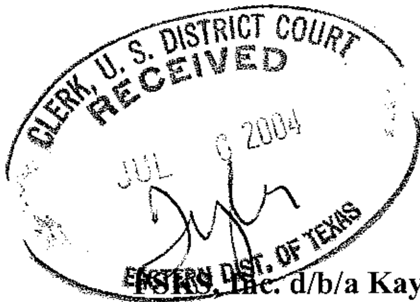

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

PSKS, Inc. d/b/a Kay's Kloset...Kay's Shoes; and Toni Cochran, L.L.C., d/b/a Toni's—

Plaintiffs,

v.

Leegin Creative Leather Products, Inc.

Defendant.

Civil Action No. 2-03CV-107-TJW

LEEGIN'S REPLY IN SUPPORT OF ITS RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

I. INTRODUCTION

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). In its Renewed Motion for Judgment as a Matter of Law, Leegin demonstrated that Plaintiff failed to produce substantial evidence of antitrust injury or the amount of damages. In its response to Leegin's motion, Plaintiff misrepresents the authorities it cites, obfuscates the correct legal standards, and argues that purported "facts" support new theories that Plaintiff never advanced at trial. The Court should grant Leegin's motion.

II. ARGUMENT

A. Plaintiff Failed to Produce Substantial Evidence of Antitrust Injury.

Plaintiff states that in determining whether it has established antitrust injury, "[t]he focus is on whether the plaintiff's injury stemmed from any of the potential anticompetitive dangers that led the Court to label vertical price fixing unlawful in the first instance." Plaintiff's

Response ("Pl.") at 3. Leegin agrees this is the proper focus of the inquiry. Plaintiff then asserts, "[a] dealer terminated as a result of an illegal price fixing scheme necessarily suffers antitrust injury," in other words, that termination establishes antitrust injury as a matter of law. Pl. at 4 (emphasis added). Plaintiff is wrong. The Supreme Court repeatedly has emphasized the fundamental principle that antitrust law protects competition, not competitors. *ARCO*, 495 U.S. at 338 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). Furthermore, the Supreme Court has clearly held that per se violations are not exempt from the antitrust injury requirement. *Id.* at 341-44.[1]

Plaintiff cites *Pace Electronics, Inc. v. Canon Computer Systems, Inc.*, 213 F.3d 118, 124 (3rd Cir. 2000), for this erroneous proposition. For the reasons stated in Leegin's Renewed Motion, *Pace* was wrongly decided. Instead of addressing the authorities Leegin cited on this issue, Plaintiff simply claims, "[t]he position in *Pace* seems to be universally accepted," citing four lower court cases.[2] This is not so. Not one of these cases holds that a dealer terminated pursuant to a vertical minimum price-fixing agreement has established antitrust injury as a matter of law; indeed, not one of these cases even involves a dealer terminated pursuant to a vertical minimum price-fixing agreement.[3] In any event, the Supreme Court's decision in *ARCO* is clearly the governing precedent.

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1 The Supreme Court stated: "The purpose of the antitrust injury requirement is different [from per se rules and the rule of reason]. It ensures that the 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 for either damages or equitable relief. Actions per se unlawful under the antitrust laws may nonetheless have some procompetitive effects, and private parties might suffer losses therefrom. *ARCO* at 343-44.

2 *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 783 (7th Cir. 1994); *American Ad Management, Inc. v. General Tel. Co. of California*, 130 F.3d 1051, 1058 (9th Cir. 1999); *First Medical Representatives, LLC v. Futura Medical Corp.*, 195 F. Supp. 2d 917, 924-25 (E.D. Mich. 2002); and, *Sterling Interiors Group, Inc. v. Haworth, Inc.,* 1996 WL 426379, at *19 (S.D.N.Y. July 30, 1996).

3 For example, *Hammes* simply held that in connection with a motion to dismiss, a plaintiff alleging it suffered losses inflicted by a cartel in retaliation for an attempt to compete with cartel members established antitrust injury. *Id.* at 783. None of the other three cases stand for the proposition that dealer termination alone establishes antitrust injury as a matter of law. Rather, in each case, the court found that plaintiff sufficiently pleaded antitrust injury not simply based on plaintiff's allegation that it was foreclosed from the market, but also that this foreclosure resulted in decrease in competition.

