

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

GEORGE MILLER BRICK CO., INC.,

Plaintiff,

DECISION AND ORDER

Index No. 1995/01001

v.

STARK CERAMICS, INC.,

Defendant.

In 1995, plaintiff George C. Miller Brick Co., Inc. (Miller), a distributor of brick and tile products, commenced this antitrust action under the Donnelly Act (General Business Law § 340 et seq.) against a supplier, defendant Stark Ceramics, Inc. (Stark), seeking treble damages based on allegations of bid rigging and price fixing in April 1991 in connection with the award of a contract for structural glazed facing tile on a construction project at the Albion Correctional Facility. The matter has been bifurcated for trial, the court (Stander, J.) having previously ordered separate trials on the issues of liability and damages.

Before the court are two motions brought by Miller. The first motion seeks an order (1) prohibiting Stark from putting on evidence or argument for the purpose of "explaining away" the response to interrogatory No. 18 (c); (2) prohibiting Stark from advising the jury that damages for a Donnelly Act violation are

trebled; and (3) allowing evidence during the liability portion of the trial of Miller's termination as a distributor of Stark's products. The second motion seeks an order reconsolidating the trial.

BACKGROUND

Miller was Stark's exclusive distributor in the Rochester area. John H. Black Co. (Black) was Stark's exclusive distributor in the Buffalo area, which includes the Albion Correctional Facility. This action is based on allegations that, after Miller was awarded the prison contract, it was pressured by Stark to relinquish the contract and to withdraw its bid so that, upon a rebidding, Black would be awarded the contract. Miller, fearful of losing its distributorship, cooperated with Stark on the condition that Black fix its price at \$109,000. Upon the rebidding, Miller then followed Stark's direction and submitted a bid six percent higher. After Black was awarded the contract, it demanded that Stark pay it \$4,000, representing the difference between Miller's original bid and Black's subsequent bid. Stark made the payment to Black and then terminated Miller's distributorship, allegedly because it blamed Miller for having to make the payment to Black. Miller claims damages arising from the loss of the contract and the termination of its distributorship.

Previously, it was determined by the Fourth Department that

the action, as pled, alleges a vertical price fixing scheme that is a per se violation of the Donnelly Act (*George C. Miller Brick Co. v Stark Ceramics*, 2 AD3d 1341, 1343; see *Business Elecs. Corp. v Sharp Elecs. Corp.*, 485 US 717, 735-736 [1980]). The only remaining allegation of concerted action under the Act involves a conspiracy between Miller, itself, and Stark,¹ distinguishing this case from *Monsanto Co. v Spray Rite Corp.* (465 US 752 [1984] *reh denied* 466 US 994). Although the only remaining allegation of concerted action involves Miller and Stark, there is an actionable wrong under the Donnelly Act because Miller alleges it was coerced to participate in the illicit scheme (see *Simpson v United Oil Co. of California*, 377 US 13 [1964], *reh denied* 377 US 949; *Isaksen v Vermont Castings*, 825 F2d 1158, 1162-1163 [7th Cir 1987], *cert denied* 486 US 1005; *Ring v Spina*, 148 F2d 647 [2d Cir 1945]; *Rochez Bros. v North Amer. Salt Co.*, 1994 WL 735932 at 3 [US Dist Ct, WD Pa 1994]).² Moreover, the "in pari delicto" defense is not applicable to private antitrust actions such as this (see *Perma Life Mufflers v*

¹ Although initially Black was named as a codefendant, in 1999 Black was granted summary judgment dismissing the action against it and thereafter the action was discontinued against Black.

² The Donnelly Act is "construed in light of Federal precedent and given a different interpretation only where State policy, differences in statutory language or legislative history justify such a result" (*Anheuser-Busch v Abrams*, 71 NY2d 327, 335; see *X.L.O. Concrete v Rivergate*, 83 NY2d 513, 518).

