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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.	§	Civil Action No. 02-03CV-107 TJW
	§	
Leegin Creative Leather Products, Inc.	§	
	§	
Defendant.	§	

PLAINTIFFS' RESPONSE TO LEEGIN'S MOTION FOR JUDGMENT AS A MATTER OF LAW

Plaintiffs PSKS, Inc. d/b/a Kay's Kloset . . . Kay's Shoes ("Kay's Kloset") respectfully requests the Court deny Leegin's motion for judgment as a matter of law.

I. INTRODUCTION

Since 1911, agreements fixing retail prices between a manufacturer and its retailers have been *per se* illegal as an unreasonable restraint of trade under Section 1of the Sherman Antitrust Act. Notwithstanding this clear prohibition, the defendant in this case systematically proceeded to require its retailers to enter into written agreements fixing retail pricing. When Kay's Kloset refused to go along with the price fixing scheme put in place by Leegin, Leegin stopped shipping Brighton goods to it.

Not only did Leegin stop shipping goods to Kay's Kloset, it undertook to direct customers that had purchased goods at Kay's Kloset to other area retailers. Because of the wrongful conduct of Leegin, Kay's Kloset suffered damages. The evidence fully supported the jury's finding that Leegin violated the antitrust laws, and that Kay's Kloset suffered lost profits of $1,200,000.

II. STANDARDS FOR GRANTING MOTION FOR JUDGMENT AS A MATTER OF LAW

"Judgment as a matter of law is proper after a party has been fully heard by the jury on a given issue, and 'there is no legally sufficient basis for a reasonable jury to have found for that party with respect to that issue.'" *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 804 (5th Cir. 1997)(quoting Fed. R. Civ. P. 50(a)). The evidence must be viewed in the light most favorable to Kay's Kloset, and all factual inferences must be drawn in favor of Kay's Kloset. The Court must leave "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts to the jury." *Id.* at 804. Thus, the motion should be granted only "[i]f the facts and inferences point so strongly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict." *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969).

III. ARGUMENT AND AUTHORITIES

A. The Evidence Supported Antitrust Injury

In arguing for judgment, Leegin focuses upon the need to show "antitrust injury" and claims that no "antitrust injury" ever was shown. Leegin also seems to recognize that "antitrust injury" has been defined as:

> injury of the type the antitrust laws were intended prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect 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).

The need to show an "antitrust injury" does not equate to the need to show a significant injury to interbrand competition. *Lake Hill Motors, Inc. v. Jim Bennett Yacht Sales, Inc.*, 246 F.3d 752, 756 (5th Cir. 2001). The focus is on whether the plaintiff's injury stemmed from any of the potential anticompetitive dangers that led the Court to label vertical maximum price fixing unlawful in the first instance. *See, Pace Electronics, Inc. v. Canon Computer Systems, Inc.*, 213 F.3d 118 (3d Cir. 2000). Vertical minimum price fixing is *per se* illegal because of the manifestly anticompetitive impact that it has.

Kay's Kloset was unlawfully terminated at the end of 2002.[1] One of the owners, Phillip Smith testified the effect of that termination on Kay's Kloset's business: "Our sales have dropped dramatically. We're about 50 percent of where we were. Our gross profit has fallen dramatically."[2] Kay's Kloset's purchases of Brighton goods from Leegin fell from $184,169 in 2002 to $147 in 2003. Plaintiff's Exhibit 85. This evidence alone establishes "antitrust injury" under the precedents of Fifth Circuit law. *Greene v. General Foods Corp.*, 517 F.2d 635, 665 (5th Cir. 1975). *See also, Baker's Carpet Gallery, Inc. v. Mohawk Industries, Inc.*, 942 F. Supp. 1464, 1482 (N.D. Ga. 1996)("The Fifth Circuit also has held that wrongful termination of a dealership can constitute antitrust injury."); *Graphic Products Distributors, Inc. v. ITEK Corp.*, 717 F.2d 1560, n. 35, 1579 (11th Cir. 1983).

