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**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF TEXAS**
**MARSHALL DIVISION**

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| **PSKS, Inc. d/b/a Kay's Kloset...Kay's Shoes; and Toni Cochran, L.L.C., d/b/a Toni's** | |
| *Plaintiffs,* | **Civil Action No. 2-03CV-107** |
| **v.** | |
| **Leegin Creative Leather Products, Inc.** | **T. John Ward** |
| *Defendant.* | |

**LEEGIN'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW**

Defendant Leegin Creative Leather Products, Inc. ("Leegin") respectfully moves for judgment as a matter of law against Plaintiff PSKS, Inc. d/b/a Kay's Kloset...Kay's Shoes ("Kay's Kloset" or "Plaintiff") on the ground that there is no legally sufficient evidentiary basis for the jury's finding of antitrust injury or its award of damages.

## I. FACTUAL BACKGROUND

Leegin is the manufacturer of the "Brighton" brand of women's handbags, wallets, watches, jewelry and accessories. Plaintiff Kay's Kloset is a retail store that once carried Brighton products. Plaintiff alleged that Leegin entered illegal agreements with Brighton retailers to fix prices and terminated Plaintiff's account pursuant to those alleged agreements. Plaintiff sought damages under the antitrust laws in the form of the lost profits. The case was tried to a jury. In its verdict, the jury found "from a preponderance of the evidence that the defendant and its retailers entered into a contract, combination or conspiracy to fix the retail prices of Brighton products and that such contract, combination or conspiracy proximately caused the plaintiff to suffer antitrust injury to its business or property," and that $1,200,000 "would fairly and reasonably compensate the plaintiff for the injury to its business or property."

## II. STANDARD

Rule 50(a) of the Federal Rules of Civil Procedure provides that once a party has been fully heard on an issue at trial, the court may grant a motion for judgment as a matter of law

against that party on a claim, if: (1) there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on the issue; and (2) the claim cannot be maintained under controlling law without a favorable finding on that issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (standard for summary judgment "mirrors" that under Rule 50(a) and trial judge must direct verdict if, under governing law, there can be but one reasonable conclusion as to the verdict); *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1387 (5th Cir. 1996). If the motion is denied, and the jury verdict is adverse to the moving party, that party may renew its request for judgment as a matter of law after the entry of judgment. Fed. R. Civ. P. 50(b).

The court should grant a motion for judgment as a matter of law not only when the nonmovant presents no evidence, but also when there is not a sufficient conflict in the substantial evidence to create a jury question. *Travis v. Board of Regents of Univ. of Texas*, 122 F.3d 259, 263 (5th Cir. 1997). "Substantial evidence is defined as 'evidence of such quality and weight that reasonable and fair minded men in the exercise of impartial judgment might reach different conclusions.'" *Krystek v. University of So. Miss.*, 164 F.3d 251, 255 (5th Cir. 1999). In deciding whether a plaintiff has presented substantial evidence on an issue, the Court must view the evidence most favorably to the plaintiff, and may not consider the credibility of witnesses or evaluate the weight of the evidence or conflicting inferences. *Greenwood v. Societe Francaise De*, 111 F.3d 1239, 1245-46 (5th Cir. 1997). However, the nonmovant is not entitled to the "benefit of unreasonable inferences or those at war with the undisputed facts." *Sip-Top, Inc. v. Elco Group, Inc.*, 86 F.3d 827, 830 (8th Cir. 1996).

## III. ARGUMENT

To recover on its antitrust claim, Plaintiff had the burden of producing substantial evidence of: (1) a violation of the antitrust laws; (2) the fact of damage; (3) the amount of damage; and, (4) that the claimed damages constitute or reflect antitrust injury. *Taylor Publishing Co. v. Jostens*, 216 F.3d 465, 484-485 (5th Cir. 2000), citing *Nichols v. Mobile Bd. of Realtors, Inc.*, 675 F.2d 671, 675 (5th Cir. 1982) and *Atlantic Richfield Co. v. USA Petroleum*

*Co.*, 495 U.S. 328, 344, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990). Plaintiff failed to produce substantial evidence of antitrust injury or the amount of damages.

## A. The Evidence Offered by Plaintiff Was Insufficient as a Matter of Law for the Jury To Find Antitrust Injury.

### 1. Plaintiff Was Required To Prove Antitrust Injury.

In order to prevail in an action under Section 1 the Sherman Act or Section 4 of the Clayton Act, an antitrust plaintiff must demonstrate antitrust injury. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 113 (1986); *Bell v. Dow Chemical Co.*, 847 F.2d 1179, 1182 (5th Cir. 1988); *McCormack v. NCAA*, 845 F.2d 1338, 1341 (5th Cir. 1988); *El Aguila Food Products, Inc. v. Gruma Corporation,* 301 F. Supp. 2d 612, 619 (S.D. Tex. 2003) ("[T]he fact that a party may suffer injury does not automatically establish that the injury is an antitrust injury. Antitrust damages flow from an antitrust injury, not simply because the party sustains a loss."). The Supreme Court has defined "antitrust injury" as:

> injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of the anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."