Intl. Parts Corp., 392 US 134, 140 [1968] overruled on other grounds *Cooperweld Corp. v Independence Tube Corp.*, 467 US 752, 765-766 [1984]; see also *Bindt Corp. v Inflight Advertising*, 285 AD2d 309, 314). A private antitrust action "may be barred on the grounds of the plaintiff's own culpability only where (1) as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress, and (2) preclusion of suit would not significantly interfere with the effective enforcement of the [antitrust laws] and protection of the ... public" (*Bateman Eichler, Hill Richards v Berner*, 472 US 299, 310-311 [1985]).

Vertical Restraint of Trade and Defendant's Monsanto Argument

In view of the implication in defendant's motion papers and its express position at oral argument that it will be entitled to a directed verdict at the end of plaintiff's case, and particularly in view of the court's remarks during oral argument that acceptance of defendant's *Monsanto* argument might indeed entitle it to judgment as a matter of law, the court finds it necessary to elucidate the effect of the Appellate Division's decision that this is, indeed, a vertical restraint of trade case, and to dispel any misconception. The following is also necessary to provide the backdrop to the discretionary rulings below. Restraints imposed by agreement between competitors are denominated as horizontal restraints while those imposed by

agreement between firms at different levels of distribution are vertical restraints (see *Business Elecs. Corp. v Sharp Elecs. Corp.*, 485 US 717, 730 [1988]). It is beyond dispute that the alleged restraint in this case is vertical since it involves a restraint imposed by agreement between a supplier and a distributor.

Under the Sherman Act, a vertical restraint of trade is not illegal per se unless it includes some agreement on price or price levels (485 US at 735-736). "Without an agreement as to a specific minimum price or price level, a vertical restraint is unlawful only if it fails a rule of reason analysis" (*Euromodas v Zanella, LTD.*, 368 F3d 11, 21 [1st Cir 2004]).

Commentary to the New York Pattern Jury Instructions suggests that the rule is otherwise under the Donnelly Act. The commentary clearly indicates that vertical price fixing is not a per se violation of the Donnelly Act but is subject to the rule of reason standard (1 NY PJI2d 532 [2005]). The cases cited in the comment, however, do not support that proposition. The issue in *Anheuser-Busch v Abrams* (71 NY2d 327) concerned the authority of the Attorney General under the Donnelly Act to investigate vertically imposed exclusive territorial dealerships (71 NY2d at 331). The other case involved allegations of price discrimination, not price fixing (*State v Mobil Oil Corp.*, 38 NY2d 460, 463).

In this case, there are allegations of vertical price fixing. When the matter was before the Fourth Department in December 2003, the issue was raised whether the per se standard or the rule of reason standard was applicable. The Fourth Department rejected defendant's contention that the rule of reason standard applied and held that "the per se standard is properly applied where, as here, price fixing is alleged" (2 AD3d 1341, 1343). In support of that determination, the Court cited, among other things, the United States Supreme Court's decision *Business Elecs.* Thus, it is the law of the case that this is a per se violation case arising under the Donnelly Act.

Concerted Action

Neither the Sherman Act nor the Donnelly Act proscribe independent action (see *Monsanto Co. v Spray Rite Corp.*, 465 US 752, 761, *reh denied* 466 US 994 [Sherman Act]; *State v Mobil Oil Corp.*, 38 NY2d 460, 464: "a one-sided practice ... is outside the scope of the [Donnelly Act]"). Section 1 of the Sherman Act requires that there be a "contract, combination ... or conspiracy", while the Donnelly Act requires a "contract, agreement, arrangement or combination" (General Business Law § 340 [1]).

In this case, summary judgment has been granted to Black dismissing the action against it. In its opposing papers here, defendant clearly implies that, under *Monsanto* and cases like it,

plaintiff will not survive a motion for a directed verdict absent proof of an agreement between it and some other non-terminated distributor (such as Bock Brick Co. and Momack Building Materials) to fix prices. Defendant, however, misreads *Monsanto* in this regard.

