COMMONWEALTH OF PENNSYLVANIA

CENTURY MOTORS, INC.	:	BEFORE THE BOARD OF CLAIMS
	:	
VS.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, FIRST JUDICAL DISTRICT OF PENNSYLVANIA – TRAFFIC COURT OF PHILADELPHIA	:	DOCKET NO. 3694

FINDINGS OF FACT

1. The hearing on this matter was held before a panel consisting of Louis R. Martin, Chairman, and James B. Wilson, Engineer Member.

2. Plaintiff, Century Motors, Inc., ("Century" or "Century Motors") of 3101 S. 61st Street, Philadelphia, PA 19153, is a business operating within the city and county of Philadelphia which provided, among other things, towing and storage services of motor vehicles. (Statement of Claim).

3. Defendant is the First Judicial District of Pennsylvania-Traffic Court of Philadelphia ("Traffic Court") located at 800 Spring Garden Street, Philadelphia, PA 19123 established Pursuant to 42 Pa. C.S.A. Section 1301. (Statement of Claim).

4. Century Motors filed its claim with the Board on February 20, 2004 and its amended claim on August 12, 2004. (Statement of Claim, Amended Statement of Claim).

5. Plaintiff entered into a contract with Defendant dated March 1, 2001. (Stipulation ¶ 1; N.T. 10; Ex. P-1).

6. This contract required the Plaintiff to tow, store, and dispose of vehicles designated by the Philadelphia Police Department on behalf of the Defendant. (N.T. 10-11; Ex. P-1).

7. On May 18, 2001, Plaintiff and Defendant amended the contract between the parties dated March 1, 2001, establishing a term of two years and a renewal clause stating that the agreement "shall automatically renew for a similar term by agreement of the parties" plus other changes not relevant to the matter at hand. (N.T. 12-13; Ex. P-2).

8. On September 14, 2001, the once amended contract between the parties dated March 1, 2001, was among other things further amended to ". . . take possession, impound and control the disposition of those vehicles located within the jurisdictional limits of the City of Philadelphia which have been designated by an appropriate law enforcement officer as in violation of the statute known as the Live Stop Law or The Impoundment Law authorizing same." We will hereinafter refer to the contract between the parties, as amended, as the "Agreement." (N.T. 13-14; Ex. P-3).

9. The Board understands the above reference to the "Live Stop Law or The Impoundment Law" to be referring to the provisions of the Motor Vehicle Code at 75 Pa. C.S. § 6309.2 . (75 Pa.C.S. § 6309.2; N.T. 14, 77-78; Ex. P-3; Board Finding).

10. The parties also agreed upon the charges that Century would receive for towing and storage of vehicles as reflected in a Rider to the Agreement. (N.T. 15-16, 43; Ex. P-4).

11. On October 4, 2002, what is referred to as Act 123 was passed by the Pennsylvania General Assembly and signed into law to be effective in 60 days, making the Philadelphia Parking Authority ("PPA") the "appropriate towing and storing agent" for vehicles within the City and County of Philadelphia, instead of the Defendant, the Traffic Court. (75 Pa.C.S. §§ 6309, 6309.1, 6309.2).

12. Century Motors was aware in October 2002 of the changes Act 123 made to the Motor Vehicle Code. (F.O.F. 13-18; Ex. P-6).

13. The Traffic Court and the PPA had conversations with Century Motors' attorney, John DeVirgilis, subsequent to the passage of Act 123. (N.T. 69-76, 89-95; Ex. P-6).

14. The PPA advised Mr. DeVirgilis, among other things, that it was not prepared to take over the process of towing heavy equipment in December when Act 123 was to go into effect. (N.T. 91).

15. Mr. DeVirgilis sent a letter to the PPA dated October 22, 2002 which acknowledged that the PPA would assume responsibility for towing vehicles at some time "in the near future" pursuant to Act 123. However, this letter also confirmed that Century currently had a towing and storage contract with the Traffic Court by which it was "authorized to dispose of all vehicles" and that it would continue to do so until the Agreement was terminated. Century and the Traffic Court were copied on the letter. (Ex. P-6).

16. Neither the Traffic Court nor the PPA objected to the substance or content of Century's October 22, 2002 letter wherein Century informed the PPA, inter alia, that it would continue to work under the Agreement and respond to towing requests until it received a termination notice. (N.T. 70-73, 93-94; Ex. P-6; F.O.F. 12-15, 17-20; Board Finding).

17. Century did not sign any other contracts with the Traffic Court or the PPA during the subject time period. (N.T. 26-28).

18. The PPA did not have the ability to tow trucks, so Century Motors continued to tow trucks and the cars assigned to it under the Live Stop Program or otherwise until the PPA acquired the necessary equipment and trained its equipment operators. (N.T. 23, 69, 76, 90-91).

19. President Judge Kelly of the Defendant sent a letter to the Plaintiff dated August 21, 2003 which purported to terminate the Agreement and directed, inter alia, that, as of August 25, 2003, Century was to stop taking towing work thereunder, as its services were no longer needed. (N.T. 14, 15, 29, 30, 85, 86; Ex. P-7).

20. Paragraph 24 of the Agreement between the parties states:

> The parties agree that any law suit, action, claim, or legal proceeding involving, directly or indirectly, any matter arising out of or related to this Agreement, or the relationship created or evidenced thereby, shall be brought exclusively in the Court of Common Pleas of Philadelphia County.

(Ex. P-1).

21. On September 8, 2003, Plaintiff filed in the Court of Common Pleas of Philadelphia a Petition to Preclude Enforcement of Court's Termination of Exclusive Agreement ("Petition") naming the Traffic Court as the Defendant in the matter. (N.T. 33-35, 73-74; Ex. P-8).

22. Dominic J. Rossi, Deputy Court Administrator for the First Judicial District, acknowledged that an affidavit of service for the Petition was signed by Marianne Trombetta, an employee of the Traffic Court, thus establishing that the Petition was served upon the Traffic Court. (N.T. 79-81).

23. The Board takes judicial notice of the information which appears as a matter of public record in the Civil Docket records of the Philadelphia Court of Common Pleas regarding Case ID 030900645, captioned as CENTURY MOTORS INC. VS. FIRST JUDICIAL DISTRICT OF PA TRAFFIC COURT OF PHILADELPHIA. This case was considered opened on September 5, 2003. On September 8, 2003 Century filed a PETITION TO PRECLUDE ENFORCEMENT OF COURT'S TERMINATION OF EXCLUSIVE AGREEMENT and on September 19, 2003, Century filed a COMPLAINT WITH NOTICE TO DEFEND WITHIN TWENTY (20) DAYS AFTER SERVICE IN ACCORDANCE WITH RULE 1018.1 both in this same case. An affidavit of service of the complaint was filed on September 30, 2003 and the Traffic Court filed its answer to Century's motion to preclude enforcement on September 30, 2003, and the Common Pleas Court scheduled a hearing for the Defendant to show cause on February 10, 2004. The Civil Docket records do not indicate whether that hearing was ever held and the next entry, dated April 2, 2003, indicates that the case was SETTLED VIA S D & E PRAECIPE [Settle Discontinue End filed] BY PLAINTIFF'S ATTORNEY. The Board has specific information about the claims raised in the Petition which was entered at the Board Hearing as Exhibit P-8. However, we were unable to glean any additional information about the issues raised in the complaint filed at the Common Pleas Court because the civil Docket

indicates that on February 23, 2009 the case record was disposed of in accordance with the records retention policy. (Philadelphia Court of Common Pleas – Civ. Dkt.) https://jfdefile.phila.gov/dockets/zk_fjd_public_qry_03.zp_dktrpt_docket_report?case_id=030900645 (accessed only through http://www.phila.gov; click on "Civil Docket"; click on "Display Civil Docket Report"; click on accept disclaimer; and enter case ID – 030900645); (Ex. P-8; Board Finding).

24. In the Petition, Century sought to have the termination of its Agreement voided, and it sought damages in excess of $50,000.00 for premature termination of the Agreement and for breach of the exclusivity provisions of this Agreement (which it alleged to be an exclusive contract to tow vehicles in the City and County of Philadelphia). (Ex. P-8; Board Finding).

25. On September 19, 2003, Century also filed a complaint with the Philadelphia Court of Common Pleas under the same docket number (Docket No. 030900645) as its Petition. (N.T. 73-74; F.O.F. 23; Board Finding).

26. Mr. Rossi's testimony also confirms that Century filed the Petition and accompanying complaint with the Philadelphia Common Pleas Court. He further testified that neither of them raised the issue of the constitutionality of Act 123. (N.T. 73-74).

27. The above matter before the Philadelphia Court of Common Pleas was marked settled on April 2, 2004, and the Court records for the case (other than the docket entries) were destroyed on February 23, 2009. (F.O.F. 21-27; Board Finding).

28. Century Motors did not file a petition or written complaint directly with the Traffic Court regarding the premature termination or any other alleged breach of the Agreement. (N.T. 27, 72-73; Board Finding).

29. On February 20, 2004, Century filed its claim with this Board, alleging that the Traffic Court "violated the terms of the Agreement in that it: (a) terminated an exclusive agreement without cause; (b) failed to provide plaintiff with all vehicles pursuant to the live stop and impoundment enforcements and the appropriate statutes; and (c) hired private vendors in direct violation of the agreement." (Statement of Claim).

30. Century sought and continues to seek a damage award from this Board in the form of monetary compensation for the breaches of the Agreement noted in the immediately preceding paragraph. (Statement of Claim and Amended Statement of Claim).

31. On June 10, 2004, Defendant filed a Motion for Judgment on the Pleadings seeking dismissal of Plaintiff's Statement of Claim. (Defendant's Motion for Judgment on the Pleadings).

