

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

UNCLE HENRY'S, INC.,)	
)	
PLAINTIFF)	
)	
v.)	Civil No. 01-180-B-H
)	
PLAUT CONSULTING, INC.,)	
)	
DEFENDANT)	

**ORDER AFFIRMING RECOMMENDED AND MEMORANDUM
DECISIONS AND ORDERS OF THE MAGISTRATE JUDGE**

I. MOTIONS TO STRIKE AND MOTION FOR SUMMARY JUDGMENT

The United States Magistrate Judge filed with the court on October 21, 2002, with copies to counsel, his Memorandum Decision on Parties' Motion to Strike and Recommended Decision on Defendant's Motion for Summary Judgment.

The plaintiff filed an objection to the Recommended Decision on November 8, 2002, its motion for reconsideration of the recommendations on November 14, 2002, and its amended motion for leave to file supplemental appendix and supplemental statement of facts on November 14, 2002. The Magistrate Judge issued his Memorandum Decision on Plaintiff's Motions for Reconsideration and for Supplementation of the Record on December 17, 2002.

I agree with the Magistrate Judge's decision denying the plaintiff leave to file supplemental appendix and supplemental statement of facts so far as the motion to reconsider directed to him is considered; and, after *de novo* review, I adopt the

Magistrate Judge's decision as my own in determining the record for purposes of my review of the objections to his Recommended Decision. Under the clearly erroneous review standard, I **AFFIRM** his rulings on the motions to strike. Upon *de novo* review, I **AFFIRM** the Magistrate Judge's Recommended Decision on the Motion for Summary Judgment as amended by the Magistrate Judge's Memorandum Decision on motions for reconsideration as follows:

1. The plaintiff's motions to strike are **GRANTED IN PART** and **DENIED IN PART**.
2. The defendant's motion to strike is **GRANTED**.
3. The defendant's motion for summary judgment is:
 - (i) **GRANTED** with respect to Counts I and VI of the Amended Complaint and Plaut's Eighth Affirmative Defense;
 - (ii) **GRANTED** with respect to Counts III and IV as to all claims, except for that pertaining to Statement No. 1;
 - (iii) **GRANTED** with respect to Count V, except as it pertains to the period from July 18, 2001 through August 23, 2001; and
 - (iv) otherwise **DENIED**.

As to all Counts of the Amended Complaint that survive summary judgment, the Court **DECLARES** and **ADJUDGES** that:

1. Plaut shall in no event be liable to Uncle Henry's except for actual damages;
2. Plaut shall in no event be liable for damages in an amount in excess of the full amounts paid or payable under the statement of work ("SOW") (*i.e.*, \$645,100), plus reasonable attorney fees up to twenty percent of the amount reflected in the SOW (*i.e.*, \$129,020); and

3. Plaut shall in no event be liable to Uncle Henry's for consequential, incidental, special or indirect damages (including loss of profits or business opportunities), damages for loss of or damage to recorded data, or damages suffered by third parties.

The following remain for trial (in addition to Plaut's counterclaims, as to which no dispositive motion was filed):

- (i) Count II of the Amended Complaint;
- (ii) To the extent they bear on Statement No. 1 only, Counts III and IV of the Amended Complaint; and
- (iii) To the extent it pertains to the period from July 18, 2001 through August 23, 2001, Count V of the Amended Complaint.

II. DEFENDANT'S MOTION TO AMEND

The Magistrate Judge issued his Recommended Decision on Defendant's Motion to Amend on October 21, 2002. The time within which to file objections expired on November 7, 2002, and no objections have been filed. The Magistrate Judge notified the parties that failure to object would waive their right to *de novo* review and appeal.

It is therefore **ORDERED** that the Recommended Decision of the Magistrate Judge is hereby **ADOPTED**. The defendant's motion to amend paragraph 43 of its Answer is **GRANTED**. The defendant is directed to file and serve forthwith an Amended Answer and Counterclaim limited to an amendment of paragraph 43 of the Answer, as proposed in its motion.

III. DEFENDANT'S MOTION TO EXCLUDE TESTIMONY

No response has been filed to defendant's Motion to File Additional Memorandum and Incorporated Memorandum in Support of Motion to Exclude Testimony of Plaintiff's Expert Raymond Neveau. The motion is **GRANTED**.

Ruling on the defendant's motion to exclude testimony is **RESERVED**. It is **ORDERED** that at the final pretrial conference, counsel shall inform the Court which experts remain in controversy following these summary judgment rulings and any further discussion between counsel.

So ORDERED.

DATED: JANUARY 9, 2003

D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

U.S. District Court
District of Maine (Portland)
Civil Docket For Case #: 01-CV-180

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