*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.* 395 U.S. 100, 125 (1969).

Even where a per se violation is alleged, a plaintiff must prove antitrust injury. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 341-42 (1990) (hereafter *"ARCO"*).[1] The Court in *ARCO* explained that antitrust violations—even actions considered per se unlawful—

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[1] In *ARCO,* the plaintiff argued that any losses flowing from a per se violation of Section 1 automatically satisfy the antitrust injury requirement. The Supreme Court disagreed. The Court stated that the per se and rule of reason analyses are merely methods for determining whether a particular restraint is unreasonable, and do not themselves satisfy the antitrust injury requirement. Rather, "the purpose of the antitrust injury requirement is different [in that] it ensures that the <u>harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place, and it prevents losses that stem from competition from supporting suits by private plaintiffs</u> for either damages or equitable relief." *Id.* at 342 (emphasis added).

may "have three effects, often interwoven": they may reduce competition, increase competition, or be neutral towards competition. *Id.* at 343-344. For this reason,

> The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior. The need for this showing is at least as great under the per se rule as under the rule of reason. Indeed, insofar as the per se rule permits the prohibition of efficient practices in the name of simplicity, the need for the antitrust injury requirement is underscored.

*Id.* at 344 (emphasis added). Accordingly, Plaintiff was required to submit evidence to prove antitrust injury. *See id.*

### 2. Plaintiff Presented No Evidence of Antitrust Injury.

Plaintiff did not present any evidence that its claimed injuries stemmed from a competition-reducing aspect of Leegin's alleged conduct. Indeed, Plaintiff did not present any evidence of any reduction in competition, or any threat of any reduction in competition. Plaintiff did not present evidence that the alleged price-fixing agreements between Leegin and retailers restrained (or even were likely to restrain) competition in any market, or that its claimed injuries were proximately caused by such a restraint. The mere fact that Plaintiff (like all other Brighton retailers) lost some degree of freedom to set retail prices did not satisfy the antitrust injury requirement.[2] Consequently, Plaintiff failed to meet its burden to establish antitrust injury. *See ARCO*, 495 U.S. at 343-344; *Brunswick*, 429 U.S. at 489.

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[2] The Supreme Court has rejected dealer freedom as a basis for condemning vertical restrictions. *GTE Sylvania*, 433 U.S. at 54, n. 21; *State Oil v. Kahn*, 522 U.S. 3, 18 (1997). This Court cited *Pace Electronics, Inc. v. Canon Computer Systems, Inc.*, 213 F.3d 118, 124 (3rd Cir. 2000), in its Order granting Plaintiff's motion to exclude Leegin's expert Kenneth J. Elzinga, on the grounds, inter alia, that antitrust injury was established under *Pace*. *Pace* relies on the rejected dealer freedom rationale and thus conflicts with these controlling authorities. Furthermore, *Pace* conflicts with controlling Supreme Court and Fifth Circuit authorities that require a plaintiff—even in a case alleging a *per se* violation of antitrust laws—to establish antitrust injury. *Brunswick,* 429 U.S. at 489; *ARCO*, 495 U.S. at 344; *Bell,* 847 F.2d at 1182 ("[P]laintiff's injury must be the type that the antitrust laws were intended to prevent. The court's focus must be upon competition in the allegedly restrained market.") (emphasis added).

## B. There Was Insufficient Evidence for the Jury to Award Damages.

### 1. Plaintiff Is Required To Prove Damages With Reliable Evidence.

An antitrust plaintiff has the burden to develop a reasonable theory of calculating damages and introduce sufficient data to make a calculation. *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 668 (5th Cir. 1974) ("*Lehrman II*"). A plaintiff is not entitled to any recovery unless the amount of damages is based on substantial evidence. *Keener v. Sizzler Family Steak Houses*, 597 F.2d 453, 457 (5th Cir. 1979). Once the fact of damages is proven to a reasonable certainty, an antitrust plaintiff has a somewhat more relaxed burden of proof regarding the amount of damages. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264, 66 S. Ct. 574, 90 L. Ed. 652 (1946); *Eleven Line, Inc. v. North Texas State Soccer Ass'n, Inc.*, 213 F.3d 198, 207 (5th Cir. 2000). However, "this tolerant view is limited by [the court's] responsibility not to allow damages to be determined by 'guesswork' or 'speculation;' we must at least insist upon a 'just and reasonable estimate of the damages based on relevant data.'" *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 46 (5th Cir. 1972) (quoting *Bigelow,* 327 U.S. at 264), *cert denied,* 409 U.S. 1077 (1972) ("*Lehrman I*").

