of the claim for breach of the insurance contract, the defendants have not established their entitlement to summary judgment.¹⁵

c. Diminished Value

The plaintiff claims that the defendants also breached the insurance contract by failing to reimburse it for the diminution in value of the press caused by the “accident.” Complaint ¶¶ 33-34; Plaintiff’s Opposition at 14-16. It values this claim at \$1.6 million, the net cost of a replacement press which it purchased, Plaintiff’s Opposition at 15-16, although the complaint asserts that the lost value of the press is \$525,000, Defendants’ First SMF ¶ 79; Plaintiff’s First Responsive SMF ¶ 79. The defendants contend that the policy provides only for repair or replacement costs actually incurred as a direct result of the accident and not for diminished value. Defendants’ Motion at 19.

The defendants’ interpretation of the applicable policy language, quoted above in section I(C)(1)(a) of this opinion, is correct. The defendants cannot have breached the insurance contract by refusing to

¹⁴ In order to resolve this aspect of the defendants’ motion for summary judgment, it is not necessary to determine whether the plaintiff’s method of computing its alleged damages for business interruption “comports with” the defendants’ claims-handling manual, as the plaintiff asserts, or whether that manual has any legal effect whatsoever with respect to the issues in this case.

¹⁵ The defendants argue briefly that the policy does not provide coverage “for lost profits per se,” but only for the actual loss of business income. Defendants’ Motion at 18. In their reply memorandum, they respond to the plaintiff’s contention that lost profits are covered by citing a different portion of the policy which provides that loss of business income will be reimbursed only when it is sustained “due to the necessary suspension of your ‘operations’ during the period of restoration.” Defendants’ Reply Brief Concerning Its [sic] Motion for Summary Judgment, etc. (Docket No. 67) at 5. Since the press continued to operate, the defendants contend, lost profits from its allegedly degraded performance are not recoverable. *Id.* Again, it is not clear from the portions of the policy provided by the parties that this language applies to Part IV, the boiler and machinery coverage, in which the more specific business-interruption language quoted in the text appears. If the language of the two provisions is applicable to this claim, and if the language from Part IV may reasonably be interpreted to conflict with the language on which the defendants now rely, the former language should control the insurers’ liability. See *Acadia Ins. Co. v. Mascis*, 776 A.2d 617, 620 (Me. 2001) (conditions and exceptions in insurance contract are construed strictly against insurer and liberally in favor of insured); *Pine Ridge Realty, Inc. v.* (continued on next page)

reimburse the plaintiff for the diminished value of the press after the accident and before further harm, if any, was caused to the press by the plaintiff's election to undertake "temporary" repairs against the advice of the manufacturer's mechanic. The policy provides coverage only for repair or replacement. *See also Hall*, 801 A.2d at 995 (insurer liable under policy for cost of "repair" not liable for losses associated with diminished value). This may explain why the plaintiff in its brief now contends that it is entitled to reimbursement for the net purchase price of a replacement press.

That claim is foreclosed by the policy language as well. The insurer is obligated to pay only "the smallest of" the cost at the time of the accident to repair the press, the cost at the time of the accident to replace the press with a like unit, or the amount actually spent that was necessary to repair or replace the press. Defendants' First SMF ¶ 80; Plaintiff's First Responsive SMF ¶ 80. The plaintiff has not taken the position in this action that effective repair of the press was impossible at the time of the accident; it admits that the press could have been repaired at that time "to the condition it was in prior to the accident." Plaintiff's Opposition at 15. Given that admission, there can be no breach of contract for failure to pay for a replacement unit. I have already determined that the plaintiff has failed to provide evidence that would allow a reasonable factfinder to conclude that the defendants breached the insurance contract by failing to pay for what the plaintiff characterizes as "permanent" repairs, as distinct from the "temporary" repairs which the plaintiff chose to undertake in the face of the manufacturer's warnings that such repairs could cause further damage. The defendants are entitled to summary judgment on this aspect of Count I.