32. On August 3, 2004, the Board issued an order granting the Defendant's motion unless Plaintiff filed an amended complaint within 20 days which addressed the jurisdictional dispute concerning Section 1712.1 and 1724 of the Commonwealth Procurement Code. (Board's August 3, 2004 Opinion and Order).

33. Plaintiff's Amended Statement of Claim was received by the Board on August 12, 2004. It reiterated the claims in original Statement of Claim and provided a new Paragraph 13 which stated: "Plaintiff provided notice pursuant to Section 1712.1 of the Commonwealth Procurement Code to the contracting officer, the Commonwealth of Pennsylvania, First Judicial District of Pennsylvania, Traffic Court of Philadelphia, by certified mail dated September 8, 2003 and received September 13, 2003." (Plaintiff's Amended Statement of Claim).

34. On September 14, 2004, the Traffic Court filed an Answer and New Matter to Century's Amended Statement of Claim rather than preliminary objections. Defendant did raise the issue of timeliness and failure to comply with Section 1712.1 in its New Matter but did not file any subsequent interlocutory motions on the issue. (Defendant's Answer and New Matter to Plaintiff's Amended Statement of Claim).

35. On February 4, 2005, Defendant filed a First Request for Production of Documents and asked the Plaintiff, inter alia, to produce a copy of the "Notice" it forwarded on September 8, 2003 to the Traffic Court's contracting officer. (Defendant's First Request for Production of Documents).

36. On February 22, 2005, in response to Defendant's Request for Production of Documents, Plaintiff provided the aforementioned Petition filed with the Philadelphia Court of Common Pleas on or about September 8, 2003. (Plaintiff's Response to Defendant's Request; Ex. P-8).

37. Century's Petition filed with Philadelphia Court of Common Pleas sought to prevent the Traffic Court from terminating the Agreement and claimed, inter alia, that under the terms of the subject Agreement, the Traffic Court guaranteed that Century "would be the exclusive vendor for the towing and storage of the said vehicles" and that the Agreement's automatic renewal provision had already gone into effect on March 1, 2003 (which purportedly extended the Agreement from March 1, 2003 to March 1, 2005). (Exs. P-1, P-2, P-8; F.O.F. ¶¶ 21-26).

38. As alleged in its New Matter to Plaintiff's Amended Statement of Claim and argued in post-trial brief, the Traffic Court contends that, if Century had a claim, it failed to file it with the Traffic Court as required by 62 Pa.C.S. § 1712.1 before filing the claim with the Board. (Defendant's Answer and New Matter to Amended Statement of Claim; Defendant's Purposed Conclusions of Law at ¶¶ 6-8).

39. Specifically, the Traffic Court contends that Century has failed to exhaust administrative remedies before filing its claim with this Board and/or a failed to timely file its claim with the Traffic Court within six months of the claim's accrual (which accrual Century argues, in the alternative, occurred in October 2002 with the passage of Act 123 or, at the latest, on December 4, 2002, the effective date of Act 123. (Defendant's Proposed Findings of Fact and Conclusions of Law at pp. 7-8; F.O.F. ¶ 38; Board Finding).

40. This matter before the Board is a contract claim against a Commonwealth agency. (Amended Statement of Claim; F.O.F. ¶¶ 3-8, 21-26, 29-30; Board Finding).

41. The provision of the Procurement Code relevant to claim filings with the contracting agency and the Board of Claims provides as follows:

> **§ 1712.1 Contract Controversies**
>
> **(a) Right to claim.** - A contractor may file a claim with the contracting officer in writing for controversies arising from a contract entered into by the Commonwealth.
>
> **(b) Filing of claim.** - A claim shall be filed with the contracting officer within six months of the date it accrues. If a contractor fails to file a claim or files an untimely claim, the contractor is deemed to have waived its right to assert a claim in any forum. Untimely filed claims shall be disregarded by the contracting officer.
>
> **(c) Contents of claim.** - A claim shall state all grounds upon which the contractor asserts a controversy exists.
>
> **(d) Determination.** - The contracting officer shall review a claim and issue a final determination in writing regarding the claim within 120 days of the receipt of the claim unless extended by consent of the contracting officer and the contractor. If the contracting officer fails to issue a final determination within the 120 days unless extended by consent of the parties, the claim shall be deemed denied. The determination of the contracting officer shall be the final order of the purchasing agency.
>
> **(e) Statement of claim.** - Within 15 days of the mailing date of a final determination denying a claim or within 135 days of filing a claim if no extension is agreed to by the parties, whichever occurs first, the contractor may file a statement of claim with the board.

62 Pa.C.S. § 1712.1.

42. With respect to the first aspect of Century's claim filed here at the Board (i.e. the premature termination of the Agreement), the evidence presented in this case indicates that, up until the issuance of the Traffic Court's termination letter of August 21, 2003, it was not clear to Century, as a matter of fact, whether the Traffic Court or PPA would continue performance under the Agreement. The ongoing actions and communications of all three entities involved indicate that none of them considered the Agreement to be terminated in October or December 2002 (as now asserted by Defendant). Among other things: Century sent a letter dated October 22, 2002 stating that it would continue to provide towing services pursuant to the Agreement until it received a termination notice; neither the Traffic Court nor the PPA objected to the content of Century's October 22 letter; Century signed no other towing agreement with the Traffic Court; towing requests continued; Century continued to tow vehicles as requested; and

the Traffic Court did not send Century an actual termination letter until on or about August 21, 2003. (Ex. P-6, P-7; F.O.F. ¶¶ 11-20; Board Finding).

43. With respect to the second aspect of Century's claim filed here at the Board (i.e. breach of the exclusive nature of the Agreement), Mr. Cray (Century's general manager) testified that, at some point after the September 12, 2001 amendment to the Agreement (which Century alleges provided it the exclusive right to tow Live Stop vehicles) and before the August 21, 2003 letter directing Century to stop towing, he realized that vehicles were being towed and stored by someone other than Century Motors. However his uncontradicted testimony also establishes that Century's inquiries regarding towing activity by other vendors went unanswered; that during this period Century never received sufficient information or response from the Traffic Court or PPA that would have enabled Century to ascertain an amount due or been capable of preparing a concise and specific written statement detailing its injury due to Traffic Court's alleged breach of the exclusivity provisions of the Agreement; and in fact, received no clear or unequivocal response to its concerns with this breach of the Agreement until its receipt of the Traffic Court's letter of August 21, 2003. (Amended Statement of Claim; N.T. 17-18, 31-32; Exs. P-7, P-8; Board Finding).

44. The testimony of Mr. Cray and Mr. Ianni together with the ACS records (Ex. P-9), does establish that the towing of vehicles under the Live Stop Program by parties other than Century was an ongoing occurrence during the time period between September 12, 2001 through August 21, 2003. (N.T. 17-18, 31-32, 42-44).

45. By its August 21, 2003 letter, the Traffic Court informed Century that it was terminating the Agreement and that Century should cease towing vehicles as of August 25, 2003. Although the evidence is unclear as to exactly when Century received the letter, it appears to us that Century received the letter at least by August 25, 2003, the effective date of such termination. Accordingly, the Board finds August 25, 2003 to be the most reliable date for purposes of determining when Century was first clearly notified that the Agreement was terminated and it would no longer be expected to perform, nor be paid for, towing services under the Agreement. (Ex. P-7, P-8 (¶ 13); Board Finding).[1]

46. Richard Cray, the general manager of Century, over objection by Century's counsel that the response called for a legal conclusion, agreed at the hearing with Traffic Court's counsel, on cross examination, that he knew in October 2002 after passage of Act 123 that the Agreement "was coming to an end and that the Philadelphia Parking Authority was the authorized entity." However, Mr. Cray himself also acknowledged in further response to this line of questioning that he did not know from this if the Traffic Court still had any power to perform the Agreement. Although this questioning was allowed by the Panel, we do not find Mr. Cray's opinion nor the opinions of Mr. Rossi, Mr. Fenerty or other fact witnesses on the legal effect of Act 123 on the Agreement (given several years after the occurrence) to be persuasive, nor does it alter our factual determination (supported by the contemporaneous acts of the parties

[1] A copy of the August 21, 2003 letter submitted to the Board as Ex. P-7 contains indications of a fax transmittal or reception date of August 22, 2003. However, the sender's recipient's name and phone number are not discernible nor was there a fax cover sheet included leaving us unable to conclude with assurance that this was actually received by Century on August 22, 2003. It does, however, appear that Century's towing ceased by August 25, 2003.

from October 2002 through August 2003) that the first clear and unequivocal notice to Century that its Agreement was terminated and it would no longer be paid for towing thereunder was its receipt of the August 21, 2003 letter from the Traffic Court. (N.T. 17-18, 24-32, 69-76, 86-87, 91-97; Exs. P-1, P-2, P-3, P-6, P-7; F.O.F. 11-20, 42-46; Board Finding).

47. Century filed its Petition with the Philadelphia Court of Common Pleas on September 8, 2003, eighteen days after the date of the August 21, 2003 termination letter and 14 days after the August 25, 2003 effective date of said termination notice. (N.T. 35, 73-74; Exs. P-7, P-8; F.O.F. ¶¶ 21-26, 45-46; Board Finding).

48. Century's claim filed with the Philadelphia Court of Common Pleas on September 8, 2003, entitled "Petition to Preclude Enforcement of Court's Termination of Exclusive Agreement," (the "Petition") alleged, among other things, that: the Agreement for towing and storage of vehicles gave Century the exclusive right to do so in the City and County of Philadelphia; the Agreement renewed automatically on March 1, 2003 for another two years; and that the Traffic Court terminated the Agreement and obtained services of other towing vendors in violation of the exclusive Agreement. Century, in this Petition, then sought a judgment: (a) precluding enforcement of the termination notice; (b) granting monetary damages in an amount in excess of $50,000; and (c) granting such other equitable relief as the Court deemed just. (Ex. P-8; F.O.F. ¶¶ 21-27; Board Finding).