The Supreme Court repeatedly has emphasized that: "Low prices benefit consumers regardless of how those prices are set, so long as they are above predatory levels, they do not threaten competition." *ARCO v. USA Petroleum*, 495 U.S. 328, 340 (1990). Vertically imposed minimum prices harms consumers because it defeats competition to set lower prices. "'Resale

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1 Trial Transcript April 8, 2004, AM, p. 111, line 4 - p. 112, line 1; Trial Transcript April 12, 2004 PM, p. 61, line 5 - 9

2 Trial Transcript April 8, 2004, AM, p. 112, line 20-p. 113 line 1.

price maintenance is not only designed to but invariably does in fact reduce competition not only *among* sellers of the affected product, but quite as much *between* that product and competing brands.' * * * Professor Posner also recognized that 'industry-wide resale price maintenance might facilitate cartelizing.'" *Continental T.V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51 n. 18 (1977)(citations omitted).

A dealer terminated as a result of an illegal price fixing scheme necessarily suffers antitrust injury. This position is consistent with the recent holding of *Pace Electronics, Inc. v. Canon Computer Systems, Inc.*, 213 F.3d 118, 122-23 (3d Cir. 2000): "We think that a maverick dealer * * * which is terminated for charging prices less than those set under a vertical minimum price fixing agreement, suffers the type of injury which the antitrust laws are designed to prevent and may recover damages, such as lost profits, which flow from that termination."

The position in *Pace* seems to be universally accepted. "Losses inflicted by a cartel in retaliation for an attempt by one member to compete with the others are certainly compensable under the antitrust laws." *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 783 (7th Cir. 1994). *See also, American Ad Management, Inc. v. General Telephone Company of California*, 190 F.3d 1051, 1058 (9th Cir. 1999)(broker for advertisements whose prices were fixed suffered antitrust injury); *First Med Representatives, LLC v. Futura Medical Corp.*,195 F. Supp. 2d 917, 924-25 (E.D. Mich. 2002)("Plaintiff's injury flows from a competition-reducing (i.e., anticompetitive) aspect of the challenged act: its elimination from the * * * market.); *Sterling Interiors Group, Inc. v. Haworth, Inc.*, 1996 WL 426379, *19 (S.D.N.Y. 1996)("The anticompetitive dangers of minimum price arrangements flow both to customers who purchase at prices set higher than competitive levels, and to dealers who are effectively foreclosed from competing in the marketplace.")

The evidence at trial showed the pernicious effects of Leegin's price fixing scheme. The evidence in this case showed how the claimed "vertical" price restriction frequently became a horizontal agreement among competitors. Jan Clinkscale told Philip and Kay Smith about how Leegin has handled discounting problems in the past. In the past, Leegin would act as a middle man between the competitors: They'll "try and work up some agreement from the middle man. I mean, maybe this will blow up and Ann will – they'll discuss it with Ann. They'll discuss it with the airport, you know, make everybody play by the rules." Transcript, 4/8/04 a.m., p. 95.

Another example of how this "vertical" arrangement facilitated the forming of a retail cartel among Brighton dealers involved a meeting among those dealers in Hawaii. Ann Wolfe testified about that meeting. She described a general discussion among Brighton dealers, including a discussion about pricing practices. After this discussion, there was a general consensus reached about the permissibility of the pricing practices. That was then approved by Jerry Kohl. Transcript 4/12/04 a.m., p. 121. The coordinated price fixing that occurred at this meeting was documented by Jerry Kohl in an e-mail message: "What we have decided is OK after talking to more than 100 retailers is a birthday Club that on your birthday (or within a short time of your birthday) a consumer can get a discount on 1 piece of merchandise in your store (everything not only Brighton)." Plaintiff's Exhibit No. 73. Clearly, the vertical price fixing scheme has been transformed into a horizontal cartel that has spread to effect pricing decisions on all merchandise carried by a store carrying Brighton.