Massachusetts Bay Ins. Co., 752 A.2d 595, 599 (Me. 2000) (where terms of policy and binder conflict, they are construed together with most liberal provision in favor of insured controlling).

2. *Counts II and III (Statutory Violations)*. The complaint alleges that the defendants violated 24-A M.R.S.A. §§ 2436 and 2436-A. Complaint ¶¶ 36-45. The defendants seek summary judgment on both claims. The plaintiff seeks summary judgment on Count III.

a. Count II

The statute invoked by the plaintiff in this count provides, in relevant part:

A claim for payment of benefits under a policy . . . of insurance delivered . . . in this State is payable within 30 days after proof of loss is received by the insurer and ascertainment of the loss is made either by written agreement between the insurer and the insured . . . or by filing with the insured . . . of an award by arbitrators as provided in the policy. . . . A claim that is neither disputed nor paid within 30 days is overdue. If, during the 30 days, the insurer, in writing, notifies the insured . . . that reasonable additional information is required, the undisputed claim is not overdue until 30 days following receipt by the insurer of the additional requested information

24-A M.R.S.A. § 2436(1). The statute provides a remedy of interest on the overdue claim at the rate of 1½% per month. 24-A M.R.S.A. § 2436(3). The term “proof of loss” is not defined in the statute or in any other provision of the chapter of Title 24-A in which the statute appears.

The defendants contend that the statutory 30-day period never began to run because the plaintiff never submitted a proof of loss. Defendants’ Motion at 20. The plaintiff’s only response is that the policy requires the insurer to send a proof-of-loss form to the insured, which the insured must return within 60 days. Plaintiff’s Opposition at 18. Since the defendants admittedly did not send such a form to the plaintiff, Plaintiff’s First SMF ¶ 5; Defendants’ Reply to Plaintiff’s Statement of Additional Material Facts, etc. (“Defendants’ First Responsive SMF”) (Docket No. 68) ¶ 5, the plaintiff contends that it could not have submitted a proof of loss. *Id.*¹⁶ However, assuming *arguendo* that the policy may reasonably be read to

¹⁶ The plaintiff goes on to assert that “the failure to send out the proof of loss notice would seem in and of itself a (continued on next page)

require the insurer to send the form to the insured upon receipt of notice of a potential claim, this argument does not state a claim under the statute; by the terms of the plaintiff's scenario, no proof of loss was ever received by the insurer. The terms of the statute thus were not triggered. If the defendants somehow prevented the plaintiff from filing proof of loss — an unlikely scenario, since there is no evidence that the defendants would have refused to accept a “proof of loss” that was not filed on their own form — the plaintiff is not necessarily without a remedy. It is simply without a remedy under section 2436.

The plaintiff also contends that the insurer was required by the terms of its own claims-handling manual to “respond upon receiving a statement from the insured outlining the loss” and that the required response was to send out a “proof of loss notice.” *Id.* at 19 (internal quotation marks omitted). Assuming *arguendo* that the claims-handling manual has any legal force or effect with respect to this issue, this argument is merely a restatement of the assertion already made — that the insurer's failure to send the plaintiff the form on which it could submit its proof of loss entitles the plaintiff to recover under the late payment statute. For the reasons already discussed, that claim fails. The defendants are entitled to summary judgment on Count II.

b. Count III

The statute invoked by Count III provides, in relevant part:

1. Civil actions. A person injured by any of the following actions taken by that person's own insurer may bring a civil action and recover damages, together with costs and disbursements, reasonable attorney's fees and interest on damages at the rate of 1½% per month;

A. Knowingly misrepresenting to an insured pertinent facts or policy provisions relating to coverage at issue;

violation of the statute.” Plaintiff's Opposition at 19. Nothing in the language of section 2436 supports this argument.

