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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

T. John Ward

LEEGIN'S MOTION FOR NEW TRIAL

Pursuant to Federal Rule of Civil Procedure 59(a), Defendant Leegin Creative Leather Products, Inc. ("Leegin") respectfully moves for a new trial.

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. INTRODUCTION AND SUMMARY OF ARGUMENT

Because of serious errors relating to questions of both liability and damages, the Court should grant a new trial under Fed. R. Civ. Pro. 59(a). Fundamental errors made both before and during trial affected the way in which the case was presented to the jury. The errors related to

both the proof of an agreement and the appropriate standard of analysis under the antitrust laws for any such agreement. There is no dispute that Leegin attempted to create and enforce a unilateral pricing policy as permitted by the *Colgate* doctrine. Under present law, the line between a per se legal policy under *Colgate* and a per se illegal agreement to fix prices is unfortunately gossamer-thin. Under these circumstances, the court's exclusion of certain testimony and its denial of Leegin's requested jury instructions prejudiced Leegin.

Despite the fact that the Amended Complaint made a number of allegations relevant only to a rule of reason analysis, the Court interpreted the Amended Complaint as presenting only a per se theory. On that basis, the Court excluded the testimony of Leegin's antitrust economics expert, Kenneth G. Elzinga. Professor Elzinga's analysis provided a factual basis for both (1) rejecting the current per se rule and (2) recognizing an exception to that rule under established Fifth Circuit law. Professor Elzinga's analysis also showed that competition was not harmed by Leegin's pricing practices (whether or not they were effected through agreements), and that any harm to the Plaintiff did not constitute antitrust injury. Consistent with its ruling excluding Professor Elzinga, the Court denied instructions that would have required the jury to find actual harm to competition under the rule of reason.

With regard to antitrust injury, the Court partially retreated from its pretrial ruling, but in a way that created further confusion and prejudice. Despite denying Leegin the ability to offer expert economic testimony on the subject, the Court's instructions and jury questions required the jury to find antitrust injury. However, the Court refused to define antitrust injury, denying Leegin's requested definition from the Fifth Circuit Pattern Jury Instructions. Taken together, the Court's rulings denied Leegin the ability to introduce economic evidence showing the absence of antitrust injury, required the jury to find antitrust injury, but refused to give an instruction defining antitrust injury—a concept that is arcane to antitrust lawyers and courts alike. Under these circumstances, it was impossible for the jury to render a meaningful verdict. Accordingly, the Court should order a new trial.

Errors relating to damages also require a new trial. Pursuant to Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure, Plaintiffs' damages expert, James T. Davis, presented a written report of his opinions and the bases for those opinions. Due to both its insufficient methodology and its insufficient factual basis, Davis's report clearly failed to meet the standards of Fed. R. Evid. 702. Leegin moved to exclude Davis' testimony as unreliable, but the Court ruled "the subjects complained about in the motion are more appropriately the topics of vigorous cross-examination of the expert." Cross-examination of Davis confirmed the inadequacy of his analysis. At the close of Plaintiff's evidence, the Court stated on the record that it found Davis' testimony to be seriously suspect, but nevertheless allowed it to go to the jury, which returned a verdict of $1,200,000. Without Davis's opinions, there is nothing in the record that supports the verdict, and certainly nothing to support such a large award. For the reasons set forth in Leegin's Renewed Motion for Judgment as a Matter of Law, Plaintiff's failure of proof on damages requires that the judgment be reversed and rendered in Leegin's favor. At a minimum, however, these legal errors require a new trial.

III. SCOPE AND STANDARD OF REVIEW

The District Court is empowered to grant a new trial to any party on all or part of the issues after a jury trial. Fed. R. Civ. P. 59(a). Rule 59(a) does not enumerate the grounds on which the Court may order a new trial; it simply states that after a jury trial, a new trial may be granted "for any of the reasons for which new trials have heretofore been granted in actions at law." *Id.; see also Sibley v. Lemaire*, 184 F.3d 481, 487 (5th Cir. 1999). Generally, the law recognizes two such reasons: (1) if erroneous legal rulings prejudiced a party, and (2) if the jury returned a verdict that is against the clear weight of the evidence.

A court should grant a motion for new trial based on legal errors if the court concludes that those errors affected the substantial rights of a party or resulted in a miscarriage of justice. *Government Financial Services One Ltd. Partnership v. Peyton Place*, 62 F.3d 767, 774 (5th Cir. 1995) (court has discretion to grant a new trial where necessary to do so "to prevent an

injustice"). Erroneous evidentiary rulings may be grounds for new trial if a party's substantial rights are affected and the error is harmful. *Carroll v. Morgan*, 17 F.3d 787, 790 (5th Cir. 1994), citing *Munn v. Algee*, 924 F.2d 568, 573 (5th Cir. 1991). Erroneous jury instructions and the failure to give adequate instructions also are grounds for a new trial, if the court concludes "the jury charge as a whole leaves substantial and ineradicable doubt whether the jury has been properly guided in its deliberations." *Hiltgen v. Sumrall*, 47 F.3d 695, 703 (5th Cir. 1995), quoting *Mayo v. Borden, Inc.*, 784 F.2d 671, 672 (5th Cir. 1986).