The actions of Leegin were designed to suppress competition. That was the theme of repeated e-mails issued by Jerry Kohl. For example, he noted that if gift-with-purchase giveaways were permitted, "the other retailers in the area feel they have to compete and before long its chaos." Plaintiff's Exhibit No. 74. Laura Young also displayed the attitude that

discounting activities would "spread like cancer." Plaintiff's Exhibit 67. If any competition is permitted, that competition would result in a situation that is "out of control." Plaintiff's Exhibit 74. This attitude is one of the evils that the antitrust laws were enacted to prevent.

B. The Evidence Supported the Damage Award

The standard for quantifying antitrust damages after the fact of damages has been shown is more relaxed than in a case not involving antitrust damages. As the Fifth Circuit has recognized:

> the nature of an antitrust claim means that "some plaintiffs can only hypothesize about what the state of their affairs would have been absent the wrong," *H & B Equipment Co. v. International Harvester Co.*, 577 F.2d 239, 246 (5th Cir. 1978), and we have, therefore, declined to hold antitrust plaintiffs to the same burden of proof of damages as demanded of plaintiffs in other civil cases. *See Eleven Line, Inc. v. North Texas State Soccer Ass'n*, 213 F.3d 198, 206-07 (5th Cir. 2000). Such leniency notwithstanding, an antitrust plaintiff may not merely rely on "guesswork or speculation" to establish damages. *Id.* Rather, our cases indicate that the plaintiff must provide a "just and reasonable estimate of the damage based on relevant data." *Id.*

Bell Atlantic Corp. v. AT&T Corp., 339 F.3d 294, 303 (5th Cir. 2003).

At the outset, it should be remembered that the Jury only awarded $1.2 million out of the requested $1.7 million in damages. To the extent that the points raised by Leegin represent factual issues – and some, such as mitigation certainly do – the jury considered them, and apparently agreed with Leegin.

It should also be kept in mind that the defendant did not offer an alternative measure of damages. Leegin's expert expressly stated that he did not determine damages.[3] The fact that the defendant "has not sought to demonstrate any better method for determining lost future profits

[3] Trial Transcript April 12, 2004 PM, p. 40, lines 9-14

that could have been applied to the available data in this case" is a fact to consider. *Greene v. General Foods Corp.*, 517 F.2d 635, 665 (5th Cir. 1975).

The fixing of damages is peculiarly a function of the jury and its determination should not be overturned unless it is grossly excessive. *State Office Systems, Inc. v. Olivetti Corporation of America*, 762 F.2d 843, 847 (10th Cir 1985). In this case, the award, which represents only 70% of the amount sought is not excessive.

C. <u>The Plaintiff's Approach used an Appropriate Damages Period</u>

In the Fifth Circuit, the period for which a jury can award damages is an issue of the Jury. That was the holding of *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 47 (5th Cir. 1972). In that case, the Court held that "[t]he duration of the period during which the plaintiff might be expected to profit will vary from case to case; it is susceptible of no precise formulation, and must be left to the processes of the jury informed by the presentation of conflicting evidence." After the case was retried, it again reached the Fifth Circuit in *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659 (5th Cir. 1974). Again, the duration of the damage period was attacked as speculation. This contention was rejected: "Lehrman testified to his age, health and desire to stay in the business in order to give some indication of the appropriate duration of future profits." 500 F.2d at 670-71. This testimony was sufficient to allow the jury to determine damages appropriately.

In *Malcolm v. Marathon Oil Co.*, 642 F.2d 845 (5th Cir. 1981), the Fifth Circuit overturned an order granting a new trial in an antitrust case. The trial court had granted the new trial on the basis that damages had not been definitively quantified. This was held to be erroneous. The Court stressed that in an antitrust setting, "[i]t is appropriate that if there is uncertainty, the defendant should bear the burden of that uncertainty because his unlawful

actions created it." 642 F.2d at 864. The relaxed standards of proof "are particularly appropriate in cases where the finder of fact must estimate lost future profits." *Id.*

In *Malcolm*, the plaintiff had not even testified as to how long he would have stayed in business. The argument that this created as deficient basis on which to award damages was rejected as well:

> This Court has previously found evidence of future duration of a business to be inferable from evidence of a plaintiff's age, health and desire to remain in business. * * * Malcolm offered comparable evidence. He testified that his plans for future expansion were cut short by the defendants' refusal to deal * * * Thus, the jury could infer that Malcolm would have stayed in business but for the refusal to deal.