In *Monsanto*, a terminated distributor brought an antitrust action against the manufacturer alleging that the manufacturer conspired with other distributors to fix prices. At trial, the plaintiff introduced evidence that it had been terminated by the defendant following complaints by other distributors regarding the plaintiff's price-cutting practices. On appeal from a verdict in favor of the plaintiff, the Seventh Circuit held that the evidence of the termination in response to the complaints was sufficient to raise an inference of concerted action, thus indicating "that an antitrust plaintiff can survive a directed verdict if it shows that a manufacturer terminated a price-cutting distributor in response to or following complaints by other distributors" (465 US at 759). The Supreme Court disagreed, holding that such evidence alone is not sufficient to establish concerted action and that there must be additional "evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently" (465 US at 764).

The present case is different. There is no longer any

allegation, as there was in *Monsanto*, that defendant conspired with other distributors to fix prices. Plaintiff here, unlike the plaintiff in *Monsanto*, is alleging an illegal conspiracy between it and defendant to fix prices. Thus, while in *Monsanto* evidence of a conspiracy between the defendant and other distributors was critical to show concerted action, here it is not.

The fact that the only parties to the alleged illegal activity in this case are the plaintiff and the defendant does not preclude an action under the Sherman Act. It long has been held under the Sherman Act that "[t]here is an actionable wrong whenever the restraint of trade or monopolistic practice has an impact on the market; and it matters not that the complainant may be only one merchant" (*Simpson v United Oil Co. of California*, 377 US 13, 16 [1964]). In *Simpson*, a retail gasoline dealer was required, by virtue of its lease and consignment agreement with its supplier, to sell gasoline at the price set by the supplier. When the retailer sold gas below the fixed price, the supplier refused to renew the retailer's lease and terminated the consignment agreement. The retailer commenced an action under the Sherman Act against the supplier alleging that it had been economically coerced into the price fixing scheme. The Supreme Court held that there was an actionable wrong under the Sherman Act and "[t]he fact that a retailer can refuse to deal does not

give the supplier immunity if the arrangement is one of those schemes condemned by the antitrust laws" (377 US at 16; see *Ring v Spina*, 148 F2d 647 [2d Cir 1945] [one constrained to enter into an illegal agreement under the Sherman Act by virtue of economic necessity is not precluded from recovering damages on ground that he himself was a participant in the unlawful combination]).

More recently, *Isaksen v Vermont Castings* (825 F2d 1158 [7th Cir 1987] [Posner, J.], *cert denied* 486 US 1005) held that it is of no moment under the Sherman Act that the only alleged concerted action involved the plaintiff and the defendant, since it was further alleged that the plaintiff was an involuntary participant (825 F2d at 1163). The plaintiff in that case, like here, was unable to allege that other distributors were involved in a conspiracy with the defendant. The Seventh Circuit, however, held that alleged concerted action involving the plaintiff "knuckling under to pressure by [the defendant] to raise his prices" could satisfy the concerted action requirement of the Sherman Act (825 F2d at 1162).

In another case, remarkably similar on its facts to the case at bar, a District Court held that the alleged "conspiracy between [the] plaintiff and ... defendant may satisfy [the Sherman Act's] concerted action requirement" (*Rochez Bros. v North Amer. Salt Co.*, 1994 WL 735932, at 3 [US Dist Ct, WD Pa 1994]). The plaintiff in that case, as here, alleged that it

was coerced into submitting a noncompetitive bid for a public works project by implicit threats from its supplier. Moreover, like this case, the plaintiff alleged that, despite its compliance with defendant's order to bid noncompetitively, the defendant thereafter terminated its relationship with plaintiff.

Since *Simpson*, the Supreme Court has rejected the application of the "in pari delicto" (of equal fault) defense in private antitrust actions (*Perma Life Mufflers v Intern. Parts Corp.*, 392 US 134, 140 [1968] *overruled on other grounds*, *Cooperweld Corp. v Independence Tube Corp.*, 467 US 752, 765-766 [1984]). The Court explained that preservation of the private antitrust action as "an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust law" outweighed any inequities that might result should a culpable plaintiff recover a windfall gain (392 US at 139). Indeed, the Court emphasized "the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes" (*Bateman Eichler, Hill Richards v Berner*, 472 US 299, 307 [1985], quoting 392 US at 138). The Court, however, refused to decide whether "truly complete involvement and participation in a monopolistic scheme could ever be a basis, wholly apart from the idea of in pari delicto," to bar a plaintiff's cause of action (392 US at 140). The Court appears to have answered that question in *Bateman*.

