

1 THE CLERK: Calling CV-07-187, M.V.B. v.
2 Allstate.

3 Counsel, please state your appearances for
4 the record.

5 MR. GOLDSTEIN: Steven F. Goldstein for
6 plaintiff.

7 MS. EVERSMAN: Erica L. Eversman, also for
8 plaintiff.

9 MR. HAHN: Andrew Hahn for defendant. I
10 believe I have James Yu on the line, also for the
11 defendant.

12 THE COURT: Good afternoon. This is Judge
13 Bianco. I scheduled this to place the Court's ruling
14 on the record with respect to the motion that's pending
15 with respect to the issue of damages and the scope of
16 damages on the remaining causes of action. So I'm
17 going to read the ruling into the record and then we
18 can discuss next steps after doing that.

19 I did receive Mr. Hahn's letter and Ms.
20 Eversman's response to that letter, and I've considered
21 those as well. I just want to highlight that the issue
22 that the Court requested and accepted additional
23 briefing on was limited to the relevance of Dr.
24 Jennings' expert report and testimony to demonstrate
25 damages and specifically on the issue that was not

1 directly addressed by the Court's prior opinions, for
2 reasons that we already discussed, of whether or not
3 lost profits or lost sales, however you want to
4 characterize them, are recoverable in this case on the
5 causes of action.

6 In its brief, Allstate also argues other
7 issues already addressed by the 2010 summary judgment
8 decision as well as the 2012 Daubert decision. But I
9 just reiterate that I don't see any basis to reconsider
10 those decisions as it relates to things that the Court
11 has already decided.

12 I'm ruling and focused on whether or not
13 there is some legal impediment to recovering the types
14 of damages on these causes of actions that Dr. Jennings
15 has opined on in his report. Therefore, his report and
16 testimony or anticipated testimony is pertinent only to
17 the extent to assess whether or not these types of
18 damages are recoverable under New York law.

19 Having reviewed the submissions and
20 conducted a thorough review of the case law, I conclude
21 that Dr. Jennings' report and testimony are relevant to
22 show damages caused by Allstate's alleged labor rate
23 suppression and failure to pay for certain procedures
24 and steering. Those damages include M.V.B.'s lost
25 revenue which Allstate calls lost profits. It's my

1 holding that lost revenue or lost profits are
2 recoverable under Section 349 in this case.

3 However, my ruling is that with respect to
4 the tortious interference cause of action, that the
5 damages are limited to specific contractual
6 relationships that can be identified and, therefore,
7 his report and testimony would not be relevant for that
8 particular cause of action because the damages that he
9 outlines go beyond those particular contractual
10 relationships that can be identified.

11 So the motion in limine is granted to the
12 extent that I am precluding his report and testimony to
13 be considered in connection with the tortious
14 interference claim, but it is denied with respect to
15 the Section 349 claim. I will explain the details for
16 that ruling now.

17 First, just by way of background -- I'm not
18 going to go through the background in any extensive
19 detail because both sides are fully familiar with it
20 and it's set out in prior rulings and opinions by the
21 Court, including the summary judgment opinion at 728
22 F.Supp.2d 205 (E.D.N.Y. 2010). Since that time, I've
23 also considered the Daubert challenge of Dr. Jennings.
24 On November 29th, 2012, I ruled that his qualifications
25 and methodology as set forth in the report and

1 testimony satisfied the Daubert standard and also
2 denied Allstate's motion to strike.

3 We then had, as I mentioned, a telephone
4 conference in March of 2013 to address this issue of
5 whether or not lost profits as a matter of law were
6 recoverable in this case, and that's what led to the
7 briefing on the present motion.

8 In short, Allstate argues that lost profits
9 are not the type of damages recoverable under Section
10 349 because it is a consumer-oriented statute and that
11 Dr. Jennings' conclusions are too broad because they do
12 not address specific contractual relationships.

13 In response, M.V.B. argues that damages
14 caused by Allstate's alleged labor suppression and
15 failure to pay for certain procedures are actual
16 damages under Section 349 not lost profits, and in
17 addition, M.V.B. argues that revenue it lost during the
18 alleged steering and retaliation and other conduct is
19 recoverable under both Section 349 and tortious
20 interference. I'll first address Section 349 and then
21 the tortious interference damages.

22 With respect to Section 349, I agree with
23 M.V.B. that if proven at trial, the effects of
24 Allstate's alleged labor rate suppression and failure
25 to pay for certain procedures are losses but not even

1 in the category of lost profits. Here, M.V.B. seeks
2 among other things damages for what it calls
3 significant, unreimbursed expenses such as the labor of
4 M.V.B. employees, garage insurance premiums and other
5 categories along those lines. To the extent that Dr.
6 Jennings addresses these losses in his report, that
7 would certainly be relevant to a Section 349 claim.