642 F.2d at 864-85.

In *Graphic Products Distributors, Inc. v. Itek Corporation*, 717 F.2d 1560 (11th Cir. 1983) similar evidence was held to satisfy the requirement for showing the damages period. There, "testimony about the age and health of Itek's principals, coupled with their desire to remain in business, sufficed to allow the jury to estimate the duration of future profits." 717 F.2d at 1582 n. 42. *See also*, *Delong Equipment Co. v. Washington Mills Electro Minerals Corp.*, 900 F.2d 1188 (11th Cir. 1993)(sustaining 25 year damages period).

In the present case, the evidence on damage duration was appropriately supported by the same considerations as supported the awards in these other cases. Philip Smith for Kay's Kloset testified about the store, and its plans, and the practice of the store in selling products.[4] He testified to the uniqueness of the brand, and how it was a wonderful product to sell. [5] He testified that the store generally would retain lines of products. Over the history of the store (which had

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4 Trial Transcript April 8, 2004 AM, p. 54, line 7 -p. 56, line 12; p. 69, line 9 - p. 70, line 9; p. 77, line 2-25; p. 78, line 18 - p. 79, line 3; p. 112, line 20 - p 113, line 9; p. 114, line 18 - p 115, line 2.

5 Trial Transcript April 8, 2004 AM p. 48, line 15 - p. 49, line 23; p. 60, lines 12-17; p. 61, lines 8-16; p. 78, lines 8-17; p. 99, lines 1-6; p. 112, lines 2-8

been in operation since 1986), he could recall dropping only one or two lines of products.[6] He testified that the store would remain in operation, and that he did not intend to retire.[7] He testified that eventually when he and his wife did choose to retire, his daughter, who currently manages the store, would take over the business.[8]

Leegin clearly planned to be operating for at least 10 years. The evidence showed that it had contracted to license the "Brighton" name to various entities for 10 and 12 years.[9] Certainly, it contemplated that it would be selling a product into the marketplace over that period of time.

Based upon the experience that he has had in building this business over the prior 17 years, Mr. Smith testified that he thought it would take him at least 10 years to make that business recover.[10] He explained why:

> 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 right now. It would be more than 10 years.

Transcript, April 8, 2004, AM, p. 113, lines 17-22.

Mr. Smith is in a position to testify in such a manner as to lost profits. *State Office Systems, Inc. v. Olivetti Corporation of America*, 762 F.2d 843, 846 (10th Cir 1985). Clearly, the basis for the testimony of a ten year damage period was sufficient to enable the jury to consider awarding damages for that length of time.

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6 Trial Transcript April 8, 2004, PM p. 52, line 22 - p. 53, line 14

7 Trial Transcript, April 8, 2004 AM, p. 115, lines 3-4

8 Trial Transcript, April 8, 2004 AM, p. 115,lines 5-8

9 Plaintiff's Trial Exhibit 114 (Trademark and License Agreements)

10 Trial Transcript April 8, 2004 AM, p 113, lines 10-22

D. There was sufficient evidence to prove Lost Net Profits

The Brighton line was not the only line of products sold by Kay's Kloset. Although it made up as significant percentage of the sales of Kay's Kloset, it was not even most of the sales of that store. Because of 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 that line.[11]