49. The Board takes judicial notice that, on or about September 19, 2003, Century also filed a complaint with the Philadelphia Court of Common Pleas under the same docket number, and that this entire case was subsequently marked settled and closed on the docket by entry dated April 2, 2004. However, because the actual filings in this case were destroyed on February 23, 2009 per records retention policy, we have no documentary evidence other than the Petition as to the substance of these filings. (Ex. P-8; F.O.F. ¶¶ 21-27; Board Finding).

50. Traffic Court made no arguments and presented no evidence to support an accord and satisfaction defense to the present claim or other similar defense based on an earlier settlement of the issues in the case before the Board. (Answer and New Matter to Amended Claim; Defendant’s Proposed Findings of Fact and Conclusions of Law; Board Finding).

51. Based on the foregoing series of events, and according to the evidence presented, we find that the earliest point in time at which Century was: (a) first able to litigate its claim against the Traffic Court for breach of the Agreement (i.e. when it could first have ascertained an amount due and been capable of preparing a concise and specific written statement detailing its injury in this matter) and (b) affirmatively notified that the Agreement would be terminated and it would no longer be paid for towing services thereunder was August 25, 2003, the date by which the evidence indicates Century had received the Traffic Court's August 21, 2003 termination letter. (N.T. 17-18, 31-32, 42-44; Exs. P-6, P-7; F.O.F. 11-20, 42-46; Board Finding).

52. Century's claims for breach of the Agreement, in fact, accrued, at the earliest, on August 25, 2003. (N.T. 17-18, 31-32, 42-44; Exs. P-6, P-7; F.O.F. 11-20, 42-46, 51; Board Finding).

53. Century's Petition, filed with the Philadelphia Court of Common Pleas on or about September 8, 2003 included both aspects of the claim currently before the Board for early termination and breach of the exclusive nature of the Agreement and was filed there well within six months of the earliest date these claims first accrued. (Amended Statement of Claim; N.T. 35; Ex. P-8; F.O.F. 21-33, 37, 42-52; Board Finding).

54. The Agreement (at Paragraph 24) expressly designated the Court of Common Pleas of Philadelphia County as the "exclusive" forum for the resolution of disputes concerning the Agreement and required Century to file all such disputes there instead of with the Traffic Court. (Exs. P-1 through P-3; F.O.F. ¶¶ 5-10; Board Finding).

55. Paragraph 24 of the Agreement constituted a specific representation of the Traffic Court that Century was required to file all disputes respecting the Agreement exclusively at the Philadelphia Court of Common Pleas, and Century reasonably relied on this Paragraph 24 in filing its claim with the Philadelphia Court of Common Pleas, as it was required and instructed to do under the Agreement, instead of with the Traffic Court. (Exs. P-1 through P-3; F.O.F. ¶¶ 5-10, 19-26, 37, 47-50, 53; Board Finding).

56. Furthermore, the Board finds that Century's claim filed with the Philadelphia Court of Common Pleas (i.e. the Petition) gave the Traffic Court notice of, and a substantial opportunity to resolve, the issues presented in this case before bringing the matter to the Board of Claims. (F.O.F. ¶¶ 37, 55; Board Finding).

57. Joseph Ianni, Century's accountant for about twenty years, testified as an expert witness as to Century's damages in this matter. Mr. Ianni testified that he calculated Century's "lost revenue" resulting from the failure to receive towing due Century under the Live Stop Program to be $2,980,467. He calculated these lost revenues for the period September 12, 2001 to August 21, 2003. (N.T. 36-37, 44, 50; Board Finding).[2]

58. Mr. Ianni also prepared a one page report that described Century's alleged lost revenues on the Agreement. Although the Panel noted at hearing that it considered this one page report to be an out of court statement (and, thus, hearsay if submitted for the truth of the matter asserted therein), the Panel later admitted the document into evidence without apparent restriction. (N.T. 37-48, 105-106; Ex. P-5; Board Finding).

59. Mr. Ianni testified that he reviewed, inter alia, the Agreement, the Rider thereto containing prices for services, the deposition of Dennis Rosen (a representative of ACS) and detailed records of vehicles towed by PPA compiled by ACS to arrive at his damage calculation which began by calculating the number of vehicles towed and the amount of revenue lost to Century as a result of Live Stop vehicles being towed by parties other than Century. ACS was an outside company contracted by PPA to provide computer services and detailed records of vehicles towed by and for the PPA during the period here at issue. (N.T. 42-44; Board Finding).

[2] The transcript of Mr. Ianni's testimony records the amount as $2,980,476 on page 44 and as $2,980,467 on page 50. We find the latter amount to be correct as Mr. Ianni explicitly spelled out the number upon request for clarification from Defendant's counsel (at N.T. 44) and it was later restated correctly (at N.T. 50).

60. The ACS records on the computer disks included about 3600 pages of documentation broken down into four categories: Live Stop Revenue; Live Stop Delayed Revenue; Revenue – Excluding Live Stop; and Delayed Revenue – Excluding Live Stop. These reports showed towed vehicles with "Release Dates" or "Payment Dates" of "03/01/2001 THRU 08/21/2003". (N.T. 43; Ex. P-9).

61. The ACS records on computer disks reflected, among other things, vehicles that were towed by the PPA under the Live Stop Program, including those towed from September 21, 2001 through August 21, 2003. (N.T. 42-43; Ex. P-9).

62. The Parties agreed by pre-trial stipulation that: "the records produced by the Philadelphia Parking Authority contractor ACS under oath on July 14, 2005 during the deposition of Dennis Rosen regarding the time period of March 1, 2001 through August 21, 2003 pertaining to live stop towing operations will be accepted as true and correct and submitted with no further proof at trial." (Stipulation ¶ 2).

63. Ms. Butler, counsel for the Traffic Court, initially objected at hearing to Century's motion to admit the ACS records (on computer disks) into evidence (as Ex. P-9) on the basis she had not had an opportunity to review the content of these computer disks prior to the hearing. After some discussion as to these records (on computer disks) and their admissibility, including reference to a pre-trial stipulation by the parties regarding same, the Panel deferred ruling on the admissibility of these records (the computer disks) until Ms. Butler had an opportunity to review same post-hearing. On this basis, Ms. Butler withdrew her objection at that time. Following the hearing and some additional correspondence among the parties and the Board Panel, it appears Ms. Butler eventually had opportunity to review the computer disks and has filed no follow-up objection to their admission. (Board Docket Sheet for Case #3694; N.T. 53-61; Ex. P-9; Board Finding).

64. The ACS records (which were on computer disks) utilized by Mr. Ianni to calculate the number of Live Stop vehicles towed during the period September 12, 2001 to August 21, 2003 (and Century's lost revenue thereon) were the same as those produced (also on computer disks) by Dennis Rosen at his deposition under oath on July 14, 2005. (N.T. 42-44; Ex. P-9; Board Finding).

65. Ms. Butler also objected to Mr. Ianni's testimony regarding lost revenues to Century due to others towing Live Stop Program vehicles between September 12, 2001 and August 21, 2003 and about what he relied on to reach his calculations and conclusions regarding these lost revenues due to the alleged breach of the exclusivity aspect of the Agreement. Mr. Ianni's expert report (identified lost revenues attributable to towing of Live Stop and non-Live Stop vehicles between March 1, 2001 to August 21, 2003). Although Mr. Ianni's lost revenue number testified to at hearing was different than those lost revenue numbers in his report because his testimony focused on a shorter time frame and a subset of the vehicles noted in his report, we find his testimony as to this subset and the materials he relied upon to be within the scope of his expert report. Ms. Butler failed to object timely to Mr. Ianni's testimony regarding Century's costs to tow vehicles, which did exceed the scope of his expert report. (N.T. 45-50; Ex. P-5; Board Finding).

66. Mr. Ianni testified that he was able to calculate the number of vehicles towed by PPA from the ACS records during the period of September 12, 2001 (date the original contract was allegedly amended to include Live Stop Program vehicles) until August 21, 2003 (date of letter ordering towing to stop on August 25, 2003) which he determined to be 45,416. It was unclear whether this 45,416 number represented all vehicles towed by the PPA during that time or just the number of vehicles towed under the Live Stop Program during this period. (N.T. 43-44, 50; Ex. P-5; Board Finding).

67. In contrast to this large number of vehicles apparently towed for the PPA according to Mr. Ianni from September 12, 2001 to August 21, 2003, Richard Cray, the general manager and office manager of Century, testified that, from December 2002 (when Act 123 went into effect) until August 2003, Century was asked to tow only six cars aside from the trucks that it towed during that eight month period. (N.T. 14-15, 23, 31-32, 42-44).

68. Century was paid for the vehicles that it handled according to the prices listed in the Rider to the Agreement. (N.T. 15-16, 23; Ex. P-4; Board Finding).

69. Mr. Ianni calculated Century's lost revenue due to the towing of Live Stop vehicles by persons other than Century to be $2,980,467.00 for the period September 12, 2001 to August 21, 2003. (N.T. 43-44, 49-50; F.O.F. ¶¶ 57, 59-61).

70. The Board finds Mr. Ianni's testimony regarding lost revenue to Century because others were towing Live Stop vehicles to be lacking in clarity and substance on several material issues. For instance, we could not ascertain from his testimony exactly how he applied the data he considered from the ACS records (to calculate the number of vehicles towed under the Live Stop Program that were not assigned to Century for towing) to the Agreement Rider listing fees for different services (such as administration charges, towing fees, storage fees and such) to arrive at his calculation of lost revenues. (N.T. 36-52; Exs. P-4, P-9; F.O.F. ¶¶ 57, 60-61, 66, 69; Board Finding).