B. Failing to acknowledge and review claims, which may include payment or denial of a claim, within a reasonable time following receipt of written notice by the insurer of a claim by an insured arising under a policy;

* * *

D. Failing to affirm or deny coverage, reserving any appropriate defenses, within a reasonable time after having completed its investigation related to a claim; or

E. Without just cause, failing to effectuate prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear.

2. Without just cause. For the purposes of this section, an insurer acts without just cause if it refuses to settle claims without a reasonable basis to contest liability, the amount of any damages or the extent of any injuries claimed.

24-A M.R.S.A. § 2436-A(1) & (2). The complaint appears to invoke only subsection (1)(E) of the statute. Complaint ¶¶ 42-45. The defendants contend that the plaintiff breached its duty under the policy to cooperate in the insurer's investigation by refusing to allow the defendants to inspect the press and by failing to provide documentation that they requested, thus preventing the defendants from promptly and fairly settling the claim; that the plaintiff cannot establish that liability ever became reasonably clear because it "never produced any evidence supporting the amount of its alleged loss;" and that it actually offered an amount in settlement that exceeded the amount of the plaintiff's injury. Defendant's Motion at 22-23. The plaintiff conflates its response to these arguments with its response to the defendant's argument concerning Count II. Plaintiff's Opposition at 18-19. The defendants' position with respect to the proof of loss is not particularly relevant to its arguments concerning Count III, which invokes a statute that does not use that term. The extent of the plaintiff's response with respect to Count III appears to be the assertion that "[t]he factually [sic] record is replete with the Insurer's failure to take even minimal action to effect a resolution of this claim, and preclude [sic] summary judgment on . . . the Unfair Claims Practice Act." *Id.* at 19.

Despite this insufficient response, which is perhaps explained by the plaintiff's reliance on its own motion for summary judgment on this count, I have already determined that the plaintiff has provided sufficient evidence of damages, or "the amount of the alleged loss," and the amount offered in settlement, while it may have exceeded the costs of repair actually incurred by the plaintiff, did not necessarily exceed the claimed amount of the business interruption loss. The defendants accordingly are not entitled to summary judgment on Count III based on their second and third arguments. With respect to the first argument, the factual assertions cited by the defendants in support of their contention that the plaintiff failed to allow it to investigate the claim are disputed. Defendants' Motion at 22; Defendants' First SMF ¶¶ 70-71; Plaintiff's First Responsive SMF ¶¶ 70-71. The factual assertions underlying the defendants' contention that the plaintiff did not provide them with the information requested in the course of their investigation are not effectively disputed by the plaintiff. Defendants' Motion at 22; Defendants' First SMF ¶¶ 62, 74; Plaintiff's First Responsive SMF ¶¶ 62, 74. Whether those failures to provide information, standing alone, are sufficient to establish a "reasonable basis to contest liability" or otherwise to absolve the defendants of liability under section 2436-A cannot be resolved as a matter of law. For that reason, along with the disputed factual basis for the defendants' contention that the plaintiff blocked its investigation, the defendants are not entitled to summary judgment on Count III.

The plaintiff contends that it is entitled to summary judgment on this count because the defendants failed to comply with the term of their claims-handling manual that requires the insurer to propose a settlement to or request additional information from its insured within 30 days of receiving a statement from the insured outlining the loss. Net 2 Press, Inc's Motion for Partial Summary Judgment, etc. ("Plaintiff's