Kay's Kloset uses a "point-of-sale" system to track the direct costs and selling price of items of inventory that it maintains. That information can be accessed by individual product, or by product manufactured by one company.[12] Based upon that "point-of-sale" system, it was possible for James Davis, the retained damages expert, to determine the contribution to gross profit that Brighton made to Kay's Kloset net profits for the three years prior to the time shipments were terminated to Kay's Kloset. Those contributions to profit are not disputed, and are in the amounts of $289,516 for 2000, $201,591 for the year 2001, and $141,458 for the year 2002.[13] In determining to use these years for determining the profitability of the product to Kay's Kloset, the expert was mindful that conditions were not constant during that period. September 11, 2001 triggered a sharp downturn in retail sales. Kay's Kloset, located near the Dallas-Fort Worth airport particularly was hard hit. The effects of the decline continued into 2002. In 2002, Kay's Kloset had experienced problems obtaining product as well, which contributed to lower sales.[14]

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11 Trial Transcript April 8, 2004 AM, p. 81, line 10 - p. 82, line 16

12 Trial Transcript, April 8, 2004 AM, p. 77, lines 22-25

13 Trial Transcript April 8, 2004 PM, p. 94, lines 16-24; p. 95, line 21 - p. 96, line 24; p. 102, line 7 - p. 103, line 18

14 Trial Transcript April 8, 2004 PM, p. 103, line 19 - p. 104, line 12

Plaintiff's expert projected future profits based upon this three year history.[15] He made a very conservative assumption in projecting future sales growth – he projected absolutely no sales growth. This significantly understates the damages, had the rate of growth for Brighton products for the national stores – 16% – been applied to the calculation.[16] And, this projection was conservative in that it did not inflate sales or profits for such factors as inflation or growth. It did not take into account the value to Kay's Kloset of promotional allowances or rebates.[17] It did not consider the value that Brighton had as a "door-opener" for cross sales of product.[18]

After projecting that the actual experience over these years could be expected to occur over the next 10 years, the expert then reduced the profits to present value. This is a conservative approach to damages, using only accepted methods.[19] Even Leegin's expert conceded that Mr. Davis used an accepted methodology.[20]

Contrary to the argument set forth in Leegin's brief, James Davis did consider the fact that gross profits declined in 2001 and 2002. He recognized that the declines in those years was caused by the September 11, 2001 tragedy. It took that tragedy to change the upward trend in sales experienced by Kay's Kloset from 1997 through 2000. That tragedy hurt retailing in the Dallas area.[21] Even Leegin's expert agreed that a store, such as Kay's Kloset, which caters to

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15 Trial Transcript, April 8, 2004, PM, p. 104, lines 13-15; p. 106, lines 22 - p. 107, line 8

16 Trial Transcript, April 8, 2004 PM, p. 107, line 24 - p. 108, line 13; p. 141, line 20 - p. 142, line 16.

17 Mr. Smith testified about a 2% "rack credit" that he would receive from Leegin. (Based upon annual purchases of $200,000 per year, this promotional credit alone would amount to an annual value of $4,000.00) Plaintiffs Trial Ex. 85 at LCL 005274; Trial Transcript April 8, 2004, PM p. 75, line 10 thru p. 76, line 13; p. 108, lines 20-24.

18 Trial Transcript, April 8, 2004 PM, p. 108, lines 14-16.

19 Trial Transcript April 8, 2004, PM, p. 106, line 22 - p. 107, line 23.

20 Trial Transcript April 12, 2004, PM, p. 39, line 23 - p. 40, line 8

21 Trial Transcript April 8, 2004 PM, p. 102, lines 20 - p. 104, line 15; p. 141, lines 5-14

airline employees would have experienced problems as a result of the September 11, 2001 tragedy.[22]

The fact that the downturn in 2001 and 2002 can be explained by factors other than a market shift provided a firm basis for the jury to conclude that Davis' reliance upon a three year average is an acceptable benchmark to use in assessing damages.

E. The Plaintiffs Damages Calculations did not seek loss for Lawful Competition

Leegin argues that there might be other factors that could have resulted in future declining sales of Brighton products by Kay's Kloset, (had it not illegally stopped shipping Kay's Kloset those products) and those other factors must be taken into account in calculating damages. Leegin further claims that the failure of the plaintiff's expert to account for all possible other causes of injury strips the jury's award of damages of any support, justifying judgment in its favor. Not surprisingly, Leegin's position is not the law.