Expert testimony requires a proper methodology applied to correct facts. Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993); *Seatrax, Inc. v. Sonbeck Int'l, Inc.*, 200 F.3d 358, 371-72 (5th Cir. 2000). Where an expert intentionally fails to consider undisputed facts that are clearly relevant to the proper calculation of damages, the result is inherently unreliable. *Marcel v. Placid Oil Co.*, 11 F.3d 563, 567-68 (5th Cir. 1994) (affirming the exclusion of proffered testimony because of serious flaws in the expert's data); *Chavez v. Ill. State Police*, 251 F.3d 612, 643-45 (7th Cir. 2001) (absent reliable underlying data, statistics cannot establish the opinion advanced); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1055-56, 1057 (8th Cir. 2000) (testimony which does not consider and is not "tied to" all the relevant the facts is mere speculation). Under such circumstances, the error could be described either as a failure of methodology or a failure to use the correct facts. In either case, the result cannot support a verdict, especially a verdict so obviously out of proportion to any realistic loss

under the circumstances.

### 2. Plaintiff Failed to Present Sufficient Evidence for the Jury To Calculate Damages Without Engaging in Speculation.

Plaintiff's damages claim was based entirely on the opinions of Plaintiff's expert, James T. Davis. Davis's damages model was fatally flawed in a number of respects, as described below, and cannot support the jury's verdict.[3] Any of the errors discussed below is sufficient to render the damages evidence unreliable. In combination, they render it absurd.

#### *a. There Was Insufficient Evidence for the Jury to Determine an Appropriate Damages Period.*

The Fifth Circuit has "consistently required more evidence than the self-serving speculation of the plaintiff to support an award of damages." *Keener*, 597 F.2d at 457. Plaintiff's damages model relied on a 10-year damages period based entirely on the conclusory and self-serving testimony of Phil Smith, the proprietor of Kay's Kloset, that it would take him 10 years to recover from the loss of the Brighton line.[4] Davis did not conduct any analysis before adopting Smith's 10-year estimate. *Id.* Davis did not consider whether Smith's estimate was inconsistent with the only asserted foundation for that estimate—namely, Smith's testimony that he based his 10-year projection on his opinion that it took him seven to eight years to "build up" the Brighton brand.[5] Nor did Davis account for the evidence at trial that, contrary to Smith's statement that it took him seven to eight years to "build up" the Brighton brand, Plaintiff in fact achieved the high point of its Brighton sales in four to five years.[6] Furthermore, as discussed in

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[3] Before trial, Leegin moved to exclude Davis's expert testimony as inadmissible under Federal Rule of Evidence 702 and the standards articulated in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). The Court denied Leegin's motion. Leegin incorporates by reference the arguments and authorities presented in Leegin's motion to exclude Davis.

[4] Davis testified that he adopted Smith's 10-year number without any independent analysis. Trial Transcript, April 8, 2004, p.m. session, page 118, lines 1-9 (Q: Now it's correct, isn't it Mr. Davis, as to the 10-year period, you rely exclusively and totally on what Mr. Smith told you to use? A: Yes. Q: You've done – there's no part of that 10-year number that James T. Davis is really saying is correct; isn't that right? A: I relied on Mr. Smith's representation as indicated in my report.).

[5] Trial Transcript, April 8, 2004, p.m. session, page 46, line 18 to page 47, line 11.

[6] Trial Transcript, April 8, 2004, a.m. session, page 60, lines 8 to 11; Trial Transcript, April 8, 2004, p.m. session, page 48, lines 15-21.

greater detail below, Davis did not consider local market conditions.

The Fifth Circuit granted a directed verdict on similar facts where an expert simply relied on the plaintiff's self-serving testimony without conducting any independent examination of plaintiff's historical performance or changing market conditions. *See Chrysler Credit Corp v. J. Truett Payne Company, Inc.*, 670 F.2d 575, 582-83 (5th Cir. 1982). In *Chrysler Credit*, the expert adopted the plaintiff's "unsupported estimate" of the good will value of the business, without any independent examination of relevant data. *Id.* at 582. In deciding whether the Plaintiff offered substantial evidence of damages, the court held:

> Self-serving and unsupported assumptions cannot sustain a calculation of a going concern value. The burden of putting forth substantial evidence is not satisfied by mere speculation and guesswork.. . . . Even though the burden of proving damages is lessened by the fact of antitrust violation and injury, the plaintiff is still required to put forth substantial relevant evidence. . . . Even if we held that [the Plaintiff] had presented substantial evidence of violation and injury and could invoke the standard of lenity, we would nonetheless conclude that [the Plaintiff's] evidence was insufficient.

*Id.* (emphasis added).

The Court should have come to the same conclusion here.[7] Smith's self-serving

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[7] At the close of Plaintiffs' evidence, Leegin moved for judgment as a matter of law on the ground, among others, that neither Kay's Kloset nor Toni's submitted sufficient evidence for the jury to calculate their claimed damages. The Court granted Leegin's motion for judgment as a matter of law as to Toni's because, inter alia, the Court found there was insufficient evidence to support Davis' adoption of Smith's 10-year damages period for Toni's. Trial Transcript, April 12, 2004, a.m. session, page 8, lines 12-19.