8 The much broader category of damages is the
9 alleged damages for lost profits. Although as we have
10 discussed at the oral argument, the case law in this
11 area is not as abundant as one might expect, I have
12 reviewed the cases cited by the parties as well as done
13 my own independent research, and I conclude that the
14 lost profits under the circumstances of this case are
15 recoverable under Section 349 for the following
16 reasons:

17 First, Section 349 itself allows for an
18 award of "actual damages," without specifying what that
19 term includes but also does not limit the size or the
20 scope of the actual damages in any way. Sulner v.
21 General Accountant Fire & Life Assurance Corporation,
22 LTD, 471 N.Y.S.2d 794 at page 797, (N.Y. Supreme Court
23 1984).

24 Second, New York courts have repeatedly
25 called attention to the fact that Section 349 is a

1 "broad remedial statute," and that "the provision
2 creating a private right of action employs expansive
3 language." Blue Cross & Blue shield of New Jersey,
4 Inc. v. Philip Morris U.S.A., Inc., 3 N.Y.3d 200 at
5 page 207 (2004).

6 Third, the New York Court of Appeals has
7 referred to the available damages under Section 349 as
8 "compensatory damages." Oswego Laborers Local 214
9 Pension Fund v. Marine Midland Bank, 85 N.Y.2d 20 at
10 page 26 (1995).

11 In a subsequent case involving Section 349,
12 the Appellate Division noted that "compensatory damages
13 measure faire and just compensation commensurate with
14 the loss or injury sustained from the wrongful act and
15 held that the plaintiffs there could recover lost
16 profits damages in addition to their lost capital.

17 That case involved violations of several
18 statutes, including Section 349, but the court noted
19 that "while the precise measure of damages may vary
20 under each of those theories, there can be no doubt
21 that under all of them, the object of compensatory
22 damages is the same, i.e. to make the plaintiff whole."
23 Scalp & Blade, Inc. v. Advest, Inc., 765 N.Y.S.2d 92
24 at page 97, (N.Y.A.D. 2003).

25 In other words, under New York law,

1 compensatory damages must make a plaintiff whole and in
2 certain circumstances, making a plaintiff whole
3 includes awarding lost profits. Although Allstate has
4 argued that the decision in Scalp & Blade is based only
5 on a breach of fiduciary duty, the language I quote
6 shows that I don't believe that is a plausible reading
7 of the language. Scalp & Blade supports the conclusion
8 that compensatory damages under Section 349 and other
9 theories should make a plaintiff whole, which can
10 include an award of lost profits in some situations,
11 including this one.

12 Fourth, the New York Appellate Division has
13 reached a very similar conclusion in a nearly identical
14 case, in which it held that an auto body's claim of
15 lost sales due to a large alleged insurance company's
16 steering was an injury sufficient to bring suit under
17 Section 349. North State Auto Bond, Inc. v.
18 Progressive Insurance Group Company, 953 N.Y.S.2d 96
19 (A.D. 2012).

20 That case is a summary judgment opinion
21 about standing and not damages, but the court still
22 analyzed the alleged injury and held that the auto
23 body's claim of five million dollars in lost business
24 due to the alleged steering was an injury that
25 conferred standing to sue under Section 349.

1 I believe that case contradicts Allstate's
2 argument that M.V.B. cannot recover for its full injury
3 because it is a private business and a Section 349 is a
4 consumer-oriented statute. For one thing, North State
5 Auto Bond reiterates that private businesses have
6 standing to sue under Section 349, which several courts
7 have already recognized. North State Auto Bond also
8 explained the difference between what constitutes a
9 violation under Section 349 and what constitutes an
10 injury. Allstate does not seem to make the distinction
11 between the two concepts.

12 A violation of Section 349 is deceptive
13 conduct which may affect consumers as a whole, and such
14 conduct is, quoting now from North State Auto Bond at
15 page 102, "unlawful without reference to whether it has
16 actually caused specific pecuniary harm to consumers in
17 general." Thus, the injury under Section 349 is
18 analytically separate and occurs to an individual by
19 reason of the deceptive conduct.

20 The court in North State Auto Bond noted
21 that affording standing to private businesses injured
22 by deceptive conduct is consistent with the purpose of
23 the statute and is supported in the legislative
24 history, particularly because private businesses such
25 as M.V.B. are often more financially capable of

1 enforcing Section 349. It would appear to me to be
2 inconsistent to hold that private businesses can only
3 recover for part of their injury simply because
4 Allstate's conduct as alleged was deceptive toward the
5 general public.