Bateman arose in the context of a private action brought under the federal securities law. The Court clearly indicated, though, that the rule it announced in that case had broader application, including application to private antitrust actions. The Court held that "a private action for damages in these circumstances may be barred on the grounds of the plaintiff's own culpability only where (1) as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress, and (2) preclusion of suit would not significantly interfere with the effective enforcement of the [regulatory laws] and protection of the ... public" (472 US at 310-311).

Although the Second Department has held under *Perma Life* that a contracting defendant has standing to claim that its agreement violates the Donnelly Act (see *Bindit Corp. v Inflight Advertising*, 285 AD2d 309, 314), there are no reported cases specifically rejecting the *in pari delicto* defense, or adopting the standard set forth in *Bateman*, as a matter of State law. There appears to be no reason, however, why state antitrust cases should be treated differently than federal antitrust cases in this regard (see *Anheuser-Busch*, 71 NY2d at 335: the Donnelly Act is "construed in light of Federal precedent and given a different interpretation only where State policy, differences in statutory language or legislative history justify such a result").

With this background in mind, the court turns to the procedural history of the case, and plaintiff's motions.

RELEVANT PROCEDURAL HISTORY

In 1997, Miller brought a motion seeking, among other things, an order deeming the subject matter of a notice to admit dated May 2, 1997 to be established as true. The subject matter of the notice to admit was Stark's response to interrogatory No. 18 (c). In that interrogatory, Miller asked Stark to "[d]escribe the procedures which Miller ... was suppose to follow with respect to the bidding on prison expansion projects both within and without its territory...". Stark responded: "On the prison expansion project, Stark distributors were permitted to bid if requested by the State, provided that such distributors included in their bids a factor for specification protection. A distributor who was granted an exclusive territory for a particular project would offer the product at the lowest bid price." The court (Lunn, J.) denied the motion as it pertained to the notice to admit, indicating that because the responses to the interrogatories were verified and sworn as true, "[they] have already been admitted as true and may not be explained away at trial."

In November 1999, the Court (Stander, J.) granted summary judgment to Stark and dismissed the second amended complaint against it. Upon reargument in May 2000, the court adhered to

its earlier determination and again dismissed the second amended complaint against Stark. On appeal, however, the Fourth Department held that there are triable issues of fact whether there was a violation of the Donnelly Act by Stark and thus that it was error to grant Stark summary judgment (281 AD2d 960, 961).

In May 2002, as relevant here, the court (Stander, J.) bifurcated the trial at the request of Stark³ and precluded Miller, during the liability phase of the trial, from presenting evidence of its termination as a distributor of Stark's products. Miller appealed but failed to brief the issue whether the court properly bifurcated the trial. The Fourth Department affirmed, holding that the part of the order dealing with the admissibility of evidence was not appealable and that Miller abandoned the bifurcation issue by not briefing it (*Miller Brick*, 2 AD3d at 1343).

PRESENT MOTIONS

More than a year later, in September 2004, Miller brought the first of the two motions now before the Court. Miller contends that, by virtue of Justice Lunn's decision in 1997, it

³ Stark contended that: "[T]he issues of damages and liability are completely unrelated. The existence of a price-fixing conspiracy has no bearing on the measure of damages purportedly sustained by [Miller] after its termination as a ... distributor." According to Stark, bifurcation would "further judicial economy, promote juror understanding of the issues, and require shorter and less encompassing closing arguments and jury charges." Miller did not oppose bifurcation.