The only evidence Plaintiff cites as showing antitrust injury is harm to Plaintiff itself. Pl. at 3. As stated above, antitrust laws protect competition, not competitors. It is well established that, standing alone, dealer termination raises no antitrust concerns. *Kestenbaum v. Falstaff Brewing Corp.*, 575 F.2d 564, 571 (5th Cir. 1978), *cert denied*, 440 U.S. 909 (1979). Thus, absent a reduction in competition, the termination of a dealer pursuant to an alleged price fixing agreement does not alone establish antitrust injury.[4] Since Plaintiff failed to submit any evidence of a reduction in competition, there was no substantial evidence for the jury to find that Plaintiff had suffered antitrust injury.

Apparently recognizing the error of its position, Plaintiff attempts to change the entire theory of the case it advanced at trial. Referring to a discussion between Jerry Kohl and a group of retailers in Hawaii, Plaintiff claims that "the vertical price fixing scheme [was] transformed into a horizontal cartel" and that this alleged cartel caused a reduction in competition. Pl. at 5. Plaintiff's new argument fails. First, even if these purported "facts" evidenced a horizontal cartel (and Leegin strongly contends they do not), Plaintiff cannot remedy its failure to prove antirust injury at trial by advancing this entirely new theory, since there were no instructions that would have permitted the jury to find that Plaintiff had established antitrust injury on that basis.

Second, the purported "facts" cited by Plaintiff do not come close to proving a horizontal cartel. In a horizontal dealer cartel, the dealers impose their will on an unwilling manufacturer. *See* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1604c (2nd ed. 2004) ("So long as a cartel of traditional dealers accounts for a majority of a manufacturer's sales and has the credible capacity to abandon the manufacturer, the latter cannot resist the cartel's demands."). Plaintiff's new arguments regarding antitrust injury also illustrate the relevance of Professor

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[4] Plaintiff quotes *First Medical Representatives* for the statement that "Plaintiff's injury flows from a competition-reducing (i.e., anticompetitive) aspect of the challenged acts: elimination from the injection caps market." 195 F. Supp. 2d at 924-25. Plaintiff's selective quotation is misleading. The court in *First Medical Representatives* acknowledged that "the antitrust laws are aimed at protecting competition, not competitors," and concluded that an eliminated competitor "can nonetheless be a proper plaintiff, <u>so long as the act of which it complains results in a decrease, rather than increase, in competition</u>." *Id.* at 925 (emphasis added). Here, Plaintiff submitted no evidence that Leegin's pricing policy or Plaintiff's alleged termination as a Brighton dealer resulted in any reduction in competition in the market for women's accessories.

Elzinga's excluded expert testimony. Professor Elzinga addressed the potential competitive harm from a dealer cartel but concluded that there was no evidence of one in this case. Elzinga Report at 1-15. The evidence here is that Mr. Kohl listened to the views of the retailers and then made and announced his own voluntary decision based on his view of the best interest of Leegin and the Brighton brand.[5] This is nothing more than the kind of communication between a manufacturer and its retailers that the Supreme Court has held is natural and appropriate. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 762-64 (1984). Plaintiff also cites to evidence showing Leegin's concern about discounting spreading. It is undisputed that Leegin wanted Brighton retailers to charge the suggested retail prices and was concerned that, without enforcement of the pricing policy, the prices would fall to levels that would not allow the retailers to merchandise the Brighton line in the manner Leegin thought best.[6] The references to discounting spreading in the absence of enforcement are nothing more than acknowledgements of the natural and expected harmful effects on the Brighton system that would be caused by the kind of free-riding practiced by Plaintiff.

In sum, Plaintiff submitted no evidence that Leegin's pricing policy resulted in any reduction in competition in the market for women's accessories, and accordingly, the Court should grant Leegin's motion.

B. <u>Plaintiff Failed to Produce Substantial Evidence of the Amount of Damages.</u>

Plaintiff attempts to defend the inherently speculative damages award by referring to the relaxed standard of proof of amount of damages in antitrust cases and to the fact that the jury awarded less than the total amount requested under Plaintiff's deficient damages model. Neither argument has merit. The relaxed standard will not justify a damages model that lacks a

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[5] Trial Transcript, April 12, 2004, a.m. session, page 119, line 17, to page 122, line 11.