6 Allstate has attempted to distinguish North
7 State Auto Bond by arguing that the five million
8 dollars in "lost business" in that case is different
9 from the "lost profits" described in the Jennings
10 report. I don't believe there to be a factual
11 distinction between the use of the terms. The Jennings
12 report uses the term "revenue losses" to describe
13 business that M.V.B. is alleged to have either never
14 received or was not compensated for because of
15 Allstate's conduct as alleged.

16 Whether you call it lost business or lost
17 sales or lost profits, it's precisely the same injury
18 referred to as lost business in North State Auto Bond.
19 Therefore, the Court concludes that if lost sales are
20 an injury that confer standing to sue under Section
21 349, they are also part of the available compensatory
22 damages under that section, particularly in light of
23 Section 349's broad remedial purpose.

24 Finally, Allstate has cited no case holding
25 that lost profits are not recoverable under Section

1 349, nor has the Court found any such case that's
2 inconsistent with this ruling. Each of the cases cited
3 by Allstate in their papers address whether a
4 particular alleged violation of Section 349 is
5 consumer-oriented or not, which was decided in this
6 particular case at the summary judgment stage and it's
7 not an issue being considered on the motion in limine.
8 So those cases are ones where the court, in rejecting
9 the concept of lost profits under Section 349 was not
10 rejecting it under the theory of whether or not it
11 constituted actual damages under the statute but was
12 rejecting it because it was not consumer-oriented.

13 Turning to the tortious interference cause
14 of action. Under New York law, lost profits are
15 recoverable for tortious interference with prospective
16 contractual relations. Guard Life Corp. v. South
17 Parker Hardware Manufacturing Corp., 50 N.Y.2d 183 at
18 197 (1980).

19 However, as the Court noted in its summary
20 judgment opinion, a tortious interference cause of
21 action requires plaintiffs to prove the specific
22 prospective relations with which Allstate interfered.
23 Desert Beauty, Inc. v. Fox, 568 F.Supp.2d 416 at 429
24 (S.D.N.Y. 2008).

25 M.V.B. has identified several individuals

1 and could recover damages based on those specific
2 losses at trial, to the extent it relates to a specific
3 business relationship that they can identify. M.V.B.
4 has not, however, cited any authority and I don't
5 believe there is any authority to allow them to recover
6 for a tortious interference theory for all of
7 Allstate's alleged steering activity based only on
8 proof of steering in individual cases combined with Dr.
9 Jennings' methodology in his report.

10 The distinction between losses related to
11 specific individuals and losses related to the broader
12 alleged practice of steering in retaliation is a
13 distinction that I believe is rooted in the fact that
14 Section 349 and tortious interference require different
15 proof.

16 The case law is clear that tortious
17 interference claims must be based on proof concerning
18 specific prospective relations on the public as a
19 whole, while the consumer-oriented conduct under
20 Section 349 depends upon evidence of, among other
21 things, extensive marketing schemes, multimedia,
22 dissemination of information to the public and standard
23 practices that affect similarly situated customers, as
24 outlined in North State Auto Bond.

25 Thus, Section 349 calls for proof of general

1 practices, Allstate's general practices in this case
2 and the alleged broader injury that it caused, while
3 the tortious interference claim only allows for proof
4 of specific examples of interference. Therefore, the
5 Court concludes that while M.V.B. may seek lost profits
6 related to tortious interference with specific
7 individuals or entities that M.V.B. has identified, Dr.
8 Jennings' testimony is irrelevant to the damages in
9 those individuals' cases because his calculations and
10 methodology don't address those individual cases.

11 So I'm granting the motion to the extent
12 that the Jennings report is trying to utilize for
13 purposes of the tortious interference claim because it
14 has -- there's no ability to recover those types of
15 damages under New York law for that cause of action.

16 Finally, as a side note, to the extent again
17 that it's being raised under Daubert or 403 that Dr.
18 Jennings' testimony should be excluded, I've already
19 stated the reasons for that regarding his
20 qualifications, methodology and opinions satisfying
21 Daubert, and I don't believe under Rule 403, that
22 there's any basis to preclude his testimony as it
23 relates to the issue of Section 349. That's the
24 Court's ruling with respect to the pending motion.

25 My review of the docket sheet indicates, Ms.

1 Goldstein, that there was a pretrial order that was
2 filed way back in 2011.

3 MR. GOLDSTEIN: I believe so, yes, Judge.

4 THE COURT: I didn't hear what you said.

5 MR. GOLDSTEIN: I believe that's true.

6 THE COURT: Was there -- I don't remember
7 now before we had the settlement conference and then
8 this issue came up. Was there an intention to try to
9 narrow that pretrial order, which I believe was like
10 150 pages or so?

11 MR. GOLDSTEIN: Based on your ruling now,
12 Judge, probably, but I have to go back and look at it.

13 THE COURT: Okay. So do we want to schedule
14 a date for the filing of any amendments to -- an
15 amended pretrial order? Does that makes sense?