Motion”) (Docket No. 59) at 3.¹⁷ It contends that it notified the insurer of its loss “on October 12, 2001,” but that the defendants did nothing within 30 days after receiving that notice. *Id.* at 5. Again, the plaintiff provides no citation to its statement of material facts to support these assertions. It apparently means to refer to paragraphs 2 and 5-8 of its statement of material facts. Plaintiff’s Second SMF ¶¶ 2, 5-8. However, paragraph 2 of that document cannot reasonably be read to show that the October 12 notification was, in the language of the defendants’ claims-handling manual, “a statement from the insured outlining the loss.” The plaintiff asserts in the alternative that its letter of November 19, 2001 served this purpose, Plaintiff’s Motion at 6-7, and that assertion finds more support in its statement of material facts, Plaintiff’s Second SMF ¶ 3 (notice provided “of how, when and where the loss occurred and included an estimate for damages”). The defendants have appropriately disputed this factual assertion. Defendants’ Second Responsive SMF ¶ 3. Even if that were not the case, the plaintiff’s necessarily implied contention that the defendants’ claims-handling manual defines fair claims-handling practices as a matter of law, for which it cites no authority, is inconsistent with Maine law suggesting that section 2436-A should be strictly construed. *See Burne v. John Hancock Mut. Life Ins. Co.*, 403 A.2d 775, 777 (Me. 1979) (section 2436 must be strictly construed because provision for interest on overdue claims is penal; section 2436-A has identical provision). While a particular insurer’s internal procedures for handling claims may be some evidence of what “prompt, fair and equitable settlement of claims” might be and when “liability has become reasonably clear,” in the language of section 2436-A, it cannot determine what those terms mean in every case as a matter of law, particularly when the statute itself defines “just cause” in terms of “a reasonable basis to contest liability.” On the state of the summary judgment record in this case, such determinations can

¹⁷ Curiously, much of the plaintiff’s argument is based on the language of 24-A M.R.S.A. § 2436, Plaintiff’s Motion at 4-6, (continued on next page)

only be made by the factfinder. Accordingly, the plaintiff is not entitled to summary judgment on the basis of its first argument.

The plaintiff offers as a second basis for summary judgment in its favor on Count III the assertion that “[a]s of March 27, 2002 there was no issue of liability” because the defendants’ adjuster suggested setting reserves of \$65,000 on the plaintiff’s claim on that date. Plaintiff’s Motion at 6-7. Again, the plaintiff cites no authority to support its necessarily implied assertion that the setting of reserves by an insurer — assuming that the defendants in fact followed the adjuster’s recommendation — is the equivalent of an admission of liability in that amount. The only factual information in the summary judgment record is undisputed and directly to the contrary. Defendants’ Second SMF ¶ 40; Plaintiff’s Second Responsive SMF ¶ 40. The plaintiff accordingly is not entitled to summary judgment on this basis.

3. *Good Faith and Fair Dealing (Count IV)*. The complaint alleges that the defendants breached an implied covenant of good faith and fair dealing by failing to pay for the cost of business interruption incurred or to be incurred and by sending an unsolicited settlement check “in order to have the Plaintiff inadvertently cash the check and be estopped from pursuing a claim for the full amount of damages.” Complaint ¶¶ 48-50. The defendants agree that “an implied covenant of good faith and fair dealing exists in every insurance contract” under Maine law, but contend that the plaintiff “has not met its burden of proving that the Defendants investigated the claim in bad faith or unfairly.” Defendants’ Motion at 23-24. This assertion does not appear to meet the thrust of the allegations in the complaint about the nature of the allegedly breaching activity. The defendants do not address the claims concerning business interruption at all.¹⁸ They

while it clearly is seeking summary judgment on the claim that it asserts under 24-A M.R.S.A. § 2436-A.

¹⁸ The defendants do offer a general, conclusory argument that the “implied covenant claim must . . . fail because [the plaintiff] has not produced evidence of any damages flowing from the alleged breach of the implied covenant.” Defendants’ Motion at 24-25. I have concluded that the plaintiff has produced evidence of such damages.

address the second claim by asserting that their settlement offer exceeded the repair cost actually incurred and therefore cannot constitute evidence of bad faith, contending as well that the setting of reserves on the claim in the amount of \$68,000, Defendants' First SMF ¶ 35, demonstrates their willingness "to reimburse [the plaintiff] fully for its covered loss once [the] repairs were complete." *Id.* at 24. While this may well be evidence that the defendants did not act in bad faith as to the plaintiff's claim arising from the settlement offer, it cannot be considered dispositive as a matter of law.