[6] Plaintiff also cites testimony from Jan Clinkscale that Leegin would "make everybody play by the rules." Pl. at 5. This evidence is nothing more than a statement that Leegin enforced its policy, as Leegin certainly was entitled to do under the *Colgate* doctrine.

reasonable basis for the jury to assess a non-speculative amount.[7] And, where the damages model is utterly disconnected from a valid factual basis, the fact that the jury gave less that requested does not cure the defect. A jury award for less than the amount claimed cannot absolve—as a matter of law—Plaintiff's burden of proof.

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

Plaintiff contends, "the period for which a jury can award damages is an issue of the jury." Pl. at 7. While this is undoubtedly true, it does not mean that an expert can blindly adopt a damages period based on nothing but his client's self-serving testimony. *Keener v. Sizzler Family Steak Houses*, 597 F.2d 453, 457 (5th Cir. 1979) (The Fifth Circuit has "consistently required more evidence than the self-serving speculation of the plaintiff to support an award of damages."). Since the damages model offered by Plaintiff's expert Mr. Davis relies entirely upon Plaintiff's bald assertion that it would take him 10 years to recover from the loss of the Brighton line—a claim that Mr. Davis adopted without any inquiry or analysis[8]—the damages award cannot stand. *See Chrysler Credit Corp v. J. Truett Payne Company, Inc.*, 670 F.2d 575, 582-83 (5th Cir. 1982). 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. 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. There was no such basis.

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[7] *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 46 (5th Cir. 1972) ("[T]his 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.'") (quoting *Bigelow, Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264, 66 S. Ct. 574, 90 L. Ed. 652 (1946)), *cert denied,* 409 U.S. 1077 (1972); *Keener v. Sizzler Family Steak Houses*, 597 F.2d 453, 457 (5th Cir. 1979) (a plaintiff is not entitled to any recovery unless the amount of damages is based on substantial evidence).

[8] Trial Transcript, April 8, 2004, p.m. session, page 118, lines 1-9.

The correct issue is how long it would take Plaintiff to replace the Brighton line going forward. Smith's self-serving testimony was not even addressed to this question. For example, his estimate was based almost exclusively on the number of years that he operated his business before discovering the Brighton line.[9] Brighton did not even exist for a number of those years, making the basis for Smith's self-serving opinion utterly irrelevant to the question at hand. Based on Plaintiff's "reasoning" if Kay's Kloset had started in business ten years earlier, then Davis could have tagged Leegin for 20 years of damages because of the additional years that it took Smith to "find" Brighton. Because Plaintiff's damages case was based on how long it would take to replace the Brighton line, Plaintiff was required to present evidence relevant to how long it would reasonably take Plaintiff to locate and develop alternative product lines based on the current state of the market, not based on the state of the market when Plaintiff was first in business and Leegin had not yet introduced its Brighton line of ladies' accessories. It is possible that a business owner would know relevant facts that bear on this question, but Smith's opinion was not based on such facts. Plaintiff did not present evidence of alternative product lines, combinations of product lines, or different approaches to sales and marketing that could be employed to replace Brighton. Plaintiff simply pulled 10 years out of thin air, and Davis used that number.

Plaintiff's damages period is a house of cards for other reasons too. 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.[10] Nor did they reconcile the 10-year number with the evidence at trial showing that

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[9] Trial Transcript, April 8, 2004, a.m. session, page 113, lines 10-22 (Q: Well, based on that experience and based on your knowledge of the market, how long do you estimate it will take for your business to recover? A: A minimum of 10 years to get back to where I was prior to them terminating the shipments of their products to our family store. Q: And why do you say that? A: It took me 10 years just to find Brighton. And if you saw our earlier graph, how fast we grew once the Brighton line was incorporated into our business, 10 years is -- absolutely would be a minimum, even at a growth rate of 6 or 7 percent per year from where I'm at right now. It would be more than 10 years.) (emphasis added).

[10] *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.

prior to that decline, it took Plaintiff only four to five years to reach the high point of its Brighton sales.[11] Nor, other than by repeating the mantra that Bright was unique, did they even attempt to reconcile this critical 10-year assumption with the fact that Smith had already replaced Brighton products. Each of these deficiencies—alone—undermines the Plaintiff's damages period. Taken together, these deficiencies expose Plaintiff's damages period as fatally flawed.