The cases that Leegin relies upon did not involve the relatively easy task of determining damages for a product distributor who ceases to be a distributor of a given product. Instead, those cases dealt with entirely different issues. *El Aguila Food Products, Inc. v. Gruma Corp.*, 301 F. Supp. 2d 612 (S.D. Tex. 2003) dealt with attempting to compute damages that arose from another firms use of slotting allowances. *Craftsman Limousine, Inc. v. Ford Motor Co.*, 363 F.2d 761 (8th Cir. 2004) involved a conspiracy to limit one company's ability to promote its product. *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1057 (8th Cir. 2000) involved various challenges brought by competitors to a discount program offered to dealers by a manufacturer.[23]

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22 Trial Transcript April 12, 2004 AM, p. 66, line 4-15

23 Likewise, *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483 (8th Cir. 1992)(claim of monopolization and tying); *USFL v. NFL*, 842 F.2d 1335 (2d Cir. 1988)(claim predicated on monopolization of Football); *Farley Transp. Co. v. Santa Fe Transp. Co.*, 786 F.2d 1342 (9th Cir. 1985)(new trial required on damages in predatory pricing case where

> Antitrust plaintiffs must prove that their injuries were caused by the unlawful acts of defendants. *MCI Communications*, 708 F.2d at 1161. In doing so, plaintiffs must establish that defendants' unlawful activities were a material cause of at least some of their injury, rather than the injury being wholly attributable to other factors. *Farley Transportation*, 786 F.2d at 1349. Once plaintiffs have established causation of damages, the jury may determine the amount of damages by a just and reasonable estimate, as long as the jury verdict is not the product of speculation or guesswork. *MCI Communications*, 708 F.2d at 1161 (*citing J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566-67, 101 S.Ct. 1923, 1929, 68 L.Ed.2d 442 (1981) and *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. 100, 123-34, 89 S.Ct. 1562, 1576-83, 23 L.Ed.2d 129 (1969)).

In re Aluminum Phosphide Antitrust Litigation, 905 F.Supp. 1457, 1460 (D. Kan. 1995).

Reliance upon past history to project future lost profits has specifically been approved by the Fifth Circuit in antitrust actions. *E.g., Greene v. General Foods Corp.*, 517 F.2d 635, 661 (5th Cir. 1975); *Pierce v. Ramsey Winch*, 753 F.2d 416 (5th Cir. 1985)

There simply is no support for Leegin's position that it could raise the possibility that other factors may affect future sales, and then obtain judgment on the basis that the plaintiff did not negate that possibility. That standard is far from the appropriate standard that the plaintiff need only give the jury a just and reasonable basis for estimating damages.

In fact, many or all of the factors that Leegin has cited are already built into Davis' damage calculation. The damage period selected reflects the competition that Kay's Kloset faced from Ann Wolfe's store (which opened in 1999 or 2000) and Mahmoud Kharrat's stores. To the extent that Kay's Kloset's customers were going to those stores instead of Kay's Kloset, the sales, and profits, and hence the damage estimate for the future period was reduced. Far from not considering that situation, Davis' damage calculation fully includes that consideration.

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company did not introduce evidence on amount of business lost as result of illegal scheme) ; and *MCI v. AT&T*,708 F.2d 1081 (7th Cir. 1983)(where verdict overturned because only certain of the challenged acts were violations, damages that had not been assessed as to each violation needed to be retried) all involved less straight-forward situations for ascertaining damages than that present in this case.

The same consideration applies to the general trends that Bailes supposedly showed. Using an average of three years acted to decrease the prospective damages and accounted for that trend. Moreover, the trend that Bailes identified was that by 2002, Lewisville sales were increasing.[24] Indeed, the evidence showed that as to Kay's Kloset, there was signs that Brighton sales were also rebounding from 2001. Purchases of Brighton products (exclusive of footwear) increased in 2002 from the level in 2001. See, Plaintiff's Exhibit 85. To the extent that Davis did not include the upward projection shown for the most recent years in the damage determination, it benefitted Leegin.