Although the Court found that the absence of evidence to support any damages period for Toni's required a directed verdict on Toni's claim, the Court permitted Kay's Kloset's claim to go to the jury—but not without "deep concerns," stating:

> I'm going to overrule the motion as to Kay's Kloset, but I will tell you that I am not – it is not without some deep concern . . . on the part of the Court with respect to the plaintiffs' damages calculation. Were it not for the language about a relaxed standard where there's been an antitrust injury, the lost profits for 10 years as done by Mr. Davis will not stand the test.
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> * * *
>
> The only reason the Court is allowing this to go to the jury is because Mr. Smith, with his years of experience, has said this is based on my experience for this market. That's the only testimony I've got.

testimony that it would take him 10 years to recover from the loss of Brighton was not sufficient to support Davis's damages model. Davis did nothing more than (1) calculate Plaintiff's average annual gross profit from Brighton sales from 2000 to 2002, (2) multiply that average by Smith's 10-year number, and (3) reduce the total to present value. To allow this verdict to stand would mean that a damages expert can blindly accept any number tendered by a plaintiff and turn it into a valid damages calculation through nothing more than simple arithmetic. Worse, it would allow an expert to put an imprimatur of validity on a plaintiff's projection even where that projection is contradicted by the plaintiff's own experience.[8] By allowing Davis to testify as an expert, the Court gave the jury the impression that there was a sufficient basis in the record for Davis's assumption that 10 years was an appropriate damages period. Either Smith needed to provide more extensive and more objective data, or Davis needed to do some analysis to confirm reasonableness of the 10-year assumption (or any alternative period). Because of the absence of any relevant data to support this critical assumption, Davis's calculations fell short of constituting substantial evidence upon which the jury reasonably could assess damages. *See Chrysler Credit*, 670 F.2d at 582-83.

Contrary to Plaintiff's claims, the jury could not "cure" the infirmity in Davis's damages model. Davis testified that using his model, Plaintiff was entitled to $1,744,926 in lost profits. The jury awarded Plaintiff $1,200,000. The jury's adoption of a lesser amount suggests that the jury simply picked a smaller number, either by reducing the number of years, or on some other basis. This indicates that the jury engaged in speculation, since there was no evidence to support the jury's selection of any damages period apart from Davis's adoption of Smith's testimony that

*Id.*, page 6, lines 12-22; page 8, lines 3-7. The Court correctly rejected Plaintiff's argument that the jury could cure an unreliable damages model by substituting a lower number. The mere fact that it is lower does not mean that it has a factual basis.

[8] Neither Davis nor Smith ever reconciled the 10-year projection with the undisputed fact that Plaintiff had been experiencing a sharp decline in Brighton sales for four consecutive years prior to the loss of Brighton. *See* Trial Transcript, April 8, 2004, p.m. session, page 48, lines 15 to 21; page 102, line 14, to page 103, line 25; page 122, lines 1 to 24. Nor did they reconcile the 10-year number with the evidence at trial showing that prior to that decline, it took Plaintiff only four to five years reach the high point of its Brighton sales. *See* Trial Transcript, April 8, 2004, a.m. session, page 60, lines 8 to 11; Trial Transcript, April 8, 2004, p.m. session, page 48, lines 15-21.

it would take him 10 years to replace Brighton.[9]

### *b. There Was Insufficient Evidence for the Jury to Determine Lost Net Profits.*

The Court instructed the jury: "[L]ost profits means lost 'net profits.' They are determined by subtracting the costs and expenses of a business from the gross revenue."[10] Plaintiff presented no evidence of lost net profits.

Davis calculated an average yearly gross profit contribution earned from Plaintiff's sale of Brighton products in the three years preceding the alleged violation—$289,516 in 2000, $201,591 in 2001, and $141,458 in 2002—producing an average yearly contribution of $210,855.[11] Davis multiplied this amount by ten for the 10-year damage period provided by Smith, and reduced the total to present value using a 4.5% reduction rate.[12]

Davis's model was fundamentally flawed and lacked factual support. Davis's approach conflicted with the undisputed evidence that the trend of Plaintiff's gross profits from Brighton

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[9] Moreover, Davis actually encouraged the jury to engage in speculation. In the context of discussing Toni's claimed damages, Davis testified that if the jury found facts requiring a shorter damages period, it could simply "pick the year [it] wished." Trial Transcript, April 8, 2004, p.m. session, page 139, line 12, to page 140, line 4. The Court later acknowledged outside the jury's presence that Davis's testimony was an improper invitation to engage in speculation:

> Plaintiff's counsel: "Your Honor, the jury has the ability, if they don't believe the 10 years, it really goes to the weight of the evidence more than – it's whether we've made a sufficient case."
>
> The Court: "Yeah, but, you know, I heard that testimony of Mr. Davis too. He said, well, now, if the jury doesn't believe 10 years, they can just select one number less than 10 off my chart, is what he – I understood his testimony. But what basis . . . does the jury have to make that decision other than speculative, well, we don't think it's 10, so we'll just say it's five. Tell me where in the testimony they could – how could they – how could they make that determination based on the record now reasonably? How could they say, well, 10's too long, but five would be about right. Where could they get that? . . . How could they come up with that other than speculation?

Trial Transcript, April 12, 2004, a.m. session, page 10, line 15, to page 11, line 8. The same was true with respect to Plaintiff Kay's Kloset. There was no evidence from which the jury could pick a shorter damages period without engaging in speculation.