Plaintiff asserts that the jury's adoption of a lesser amount remedies these deficiencies. Pl. at 6-7. Plaintiff is wrong. A jury can certainly award less than an amount supported by the evidence. However, the mere fact the jury awarded less than Plaintiff requested does not mean that the jury's award has a factual basis. To the contrary, the jury's adoption of a lesser amount indicates that the jury picked a smaller number out of the air, 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 it would take him 10 years to replace Brighton.

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

The proof of lost net profits fatally was deficient. In several ways, Davis had no basis for his excessively generous assumption of lost gross profits from Brighton sales, and contrary to the Court's instructions, he failed to provide the jury a basis to reduce those gross profits to net profits. Davis's use of a flat average of three years' sales of Brighton to project future gross profits lacked evidentiary support. 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.[12] Davis multiplied this amount by ten for the 10-year damage period provided by Smith, and reduced the total to present value using a risk-free 4.5% discount

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[11] *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.

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

rate.[13] Davis's approach conflicted with the undisputed evidence that the trend of Plaintiff's gross profits from Brighton 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, but there was no evidence to support this assumption. Davis 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.

In a vain attempt to justify Davis's flawed calculations, Plaintiff now asserts that Davis made investigations that he did not make. Plaintiff asserts that Davis "recognized that the declines in [2001 and 2002] were caused by the September 11, 2001 tragedy." Pl. at 11. But the undisputed evidence showed that Plaintiff's gross profits from Brighton hit a high point in 1999 and then declined for two consecutive years <u>before</u> September 11, 2001. *See supra* n. 8. Davis's naked statement at trial that the events of September 11 had a negative impact on retail sales did not remedy his total failure to go behind the numbers to determine the actual cause of this consistent decline in Plaintiff's sales. In addition, while Plaintiff states in its brief, "Kay's Kloset, located near the Dallas-Forth Worth airport, was particularly hard hit," (Pl. at 10), Plaintiff did not submit any evidence to support this claim, which Davis adopted without any investigation of any kind. Likewise, Smith's testimony that Plaintiff "had experienced problems obtaining product" in 2002 (Pl. at 10) does not support Davis's use of the flat three-year average. Davis did nothing to investigate the facts underlying Smith's conclusory statement, or to attempt to quantify the extent, if any, these alleged "problems obtaining product" affected Plaintiff's sales.

Davis's calculation also failed to reduce the assumed gross profits to a net figure. It is not even clear that Plaintiff understands this issue. Plaintiff states that the Brighton line "was not

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

the only line of products sold by Kay's Kloset," and that based on this fact, "the determination of profits lost as a result of the loss of this line required a determination of the profits made by Kay's Kloset on this line." Pl. at 10. But the Court instructed the jury: "lost profits means lost 'net profits.' They are determined by subtracting the costs and expenses of a business from the gross revenue."[14] Thus, to permit the jury to calculate lost net profits, Plaintiff was required to produce evidence of the expenses it incurs to run its business; to attribute some portion of those expenses to its Brighton business; and to deduct those expenses from its gross profit on Brighton products. Plaintiff failed to do so.

Plaintiff also asserts, incoherently, that because of Plaintiff's point-of-sale system, Davis could determine "the contribution to gross profit that Brighton made to Kay's Kloset net profits." This statement makes no sense. Determining "the contribution to gross profit that Brighton made to Kay's Kloset net profits" does not provide any evidence for the jury to deduct the expenses Plaintiff incurred to earn these gross profits on Brighton sales. Plaintiff's position appears to be that since Plaintiff sold other products in addition to Brighton, Plaintiff is not required to deduct any expenses from the gross profits on Brighton that it projects it has lost due to the alleged violation. *See* Pl. at 10. Plaintiff cites no authority for this proposition, which directly contravenes the Court's instructions to the jury. In fact, Smith admitted that he reduced expenses after losing the Brighton line.[15] However, Davis ignored this evidence and assumed no reduction in expenses.[16] Since Plaintiff failed to present any evidence or projection of lost net profits on Brighton sales, the Court should grant Leegin's motion.