16 MR. GOLDSTEIN: Yeah, that would probably be
17 good.

18 THE COURT: Mr. Hahn?

19 MR. HAHN: That's fine.

20 THE COURT: Okay. How long do you want, Mr.
21 Goldstein?

22 MR. GOLDSTEIN: 45 days, Judge?

23 THE COURT: That sounds reasonable.

24 Is that good, Mr. Hahn?

25 MR. HAHN: Yes.

1 THE COURT: So we'll say by April 30th, the
2 parties can both amend the pretrial order to reflect
3 obviously the Court's ruling since the filing of the
4 last one. Also, hopefully, as I think I had urged at
5 several different points in this case, that there be
6 some attempt to try to streamline the presentation of
7 evidence so that the case does not go on endlessly.

8 What will happen is, within a couple weeks
9 of the filing of that document, we'll have another
10 phone conference and then we'll set a trial date. I
11 anticipate, based upon my current schedule -- we're
12 already booked for a number of criminal cases into
13 October, so I anticipate this would be tried early next
14 year, in January or February, would be my goal. Okay?

15 MR. HAHN: Your Honor, this is Andy Hahn on
16 behalf of Allstate. In view of that schedule, can I
17 seek permission for interlocutory appeal with regard to
18 the Court's ruling on the lost profits and the GBL
19 claim? I believe that the requirements for
20 interlocutory appeal pursuant to 28 USC Section 1292(b)
21 are satisfied because that is a limited controlling
22 question of law and there are substantial grounds for
23 difference of opinion, and the immediate appeal may
24 materially advance the ultimate termination of
25 litigation.

1 Can I have a few days to submit a pre-motion
2 letter?

3 THE COURT: You don't have to put a pre-
4 motion letter in. You could just file the motion. I
5 will just note -- I think we had a discussion about
6 this previously but in your motion, if you're going to
7 file the motion, as you go through those factors, what
8 I think you're overlooking is that no matter how that
9 issue gets decided, there's going to be a trial in this
10 case no matter what.

11 So for purposes of ultimately terminating
12 the litigation one way or the other, there's going to
13 be a trial one way or the other. Even if I'm incorrect
14 on this, there would still be a trial. The only
15 difference is, this issue of damages would not be part
16 of it. So arguably, some resources would be saved in
17 not having to present the testimony of experts on this,
18 but you have to balance that against the resources of
19 having to appeal a case and have the case delayed for
20 that appeal.

21 MR. HAHN: Your Honor, I wouldn't be seeking
22 a stay of the proceedings.

23 THE COURT: I understand that.

24 MR. HAHN: The proceedings would go forward.
25 If the Second Circuit grants my petition, if you agree

1 to certify the order, I think we can have the appeal
2 resolved and still continue on with the trial.

3 THE COURT: No matter how the Second Circuit
4 decides your case, the case is going to go forward
5 anyway. That's what I'm saying.

6 MR. HAHN: Right, I understand that.

7 THE COURT: That's not usually a situation
8 for interlocutory appeal. Why should we have two
9 appeals of the case? Then there's going to be a second
10 appeal potentially of the case after the trial, once
11 this issue of damages gets resolved.

12 MR. HAHN: Because I think if we get the
13 Jennings' report completely excluded, we could resolve
14 this case through a settlement or a very short trial.

15 THE COURT: Again, it's up to you. You can
16 file the motion but those are the issues you're going
17 to have to address, okay? But I'm not delaying
18 anything while you're filing that motion. I want you
19 to go forward with preparing whatever amendments you
20 want to prepare to the pretrial order and then
21 obviously, I'll give -- M.V.B. can respond to your
22 motion for certification when you file it, okay?

23 MR. HAHN: Okay. I will discuss it with my
24 client, in view of your Honor's statements.

25 THE COURT: Okay.

1 MR. HAHN: As always. Thank you very much.

2 THE COURT: Okay. Anything else, Mr.

3 Goldstein?

4 MR. GOLDSTEIN: Nothing further, Judge.

5 Thank you.

6 THE COURT: Okay, thank you. Have a good

7 day.

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I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.



ELIZABETH BARRON

March 18, 2014

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
M.V.B. COLLISION, INC.,

Plaintiff,

- against -

ALLSTATE INSURANCE CO.,

Defendant.
-----X

ORDER
07-CV-187 (JFB)(GRB)

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

★ MAR 13 2014 ★

LONG ISLAND OFFICE

For the reasons set forth on the record on March 13, 2014, Allstate's motion *in limine* to preclude the report and testimony of Dr. Jennings is granted with respect to the tortious interference claim and denied with respect to the claim under N.Y. G.B.L. § 349.

SO ORDERED.

JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE

Dated: March 13, 2014
Central Islip, New York