[10] Court's Jury Instructions, p. 8.

[11] Trial Transcript, April 8, 2004, p.m. session, page 102, line 14, to page 103, line 25.

[12] Trial Transcript, April 8, 2004, p.m. session, page 106, line 22, to page 107, line 19.

products during the three-year period was sharply downward, dropping by over 50% from 2000 to 2002 (from $289,516 to $141,458), the last year in which Plaintiff carried the Brighton line. Under Davis' model, if Plaintiff had not lost the Brighton line, its gross profits would have miraculously rebounded from $141,458 in 2002, to $210,855 in 2003—a 49% increase in one year. Davis's did no investigation of the reason for this downward trend and did not articulate any justification based on any accepted methodology for ignoring this trend or assuming that absent the loss of Brighton, this downward trend would have experienced a sudden and sharp reversal. As a result, Davis's opinion was not reliable. *See In Re Aluminum Phosphide Antitrust Litigation*, 893 F.Supp. 1497, 1502, n.11 (D. Kan. 1995) (excluding plaintiffs' damages expert for failing to provide a scientific rationale for his refusal to consider available data and address obvious errors in analytic approach). There is simply no legal or factual basis for accepting Davis's simple three-year average as a reasonable estimate of what Plaintiff's annual gross profits from Brighton would have been going forward had Plaintiff continued to sell Brighton.

Furthermore, even if Davis's calculation could be accepted as providing a fair estimate of Plaintiff's projected gross profits from Brighton sales (and Leegin contends it could not), Plaintiff did not provide the jury with any evidence from which it could determine Plaintiff's lost net profits. Davis did not offset the projected gross revenues against any projection of operating expenses. Indeed, Plaintiff did not present any evidence—through Davis or otherwise—of the costs of running Plaintiff's business to obtain these gross revenues. Thus, it was impossible for the jury to follow the Court's instruction to the jury to "determine[] [Plaintiff's lost profits] by subtracting the costs and expenses of [Plaintiff's] business from the gross revenue."

#### *c. There Was Insufficient Evidence for the Jury to Separate the Amount of Loss Allegedly Attributable to Leegin from Losses Caused By Lawful Competition and Other Factors for which Leegin Was Not Responsible.*

An antitrust plaintiff must prove the amount of damages attributable to the challenged conduct. Because an antitrust plaintiff is allowed to recover only those damages caused by the anticompetitive conduct of the defendant, the plaintiff must give the fact finder a sufficient basis

to determine and distinguish those losses caused by antitrust violations from losses caused by lawful competition and other factors for which the defendant is not responsible. *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1496-97 (8th Cir. 1992), *cert. denied,* 506 U.S. 1080 (1993); *USFL v. NFL*, 842 F.2d 1335, 1378-79 (2nd Cir. 1988); *Farley Transp. Co. v. Santa Fe Transp. Co.,* 786 F.2d 1342, 1352 (9th Cir. 1985); *MCI v. AT&T*, 708 F.2d 1081, 1162-63 (7th Cir. 1983).[13]

The evidence is undisputed that after achieving the high point of its Brighton sales in 1999, Plaintiff's gross profits from Brighton were declining precipitously in each of the three years preceding its loss of the Brighton line: from $289,516 in 2000; to $201,591 in 2001; to $141,458 in 2002.[14] Plaintiff did not produce any evidence to enable the jury determine how much of the claimed damages allegedly resulted from Leegin's suspension of shipments of Brighton products, versus how much resulted from the other causes that had already taken a huge toll on Plaintiff's business well before that suspension.

The record shows that at least two factors unrelated to Leegin's conduct contributed to the decline in Plaintiff's gross profits. First, the evidence was undisputed that the Smiths were complaining about competition caused by Leegin's opening of new Brighton accounts in nearby areas, including Frisco, Texas and Flower Mound, Texas,[15] as well as competition from nearby

[13] This burden of segregating the losses caused by lawful factors from those caused by unlawful conduct is consistent with Texas law. *See Atlas Copco Tools, Inc. v. Air Power Tool & Hoist, Inc.*, 131 S.W.3d 203, 2004 Tex. App. LEXIS 691, at *12 (Tex. App.–Fort Worth Jan. 22, 2004, pet. filed) (reversing judgment where, inter alia, expert damage testimony failed to separate lost sales due to alleged antitrust violation from lost sales due to customer dissatisfaction); *Western Minerals, Inc. v. Hill*, 441 S.W.2d 677, 679 (Tex. Civ. App.–Amarillo 1969, no writ) ("Where there is no basis for determining how much of the damages suffered resulted from the wrongful acts of the defendant and how much resulted from other causes, a judgment would be based on mere conjecture and could not be upheld.").

[14] See Trial Transcript, April 8, 2004, p.m. session, page 48, lines 15 to 21; page 102, line 14, to page 103, line 25; page 122, lines 1 to 24.