The plaintiff's response on this issue refers generally to several arguments, without reference to supporting factual assertions. Plaintiff's Opposition at 20. To the extent that I can discern the evidence offered by the plaintiff that relates to these arguments, I conclude that the plaintiff has raised disputed factual issues with respect to this claim. Plaintiff's First SMF ¶¶ 6-10, 12, 14-16. The defendants are not entitled to summary judgment on Count IV.

II. Motion to Exclude

The plaintiff moves to exclude the testimony of Louis Benbow and Paul Kamage, designated by the defendants as expert witnesses. Plaintiff's Motion . . . to Exclude the Defendant's [sic] Experts Louis Benbow and Paul Kamage ("Expert Motion") (Docket No. 31)¹⁹ at [1]. It contends that Benbow may not testify because he "never viewed the damaged part of the press, nor its emergency repair," did not conduct any tests of the press, and is not qualified to give an expert opinion concerning the press. *Id.* at [3]-[11]. It

¹⁹ Following a telephone conference I held with counsel in this case on August 3, 2004, the plaintiff filed another motion with the same title, somewhat modified in substance. Docket No. 58. In response, the defendants filed an opposition (Docket No. 64) that appears to be identical to the opposition filed in response to the first-filed motion. Nothing in my order issued following the telephone conference (Docket No. 52) required or permitted the plaintiff to re-file or modify its motion to exclude the testimony of Benbow and Kamage. The filings identified as Docket Number 58 and Docket Number 64 are stricken. I consider here the motion and associated papers as originally filed.

seeks exclusion of Kamage's testimony because, it asserts, his testimony is based entirely on that of Benbow, which must be excluded. *Id.* at [11]-[13].

Federal Rule of Evidence 702 imposes an important gatekeeper function on judges by requiring them to ensure that three requirements are met before admitting expert testimony: (1) the expert is qualified to testify by knowledge, skill, experience, training, or education; (2) the testimony concerns scientific, technical, or other specialized knowledge; and (3) the testimony is such that it will assist the trier of fact in understanding or determining a fact in issue.

Correa v. Cruisers, Div. of KCS Int'l, Inc., 298 F.3d 13, 24 (1st Cir. 2002) (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589, 592 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999)).

The defendants assert that "Benbow's expert opinion is that the Press did not need any further repairs because it was printing in a proper and commercially acceptable manner when he evaluated it in August 2003, almost two years after the 'temporary' repairs had been done." Defendants' Opposition to Plaintiff's Motion to Exclude Expert Testimony, etc. ("Expert Opposition") (Docket No. 36) at 4. According to the defendants, Benbow "bases his opinion on his inspection of the damaged parts that had been removed . . . , his understanding of the repairs that were done, as explained to him by [the plaintiff], and his evaluation of how the Press was printing." *Id.* The plaintiff does not take issue with this summary of Benbow's opinion and the basis for it.

The plaintiff argues that Benbow is not qualified to testify to this opinion because he has only testified as an expert once; he has only belonged to the relevant professional association for two or three years and "holds no position with" that organization; he "has no courses in metallurgy" or engineering; he has not been in the business of repairing printing presses since 1993 or 1994; and he has never done any repairs to a cylinder journal on the brand of press involved in this case. Expert Motion at [8]-[9]. The defendant

responds with a extensive summary of Benbow's qualifications. Expert Opposition at 2-3. He clearly has the knowledge, experience and training to opine that a particular printing press is not in need of further repair based on its current performance. Contrary to the plaintiff's argument, Benbow need not have himself repaired the particular part of the particular brand of press involved in this case in order to be qualified to express such an opinion. *See generally DaSilva v. American Brands, Inc.*, 845 F.2d 356, 361 (1st Cir. 1988) (expert witness need not have design experience with specific machine in question in order to be qualified to testify regarding its design). The plaintiff's remaining assertions, at best, go to the weight of Benbow's opinion, not to its admissibility.