71. Mr. Ianni stated that he was familiar with the costs of this towing program for Century, but did not itemize or explain them in any fashion. He stated that he calculated the "percentage of cost to revenue" ratio to be about twenty five percent but did not itemize or explain this calculation in any fashion. (N. T. 50; Board Finding).

72. Other than the cost to revenue ratio mentioned in the preceding Finding of Fact, Mr. Ianni offered no testimony about the makeup of any of the costs incurred by Century to provide towing and storage services for the Live Stop Program or any other program under the Agreement (such as overhead, personnel, equipment or any other expenses) that would have to be deducted from the gross revenue from Century's towing operation to even begin to approximate the lost <u>profit</u> which Century may have been able to claim on the Agreement. (N.T. 36-52; Board Finding).

73. Mr. Ianni failed to explicitly identify any "lost profits" due to Century because others were towing Live Stop vehicles in alleged breach of the Agreement. He also testified on

cross-examination that until the request from Plaintiff's attorney at the hearing, he had never before made such damage calculations as he presented to the Board. (N.T. 36-52; Board Finding).

74. The Board finds that damages in the form of lost profits were reasonably foreseeable if the Agreement for towing vehicles had been breached by the Traffic Court. (Exs. P-1 through P-4; Board Finding).

75. Aside from Mr. Ianni's one sentence testimony on the "percentage of cost to revenue" for "this particular program," there was no other testimony or evidence introduced at hearing as to whether a seventy-five percent profit margin was typical in the towing business or was typical for Century. This high profit margin was totally unsupported by any explanation or backup material. (N.T. 50-52; Board Finding).

76. Neither Mr. Ianni nor any other witness at hearing presented any testimony or evidence of lost revenue, costs, or lost profits to Century based on: (a) the towing of non-Live Stop Program vehicles by persons other than Century or (b) the towing of any vehicles for any time period after August 21, 2003. (N.T. 36-52; Board Finding).

77. The Board finds Mr. Ianni's testimony as to the total amount of Century's lost revenue on the Agreement due to others towing Live Stop vehicles to be questionable. Further, we find his testimony as to the percentage of costs to revenue for Century's towing operations to be incredible and wholly unpersuasive. Finally, we find his testimony as to lost profit experienced by Century due to any alleged breach of the Agreement to be substantially non-existent. (N.T. 36-52; F.O.F. 57-76; Board Finding).

78. Lacking the presentation of any supporting material or explanation as to costs or profits experienced by Century as a result of any of the alleged breaches of the Agreement by the Traffic Court, we do not find sufficient evidence presented at hearing for the Board to estimate, with reasonable certainty, the amount of damages experienced by Century on the Agreement even were we to assume, arguendo, that the Traffic Court breached the Agreement and that all other issues in this case are resolved in favor of Century. (N.T. 36-52; F.O.F. 57-77; Board Finding).

79. Having found the testimony of Century's damage expert, Mr. Ianni, to be questionable, unpersuasive, and unsupported by other evidence or full explanation of his method of calculation, and having found no other persuasive evidence to support Century's alleged damages to have been presented at hearing, the Board finds that Century has failed to prove any of its alleged damages with reasonable certainty in this case. (N.T. 36-52; F.O.F. 57-78; Board Finding).

CONCLUSIONS OF LAW

1. The Board has subject matter jurisdiction over Century's claims in this action against the Traffic Court based on alleged premature termination of the subject contract (i.e. the Agreement) and/or for alleged violation of the Agreement's exclusivity provisions. Subject matter jurisdiction obtains here because the Board is competent to hear contract claims against the Commonwealth, which is the general class and type of case presented by Century's claims. 62 Pa.C.S. § 1724; DGS v. Limbach Company, et al., 862 A.2d 713, 716-20 (Pa. Cmwlth. 2004) aff'd per curium 895 A.2d 527 (Pa. 2006); Employers Insurance of Wausau v. PennDOT, 865 A.2d 825, 833-34 (Pa. 2005); In re Melograne, 812 A.2d 1164, 1166-1167 (Pa. 2002); Frye Construction, Inc. v. City of Monongahela, 584 A.2d 946, 948-949 (Pa. 1991); Dept. of Public Welfare v. UEC, Inc., 397 A.2d 779, 784-85 (Pa. 1979); Feingold v. Bell of Pa., 383 A.2d 791, 793-794 (Pa. 1977).

2. The question of whether the Board has the authority to hear Century's claims because of alleged failures to comply with statutorily prescribed administrative remedies and/or failure to timely file its claim with the Traffic Court is one of personal jurisdiction. In re Melograne, 812 A.2d at 1166-1167; Dept. of Public Welfare v. UEC, Inc., 397 A.2d at 784-785; Frye Construction, 584 A.2d at 948-49.

3. Objections to jurisdiction over the person can, in some circumstances, be waived or estopped on equitable grounds by actions of the parties. In re Melograne, 812 A.2d at 1166-1167; Dept. of Public Welfare v. UEC, Inc., 397 A.2d at 784-785; Frye Construction, 584 A.2d at 948-49.

4. Whether the Board may exercise in personam jurisdiction over the Traffic Court for all or any part of Century's claims for premature termination or violation of the Agreement's exclusivity provisions depends on whether or not Century submitted these claims timely and to the Traffic Court before Century submitted it to the Board or whether the Traffic Court is somehow estopped from asserting these defenses. Dept. of Public Welfare v. UEC, Inc., 397 A.2d at 784-85; Frye Construction, 584 A.2d at 949.

5. The purpose of requiring a claimant to exhaust administrative remedies before filing with the Board is for parties to utilize the agency's expertise in its specialized area and to allow the agency a chance to correct its errors and thereby avoid litigation in the court system. Pennsylvania Pharmacists Ass'n v. Com., 733 A.2d 666, 672 (Pa. Cmwlth. 1999); Colonial School District et al. v. Commonwealth of Pennsylvania, Dept. of Education, 602 A.2d 455, 457 (Pa. Cmwlth. 1992).

6. The requirement to exhaust administrative remedies is not an absolute doctrine, and, whether a court ought to apply the exhaustion doctrine in a given set of circumstances is a matter within the sound discretion of the court. Frye Construction, 584 A.2d at 948. See also, Machipongo Land and Coal Company v. Commonwealth of Pennsylvania, Dept. of Environmental Resources, 648 A.2d 767, 769 (Pa. 1994) (*reversed on other grounds*).

7. Equitable estoppel is a doctrine of fundamental fairness designed to preclude a party of depriving another of the fruits of a reasonable expectation. This doctrine of equitable estoppel may be applied to a governmental agency such as the Commonwealth. See e.g., Department of Commerce v. Casey, 624 A.2d 247, 254-55 (Pa. Cmwlth. 1993) citing, inter alia, DeFrank v. County of Greene, 412 A.2d 663, 665-67 (Pa. Cmwlth. 1980).

8. A defendant may be estopped from invoking a defense to in personam jurisdiction based on a failure to exhaust an administrative remedy and/or a statute of limitations if the defendant has caused the plaintiff, through fraud or concealment, to relax his vigilance or deviate from his right of inquiry. Dept. of Public Welfare v. UEC, Inc., 397 A.2d at 784-85; In re Melograne, 812 A.2d at 1166-67; Frye Construction, 584 A.2d at 949; Machipongo Land and Coal Company, 648 A.2d at 767, 769.

9. The "fraud or concealment" necessary to establish a case for application of estoppel principles to prevent a defendant from asserting such a defense does not mean fraud or concealment in "the strictest sense encompassing an intent to deceive, but rather fraud in the broadest sense which includes an unintentional deception . . . (citation omitted)." It is not the intention of the party estopped but the natural effect upon the other party which gives vitality to an estoppel. DPW v. UEC, Inc., 397 A.2d at 784-85, citing Nesbitt v. Erie Coach Co., 204 A.2d 473, 476-77 (Pa. 1964); Storms ex. rel. Storms v. O'Malley, 779 A.2d 548, 560 (Pa. Super. 2001).

10. The Pennsylvania Procurement Code requires that a complaining contractor must first file his claim with the contracting officer of the defendant agency before filing with the Board of Claims. This claim must be filed with the contracting officer within six months of the date it accrues. 62 Pa.C.S. § 1712.1(b).

11. The Commonwealth Court has developed a two-prong standard to determine when a claim accrues. A claim accrues when: (1) a claimant is first able to litigate his or her claim, e.g., when the amount due under the claim is known and the claimant is capable of preparing a concise and specific written statement detailing the injury, and (2) the claimant is affirmatively notified that he or she will not be paid by the Commonwealth after submission of an invoice for goods or services provided. The Commonwealth Court has required that this denial of a claim be unequivocal. Darien Capital Management, Inc. v. Com., Public School Employes' Retirement System, 700 A.2d 395, 397-99 (Pa. 1997).

12. Century's claim for premature termination and breach of the exclusive nature of the Agreement accrued on August 25, 2003 because this was the earliest point in time at which Century was: (a) first able to litigate its claim against the Traffic Court for breach of the Agreement (i.e. when it could first have ascertained an amount due and been capable of preparing a concise and specific written statement detailing its injury in this matter) and (b) affirmatively notified that the Agreement would be terminated and it would no longer be paid for towing services thereunder. F.O.F. ¶¶ 42-52; Darien, 700 A.2d at 397-99.