F. The Damage Calculation Accounted for Risk and Uncertainty

Leegin has not cited a single case in which a judgment as a matter of law has been rendered because a damage expert did not use a discount rate that was high enough to satisfy a defendant. Davis explained the discount rate he used, and was cross-examined about his choice of that rate.[25] He explained that he had adjusted the income stream for risk by assuming no growth over the next ten years.[26] Bailes agreed that using a risk-free discount rate was appropriate, "had the income stream been adjusted for risk."[27]

There was no error, and certainly, no error that could support judgment as a matter of law in favor of Leegin.

G. Mitigation issues were appropriately considered in the Jury's Award

The issue of mitigation of damages was hotly contested before the jury. At issue was whether there were "substitute" merchandise that Kay's Kloset could or did purchase that could

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24 Trial Transcript April 12, 2004 PM, p. 7, line 11 - p. 8, line 18, p. 46, lines 6 - 17

25 Trial Transcript April 8, 2004 PM, p. 106, line 12 - p. 107, line 8; p. 134, line 15 - p 135, line 17

26 Trial Transcript April 8 PM, p. 135, lines 1-17; p. 141, line 24 - p. 142, line 16

27 Trial Transcript April 12, 2004 PM, p. 27, lines 16-20

"substitute" for Brighton goods wrongfully denied Kay's Kloset by Leegin. The facts showed that Brighton goods were unique.[28] The designs for those goods were protected by patents.[29] The name "Brighton" had value in the marketplace.[30] "Brighton" goods acted as a drawing card, such that while Kay's Kloset carried those goods, it became a destination store for those goods.[31]

The appeal of the Brighton name was undisputed.[32] It was one of the most recognized brands of accessories in the Texas area.[33] Customers for Brighton goods were very loyal.[34] Because of that brand loyalty, the loss of Brighton represented loss of customers.

There was no substitute for the Brighton line of products.[35] No other line possessed the attributes associated with that product.[36] Although there were other lines of purses, watches, jewelry, shoes, and accessories, nothing came close to Brighton.[37] Notwithstanding the fact that

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28 Trial Transcript April 7, 2004 PM, p. 17, line 22 - p. 18, line 14; Trial Transcript April 8, 2004 AM, p. 20, line 22-24; p. 62, lines 11-13

29 Trial Transcript April 7, 2004 PM, p. 18, lines 15-19; Trial Transcript April 8, 2004 AM, p. 21, lines 5-7; p. 62, lines 14-15; Trial Transcript April 8, 2004 PM, p. 62, lines 12-17

30 Trial Transcript April 7, 2004 PM, p. 19, lines 13-19; Trial Transcript April 8, 2004 AM, p. 21, lines 8-13; p. 62, lines 16-20

31 Trial Transcript April 7, 2004 PM, p. 19, line 21 - p. 20, line 9; Trial Transcript April 2004 AM, p. 62, lines 21-23; Trial Transcript April 12, 2004 AM, p. 18, line 19-20

32 Trial Transcript April 8, 2004 AM, p. 60, line12-15, p. 61, lines 8 -16; p. 78, lines 8-17; April 8, 2004 PM, p. 79, lines 13-16.

33 Plaintiffs Trial Ex. 6 (KK020919); April 12, 2004 AM, p. 89, line 24 - p. 90, line 3

34 Trial Transcript April 12, 2004 AM, p. 18, line 18-20 p. 20, line 2 - 11; p. 24, lines 3-7; p. 30, line 22 - p. 31, line 9

35 Trial Transcript April 8, 2004 AM, p. 113, lines 2-9; p. 114, lines 18-25

36 Trial Transcript April 7, 2004 PM, p. 89, line 18 - p. 90, line 15; p. 95, line 17 - p. 96, line 8; Trial Transcript April 8, 2004 AM, p. 113, lines 2-9; April 8, 2004 PM, p. 48, line 22 - p. 49, line 4, p. 61, line 24 - p. 62, line 6.