[15] *See* Plaintiff's Exhibit 126 (audio CD of recorded conversations). For example, in the recording of the conversation between Jan Clinkscale and Phil and Kay Smith on November 18, 2002, the Smiths complain about having to compete with Anne Wolfe's Merle Norman store in Flower Mound, Texas, which opened in 1999 or 2000 (Trial Transcript, April 12, 2004, a.m. session, page 90, line 10, to page 93, line 12; page 116, lines 3-12). In the conversation, Kay Smith states: "In Flower Mound . . . when they opened her [Anne Wolfe], what I went down is most likely I would say within 80% of what she did. So all that did was . . . sliced us off at the knee." Plaintiff's Exhibit 126 (tape of Clinkscale, Nov. 18, 2002). In the same conversation, the Smiths complain about competition from a Brighton store at the Dallas-Fort Worth Airport and competition from stores owned by "Mahmoud," a reference to Mahmoud

Brighton retailers that the Smiths suspected of discounting.[16] Plaintiff did not submit any evidence—or even claim—that this competition was unlawful. Plaintiff's damages expert Davis admitted that antitrust damages may not include losses from lawful competition or other causes unrelated to Leegin, yet Davis did nothing to identify, segregate or quantify Plaintiff's losses attributable to these sources of lawful competition.[17]

Second, the evidence was undisputed that during the same 1999-2002 period, retail sales generally in Lewisville, Texas, where Kay's Kloset is located, were declining precipitously (from approximately $2.2 billion in 1999 to approximately $1.88 billion in 2002), while retail sales were rising dramatically in the nearby markets of Frisco, Texas (from approximately $100 million in 1999 to approximately $710 million in 2002), and Flower Mound, Texas (from approximately $118 million in 1999 to approximately $151 million in 2002).[18] Despite this evidence that the retail market where Kay's Kloset is located has been in decline,[19] while the retail markets in nearby areas have been growing, Plaintiff did not produce any evidence to enable the jury determine how much of the claimed damages resulted from Leegin's conduct, versus how much resulted from the change in market conditions, namely the decline of retail sales in Lewisville and the apparent migration of retail traffic to nearby Frisco and Flower Mound.

The result of Plaintiff's failure to allocate its claimed losses was to saddle Leegin with lost profits for which Leegin was not responsible. This is not permitted. *See El Aguila Food Products, Inc. v. Gruma Corporation,* 301 F. Supp. 2d 612, 625-26 (S.D. Tex. 2003); *Craftsman*

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Kharrat, who runs several Brighton stores in the Dallas-Fort Worth area. *See id.*

[16] *See, e.g.,* Trial Transcript, April 8, 2004, a.m. session, page 82, line 23, to page 85, line 4; page 104, line 20, to page 105, line 5; page 107, line 10, to page 108, line 21.

[17] Trial Transcript, April 8, 2004, p.m. session, page 125, line 11, to page 127, line 9.

[18] Trial Transcript, April 12, 2004, p.m. session, page 7, line 11, to page 12, line 7; page 45, line 22, to page 50, line 10; *see also* page 90, line 4, to page 96, line 5.

[19] In addition, there was testimony that Phil Smith told a proprietor of a retail store in his shopping center that the area was in decline and that she would be better off leaving that location. Trial Transcript, April 12, 2004, p.m. session, page 95, line 17, to page 96, line 5. However, Smith denied making those statements.

*Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761, 777 (8th Cir. March 15, 2004); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1057 (8th Cir.), *cert. denied*, 531 U.S. 979 (2000). In *El Aguila Food Products*, the court held that an expert's testimony was unreliable because the expert failed consider or quantify the impact of other companies' lawful competition, but rather "assign[ed], indiscriminately, all of the plaintiffs' alleged lost sales to [the defendant]." *El Aguila Food Products,* 301 F. Supp. 2d at 625-26 ("The damage model presented simply measures declines in the plaintiffs' sales and attributes them to [the challenged agreements] with the retailers. This methodology ignores market realities and other externalities, which are sufficient reasons to exclude [the expert's] testimony."). Similarly, in *Craftsman Limousine*, the Eighth Circuit found that a damages expert's testimony had not aided the jury because it failed to consider factors that may have impacted the plaintiff's sales that were unrelated to the defendant's conduct, including most notably the emergence of two new competitors. *Craftsman Limousine*, 363 F.3d at 777. Likewise, in *Concord Boat*, the Eighth Circuit found that an "expert opinion should not have been admitted because it did not incorporate all aspects of the economic reality of the [relevant] market and because it did not separate lawful from unlawful conduct. Because of the deficiencies in the foundation of the opinion, the expert's resulting conclusions were mere speculation." *Concord Boat*, 207 F.3d at 1057.