A court should grant a new trial on evidentiary grounds if the verdict is against the clear weight of the evidence. *Whitehead v. Food Max of Mississippi, Inc.*, 163 F.3d 265, 269 (5th Cir. 1998). Although "substantial evidence" supporting the verdict bars a court from granting judgment as a matter of law, it does not prevent a court from granting a new trial. To the contrary, a court has the duty to set aside a verdict even though it is supported by substantial evidence, if the court is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence that is false or will result in a miscarriage of justice. *Carr v. Wal-Mart Stores, Inc.*, 312 F.3d 667, 670 (5th Cir. 2002). On a motion for new trial based on insufficiency of the evidence, the court does not presume that the verdict is correct, and need not view the evidence in the light most favorable to the nonmoving party. *Smith v. Transworld Drilling Co.*, 773 F.2d 610, 613 (5th Cir. 1985). Rather, the court is required to weigh the evidence and assess for itself the credibility of witnesses. *Id.*, quoting C. Wright, *Federal Courts* (4th ed. 1983), at 634 ("While the court is to respect the jury's collective wisdom and must not simply substitute its opinion for the jury's, 'if the trial judge is not satisfied with the verdict of a jury, he has the right—and indeed the duty—to set the verdict aside and order a new trial.'").

IV. ARGUMENT

A. The Court's Exclusion of Professor Elzinga's Testimony Prejudiced Leegin.

Leegin proffered antitrust economics expert Kenneth G. Elzinga to address multiple issues relating to the competitive effects of Leegin's pricing practices. Professor Elzinga

explained that (1) Leegin's pricing practices are pro-competitive, (2) the per se rule should not apply because the concerns underlying the general per se rule against vertical price agreements are not present, and (3) Plaintiff failed to prove antitrust injury.[1] Shortly before trial, the Court stated that it viewed this case to be a per se case,[2] and granted Plaintiffs' motion to exclude Professor Elzinga's testimony.[3] By ruling that Leegin was not entitled to submit expert testimony relevant to determining whether Leegin's policy harms competition or consumers, whether a per se rule should prohibit vertical minimum price agreements, whether an exception should be made to the application of the per se rule in this case, or whether Plaintiff's claimed injuries constituted "antitrust injury," the Court severely restricted Leegin's defenses at trial.

Having succeeded in excluding Professor Elzinga's testimony, Plaintiff made a 180-degree turn at trial. Plaintiff's counsel repeatedly argued to the jury that Leegin's policies harmed competition and consumers, and elicited testimony in an effort to support these arguments.[4] Thus, while purporting to pursue a per se theory, Plaintiff instead placed the spotlight directly on the alleged effects of Leegin's pricing policy on competition and consumers—matters that are relevant only under the rule of reason. Under these circumstances, it was critical for Leegin to have the opportunity to present expert testimony to explain why Leegin's policy does not harm competition or consumers, despite the requirement that retailers follow Leegin's suggested prices.[5]

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[1] With respect to the determination of whether the Court erroneously excluded Professor Elzinga's testimony, Leegin incorporates by reference the arguments and authorities set forth in Leegin's Response to Plaintiffs' Motion to Exclude the Testimony of Kenneth G. Elzinga, filed March 18, 2004.

[2] Minute Order of Pretrial Conference, filed March 22, 2004.

[3] Order Granting Plaintiffs' Motion to Exclude the Testimony of Kenneth G. Elzinga, filed March 26, 2004. Relying on *Pace Electronics, Inc. v. Canon Computer Systems, Inc.*, 213 F.3d 118, 124 (3rd Cir. 2000), the Court held that expert testimony on the existence of antitrust injury was not relevant because as a dealer alleging termination pursuant to a price-fixing agreement, Plaintiff had established antirust injury as a matter of law. *See id.*

[4] *See, e.g.*, Trial Transcript, April 7, 2004, a.m. session, page 17, lines 9-14; Trial Transcript, April 7, 2004, p.m. session, page 48, line 2 to page 49:25; Trial Transcript, April 13, 2004, a.m. session (closing argument) (transcript not yet available).