13. Because Century's claim for breach of the Agreement accrued on August 25, 2003, Century would have had six months from that date, or until February 25, 2004, to file its claim with the contracting officer for the Traffic Court. 62 Pa.C.S. § 1712.1 (b); Board Finding.

14. Paragraph 24 of the subject Agreement between Century and the Traffic Court states explicitly that "any lawsuit, action, claim . . . or any matter arising out of or related to this agreement, or the relationship created or evidenced thereby, shall be brought exclusively in the Court of Common Pleas of Philadelphia County." Ex. P-1.

15. Century did file a claim on the Agreement with the Philadelphia Court of Common Pleas on September 8, 2003, entitled Petition to Preclude Enforcement of Court's Termination of Exclusive Agreement (i.e. the "Peition") and notified the Traffic Court of this action promptly thereafter. In the Petition, Century sought to have the termination of its Agreement voided, and it sought damages in excess of $50,000.00 for premature termination of Agreement and breach of the exclusivity provisions of this Agreement (which it alleged to be an exclusive contract to tow vehicles in the City and County of Philadelphia). Century filed this Petition within 18 days of the date of the letter terminating its services and within 14 days of its receipt of same, well within the six-month limitation period of Section 1712.1(b). Ex. P-8; 62 Pa.C.S. § 1712.1(b).

16. Because Paragraph 24 of the Agreement constitutes an express and affirmative representation to Century by the Traffic Court that claims on the Agreement must be filed with the Philadelphia Court of Common Pleas as the forum for resolution of Agreement disputes rather than with the Traffic Court (or its contracting officer), and Century did so in reliance on same, the Traffic Court cannot now be heard to object to Century's compliance with same as a means to escape a hearing on the merits of the claim. Accordingly, we find that the Traffic Court is appropriately estopped from invoking the defense of failure to exhaust administrative remedy and/or the bar of the time limitations on action due to Century's failure to file its claim with the Traffic Court's contracting officer. Dept. of Public Welfare v. UEC, Inc., 397 A.2d at 784; Frye Construction, 584 A.2d at 948; Machipongo, 648 A.2d at 769; Deptartment of Commerce v. Casey, 624 A.2d at 254-55, citing, inter alia, Novelty Knitting Mills, Inc. v. Siskind, 457 A.2d 502, 503-05 (Pa. 1983).

17. Century filed its claim with the Common Pleas Court within 14 days of the claim accrual date giving the Traffic Court a substantial opportunity to resolve this issue before the case was presented to the Board, which is the purpose behind 62 Pa.C.S. § 1712.1(b) and the exhaustion of administrative remedies doctrine. F.O.F. ¶45; Pennsylvania Pharmacists Ass'n. v. Com., 733 A.2d 666, 672 (Pa. Cmwlth. 1999); Colonial School District, et. al v. Commonwealth of Pennsylvania, Dept. of Education, 602 A.2d 455, 457 (Pa. Cmwlth. 1992).

18. Because the Traffic Court is estopped from raising the defenses of failure to exhaust administrative remedies and/or failure to timely file its claim with the Traffic Court's contracting officer per 62 Pa.C.S. § 1712.1, we conclude that, in addition to subject matter jurisdiction, the Board also has personal jurisdiction over the matter before us. C.O.L. ¶¶ 1-17.

19. Joseph Ianni, Century's accountant for some twenty years, testified as an expert witness with regard to Century's damages and prepared a one page report on same. Because the report itself is an out of court statement, the Board finds it to be hearsay and will not consider the report for the truth of the matter asserted therein despite apparent unrestricted admission of same by the Panel, but will utilize same for non-hearsay purposes such as addressing Defendant's objection to the scope of Mr. Ianni's testimony. Ex. P-5; F.O.F. ¶ 58; McManamon v. Washko, 906 A.2d 1259, 1266-68 (Pa. Super. 2006).

20. Because we find the portion of Mr. Ianni's testimony respecting his explanation of his lost revenue calculation and his information sources for same objected to by Defendant's counsel to be within the scope of his report, and that portion of his testimony respecting costs (which arguably was beyond the scope of his report) to have been presented without timely objection, we conclude that all of Mr. Ianni's testimony is admissible and will consider same. Ex. P-5; F.O.F. ¶¶ 57-69; Tiburzio-Kelly v. Montgomery, 681 A.2d 757, 764-65 (Pa. Super. 1996).

21. Lost profit, not lost revenue, is the measuring standard used by Pennsylvania courts to calculate damages for non-performance or breach of a contract in circumstances like the case at hand. Company Image Knitware, LTD. v. Mothers Work, Inc., 909 A.2d 324, 336 (Pa. Super. 2006); Dep't of Transportation v. Brozzetti, 684 A.2d 658, 665-66 (Pa. Cmwlth. 1996); Quinn v. Bupp, 955 A.2d 1014, 1021 (Pa. Super. 2008).

22. The general rule of law applicable to a claim for damages in a contract action allows such damages only where: (1) there is evidence to establish them with reasonable certainty; (2) there is evidence to show that they were the proximate consequence of the wrong; and (3) these damages were reasonably foreseeable. Mothers Work, 909 A.2d at 336; Brozzetti, 684 A.2d at 665-66; Quinn, 955 A.2d at 1021.

23. Because this was a contract for services to be provided by Century, the Board finds that it was reasonably foreseeable to expect that there could be a loss of profits for Century if the Traffic Court were to breach the Agreement. This satisfies the third prong of the test for damages in the form of lost profits as outlined in Mothers Work above. Ex. P-1.

24. As fact finder, the Board determines the credibility of witnesses and resolves conflicts in the evidence. The Board found the testimony of Mr. Ianni, Century's expert and only witness on damages, to be lacking generally in clarity and substance. F.O.F. ¶¶ 66-77; A.G. Cullen Const., Inc. v. State System of Higher Education, 898 A.2d 1145, 1155 (Pa. Cmwlth. 2006); Commonwealth v. Holtzapfel, 895 A.2d 1284, 1289 (Pa. Cmwlth. 2006); Allegheny Ludlum Corp. v. Municipal Authority of Westmoreland County, 659 A.2d 20, 30 (Pa. Cmwlth. 1995).

25. Because the Board found Mr. Ianni's testimony with regard to Century's lost revenue due to the towing of Live Stop vehicles by persons other than Century to be lacking in clarity and substance due, among other things, to his failure to explain how he applied the vehicle data from the ACS records to the Agreement Rider listing fees for different services; and because we found Mr. Ianni's testimony and the evidence presented by Century on the cost to

revenue ratio for Century's towing activities to be without explanation or substantiation of any of the components of such cost (e.g. overhead, personnel, equipment, or other expenses) and wholly lacking in credibility; and because Mr. Ianni and Century offered no meaningful testimony as to the approximate amount of lost profits which Century may have been able to claim due to the alleged towing of Live Stop vehicles by others in violation of the Agreement; and because neither Mr. Ianni nor any other witnesses at hearing presented any testimony of lost revenue, cost or lost profits to Century based on the towing of non-Live Stop vehicles by persons other than Century or due to the towing of any vehicles for any time period after August 21, 2003; and because these failures have caused the Board to find that Century has failed to establish its damages with respect to any alleged breach of the Agreement with reasonable certainty we conclude that Century has failed to carry its burden to establish damages due to the alleged early termination of the Agreement and/or any other violation of the alleged exclusivity provisions of the Agreement with reasonable certainty and can make no award on any portion of the claim asserted at the Board by Century. Mothers Work, 909 A.2d at 336; Brozzetti, 684 A.2d at 658; Paliotta v. Dep't of Transportation, 750 A.2d 388, 390 (Pa. Cmwlth. 1999); General Dynafab, Inc. v. Chelsea Industries, Inc., 447 A.2d 958, 960 (Pa. Super. 1982); Delahanty v. First Pennsylvania Bank, N.A., 464 A.2d 1243, 1257 (Pa. Super. 1983).

OPINION

Background

On March 1, 2001, the Plaintiff, Century Motors, Inc. ("Century"), entered into a contract with the Defendant, First Judicial District of Pennsylvania – Traffic Court of Philadelphia, ("Traffic Court") to tow, store and dispose of vehicles as designated by Philadelphia law enforcement agencies. The contract was amended twice. On May 18, 2001, the contract was amended to include provisions for a two-year term and renewals, and on September 14, 2001, the contract was amended to include the handling of vehicles "designated by an appropriate law enforcement officer as in violation of the statute known as the 'Live Stop Law' or 'The Impoundment Law.'" [3] We will hereinafter refer to the contract (as amended) between Century and the Traffic Court, as do the parties, as the "Agreement."

On October 4, 2002, the Governor signed into law an amendment ("Act 123") to the Pennsylvania Motor Vehicle Code, 75 Pa.C.S. § 6309-6309.2, which became effective in 60 days. Pursuant to that amendment, the Philadelphia Parking Authority ("PPA") replaced the Traffic Court as the "appropriate towing and storing agent" for Philadelphia County. Following the passage of Act 123, Century's attorney, John DeVirgilis, engaged in discussions with the PPA. Although the testimony at hearing varied regarding these discussions, it appears that, as a result of these discussions, Mr. DeVirgilis sent a letter to the PPA dated October 22, 2002 in which he acknowledged that the PPA would assume responsibility for towing vehicles at some time "in the near future" pursuant to Act 123. However, the letter also confirmed that Century would continue to dispose of all vehicles pursuant to its current towing and storage contract with the Traffic Court until the Agreement was terminated. Thereafter, Century continued to tow

[3] These monikers are not actually listed in the text of the law, but the Board understands the allusion to the Live Stop Law and/or The impoundment Law to be referring to 75 Pa.C.S. § 6309.2 of the Pennsylvania Motor Vehicle Code.

vehicles (primarily trucks) as requested until it received a letter dated August 21, 2003 by which the Traffic Court notified Century that all towing under the Agreement would be terminated by August 25, 2003. Thus, despite the passage of Act 123 (and the various opinions expressed as to the legal effect of same by several witnesses) Century continued to tow vehicles, if and when requested to do so, and to receive compensation for the services it provided until August 25, 2003.