37 Trial Transcript April 8, 2004 AM, p. 113, lines 2-9; p. 114, lines 18-25; April 8, 2004 PM, p. 44, line 20 - p. 46, line 14

Kay's Kloset was a destination store for Brighton products, it also sold purses, belts, jewelry and shoes by manufacturers other than Brighton – even when it sold Brighton products.[38]

Under these circumstances, it was plaintiff's position that there was no substitution for Brighton. The additional lines that Kay's Kloset stocked after Leegin ceased supplying it would have been stocked in any event, as just another line of products carried at the store. There simply was no way for Kay's Kloset to replace the Brighton line of products.

If there were substitute products, the burden to show an alternative source of supply rested with Leegin.

> Even if [Plaintiff] was under a "duty" to minimize his damages the defendants were not entitled to a directed verdict, because the "burden of showing that the victim of tortious conduct failed to minimize his damages rests with the wrongdoer." *Tennessee Valley Sand & Gravel Co. v. M/V Delta*, 598 F.2d 930, 933 (5th Cir. 1979) *(citing Golf City, Inc. v. Wilson Sporting Goods Co.*, 555 F.2d 426, 436 (5th Cir. 1977)). The defendants must show that the injured party's conduct was unreasonable and aggravated the harm. *Id.* at 933. The defendants did no more than establish that Malcolm failed to contact a few known suppliers of gasoline. They did not establish that those dealers could or would have sold Malcolm the needed product in sufficient quantities to keep his business alive. The defendants, thus, did not prove a failure to mitigate damages.

Malcolm v. Marathon Oil Co., 642 F.2d 845, 863 (5th Cir. 1981).

The other aspect of mitigation challenged by Leegin is an alleged failure to account for reduced expenses. Again, the claim of failure is imagined. Mr Davis testified about how, in this case, gross margins equated to net profits.[39] Mr. Davis testified that he had reviewed the financial information for the store, and that overall there was no reduced expenses "there's one-

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38 Trial Transcript, April 7, 2004 PM, p. 63, lines 1-11; Trial Transcript April 8, 2004 AM, p. 112, line 2 - p. 113, line 9; p. 114, lines 18-25; April 8, 2004 PM, p. 52, line 22 - p. 53, line 14.

39 Trial Transcript April 8, 2004 PM, p. 110, lines 6-19

tenth of 1 percent for the two fiscal years after the incident."[40] Clearly, if there was a fact issue about this issue, it was for the jury to decide.

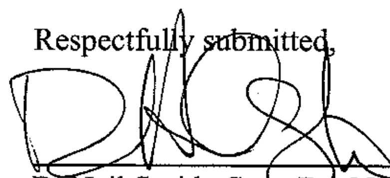
It was incumbent upon Leegin to prove the lack of mitigation. Whether or not it was successful on this aspect of its argument, or one of the other points it raised is uncertain. What is certain is that although Kay's Kloset sought $1.7 million in damages, the jury awarded only $1.2 million in damages.

CONCLUSION

Leegin made the tactical decision not to attempt to quantify the damage they inflicted on Kay's Kloset. As a result, they did not offer a damage model. It would appear that Leegin now regrets that decision, and is asking the Court to relieve them of the problems created by their failure to present an alternative to Davis' damage determination.

Certainly, the arguments advanced in Leegin's Motion for Judgment as a Matter of Law are insufficient to support granting the Motion. For the reasons set forth herein, the Court should deny that motion.

Respectfully submitted,



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[40] Trial Transcript April 8, 2004 PM, p. 133, lines 3 - 18

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was served on the parties listed below, by first-class mail, on this 22 day of June, 2004.

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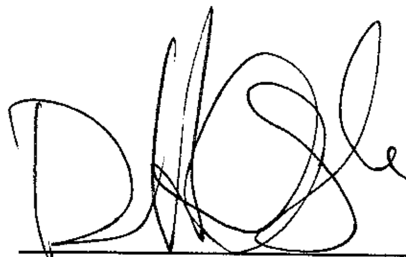

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