"is entitled to a motion in limine prohibiting [Stark] from introducing any evidence, or argument, the purpose of which is to explain away its response to interrogatory No. 18 (c)." Miller further contends, citing *HBE Leasing Corp. v Frank* (22 F3d 41, 46 [2d Cir 1994]), that it is improper to inform a jury that damages for a Donnelly Act violation are trebled and thus "[Stark], or its attorneys ... [should be precluded] from making any such reference during the course of the trial." Finally, Miller contends that, notwithstanding the previous order of the Court (Stander, J.), it should be permitted to introduce evidence of its termination as a distributor during the liability portion of the trial. In support of that contention, Miller cites its belief that the prior order bifurcated only the amount of damages from the fact of damage, and argues that the fact of damage is a necessary element of liability. Miller further argues that Stark's pretextual reasons for the termination are circumstantial evidence of an alleged agreement between Stark and its other distributors to restrain trade.

Stark opposes the motion and cross-moves for costs. In its opposing papers dated January 3, 2005, Stark contends that the motion should be denied in its entirety because it is untimely in light of a scheduling order by Stander in May 2001. Stark also contends that the motion, insofar as it seeks reargument of that part of the May 2002 order limiting evidence during the liability

portion of the trial, is untimely (see CPLR 2221 [d]). In the alternative, Stark opposes reargument because Miller's "understanding of bifurcation orders does not serve a cognizable basis for reargument" and because the claimed relevance of the evidence of the termination is spurious inasmuch as there are no other alleged coconspirators. Stark additionally contends that, while it may not deny its response to interrogatory No. 18 (c), it may "offer proof to put the admission in context with other proof" and to explain its meaning. Finally, Stark asks this court to ignore Federal law on the treble damage issue and to reexamine that issue in light of State law, as a court has done in another context in New Jersey (see *Wanetick v Gateway Mitsubishi*, 163 NJ 484, 750 A2d 79 [2000] [there is "no compelling policy reason to justify shielding jurors from the consequences of their own actions in the jury box"]).

In the second of the two motions, dated January 13, 2005, Miller seeks an order "reconsolidating the trial of this action". Miller contends that it has become apparent since the prior order of the Court that "bifurcation is unworkable ... [because] the issues as to the existence of an agreement, the causation between any agreement and damages, and the amount of such damages, are inextricably intertwined in this case." Miller further contends that reconsolidation serves the interest of judicial economy because many of the witnesses in the two trials will be the same.

After receipt by the court of the second motion, Stark submitted supplemental papers dated January 15, 2005 more fully explaining its opposition to the first motion and indicating that, "in the event [Miller] does seek to reargue the motion with respect to bifurcation, it is respectfully requested that [Stark] be permitted an opportunity to fully respond to plaintiff's allegations and argument." In its supplemental papers, Stark contends that proof of the termination is irrelevant and immaterial to the conspiracy alleged to have occurred months before April 1991 and that, in any event, such proof is inadmissible as a matter of law under *Monsanto* in the absence of proof that a non-terminated distributor participated in the alleged conspiracy. Finally, although conditionally requesting additional time to address the reconsolidation issue, Stark contends that bifurcation was proper because the issues of fact identified by the Fourth Department in its decision on summary judgment are separate and distinct from the issue of damages.⁴

DISCUSSION

Initially, the court rejects Stark's contention that the prior scheduling order has any preclusive effect. This court has the inherent authority to control its own calendar provided that it does not exercise that discretion in a manner that conflicts

⁴ Additional supplemental papers from Miller were received by the Court on January 21, 2005.

with an existing legislative command (see *Matter of Attorney Gen. of State of New York v Firetog*, 94 NY2d 477, 490-491; *People v Mezon*, 80 NY2d 155, 158-159). That control is authorized whether the trial justice is the original justice assigned to the case or, as here, the justice substituted for the original presiding justice (see *Public Admin. of County of New York v Cohen*, 221 AD2d 297, 298; see also *Wahrhaftig v Space Design Group*, 33 AD2d 953).