[5] While Leegin's pricing policy clearly and lawfully states a preference against general discounting from the suggested price levels, it also contains a substantial exception: that retailers are entirely free to

B. The Court's Denial of Leegin's Proffered Jury Instruction on the Rule of Reason Prejudiced Leegin.

The Court denied Leegin's request that the Court instruct the jury under the rule of reason.[6] The rule of reason has been the "prevailing standard of analysis" under Section 1 of the Sherman Act since the beginning of the last century. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977), citing *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). "Under this rule, the fact-finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Id.* at 49. "Per se rules of illegality," on the other hand, "are appropriate only when they relate to conduct that is manifestly anticompetitive." *Id.* at 49-50. As Professor Elzinga's report elegantly explained, vertical resale price maintenance is not manifestly anticompetitive. To the contrary, it has many, if not all, of the potentially pro-competitive effects long recognized in vertical non-price restrictions. *See generally GTE Sylvania*, 433 U.S. at 50-57.

Even without the aid of Professor Elzinga's opinions, the testimony at trial demonstrated that Leegin's pricing conduct does not unreasonably restrain trade. The evidence demonstrated that Leegin's pricing policy was instrumental in the creation of a vibrant company that offers a unique combination of attractive products, fair and consistent prices, customer service and pleasant shopping experiences that consumers value. The evidence established that Leegin has no market power[7] and that there are many actual and potential competitors for the products

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discount Brighton products that have been discontinued, that they no longer wish to carry, or, importantly, that are slow moving for that retailer.

[6] Order Denying Leegin's Requested Jury Instructions, Request No. 4, filed April 12, 2004.

[7] In cases involving vertical non-price restrictions, the courts now recognize that interbrand competition is an effective restraint on any anticompetitive effects. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51-58 (1977). Indeed, many courts now use a "market power screen" to dismiss cases where there are a number of viable competitors. *See, e.g., Muenster Butane v. Stewart*, 651 F.2d 292, 298 (5th Cir. 1981) (holding that where defendant had no market power, and "interbrand competition was still vigorous, termination of a dealer is insufficient to support a Sherman Act violation."); *Graphic Products Distributors, Inc. v. Itek Corp.*, 717 F.2d 1560, 1568 (11th Cir. 1983) (quoting then-Professor Posner's rationale for the threshold requirement, namely that "if a firm lacks market power, it cannot affect the price of its product; that price is determined by the market."). The reason is simple: in the absence of evidence of retailer or manufacturer cartels, a manufacturer will only impose a non-price restriction that allows its retailers to raise their prices if the manufacturer believes that the restriction will make its products more competitive. If the manufacturer is wrong, interbrand competitors will quickly discipline

Leegin sells.[8] The evidence showed that Leegin adopted its pricing policy for the types of reasons that are regularly found to be pro-competitive in the context of vertical non-price restrictions. The growth in Leegin's sales showed that consumers like the combination of products and shopping experiences that the pricing policy makes possible. With the exception of the Plaintiffs, all the retailers who testified said they liked Leegin's pricing policy because it allowed them to compete with much larger retailers.[9] Plaintiffs were retailers who chose to "free-ride" on the efforts of other retailers who followed the policy. To allow malcontent retailers like Kay's Kloset to destroy this system by openly discounting actually is anticompetitive, because the likely result will be the loss of a choice that consumers obviously prefer.

For these reasons, the Court's denial of Leegin's proposed rule of reason instruction prejudiced Leegin. If correctly instructed under the rule of reason, the jury would have found that Leegin was not liable for violating antitrust laws because its conduct was not anticompetitive.

C. The Court's Denial of Leegin's Proffered Jury Instruction on the Exception to the Application of the Per Se Rule Prejudiced Leegin.

As an alternative to its request for a general rule of reason instruction, Leegin asked the Court to instruct the jury that it could apply the rule of reason under an established exception to the application of the per se rule.[10] The requested instruction was as follows:

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that mistake, because consumers will take their business elsewhere.

[8] Plaintiffs made no effort to define an economically relevant market. Plaintiffs suggested that Brighton is "unique" because the Brighton line includes purses that are coordinated with jewelry and other products. *See, e.g.,* Trial Transcript, April 8, 2004, p.m. session, page 48, line 22, to page 49, line 19. Assuming the truth of that assertion, there was no evidence that the many other manufacturers of purses could not add similarly coordinated products if there was sufficient demand.

[9] *See, e.g.,* Trial Transcript, April 13, 2004, a.m. session, page 63, line 8, to page 66, line 5; page 96, line 10, to page 103, line 4; page 111, line 3, to page 113, line 16.

[10] With respect to whether the jury should have been instructed that an exception to the application of the per se rule may apply, Leegin incorporates by reference the arguments and authorities set forth in its Response to Plaintiffs' Motion for Partial Summary Judgment, filed November 25, 2003; its Response to Plaintiff's Renewed Motion for Partial Summary Judgment, filed April 1, 2004; and its Response to Plaintiffs' Motion to Exclude Testimony by Kenneth G. Elzinga, filed March 18, 2004.