On September 8, 2003, Century filed a Petition to Preclude Enforcement of Court's Termination of Exclusive Agreement (hereinafter "Petition") in the Philadelphia Court of Common Pleas. In the Petition, Century alleged, among other things, that the Traffic Court was seeking to terminate the Agreement and had utilized other towing service vendors in violation of the Agreement. It further sought to have the termination of its Agreement voided and an award of monetary damages in excess of $50,000.00 for the breach of this Agreement which it alleged to be an exclusive contract with renewals for towing vehicles in the City and County of Philadelphia. A copy of this Petition was entered into evidence at the Board hearing as Plaintiff's Exhibit No. 8. With the exception of testimony from Dominic J. Rossi, Deputy Court Administrator for the First Judicial District, indicating that Century filed these actions with the Philadelphia Court of Common Pleas and neither of them raised the issue of the constitutionality of Act 123, no other evidence regarding this case at the Philadelphia Court of Common Pleas or its status was introduced at trial. However, it appears from the Court's Civil Docket that Century also filed a complaint with this same Court under the same docket number on September 19, 2003, and that the entire matter was thereafter settled on or about April 2, 2004. We will address further the Common Pleas case later in our discussion regarding jurisdiction.

In its claim with this Board, Century alleges that the Traffic Court "violated the terms of the agreement in that it (a) terminated an exclusive agreement without cause; (b) failed to provide plaintiff with all vehicles pursuant to the live stop and impoundment enforcements and the appropriate statutes; and (c) hired private vendors in direct violation of the Agreement." As a result; Century now seeks a damage award from this Board in the form of monetary compensation for lost towing opportunities. Although the Amended Statement of Claim is, in and of itself, less than clear as to whether the damages which Century seeks are for only the original two year term of the Agreement (March 1, 2001 to March 1, 2003); for that term plus the period until August 25, 2003 when the Traffic Court terminated the Agreement; or for the original term and the alleged two year renewal, Century's accountant and expert witness calculated Century's "lost revenue" on the Agreement to be $2,980,467. He calculated this lost revenue for the period September 12, 2001 through August 21, 2003.

Discussion

A hearing was held before a panel of this Board on October 6, 2008. Numerous issues have arisen in our review of the case as a result of the presentation of this matter before the Board panel. Some have been addressed by the parties, and some have not. Some have been supported by evidence presented and others have not.[4] However, among the multiple issues raised by this case and the manner in which it has been presented to us, the Board finds two

[4] These issues include the following: (1) Was Act 123 in violation of federal and state constitutional prohibitions against interference with existing contracts? (2) If not, did Act 123 excuse the Traffic Court from performance on the Agreement after the effective date of the Act in December 2002 by reason of impossibility? (3) If the Agreement continued to be in effect until March 2003, did it automatically renew until March 2005 without any further action or consent by both parties (as may have been specified in the first amendment to the original contract)? (4) If the Agreement was no longer in effect after December 2002, was there another contract under which Century continued to provide its services (Century does not allege violation of any other such contract.)? (5) What is the exact nature of relief sought by Century's amended statement of claim here at the Board, wherein it asked that the Traffic Court "be estopped from terminating and breaching the said agreement?" (6) Did the Agreement require exclusive use of Century's towing service in the City and County of Philadelphia or was the Traffic Court and/or PPA allowed to utilize other towing companies as well during the term(s) of the Agreement? (7) Was the Agreement exclusive for "Live Stop" towing in the City and County of Philadelphia? (8) In addition, there exist several issues of evidence admissibility.

issues to be dispositive of the matter before us: (A) whether or not the Board of Claims has jurisdiction over this case; and (B) whether or not Century has carried its burden to prove the damages it claims on the Agreement with reasonable certainty. As explained below, we find that Plaintiff has established that this Board has jurisdiction over this matter, but has failed to carry its burden to establish its damages with reasonable certainty.

Before addressing Century Motor's failure to prove its damages, the Board must first address the procedural/jurisdictional challenge to our review of the case argued by the Traffic Court. The Traffic Court here contends that: "Plaintiff failed to comply with provisions of Section 1712.1(a) thru (e) before filing its original claim with the Board"; that "Plaintiff failed to file a claim first with the contracting agency that was refused or ignored and, therefore, is deemed to have waived its right to assert a claim in any forum"; and that "Plaintiff's claim was not filed within the time prescribed by Section 1712 (sic) of the Commonwealth Procurement Code." (Traffic Court's Conclusions of Law 6-8). From these assertions, the Board understands the Traffic Court to be alleging a failure by Century to exhaust administrative remedies before filing its claim with this Board and/or a failure by Century to timely file its claim with the Traffic Court contracting officer within six months of its accrual.

This Board has addressed challenges to its jurisdiction on several occasions in the past. In each instance, we have been mindful of the Pennsylvania Supreme Court's discussion in the case of In re Melograne, 812 A.2d 1164 (Pa. 2002). In Melograne, our Supreme Court is careful to distinguish between subject matter jurisdiction, which is competency to address the general class or type of case to be heard, and personal jurisdiction, which it describes as power to act over the parties in the case to order or effect a particular result. Id. at 1166-1167. Where a tribunal lacks subject matter jurisdiction, it has no authority to hear the case and no actions by

the parties or agreements between the parties can provide that authority. Objections to jurisdiction over the person, however, can, in certain circumstances, be waived or estopped on equitable grounds by actions of the parties. Id.; see also Com., Dept. of Public Welfare v. UEC, Inc., 397 A.2d 779, 785 (Pa. 1979); Frye Construction, Inc. v. City of Monongahela, 584 A.2d 946 (Pa. 1991).

In the present case, the Board has subject matter jurisdiction over the issues because we clearly have competency to hear this general class and type of case (i.e. claim for breach of a contract against the Traffic Court, a Commonwealth entity). 62 Pa.C.S. § 1724(a); DGS v. Limbach Company, et al, 862 A.2d 713, 716-720 (Pa. Cmwlth. 2004) aff'd per curium 895 A.2d 527 (Pa. 2006); Employers Insurance of Wausau v. Com., Dept. of Transp., 865 A.2d 825, 833-834 (Pa. 2005); In re Melograne, 812 A.2d at 1166-67; Dept. of Public Welfare v. UEC, 397 A.2d at 785; Frye Construction, 584 A.2d at 949. However, whether or not the Board has in personam jurisdiction over the Traffic Court depends on: 1) whether or not Century exhausted its administrative remedy with regard to its claims against the Traffic Court before submitting them to the Board; 2) whether or not Century has submitted these claims timely; and/or 3) whether or not the Traffic Court has some how waived or is estopped from asserting any of these defenses by reason of its representations or actions with regard to the claim at issue. In re Melograne, 812 A.2d at 1166-67; Dept. of Public Welfare v. UEC, 397 A.2d at 785; Frye Construction, 584 A.2d at 949.

With regard to the question of the Board's in personam jurisdiction in this case, we first note that the relevant provisions of Section 1712.1 are as follows:

§ 1712.1 Contract Controversies

> **(a) Right to claim.** - A contractor may file a claim with the contracting officer in writing for controversies arising from a

contract entered into by the Commonwealth.

> **(b) Filing of claim.** - A claim shall be filed with the contracting officer within six months of the date it accrues. If a contractor fails to file a claim or files an untimely claim, the contractor is deemed to have waived its right to assert a claim in any forum. Untimely filed claims shall be disregarded by the contracting officer.
>
> **(c) Contents of claim.** - A claim shall state all grounds upon which the contractor asserts a controversy exists.
>
> **(d) Determination.** - The contracting officer shall review a claim and issue a final determination in writing regarding the claim within 120 days of the receipt of the claim unless extended by consent of the contracting officer and the contractor. If the contracting officer fails to issue a final determination within the 120 days unless extended by consent of the parties, the claim shall be deemed denied. The determination of the contracting officer shall be the final order of the purchasing agency.
>
> **(e) Statement of claim.** - Within 15 days of the mailing date of a final determination denying a claim or within 135 days of filing a claim if no extension is agreed to by the parties, whichever occurs first, the contractor may file a statement of claim with the board.

62 Pa.C.S. § 1712.1.

We further note that the parties disagree, inter alia, as to when Century's claim against the Traffic Court first accrued and also as to whether or not Century adequately pursued its administrative claim against the Traffic Court to contest this matter before filing here at the Board.

The Supreme Court, in Darien Capital Management, Inc. v. Com., Public School Employees' Retirement System, 700 A.2d 395, 397 (Pa. 1997), set out a two prong test for determining the time when a claim against the Commonwealth accrues. Darien states that a claim accrues when: (1) a claimant is first able to litigate his or her claim, e.g., when the amount due under the claim is known and the claimant is capable of preparing a concise and specific

written statement detailing the injury, and (2) the claimant is affirmatively notified that he or she will not be paid by the Commonwealth. Id.

The Traffic Court argues that Century was aware of the portent of Act 123 in October 2002 and that, therefore, Century's claim accrued either in October 2002 when Act 123 was passed or in December 2002 when the Act went into effect. As a result, the Traffic Court calculates that the six-month window for the filing of Century's claim under Section 1712.1(b) of the Procurement Code would have closed in either April 2003 or June 2003, respectively. Hence, according to the Traffic Court, Century's February 2004 filing with this Board was clearly outside the filing timeframe prescribed by Section 1712.1 of the Procurement Code.