Turning to the substance of the motions, the court grants that part of the first motion seeking an order prohibiting Stark from "explaining away" its verified response to interrogatory No. 18 (c) but only insofar as prohibiting Stark from denying the substance of that response. It is well settled that the response to an interrogatory is admissible as an admission of the respondent (see *United Bank Limited v Cambridge Sporting Goods Corp.*, 41 NY2d 254, 264, *rearg denied* 41 NY2d 901; *Smith v Kuhn*, 221 AD2d 620, 621; *Bigelow v Acands*, 196 AD2d 436, 439). By virtue of the verification, as the Court (Lunn, J.) previously indicated, Stark cannot deny the substance of its response to interrogatory No. 18 (c). However, because a response to an interrogatory is not a formal judicial admission, Stark's response to interrogatory No. 18 (c) is not binding and may be explained (see *Connors*, *Practice Commentaries*, *McKinney's Cons Laws of NY Book 7B*, CPLR C 3131:1 at 615 [2005 ed]; see also *Ando*

v Woodberry, 8 NY2d 165, 171; *Ferris v Sterling*, 214 NY 249; *Chamberlain v Iba*, 181 NY 486, 492; *Kirby v Monroe No. 1 Bd. of Coop. Educ. Serv.*, 2 AD3d 1387, 1388; Prince, Richardson on Evidence § 228, at 520 [Farrell 11th ed]). It will be for the trier of fact to determine the weight of the evidence in light of any explanation offered by Stark (see *Ando*, 8 NY2d at 171; Prince § 8-212, at 520-521).

Additionally, the court agrees with Miller that it is improper to inform a jury that damages for a Donnelly Act violation are trebled. The Donnelly Act, like the Sherman Act upon which it is modeled, requires the trebling of the damage award (see 15 USC § 15; General Business Law § 340 [5]). The weight of Federal authority prohibits any mention of the trebling requirement to the jury (see *HBE Leasing*, 22 F3d at 46) because “[r]eference to treble damages and attorneys fees is irrelevant to the jury questions of liability and damages and may tend to confuse or prejudice a jury into reducing its eventual award, thus frustrating Congress’s goal of deterring improper conduct by assessing treble damages and attorneys fees.” (*id* at 45). Under the pattern jury instructions given in antitrust cases under the Sherman Act (3A Fed Jury Prac. & Instr. § 150.93 [5th ed]), and antitrust cases under the Donnelly Act (PJI3d 3:58), no mention is made of the trebling requirement. Although the court can find no cases discussing this issue under the Donnelly Act, the court

agrees with the rationale of the Federal courts that have examined the issue (*Anheuser-Busch*, 71 NY2d at 335; see *X.L.O. Concrete*, 83 NY2d at 518). *Wanetick*, which is cited by Stark, arises under a New Jersey consumer fraud law and is not persuasive. The court therefore grants that part of the first motion seeking an order prohibiting Stark from advising the jury that damages for a Donnelly Act violation are trebled.

Next, the court examines the issue of reconsolidation. Given that the previous order of the court (*Stander, J.*) bifurcating the trial was entered without objection (see *Response of Carolina v Leasco Response*, 537 F2d 1307, 1324 [5th Cir 1976]), and further, that no appeal from that order was perfected, and given the implications of effectively overruling the action of the prior Justice (see *Velasquez v C.F.T.*, 267 AD2d 229; *Dawson v Pavarini Constr. Co.*, 228 AD2d 468; *Padela v Rosen and Weidberg*, 200 AD2d 722; *Carel Almo Serv. v Weisskopf*, 42 AD2d 953), the court denies Miller's motion for reconsolidation. Nevertheless, the court recognizes that "[t]o be 'liable' under the antitrust laws ... means that one has violated the antitrust laws and that violation has resulted in an injury to the business or property of the plaintiff, i.e., there was fact of damage" (*Response*, 537 F2d at 1320; see *Danny Kresky Enterprises Corp. v Magid*, 716 F2d 206, 209-210 [3d Cir 1983]). Stated another way, to establish liability, "a plaintiff must prove the existence of

'antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful'" (*Atlantic Richfield Co. v USA Petroleum Co.*, 495 US 328, 334 [1990] quoting *Brunswick Corp. v Pueblo Bowl-O-Mat*, 429 US 477, 489 [1977] [emphasis in original]); see *Truett Payne Co. v Chrysler Motors Corp.*, 451 US 557, 562 [1981]: "a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent"). Indeed, it is well-established that a "treble-damage plaintiff may not recover for losses due to factors other than defendant's [antitrust] violations" (*Amerinet v Xerox Corp.*, 972 F2d 1483, 1494 [8th Cir 1992], cert denied 506 US 1080). Thus, when an antitrust case has been bifurcated for trial, as this one has been, the plaintiff must establish during the liability portion of the trial that "the violation caused him injury" (*Response*, 537 F2d at 1321). This is true even in cases involving alleged per se violations, as here (*Atlantic*, 495 US at 341-345). The court therefore agrees with Miller's contention that the "fact of damage", i.e. whether Miller sustained an antitrust injury, is an issue that must be litigated during the liability portion of the trial.⁵

⁵ Assuming that the trier of fact returns a verdict in favor of Miller during the liability portion of the trial, it will then be Miller's burden of proof during the damage portion of the trial to show "the amount of damages" (see *Rossi v Standard Roofing*, 156 F3d 452, 484 [3d Cir 1998]).

The previous order of the court (Stander, J.) merely indicated that the trial would be bifurcated "on the issues of liability and damages." It did not address the issue, now before the court, regarding Miller's burden of proof during the first phase of the trial. Thus, the previous order of the court is not the law of the case on that issue.

In view of the foregoing, the court reconsiders the issue of the admissibility of evidence of the termination during the liability portion of the trial. The previous determination of the court (Stander, J.) on that issue was advisory only (see *Miller Brick*, 2 AD3d at 1343) and thus subject to revision upon changed circumstances (see CPLR 2221 [e] [2]). Because the court now concludes that an antitrust injury is an element that must be proven during the liability portion of the trial, it is self-evident that evidence of the termination is admissible during the first phase of this trial, if for no other reason than, to show an antitrust injury.⁶ The court rejects Stark's contention that the time period set forth in CPLR 2221 (c) (3) is applicable here to Miller's motion. The court further rejects Stark's contention that evidence of the termination is inadmissible as a matter of law under *Monsanto*. See discussion above. The court therefore grants that part of the first motion seeking an order allowing

⁶ Even under the previous order of the court, it was recognized that evidence of the termination was relevant on the issue of damages.

evidence during the liability portion of the trial of Miller's termination as a distributor of Stark's products.

Finally, the court denies Stark's cross motion for costs.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: February 2, 2005
Rochester, New York

CMD: IA NWK - CASE INQUIRY
600675/2004 ACTIVE SUPREME COURT
P.W. WILLOW FUND, LLC. VERSUS LUCENT TECHNOLOGIES
ACTION: CONTRACT PI: () PD: () IAS DTE: 06/29/2004
IAS CTGY: COMMERCIAL CASES JUSTICE: GAMMERMAN, IRA (JHO)
DISCOVERY: DUE WITHIN 12 MONTHS RJI TYPE: PRELIMINARY CONFERENCE
TI(001) AT(002) CA(000) CO(002) NOTE OF ISSUE: NONE JURY UNKWN NO S/P
600675/2004 - *** MOTIONS NOT ON FILE

CMD: IA NWK - CASE INQUIRY
600675/2004 ACTIVE SUPREME COURT
P.W. WILLOW FUND, LLC. VERSUS LUCENT TECHNOLOGIES
ACTION: CONTRACT PI: () PD: () IAS DTE: 06/29/2004
IAS CTGY: COMMERCIAL CASES JUSTICE: GAMMERMAN, IRA (JHO)
DISCOVERY: DUE WITHIN 12 MONTHS RJI TYPE: PRELIMINARY CONFERENCE
TI(001) AT(002) CA(000) CO(002) NOTE OF ISSUE: NONE JURY UNKWN NO S/P
600675/2004 - *** MOTIONS NOT ON FILE