> I have instructed you on price fixing and have instructed you that price fixing is unreasonable in and of itself. However, there are exceptions to this rule. If you find that this case involves an industry in which restraints on competition are essential if the industry (or service) is to be available at all, <u>or if you find that Leegin's pricing practices are reasonably connected to an integration of productive activities or other efficiency-creating activity in such a manner as to require an inquiry into the net competitive effect</u>, then the question of whether the alleged conspiracy constituted an unreasonable restraint on interstate commerce must then be determined on the basis of full consideration of all of the facts and circumstances disclosed by the evidence, including the nature of the particular industry or the product or service involved, the market area involved, any facts that you find to be peculiar to that industry, product, service, or market area, the nature of the alleged restraint and its effect, actual or probable, and the history of the circumstances surrounding the alleged restraint and the reasons for adopting the particular practice that is alleged to constitute the restraint. In sum, the reasonableness of a restraint is judged by its general effect on the market, not by the circumstances of a particular application. An individual business decision that is negligent or based on insufficient facts or illogical conclusions is not a basis for antitrust liability.

With the exception of the underlined portion, this proposed instruction is taken verbatim from Instruction 6.1 of the Fifth Circuit Pattern Jury Instructions (1999) (Civil Cases). The underlined portion comes directly from the Fifth Circuit's decision in *United States v. Realty Mutli-List, Inc.*, 629 F.2d 1351, 1367 (5th Cir. 1980). This Pattern Jury Instruction expressly recognizes the possibility of the jury's finding an exception to the per se rule. Leegin contended it should be allowed to present economic testimony on this issue and proffered Professor Elzinga's testimony explaining why the circumstances for an exception are present in this case.[11] The Court held that Professor Elzinga would not be allowed to provide this testimony, and, without explanation or fact-finding, denied Leegin's request for this instruction.[12]

Both the Supreme Court and the Fifth Circuit have held that conduct that is facially within a per se rule may be analyzed under the rule of reason in exceptional cases where the per se rule's assumption of competitive harm does not apply. *Broadcast Music, Inc. v. Columbia*

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[11] *See generally* Leegin's Response to Plaintiffs' Motion to Exclude Testimony by Kenneth G. Elzinga.

[12] Order Denying Leegin's Requested Jury Instructions, Request No. 5, filed April 12, 2004; Trial Transcript, April 13, 2004, p.m. session, page 85, lines 18-22.

Broadcasting System, Inc., 441 U.S. 1, 19-25 (1979);[13] *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1361-1367 (5th Cir. 1980).[14] The Pattern Jury Instructions adopted by the Fifth Circuit in 1999 explicitly recognizes such an exception. *See* Pattern Jury Instructions, 6.1 at 3. Other courts have recognized a similar exception in distinguishing between "naked" and "ancillary" restraints.[15]

Here, Leegin meets the requirements of both *Broadcast Music* and *Realty Multi-List* for

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[13] In *Broadcast Music*, the Supreme Court held that a challenged license program did not merit per se condemnation, even though it literally involved price fixing and thus facially violated the per se rule against price fixing. *Id.* at 16-24. The Court instructed that before characterizing a practice as per se illegal, courts must determine "whether the practice facially appears to be one that would almost always tend to restrict competition." *Id.* at 19-20. This inquiry "must focus on whether the effect and . . . because it tends to show effect, the purpose of the practice are to threaten the proper operation of our predominantly free-market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and reduce output . . . or instead one designed to increase economic efficiency and render markets more, rather than less, competitive." *Id.*

[14] In *Realty Multi-List*, the Fifth Circuit declined to apply a per se analysis to an alleged group boycott, even though he challenged program "literally . . . constitute[s] a group boycott" and group boycotts have been held to be per se illegal. *Id.* at 1357-1369. The court stated that "courts must be careful not to extend the per se treatment to a type of restraint literally falling within a per se category where the rationale of the generalization is not applicable," noting that "the Supreme Court has refused to accord per se treatment to practices literally comprehended within the term when, viewed in its full context, the practice appeared potentially to be reasonably ancillary to pro-competitive, efficiency-creating endeavors and therefore not a naked restraint of trade." *Id.* at 1365, citing *Broadcast Music*, 441 U.S. 1. Thus, the court framed the question as "whether this type of group boycott falls within the rationale of the per se rule." *Id.* at 1365. After considering (1) "the criteria which require a particular restraint to be classified within the per se rule," (2) the rationales underlying the per se rule against group boycotts, (3) the market at issue, and (4) the parties' contentions regarding the economic effects of the challenged program, the court held that the program did not "warrant per se treatment" because it effectively responded to "market imperfections" and achieved "enormously pro-competitive objectives." *Id.* at 1362-1369.