The Board acknowledges that the letter of Century's attorney, dated October 22, 2002, is evidence that Century was aware of the change in the law at that time. However, we find that this knowledge alone was not enough to establish an accrual date for Century's claim under the Darien criteria. For one thing, even after Act 123 was passed and became effective, it's effect on the subject Agreement remained unclear for several reasons: (1) although the letter of Century's attorney dated October 22, 2002 to the PPA (copied to the Traffic Court) acknowledged the PPA would take over towing at some time "in the near future" it also reaffirmed the existing Agreement and stated that Century would continue to provide services under the existing contract until Century received notice of termination from the Traffic Court (to which neither the PPA nor the Traffic Court expressed objection); (2) Century continued to receive towing assignments well after the effective date of Act 123 and was compensated for same (with no evidence presented that these services and the payment thereof were provided under any other contract); (3) the Traffic Court acted as though Century's continued towing was performed pursuant to the existing Agreement between them since it informed Century in its letter dated

August 21, 2003 that its services would no longer be needed after August 25, 2003 and that the Traffic Court expected Century "to continue to comply with all requirements and procedures set forth in that Agreement . . ." until that date. In short, the foregoing actions and communications between Century, the Traffic Court and the PPA strongly indicate that, as a matter of fact, none of the three parties considered the Agreement terminated by the mere passage (or effectiveness) of Act 123 at the time. Thus, it is clear from the evidence presented that the mere enactment of Act 123 cannot fairly be viewed as an affirmative notice to Century that it would not be paid on the Agreement, and that Century did not receive such notice until its actual receipt on or about August 25, 2003 of the August 21, 2003 termination letter from the Traffic Court.

In addition to the absence, in fact, of the affirmative denial component of the Darien criteria with regard to any of the Traffic Court's responsibilities under the Agreement until receipt of the August 21, 2003 letter, there also exists considerable doubt as to whether or not the enactment of Act 123 could even be considered to affect the Agreement between Century and the Traffic Court. That is, while literal application of Act 123 would preclude the Traffic Court from performing the Agreement going forward (thus providing the Traffic Court with potential grounds for a defense of impossibility/impracticability in regard to the Agreement), the prohibition against legislative interference with existing contracts found in both the Pennsylvania and federal constitutions poses a strong countervailing argument for continued enforceability of the Agreement on Century's behalf. See e.g. Burkus v. Henshall, 126 A.2d 722, 724-25 (Pa. 1956) and Allied Structural Steel Co. v. Spannaus, 98 S.Ct. 2716, 2721 (1978). Although we do not here decide this question as to the application of the impossibility defense versus the constitutional prohibition against interference with existing contracts because we find other issues clearly dispositive of this case, we do find that the very existence of this question and the

uncertainty it causes as to the actual effect of Act 123 on the Agreement is further reason to reject the Traffic Court's argument that the mere passage and/or effectiveness of Act 123 was, in and of itself, sufficient to trigger an accrual of Century's claims on the Agreement.

The Board, instead, is in substantial agreement with Century's position that its claim accrued as of August 25, 2003 when the Traffic Court notified Century of the termination of its Agreement by way of the August 21, 2003 letter and ceased actual performance of the Agreement on August 25, 2003. Up until this exchange, it appears to us from the evidence presented, it was not clear to Century whether or not the Traffic Court would continue its performance under the existing contract, which Century considered to be automatically renewed in March 2003 for an additional two-year term. Moreover, with respect to Century's claim regarding breach of the exclusive nature of the Agreement, Century's uncontradicted testimony establishes that its inquiries regarding towing activity by other vendors prior to the August 21, 2003 termination letter went unanswered, thereby depriving Century of the opportunity to prepare a concise and specific written statement detailing its injury due to the Traffic Court's alleged breach of the exclusivity provision of the Agreement or ascertain an amount due thereunder as well as depriving Century of any clear, unequivocal response or denial of its concerns with regard to this breach of the Agreement until the termination notice by way of the August 21, 2003 letter. In any event, there was no clear notice to Century that the Agreement was terminated and that it would no longer be paid for towing until its receipt on or about August 25, 2003 of this August 21, 2003 letter. Accordingly, we find that the evidence presented establishes August 25, 2003 as the earliest date that Century was clearly notified to stop performance and would have been able to prepare a concise and specific statement of its injury for the breaches alleged. It is, therefore, the date of August 25, 2003 when Century's claim on

the Agreement against the Traffic Court accrued under the Darien [5] criteria and the facts in evidence.

Having found the claim accrual date to be August 25, 2003, we next turn to the Traffic Court's argument that the Board lacks jurisdiction because Century failed to file its claim with the contracting officer within six months of the date it accrued, which would have been February 25, 2004, as required by Section 1712.1(b) of the Procurement Code.[6] Clearly, this section sets forth a procedure for an administrative remedy to be pursued for "controversies arising from a contract entered into by the Commonwealth" before the claim may be filed at this Board. However, such objections to jurisdiction over the person can, in some circumstances, be waived or estopped on equitable grounds by actions of the parties. In re Melograne, 812 A.2d at 1166-67; Dept. of Public Welfare v. UEC, 397 A.2d at 784-85; Frye Construction, 584 A.2d at 948-49. See also, Machipongo Land and Coal Company. Commonwealth of Pennsylvania, Dept. of Environmental Resources, 648 A.2d 767,769 (Pa. 1994).

The Board finds such a situation here because Paragraph 24 of the subject Agreement between Century and the Traffic Court states explicitly that "any lawsuit, action, claim . . . or any matter arising out of or related to this agreement, or the relationship created or evidenced thereby, shall be brought exclusively in the Court of Common Pleas of Philadelphia County."[7] In obvious reliance on this contractual provision, Century did file a claim on the Agreement with

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[5] The date on the termination letter was August 21, 2003. We have no persuasive evidence as to Century's actual receipt of same and note that there was an intervening weekend between Thursday August 21, 2003 and Monday August 25, 2003. Therefore the circumstances and evidence provided lead us to find August 25, 2003 as the most reliable date for this purpose. In any event, an accrual date of either August 21st or 25th makes Century's subsequent filings timely.

[6] The Traffic Court discusses the procedures for claims to be heard by the Board of Claims and states that these provisions are exclusive. However, the Traffic Court relies in error on 72 P.S. § 4651-6, which was repealed in 2002 and replaced by changes to the Procurement Code, 62 Pa.C.S. §§ 1712.1 and 1721 et seq.

[7] This same paragraph of the contract references two forums (sic) which shall have exclusive jurisdiction and states that the parties expressly consent to the jurisdiction and venue of these two forums (sic). However, no forum other than the Court of Common Pleas of Philadelphia County is mentioned in the Agreement.

the Philadelphia Court of Common Pleas on September 8, 2003 and notified the Traffic Court of this action on or about the same day. Century did this within 18 days of the date of the letter terminating its services and within 14 days of the effective date of the termination, well within the six-month limitation period of Section 1712.1(b). Because Paragraph 24 of the Agreement constitutes an express and affirmative representation to Century by the Traffic Court that claims on the Agreement must be filed with the Philadelphia Court of Common Pleas as the forum for resolution of Agreement disputes rather than with the Traffic Court, and Century did so in reliance thereon, the Traffic Court cannot now be heard to object to Century's compliance with same as a means to escape a hearing on the merits of the claim. Accordingly, we find that the Traffic Court is appropriately estopped from invoking the defense of failure to exhaust administrative remedy and/or the bar of the statute of limitation of action due to Century's failure to file its claim with the Traffic Court's contracting officer. Dept. of Public Welfare v. UEC, Inc., 397 A.2d at 784 (Pa. 1979); Frye Construction, 584 A.2d at 948; Machipongo; Dept. of Commerce v. Casey, 624 A2d. 247, 254-55 (Pa. Cmwlth. 1993), citing, inter alia, Novelty Knitting Mills, Inc. V. Siskind, 457 A.2d 502 Pa. 1983). We further note that, in fact, the Board considers Century's filing with the Philadelphia Court of Common Pleas to have given the Traffic Court a substantial opportunity to resolve this issue before coming to the Board, as is the purpose behind 62 Pa.C.S. § 1712.1 and the exhaustion doctrine in any event. 62 Pa.C.S. § 1712.1; Pennsylvania Pharmacists Ass'n. v. Com., 733 A.2d 666,672 (Pa. Cmwlth. 1999); Colonial School District, et. al. v. Commonwealth of Pennsylvania, Dept. of Education, 602 A.2d 455,457 (Pa. Cmwlth. 1992). As a result of the foregoing, the Board concludes that it has both subject matter and in personam jurisdiction in this matter.

Damages

As alluded to above, Century has the burden of proving all the facts necessary for recovery on its claim for breach of contract. See, Paliotta v. Dept. of Transportation, 750 A.2d 388, 390 (Pa. Cmwlth. 1999); General Dynofab, 447 A.2d at 958. This burden includes establishing its damages by a preponderance of the evidence. Delahanty v. First Pennsylvania Bank, N.A., 464 A.2d 1243, 1257 (Pa. Super. 1983). Pennsylvania law does not require mathematical certainty as to proof of damages, but it does require that the proof provide a reasonable basis by which the fact finder can calculate the Plaintiff's loss. Id. at 1258. A damage award may not be based on mere guess or speculation. Spang & Company v. U.S. Steel Corp., 545 A.2d 861, 866-67 (Pa. 1988). Thus, Century must provide a reasonable amount of information to enable the Board, in this case, to estimate damages without engaging in speculation. Bolus v. United Penn Bank, 525 A.2d 1215, 1226 (Pa. Super. 1987). Lost profit, is the measuring standard used by Pennsylvania courts to calculate damages for non-performance or breach of a contract in circumstances like the case at hand. Company Image Knitware, LTD. v. Mothers Work, Inc., 909 A.2d 324, 336 (Pa. Super. 2006); Dep't of Transportation v. Brozzetti, 684 A.2d 658, 665 (Pa. Cmwlth. 1996).