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14 Court's Jury Instructions, p. 8.

15 Trial Transcript, April 8, 2004, p.m. session, page 49, line 24, to page 50, line 10. Trial Transcript, April 8, 2004, p.m. session, page 110, lines 6-11; page 143, lines 14-18.

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

3. *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 separate damages resulting from the antitrust violation from other sources of loss. Mot. at 11. Plaintiff's factual distinction of the authorities cited by Leegin on this point are at the level of saying that those cases involved red cars whereas the present case involves a blue car. *See* Pl. at 12-13. The principle applied in each of these cases is that a plaintiff must separate damages that flow from the legal wrong from losses attributable to other factors.[17] <u>Plaintiff failed even to attempt that basic step despite the fact that there were such other factors</u>.

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. It was Plaintiff's burden to consider factors that may have impacted its sales that were unrelated to Leegin's conduct—including local market conditions, legal competition and the emergence of new Brighton competitors—and to segregate losses caused by such factors from losses allegedly attributable to Plaintiff's loss of the Brighton line.[18] If Davis had attempted to make this allocation and had some factual basis for his assumptions, Plaintiff would have been entitled to the more generous standard of proof regarding amount of damages. That more generous standard does not, however, allow a plaintiff to ignore other sources of loss. Davis's damages model left the jury with insufficient evidence to award any damages without guesswork. *See id.*

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[17] *See 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); *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); *Western Minerals, Inc. v. Hill,* 441 S.W.2d 677, 679 (Tex. Civ. App.–Amarillo 1969, no writ).

[18] *See El Aguila Food Products, Inc. v. Gruma Corporation,* 301 F. Supp. 2d 612, 625-26 (S.D. Tex. 2003); *Craftsman 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). Plaintiff argues that Davis's damages model includes the loss from increased competition because it uses the numbers from years in which that competition existed. Pl. at 13. What Plaintiff conveniently fails to acknowledge is that Davis chose to ignore the downward trend and indeed to assume a significant increase from the last actual year of sales, which he then applied to all future years.

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

Plaintiff asserts that Davis dealt adequately with the issue of risk in the discount rate he adopted—which he admitted to be a risk-free interest rate[19]—because he assumed no growth in Brighton sales. Plaintiff cites no authority that for the proposition that such an assumption can remedy the failure to account for risk. Moreover, the no-growth assumption was in fact overly generous on its own terms, given the undisputed evidence of the sharp downward trend in Plaintiff's Brighton sales discussed above. The fact that Brighton sales were growing nationally provides no basis to assume that the sales of a particular retailer would grow at the same rate, particularly in the face of clear evidence to the contrary. The fact that Davis used a risk-free rate to discount decidedly risky future profits remains a fatal flaw.[20]

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

Plaintiff never grapples directly with the fact that Plaintiff did, in fact, replace Brighton sales with sales of other similar products. Pl. at 14-16. For this purpose, the issue is not whether sales of those other products were a perfect or a complete substitute for sales of Brighton products. The fact is that Plaintiff earned profits from sales of other products that Plaintiff purchased using funds previously applied to Brighton purchases and sold from the retail space previously used for Brighton sales.[21] Yet, Davis chose to ignore these substitute sales, relying on

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

[20] *See 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"); *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] The proper measure of damages 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

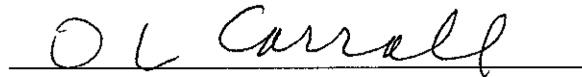
Smith's formalistic statement that there is no "substitute" for Brighton because it is "unique." Plaintiff conflates the issue of accounting for actual mitigation[22] from the fundamentally different issue of whether mitigation that did not occur might have been possible. Here, it is undisputed that mitigation in the form of replacement sales and lowered costs occurred, but Davis failed to consider them at all.

III. CONCLUSION

Because there was no legally sufficient evidentiary basis for the jury's finding of antitrust injury or its award of damages, 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 30, 2004



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1195786

[22] *See Pierce v. Ramsey Winch Company*, 753 F.2d 416, 437 (5th Cir. 1985); *Borger v. Yamaha International Corp*, 625 F.2d 390, 398 (2nd Cir. 1980).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the parties listed below, by first-class mail, on this 30th day of June, 2004.

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