It was Plaintiff's burden to consider factors that may have impacted its sales that were unrelated to Leegin's conduct—including market conditions, legal competition and the emergence of new competitors—and to segregate losses caused by such factors from losses allegedly attributable to Plaintiff's loss of the Brighton line. *See El Aguila Food Products,* 301 F. Supp. 2d at 625-26; *Craftsman Limousine*, 363 F.3d at 777; *Concord Boat*, 207 F.3d at 1057. Davis made no effort to segregate or quantify the losses Plaintiff had suffered and would continue to suffer from causes unrelated to Leegin's conduct. Plaintiff's failure to distinguish such losses from losses allegedly caused by Leegin left the jury with insufficient evidence to award any damages without guesswork. *See id.*

### *d. There Was Insufficient Evidence for the Jury to Account for Risk and Uncertainty.*

Where damages are based on a lost stream of future profits, the law requires a plaintiff to discount that stream of profits to produce a present value. Because there always is a risk that any future stream of income from a business will not materialize, proper antitrust damage analysis requires the recognition of this risk and requires that the discount rate be a *risk rate*. *Southern Pacific Communications Co. v. American Telegraph & Telephone Co.*, 556 F. Supp. 825, 1087 (D.D.C. 1983) ("[a]n appropriate discount rate must take into account the degree of risk and uncertainty actually present in the future operation of the business").[20]

Davis discounted the assumed future losses to present value by using what he admitted to be a risk-free interest rate.[21] Davis's analysis failed to take into account the substantial risk that the assumed stream of income would not be achieved. The result was to create a present value of future damages that was unrealistically high.

The risks were obvious. First, there was a substantial risk that Kay's Kloset would not achieve the assumed profits for reasons independent of Brighton. It is common knowledge that retail businesses fail frequently for a variety of reasons, including poor management and independent reasons such as the economic decline in the area in which they operate, and as described above, there was ample evidence of the latter here. Second, there was a substantial risk that the Brighton products would fall out of favor. While Brighton has been successful in the past, that is no guarantee of success in the future. Women's tastes in fashion obviously change regularly, and the allegedly unique "Brighton look" could easily fall out of favor over ten years. Indeed, Hughes testified that the market in her area was saturated and that her customers

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[20] *See also Antitrust Practice Guide: Proving Antitrust Damages*, pp. 119-120 (American Bar Association 1996) ("Discount rates must reflect the time value of money and inflation risk, as well as all of the risks inherent in business generally"); Richard G. Schneider, *Damages for the Termination of a Business Interest*, 40 Antitrust L. J. 1295, 1300-01 (1980) ("It is conceptually wrong to discount lost future profits at a simple conservative rate. . . . Using a rate for a conservative investment would, in practical effect, eliminate the risk factor that would have confronted the plaintiff had he remained in his business").

[21] Trial Transcript, April 8, 2004, p.m. session, page 134, lines 22-25; page 141, line 20, to page 142, line 7.

already had grown tired of the Brighton look.[22]

A proper damages analysis would either reduce the assumed damages in the future years to reflect the above risks, or would apply a much higher discount rate to the assumed losses in future years. Davis did neither. Davis's testimony showed no factual investigation to determine *any* kind of risk, and no methodological explanation for the omission.

#### e. *Plaintiff's Damages Model Required the Jury Improperly to Ignore Plaintiff's Admitted Mitigation of Damages.*

An antitrust plaintiff has a duty to mitigate its damages. *Golf City, Inc. v. Wilson Sporting Goods Co.,* 555 F.2d 426, 436 (5th Cir. 1977). This means that a plaintiff must "take reasonable steps to merchandise substitute (goods)." *Malcolm v. Marathon Oil Co.,* 642 F.2d 845, 863 (5th Cir. 1981). A plaintiff that sells substitute goods still may have been injured "if he would have been better off without the refusal [to supply the original goods], but the amount of damages would be reduced." *Id.* The proper measure of damages in a terminated dealer case is the overall business loss, or the competitive injury to the business, taking into account the mitigation of damages. *Pierce v. Ramsey Winch Company,* 753 F.2d 416, 437 (5th Cir. 1985), citing *Golf City,* 555 F.2d 426, 436, and *Borger v. Yamaha International Corp,* 625 F.2d 390, 398 (2nd Cir. 1980). Thus, a proper antitrust damages model must subtract actual substitute sales from projected lost profits. *Id.* at 429.[23]

Here, because Plaintiffs' claimed damages were based on lost sales of Brighton products, Plaintiff were required to make reasonable efforts to replace those products, and then deduct the profits made by selling replacement products from its calculation of damages. *Malcolm*, 642 F.2d at 863. Plaintiff also was required to deduct any reduction in expenses resulting from the loss of the Brighton line. Davis testified that while he was familiar with the legal requirement to

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[22] Trial Transcript, April 8, 2004, p.m. session, page 48, lines 5-11.

[23] In *Pierce*, the defendant terminated plaintiff's distributorship to sell defendant's winches due to plaintiff's price-cutting. The plaintiff claimed damages in the form of lost profits. The defendant argued that the plaintiff's business "boomed" after his distributorship was terminated and thus the damages awarded by the jury were excessive. *Id.* at 429. In holding that the district court's jury instruction on mitigation was not in error, the Fifth Circuit noted that Plaintiff's damage model already had "accounted for sales of the substitute winches." *Id.* at 432.

deduct mitigation from lost profits, he had not made any deduction for actual or expected mitigation in this case.[24] Instead, Davis's lost profits calculation charged Leegin with a full ten years of the average gross annual profit contribution from Brighton products in the three years before Leegin suspended shipments to Plaintiff.[25] Davis's damages model essentially assumes that the retail space and sales efforts previously devoted to Brighton products would lie fallow for ten years. This was an unreasonable assumption on its face, and not surprisingly, the evidence from Plaintiff plainly contradicted it.[26] Davis admitted that substitute sales occurred, but created a damages model that pretended they did not. As such, the failure to account for mitigation went beyond the sufficiency of the evidence, to the sufficiency of Plaintiff's damages model itself.