The Board of Claims' role as fact finder includes determining the credibility of witnesses and resolving conflicting evidence. A.G. Cullen Const., Inc. v. State System of Higher Education, 898 A.2d 1145, 1155 (Pa. Cmwlth. 2006). The Board, as the finder of fact, may believe all, part, or none of the evidence; must make all credibility determinations; and is responsible for resolving all conflicts in the evidence. A.G. Cullen 898 A.2d at 1155; Commonwealth v. Holtzapfel, 895 A.2d 1284, 1289 (Pa. Cmwlth. 2006); Allegheny Ludlum Corp. v. Municipal Authority of Westmoreland County, 659 A.2d 20, 30 (Pa. Cmwlth. 1995).

At the hearing, Century called Joseph Ianni, its accountant for 20 plus years, as an expert to establish its damages. As such, Mr. Ianni prepared a one-page report, and, although it appears from the transcript of the hearing that the panel admitted the report into the record over Ms. Butler's objection, it is not clear for what purpose the document was admitted. That said, the Board concludes that the report itself is inadmissible hearsay and cannot be admitted for the truth of the matter stated therein.[8] Mary E. Butler, Traffic Court's counsel, also objected that the scope of Mr. Ianni's testimony was outside of what was contained in his expert report. Although we appreciate Ms. Butler's position given the brevity of Mr. Ianni's written "report" and his modified "lost revenue" figure, we believe that Mr. Ianni, as an expert, was allowed to testify as to what materials and sources he reviewed and relied upon to form his opinion as well as his processes and methods. We further believe that his testimony, which focused on a smaller component of lost revenues (i.e. those attributable only to the Live Stop Program for the reduced period of September 12, 2001 through August 21, 2003) was within the fair scope of his report (which dealt with lost revenues attributable to the Agreement on both Live Stop and non-Live Stop vehicles for the period March 1, 2001 through August 21, 2003) at least at the point where Ms. Butler objected. (N.T. 39-49). Furthermore, when Mr. Ianni responded to a lone question from Century's counsel regarding costs incurred by Century for its services, which did arguably exceed the scope of his expert report, Ms. Butler did not object in a timely fashion. (N.T. 50). In light of these circumstances, as well as the Board's mandate to sit as a specialized tribunal without jury, we will allow Mr. Ianni's testimony as presented. That said, however, we find Mr. Ianni's testimony lacking in clarity and substance on several material issues.

[8]During the hearing, the Panel indicated that the plaintiff's expert report (identified as Ex. P-5) would not be admitted because it was inadmissible hearsay. (N.T. 47). However, at the end of the hearing, it also appears that the report was received into evidence without notation of any restriction at that time. (N.T. 105-06).

Mr. Ianni testified that he reviewed the Agreement, the Rider, and the towing data compiled by ACS, the outside company contracted by PPA to provide computer services and detailed records of vehicles towed by PPA. These ACS records were on compact disks and contained almost 3600 pages of documentation.[9] He also testified that he was able to calculate the number of vehicles towed by PPA during the period of September 12, 2001 (date the original contract was amended to include Live Stop vehicles) until August 21, 2003 (date of letter ordering towing to stop on August 25, 2003).[10]

Although it is less than clear exactly what data Mr. Ianni considered from these compact disks, he stated that he was able to determine that the PPA towed and stored 45,416 vehicles during the above time period. In contrast to the large number of vehicles apparently towed for the PPA from September 12, 2001 to August 21, 2003, Richard Cray, the general manager and office manager of Century, testified that, from December 2002 (when ACT 123 went into effect) until August 2003, Century was asked to tow only six cars, aside from the trucks that it towed during that eight month period.

Mr. Ianni testified that he calculated Century's lost revenue for Live Stop Program vehicle towing to be $2,980,467 for the period September 12, 2001 to August 21, 2003. To make this calculation, he testified that he reviewed the Agreement, along with its Rider that specified the applicable rates to be paid, and the records on the ACS disks to determine the number of "Live Stop" vehicles that Century should have been contacted to tow. However, Mr.

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[9] Defendant's counsel objected to the admission of this data on disks at hearing because she asserted that she had not had a chance to review the data on them. However, Ms. Butler had agreed by pre-trial stipulation that these records would be "accepted as true and correct and submitted without further proof at trial," and provided no evidence that these items had been requested in discovery and improperly withheld by Century. Additionally, she was provided a copy of these disks after the hearing and offered an opportunity to object to their admission after her review, but did not. Accordingly, these disks were added to the record by the panel as Plaintiff's Exhibit 9.

[10] The disk reports were broken down into four categories: Live Stop Revenue; Live Stop Delayed Revenue; Revenue – Excluding Live Stop; and Delayed Revenue – Excluding Live Stop. These reports showed towed vehicles with "Release Dates" or "Payment Dates" of "03/01/2001 THRU 08/21/2003".

Ianni never specifically cited the data that he used, (e.g. the rider lists fees for different services such as administration charges, towing and storage) or how he applied that data to arrive at his lost revenue number for Live Stop Program towing.[11] It is also remarkable, given that Century's claim appears to include a cause of action for early termination of its Agreement (August 25, 2003 compared to supposed renewal until March 2005), that no calculation or presentation of damages was made for lost business and subsequently lost profit suffered after August 21, 2003 because of the alleged premature termination.

Mr. Ianni also stated that he was familiar with the costs of this towing program for Century, but did not itemize or explain such costs in any fashion. In fact, his only testimony with regard to costs associated with the alleged missed revenues came in the form of a one sentence response to a single question on the topic asked by Century's counsel. Specifically, Mr. Ianni stated that Century's "percentage of cost to revenue" was about 25 percent.[12] Unfortunately, he did not testify with any specificity as to how he calculated this cost to revenue ratio. He offered no testimony about the makeup of any of the costs to provide the towing and impoundment services under the Agreement, such as overhead, employee or equipment costs, or any other expenses that would have to be deducted from the gross revenue to even begin to approximately calculate the lost profit which Century may have been able to claim. He certainly offered no testimony explicitly identifying any of Century's "lost profits" on the Agreement. Mr. Ianni also testified on cross-examination that until the request from Plaintiff's attorney, he had never before made the type of calculations for Century that he presented to the Board at hearing. (N.T. 51).

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[11] In point of fact, it is unclear from Mr. Ianni's testimony whether the 45,416 vehicles he identified as being towed between September 12, 2001 to August 21, 2003 were only Live Stop vehicles or included non-Live Stop vehicles as well. (N.T. 42-44, 50; Ex. P-5; F.O.F. ¶ 66).

[12] If we understand Mr. Ianni's one sentence assertion correctly, this would suggest a Century profit margin of 75% on its towing activities. We find such an assertion incredible absent much greater substantiation and backup than has been provided in this case.

Lost profit, not lost revenue, is the measuring standard used by Pennsylvania courts to calculate damages for non-performance of a contract in circumstances like the case at hand. Company Image Knitware, LTD. V. Mothers Work, Inc., 909 A.2d 324, 336 (Pa. Super. 2006). The general rule of law applicable to claim loss of profits in a contract action allows such damages only where: (1) there is evidence to establish them with reasonable certainty; (2) there is evidence to show that they were the proximate consequence of the wrong; and (3) these damages were reasonably foreseeable. Id.

In the present matter before the Board, we find that damages in the form of lost profits were reasonably foreseeable if the Agreement for towing vehicles had been breached by the Traffic Court. This satisfies the third prong of the above test set out in Mothers Work. However, the Board is unable to find sufficient evidence to establish Century's damages in the appropriate form of lost profits on its claim with reasonable certainty. The testimony of Century's damages expert, Mr. Ianni, was insubstantial and lacking in detail as to exactly what facts and data his opinion was based on and how he performed his revenue calculations. As the fact finder, the Board finds Mr. Ianni's testimony as to the total amount of lost revenue to be questionable. More importantly, we find his testimony as to the percentage of "costs to revenue" for this program, from which the Board might charitably infer an estimate of lost profits at seventy –five percent of revenue, to be incredible and wholly unpersuasive. Among other things, there was no other testimony as to whether a seventy-five percent profit margin was typical in the towing business, or was typical for Century. There was certainly no information provided as to the data upon which the costs or resultant profit margin was calculated. This high profit margin was totally unsupported by any other explanation or backup. Lacking the presentation of any such supporting material or explanation, we do not find sufficient evidence for the Board to

estimate with reasonable certainty the amount of damages experienced by Century even were we to assume, arguendo, that the Traffic Court breached the Agreement and that all other issues in this case are resolved in favor of Century.

In sum, we find that the Board has both subject matter and in personam jurisdiction over the instant case. However, we further conclude that Century has failed by a wide margin to meet the burden of proving its damages with reasonable certainty in this case. We also find this failure to be dispositive of the results in this matter. Accordingly, we make no award for damages in this case and issue the following order:

ORDER

AND NOW, this 9th day of October 2009, the Board of Claims hereby enters judgment in favor of the Defendant, Commonwealth of Pennsylvania, First Judicial District of Pennsylvania – Traffic Court of Philadelphia, and against the Plaintiff, Century Motors, Inc. No monetary award is made in this matter. Each party shall bear its own costs and attorneys' fees.

BOARD OF CLAIMS

ORDER SIGNED

_____
Jeffrey F. Smith
Chief Administrative Judge

_____
Harry G. Gamble, P.E.
Engineer Member

_____
Andrew Sislo
Citizen Member