[15] *See, e.g., Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 188-189 (7th Cir. 1985) ("A court must distinguish between 'naked' restraints, those in which the restriction on competition is unaccompanied by new production or products, and 'ancillary' restraints, those that are part of a larger endeavor whose success they promote. . . [The latter] are evaluated under the Rule of Reason . . . and unless they bring a large market share under a single firm's control they are lawful."); *Premier Electrical Construction Co. v. National Electrical Contractors Assoc., Inc.*, 814 F.2d 358, 368-371 (7th Cir. 1987) (ancillary restraints—where "the cooperation underlying the restraint has the potential to create the efficient production that consumers value"—are judged under the rule of reason); *Gerlinger v. Amazon.com, Inc.*, 311 F.Supp.2d 838, 2004 U.S. LEXIS 4604, at *28-31 (N.D. Cal. March 23, 2004) (holding that provision affecting price contained in broader agreement was not per se price fixing but rather an ancillary restraint to be judged under the rule of reason). Both the Heart Store "agreements" and the Trademark License Agreements fall within the category described in these cases; they created broader cooperative ventures between Leegin and select retailers that promoted enterprise, productivity and consumer choice, and the reference to Leegin's pre-existing pricing policy is merely an ancillary restraint within these broader pro-competitive agreements.

finding an exception to the application of the per se rule. Under *Broadcast Music*, Leegin's conduct does not warrant per se treatment because it does not implicate any of the rationales underlying the per se rule against price fixing, and because it allows the creation of a "new product" that otherwise would not exist, namely, the desirable combination of product, brand, limited distribution and shopping experience that consumers associate with Brighton. Similarly, under *Realty Multi-List*, Leegin's conduct does not warrant per se treatment because it was responding to market imperfections to enhance efficiencies. Here, the market imperfection was free-riding by retailers such as the Plaintiffs, and the enhanced efficiency was the creation of a desirable brand and distribution model that allows retailers to engage in interbrand competition against large department store chains and mass merchandisers. Had the court instructed the jury as requested and permitted Professor Elzinga to testify to these issues, the jury would have been able to consider the economic analysis necessary to determine whether, as in *Broadcast Music* and *Realty Multi-List*, an exception to the application of the per se rule was appropriate in this case. For the same reasons discussed above, the jury would have found that Leegin's pricing practices do not violate the rule of reason.

D. **The Court's Denial of Leegin's Proffered Jury Instruction Defining Antitrust Injury Prejudiced Leegin.**

Despite denying Leegin the ability to offer expert economic testimony on the subject of antitrust injury by granting Plaintiff's motion to exclude Professor Elzinga's testimony, the Court instructed the jury:

> The fourth element that the plaintiff must establish as a part of its claim is that it suffered injury in its business or property as a proximate result of the alleged contract, combination or conspiracy. In the course of normal, lawful competition, some businesses may suffer economic losses or even go out of business. The antitrust laws are only violated when the unlawful competitive practices cause such economic loss. An injury to a business is the "proximate result" of an antitrust violation only when the act or transaction constituting the violation directly and in a nature and continuous sequence produces, or contributes substantially to producing, the injury. In other words, the defendant's alleged violation of the antitrust laws must be a direct, substantial and identifiable cause

> of the injury that the plaintiff claims to have suffered. Proof of an antitrust violation and antitrust injury much be shown independently.[16]

In addition, the verdict form required the jury to find "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."[17] However, the Court's proposed instructions did not include a definition of "antitrust injury." Accordingly, Leegin objected to the instruction as being incomplete, and requested the following addition:

> Plaintiffs can recover only if their loss stems from a reduction in competition because of Leegin's behavior. There is no antitrust injury unless that behavior reduced competition, even if the behavior violated the antitrust law at issue.

These two sentences are included in the same Fifth Circuit Pattern Jury Instruction 6.1 from which the Court derived its instruction above; however, without explanation, the Court deleted these two sentences from its instruction, and denied Leegin's request to restore them.[18]

Leegin was prejudiced by the "half in, half out" nature of the Court's rulings on the antitrust injury requirement. Contrary to the Court's earlier ruling that the case turned on allegations of a per se violation that, if proven, established that Plaintiff suffered antirust injury as a matter of law,[19] the court instead required the jury to find the separate and independent existence of an antitrust injury, without instructing the jury what they were looking for, and without given Leegin the opportunity to prove that this undefined requirement was not met. This is not harmless error. "Antitrust injury" is not a commonly understood term. Indeed, antitrust injury is a concept that is arcane to antitrust lawyers and courts alike.[20] If properly instructed, the

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[16] Court's Jury Instructions, p. 6 (emphasis added).

[17] Plaintiffs did not object to these instructions or the verdict form and therefore waived any objection.

[18] Order Denying Leegin's Requested Jury Instructions, Request No. 6, filed April 12, 2004; Trial Transcript, April 13, 2004, p.m. session, page 85, line 23, to page 86, line 13.