The alleged "uniqueness" of some Brighton products[27] did not justify Davis's decision to ignore the actual mitigation of damages by Plaintiff. If Plaintiff had not been able to sell <u>any</u> substitute products, a possible explanation might have been the uniqueness of some of the Brighton products. Here, however, Plaintiff in fact <u>made</u> sales of substitute products, but simply did not account for them—at all. Plaintiff was not entitled to ignore the profits it admitted it was making and would continue to make from the sales of these new product lines. *See Malcolm*, 642 F.2d at 863. If Davis had deducted for substitute sales and Leegin had disagreed with the

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[24] Trial Transcript, April 8, 2004, p.m. session, page 131, line 9, to page 134, line 3.

[25] Trial Transcript, April 8, 2004, p.m. session, page 102, line 7, to page 103, line 25; page 114, line 23, to page 115, line 9; page 138, line 21, to page 139, line 4.

[26] Smith's own testimony demonstrates that this assumption is wrong. Smith testified that he had obtained replacement products in virtually every category of Brighton product he previously had carried, including handbags, belts, shoes, watches, jewelry, and lotions. Smith also testified that he had brought in new apparel lines, and that his efforts to bring to bring in new products to recover from the loss of Brighton was ongoing. Trial Transcript, April 8, 2004, p.m. session, page 44, line 16, to page 46, line 7. Smith testified that the replacement brands "are good quality, competitive products" that he "think[s] he can sell at a profit." *Id.*, page 46, lines 7-17.

[27] *See, e.g.,* Trial Transcript, April 8, 2004, a.m. session, page 60, line 12, to page 61, line 16; Trial Transcript, April 8, 2004, p.m. session, page 119, lines 2-18; page 134, lines 4-8. While Plaintiff claimed that <u>some</u> Brighton products were unique due to their coordinated decorations, this testimony did not provide any basis to conclude that <u>all</u> Brighton products were unique and thus impossible to replace with substitute products.

size of the deduction, the correct deduction would have been a matter for the jury, and Leegin would have been required to introduce facts supporting the larger deduction. Where Plaintiff admitted the existence of substitute sales, however, to ignore them completely renders the damages model fundamentally unreliable. Consequently, Plaintiff's damages claim fails as a matter of law.

Similarly ignoring the admissions by his own client, Davis also assumed no reduction in expenses.[28] Smith testified that due to the loss of the Brighton line, he has reduced the number of employees, reduced one employee's pay, and has contacted his landlord to downsize his store because of the reduction of sales.[29] These actual and prospective adjustments are not even mentioned in Davis's damages calculation.

Plaintiff had in its possession evidence of its actual profits from sales of substitute products, and its actual savings from reduced expenses. Davis's damages model ignored those facts and Plaintiff failed to present evidence to quantify these amount for the jury. Accordingly, this is not a case where leniency regarding the amount of damages should tip in Plaintiff's favor.

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[28] Trial Transcript, April 8, 2004, p.m. session, page 110, lines 6-11; page 143, lines 14-18.

[29] Trial Transcript, April 8, 2004, p.m. session, page 49, line 24, to page 50, line 10.

## IV. CONCLUSION

For all of the reasons stated herein, there was no legally sufficient evidentiary basis for the jury's finding of antitrust injury or its award of damages, and under F.R.C.P. 50(a), the Court should grant judgment for Leegin as a matter of law. Leegin requests any and all additional relief to which it may be entitled in law or equity.

Respectfully submitted,

Dated: June 8, 2004

Otis Carroll (Texas Bar No. 03895700)
**IRELAND, CARROLL & KELLEY, P.C.**
6101 South Broadway, Suite 500
Tyler, TX 75703
(903) 561-1600 (Ph)
(903) 581-1071 (Fax)

Tyler Baker (Texas Bar No. 01595600)
**FENWICK & WEST LLP**
Silicon Valley Center
801 California Street
Mountain View, CA 94041
(650) 955-8500 (Ph)
(650) 938-5200 (Fax)

*Attorneys for Defendant*
Leegin Creative Leather Products, Inc.

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument was served on the parties listed below via facsimile and/or first-class mail, postage prepaid on this 8$^{th}$ day of June, 2004:

D. Neil Smith
**NIX, PATTERSON & ROACH, L.L.P.**
205 Linda Drive
Daingerfield, Texas 75638

Ken M. Peterson
Robert W. Coykendall
**MORRIS, LAING, EVANS, BROCK & KENNEDY, CHARTERED**
300 North Mead, Suite 200
Wichita, KS 67202-2722