The plaintiff contends that Benbow's opinion does not concern scientific, technical or other specialized knowledge because he did not perform any technical or scientific testing of the press. Expert Motion at [10]-[11]. It contends that Benbow was required to measure the press itself, or some unidentified part of the press, in order to conclude that the repairs that had been done were adequate. *Id.* at [11]. It offers no authority for this assertion. I see no reason why an opinion that a printing press was performing adequately two years after the repairs in question were made may only be based on measurements of some part of the press itself, as opposed to examination of the product produced by the press. Again, at best, this argument goes to the weight of Benbow's opinion rather than its admissibility.

Finally, the plaintiff argues that Benbow's opinion will not assist the jury to determine a fact in issue because he has never viewed the damaged part of the press or its actual repair. In determining whether a proposed expert's testimony will assist the trier of fact, a court must ask "whether the untrained layman would be qualified to determine intelligently and to the best degree the particular issue without enlightenment from those having a specialized understanding of the subject matter involved." *United States v. Shay*, 57 F.3d 126, 132 (1st Cir. 1995) (citation and internal punctuation omitted). In general, an untrained layman

could not determine whether the printing press at issue was operating adequately two years after the damage at issue occurred, although perhaps he or she could conclude, based on that determination, that the repair performed two years earlier was sufficient. The plaintiff does not address this test directly. Instead, it asserts that “[i]t follows that if one cannot offer an opinion about the nature and extent of the damage, then they have no foundation upon which to premise a conclusion as to whether a repair was sufficient to remedy any damage.” *Id.* at [5]. To the contrary, it is entirely possible to conclude that a repair was sufficient, based on one’s experience and knowledge, by observing that the performance of the repaired machine was adequate after two years of continuous use following the repair. The plaintiff goes on to challenge Benbow’s reliance on a GATF (Graphic Arts Technical Foundation) test performed on the press by the plaintiff at Benbow’s request. *Id.* at [5]-[6]. It contends that the test is unreliable because Benbow relied only on a visual examination of the results rather than applying unspecified numerical or other objective standards to the results. *Id.* at [6]-[7].²⁰ The fact that an expert’s opinion is based on his informed, subjective analysis of data does not make that opinion inadmissible. Again, the plaintiff’s argument goes to the weight of the opinion rather than its admissibility.²¹

The plaintiff’s objection to Kamage’s proposed testimony is solely that it is based on Benbow’s inadmissible opinions. *Id.* at [11]-[13]. The defendants dispute this characterization of Kamage’s proposed testimony, Expert Opposition at 10-11, but it is not necessary to consider that question because I have rejected the premise that underlies the plaintiff’s sole argument. On the showing made, Benbow’s

²⁰ The plaintiff also faults Benbow for not retaining “all of his GATF tests.” Expert Motion at [7]. Since the plaintiff conducted the test at Benbow’s request, the plaintiff presumably could have retained copies of the results itself. Again, this observation goes to the weight of Benbow’s testimony rather than its admissibility, if it has any relevance at all.

²¹ The plaintiff also contends that Benbow “assert[ed] that the GATF test “is inadmissible” and asks “If the underlying test is inadmissible, then how can Mr. Benbow’s conclusion be admissible?” Expert Motion at [7]. Assuming *arguendo* that the plaintiff characterizes Benbow’s testimony correctly and that a witness’s view of the admissibility of potential (continued on next page)

proposed opinion testimony is not inadmissible. Accordingly, Kamage's testimony, to the extent that it is based on Benbow's opinion, is not inadmissible for that reason.

III. Conclusion

For the foregoing reasons, (i) the plaintiff's motion to exclude the expert testimony of Louis Benbow and Paul Kamage (Docket No. 31) is **DENIED**; and I recommend that (ii) the plaintiff's motion for partial summary judgment (Docket No. 59) be **DENIED** and that (iii) the defendants' motion for summary judgment (Docket No. 55) be **GRANTED** as to Count II and any portion of Count I other than a claim based on business interruption and otherwise **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 22nd day of September, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

evidence is valid, Fed. R. Evid. 703 makes clear that an expert may testify to opinions that are based on evidence that is
(continued on next page)

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