[19] The Court's order excluding Professor Elzinga's testimony relied on *Pace Electronics, Inc. v. Canon Computer Systems, Inc.*, 213 F.3d 118, 124 (3rd Cir. 2000). As discussed in Leegin's Renewed Motion for Judgment as a Matter of Law, *Pace* was wrongly decided and the Court's reliance on it was in error.

[20] *See generally,* Ronald W. Davis, *Standing on Shaking Ground: The Strangely Elusive Doctrine of Antitrust Injury*, 70 Antitrust L. J. 697 (2003) (discussing "the doctrine of antitrust injury, a concept that

jury would have found that Plaintiff failed to prove it suffered antitrust injury. Without a proper instruction, the jury could not have understood the meaning or importance of antitrust injury. As a result, the failure to provide a proper instruction prejudiced Leegin.

E. The Jury's Finding of Antitrust Injury Is Against the Clear Weight of the Evidence.

Even without Professor Elzinga's testimony, the evidence clearly established that Plaintiff's claimed injuries did not stem from any competition-reducing aspect of Leegin's pricing conduct. Consequently, the jury's finding of antitrust injury is against the clear weight of the evidence.

Although Plaintiff frequently referred to competition and consumers, Plaintiff made no effort to prove harm to competition in an economically meaningful sense. The evidence at trial established that consumers who shop for Brighton do not shop solely, or even primarily, on the basis of price.[21] Rather, the evidence showed that Brighton shoppers value the Brighton shopping experience, which includes personal attention, generous repair and return policies, promotional activities, and other attributes that are facilitated by the pricing policy.[22] The evidence showed that consumers value the Brighton shopping experience at the Brighton price. There was no evidence suggesting any harm to any consumer from any allegedly inflated price. There was no evidence suggesting any attempt at horizontal cartelization or other collusion with competing accessory manufacturers. Nor was there any evidence that Leegin suspended shipments of Brighton products to Plaintiff under pressure from a retailer cartel, or, indeed, "pursuant to" any agreement with any retailer. Accordingly, there is no legally sufficient evidentiary basis for the jury's finding that Plaintiff suffered antitrust injury.

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the lower courts have often found difficult to understand and apply").

[21] *See, e.g.,* Trial Transcript, April 8, 2004, a.m. session, page 38, lines 11-19; Trial Transcript, April 12, 2004, a.m. session, page 89, line 7, to page 90, line 3; page 102, line 21, to page 103, line 4.

[22] *See, e.g.,* Trial Transcript, April 8, 2004, a.m. session, page 38, line 20, to page 39, line 3; Trial Transcript, April 12, 2004, a.m. session, page 88, line 8, to page 90, line 3; page 98, line 20 to page 102, line 20; page 112, line 2, to page 115, line 24.

F. The Court's Denial of Leegin's Proffered Jury Instructions on Conspiracy and the Interpretation of Written Agreements Prejudiced Leegin.

In attempting to prove the concerted action necessary under Section 1 of the Sherman Act,[23] Plaintiff placed heavy emphasis on several types of written agreements between Leegin and some of its retailers that refer to Leegin's pre-existing unilateral pricing policy. Because of the importance of the concerted action requirement—particularly in the context of the intersection of a legal *Colgate* policy with written agreements covering other matters—proper instructions on these issues were especially critical.

Leegin requested the following instructions on the proof necessary to show concerted action:

> Plaintiffs must present evidence that tends to exclude the possibility that Leegin and its retailers were acting independently. In other words, plaintiffs must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action.
>
> There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently.[24]

These proposed instructions directly quote the core holdings of *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984), respectively.

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[23] Plaintiff has the burden of proving a "combination . . . or conspiracy in restraint of trade" between Leegin and its retailers. 15 U.S.C. § 1. The Supreme Court has spoken clearly on the standards for proof of a conspiracy in an antitrust case. "Conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986), citing *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984). Independent action is not proscribed and a manufacturer has the right to deal with retailers, or to refuse to deal with retailers, as long as it does so independently. *Monsanto*, 465 U.S. at 761. Accordingly, a plaintiff "must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita*, 475 U.S. at 588, quoting *Monsanto*, 465 U.S. at 764. To meet this burden, an "antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Monsanto*, 465 U.S. at 464, quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.* 637 F.2d 105, 111 (3rd Cir. 1980).

[24] Order Denying Leegin's Requested Jury Instructions, Request Nos. 2 and 3, filed April 12, 2004.

Leegin also requested the following instruction on the interpretation of written documents:

> The plaintiffs contend that combination or conspiracy is proved by certain written agreements that refer to Leegin's requirement that its retailers follow its suggested prices. Leegin contends that those documents are simply a restatement of its preexisting policy. It is your duty to interpret the language of those documents. You must decide the meaning by determining the intent of the parties at the time of the agreement. Consider all the facts and circumstances surrounding the making of the agreement, the interpretation placed on the agreement by the parties and the conduct of the parties.[25]

Apart from the two introductory statements, this proposed instruction is taken verbatim from Texas Pattern Jury Charge 101.8 – Ambiguous Provisions.

These instructions were particularly critical due to the interplay between Leegin's unilateral pricing policy and the later documents that refer to it. Under *Monsanto*, it is not per se illegal to refer to retail prices—only to contract, combine, or conspire to fix them. It is undisputed that in 1997 Leegin changed from merely sending products with suggested retail prices to a new and different written pricing policy under the *Colgate* doctrine.[26] Leegin's express effort to avail itself of the *Colgate* doctrine created a complex fact question about how to interpret the later documents that refer to its pricing policy. Although there are factual disputes about how Leegin implemented and enforced the policy, the evidence is undisputed that this new policy pre-dated both the Heart Store "agreements" and the Trademark Licensing Agreements. Leegin's position, as elicited through testimony at trial, was that the pricing policy applied equally to all of its retailers and that the references to the policy in the Heart Store "agreements"

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[25] Order Denying Leegin's Requested Jury Instructions, Request No. 1, filed April 12, 2004.

[26] It is undisputed that Leegin decided to exercise its rights under the *Colgate* doctrine. Under that doctrine, a manufacturer has the right to establish a policy concerning the terms under which it will deal with retailers, including the requirement that the retailers follow the manufacturer's suggested prices. The Supreme Court has made clear that the *Colgate* doctrine embodies important antitrust principle values and deserves more than grudging acceptance. *Monsanto*, 465 U.S. at 762-63. As a result, a practice that has the same market effects is per se legal if it is implemented through a manufacturer's unilateral *Colgate* policy and retailers' acquiescence to that policy, but it is per se illegal if the manufacturer and retailers "agree" to fix prices. This line between per se legality and per se illegality is amorphous, counter-intuitive and ill defined. Under these circumstances, a proper instruction under *Monsanto* regarding evidence excluding the inference of independent action was particularly critical to Leegin's substantial rights.

and the Trademark Licensing Agreements are properly understood as nothing more than a reiteration of that pre-existing policy.[27] All of the testimony at trial uniformly indicated that neither Leegin nor any of the retailers who were parties to those agreements intended them to be agreements to fix the prices.[28] There was no evidence that the alleged agreements provided Leegin any basis for assuring compliance that it did not have through its right to refuse to deal under the *Colgate* doctrine. There was no evidence that Leegin's enforcement of its policy varied depending on whether the retailer in question was an "ordinary" retailer, or a Heart Store, or a trademark licensee. Therefore, even if one concluded that the documents in question are "agreements" for some purposes, there were genuine fact questions as to whether the references to the pre-existing policy amounted to a combination or conspiracy to fix minimum prices.

For these reasons, the Court's denial of Leegin's proposed instructions prejudiced Leegin. The jury was not properly instructed to consider whether the evidence excluded the possibility of independent action, or to consider the circumstances surrounding the formation of the agreements or the intent of the parties who entered into them. It is likely that the jury gave undue weight to the existence of these written agreements. By not giving these instructions, the Court in effect shifted the burden of proof: instead of the burden being placed on Plaintiff to prove concerted action through evidence tending to negate the possibility of independent action, the burden was placed on Leegin to prove the absence of concerted action; and further, to prove that the written agreements do not show concerted action, but without the benefit of an instruction requiring the jury to consider the intent of the parties to those agreements. If properly instructed, the jury would have found that, in light of the pre-existing Colgate policy, Leegin and retailers acted independently with respect to pricing and did not intend those written agreements to be agreements to fix prices.

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[27] *See, e.g.,* Trial Transcript, April 8, 2004, a.m. session, page 12, line 4, to page 14, line 6.

[28] *See, e.g.,* Trial Transcript, April 7, 2004, a.m. session, page 68, lines 5-12; page 69, line 21, to page 74, line 8; page 87, line 11, to page 88, line 13; page 117, line 2, to page 11, line 16 (testimony of Jerry Kohl); Trial Transcript, April 8, 2004, p.m. session, page 22, line 7, to page 28, line 18 (testimony of Phil Smith); page 88, line 17, to page 89, line 7 (testimony of Mahmoud Kharrat).

G. The Court's Admission of Davis's Testimony Prejudiced Leegin.

For the reasons stated in Leegin's Motion to Exclude the Testimony of James T. Davis and Leegin's Motion and Renewed Motion for Judgment as a Matter of Law, incorporated by reference herein, the Court should not have admitted Davis's testimony. The Court's admission of Davis's testimony prejudiced Leegin's substantial rights and led to a verdict that necessarily is based upon impermissible speculation and guesswork. Accordingly, if the Court does not render judgment for Leegin, it should order a new trial. *See Elcock v. Kmart Corp.*, 233 F.3d 734, 757-758 (3rd Cir. 2000) (damages award based on inadmissible expert testimony required new trial).

H. The Court's Denial of Leegin's Proffered Instruction on Mitigation of Damages Prejudiced Leegin.

The prejudice from Davis's testimony was amplified by the Court's refusal to provide Leegin's proposed instruction regarding mitigation to the jury. The Court provided a lengthy instruction to the jury that fully addressed the issue of a failure to mitigate damages.[29] The Court's instruction, however, did not provide any guidance to jury regarding how to address evidence of actual mitigation—namely, the undisputed evidence from the Plaintiff's own witness, Smith, establishing that Plaintiff had already succeeded in its efforts to mitigate damages, and was continuing those successful efforts into the foreseeable future.[30] Accordingly, Leegin requested the following additional instruction:

> If plaintiffs earned profits from selling substitute goods or reduced expenses, these profits and any reduction in expenses must be deducted from any award of damages.[31]

This proposed instruction derives directly from the holding of *Malcolm v. Marathon Oil Co.,* 642

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[29] Court's Jury Instructions, pp. 8-9.

[30] The evidence is undisputed that Plaintiff undertook ongoing, successful efforts to mitigate its damages. Smith testified that he had obtained replacement products in virtually every category of Brighton product he previously had carried, and was engaged in continuing efforts to bring in additional replacement products. Trial Transcript, April 8, 2004, p.m. session, page 44, line 16, to page 46, line 7; page 114, line 18, to page 115, line 2. 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.

[31] Order Denying Leegin's Requested Jury Instructions, Request No. 7, filed April 12, 2004.

F.2d 845, 863 (5th Cir. 1981). The Court's denial of this instruction prejudiced Leegin. In light of Davis's testimony that he was aware of the requirement that a lost profits damages model account for mitigation, but that he had not done so,[32] the Court's failure to provide Leegin's proposed mitigation instruction suggested to the jury that Davis's failure to address mitigation was somehow justified.

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, Inc. v. Wilson Sporting Goods Co.*, 555 F.2d 426, 436 (5th Cir. 1977) and *Borger v. Yamaha International Corp*, 625 F.2d 390, 398 (2nd Cir. 1980). A proper antitrust damage model must subtract any actual substitute sales from projected lost profits. *Pierce*, 753 F.2d at 429. Even under the lenient standard for proving the amount of antitrust damages, the court must properly instruct the jury to consider mitigation. *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 46-48 (5th Cir. 1972).

The damages model that Plaintiff presented to the jury failed to account for any mitigation of damages. Instead, Davis assumed that for ten years both Plaintiffs would suffer the loss of the entire amount of the gross profits formerly generated by Brighton. As in *Lehrman*, there was no instruction to "the jury to deduct a reasonable amount attributable to [Plaintiff's] earnings" from substitute sales after it stopped carrying Brighton. *See Lehrman*, 464 F.2d at 48. Consequently, given the evidence and instructions before it, the jury had no choice but to render an award based solely on Plaintiff's damages model, without accounting for Plaintiff's successful mitigation. Without an appropriate instruction, the jury was unable to understand this fundamental flaw in Plaintiff's damages model. The Court's denial of Leegin's requested instruction clearly prejudiced Leegin. *See Lehrman*, 464 F.2d at 46-48. The result was a patently unfair windfall for Plaintiff that is devoid of evidentiary support.

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

I. The Jury's Award of Damages Is Against the Clear Weight of the Evidence.

For each of the reasons articulated in Leegin's Renewed Motion for Judgment as a Matter of Law, the jury's award of $1,200,000 in lost profit damages is contrary to the clear weight of the evidence. Under Federal Rule of Civil Procedure 59(d), a court has two options if it finds that a jury damages award is excessive: it may either order a new trial on damages or give the plaintiff the option of avoiding a new trial by agreeing to a remittitur of the excessive portion of the damages. *Hernandez v. M/V Rajaan*, 841 F.2d 582, 587 (5th Cir.), *cert. denied*, 488 U.S. 981 (1988). The Fifth Circuit "follows the maximum recovery rule under which a remittitur may reduce damages only to the maximum amount a trier of fact could properly have awarded." *Id.* Because of the flaws in Davis's analysis, there is no basis for the Court to set an appropriate remittitur. Accordingly, the Court should order a new trial.

IV. CONCLUSION

Because of prejudicial errors relating to the questions of both liability and damages, the Court should grant a new trial under Fed. R. Civ. P. 59(e).

Respectfully submitted,

Dated: June 8, 2004

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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 8th day of June, 2004:

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U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
JUN - 8 2004
DAVID J. MALAND, CLERK

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**

ORDER

Came on for consideration Leegin's Motion for New Trial and the Court finds that said motion is meritorious and should be granted. It is, therefore,

ORDERED that Defendant Leegin's Motion for New Trial is **granted**.

SIGNED THIS THE ____________ day of ____________, 2004.

____
T. John Ward
United States District Judge