UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

DALMATIA IMPORT GROUP, INC. and MAIA MAGEE, Plaintiffs, vs. FOODMATCH, INC. et al., Defendant.	: : : : : : : : :	Case No. 2:16-cv-02767-EGS

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION FOR JUDGMENT ON THE VERDICT FILED BY PLAINTIFF DALMATIA IMPORT GROUP, INC.

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Defendants FoodMatch, Inc., Earth Pride Organics, LLC, Lancaster Fine Foods, Inc., CO Nolt, Inc. and Michael S. Thompson (collectively "Defendants"), through their undersigned counsel, file this Memorandum of Law in Opposition to the Motion for Judgment on the Verdict filed by Plaintiff, Dalmatia Import Group, Inc. ("Dalmatia"). *See* Dkt. No. 269. Defendants' Opposition is made without waiver of any post-judgment motion or request, including but not limited to Rule 50(b) motions for judgment as a matter of law and Rule 59 motions for a new trial. Defendants, like Dalmatia, request that the judgment be non-final, subject to post-judgment motions and requests.

I. Dalmatia is Not Entitled to Judgment on Claims under the Defend Trade Secrets Act of 2016.

Defendants oppose the entry of judgment under the federal Defend Trade Secrets Act of 2016 ("DTSA").

While Dalmatia's Complaint did plead claims under both the Pennsylvania Uniform Trade Secrets Act ("PUTSA") and DTSA, the jury was not instructed separately on the elements under the DTSA. For example, it was not instructed that the DTSA only applied to claimed damages after the effective date of the Act, i.e. May 11, 2016, if it applied at all.

The jury was only instructed on the elements under PUTSA. All of the elements of the trade secret instruction came straight from the language of PUTSA. Where there were differences between PUTSA and the DTSA, the language of PUTSA was used. For example, the DTSA definition of trade secret is broader and the DTSA does not contain a definition for "willful and malicious." The jury instructions used the PUTSA definitions of trade secret and "willful and malicious." The PUTSA definition of "willful and malicious" presented a high burden of proof, which was important because the jury found no "willfulness."

The jury was not instructed separately on the DTSA because, at best, it was duplicative of the PUTSA and it also allowed the Court to avoid a definitive ruling on whether the DTSA applied at all since it only became effective May 11, 2016, three months after Dalmatia commenced its action. By not separately instructing the jury on the DTSA, the Court also avoided the issue that, if the DTSA did apply, it only applied to claimed damages after May 11, 2016 and Dalmatia had not offered proof of its damages limited to the period after May 11, 2016. The jury's award of $500,000 for trade secret damages covered the period from January 2016, the start of sales of the Divina product, and therefore could not be an award under the DTSA.

The DTSA did not add anything and merely presented issues that did not need to be addressed. Dalmatia is not prejudiced by the refusal to enter judgment under the DTSA since it has obtained all relief under the PUTSA to which the jury found Dalmatia was entitled. There is no additional relief under the DTSA. The only participants in the trial who are "prejudiced" by the refusal are Dalmatia's counsel, who have issued press releases touting themselves as having achieved a "landmark" or "cutting edge" verdict under the DTSA. *See* Press Releases, attached as **Exhibit "A"**. The March 1, 2017 press release by McDermott Will & Emery claiming that it "secured a $5 million trade secrets victory for specialty food company Dalmatia under the Defend Trade Secrets Act" is simply false, particularly since the jury only awarded $500,000 (not $5 million) on the trade secrets claim.

II. Dalmatia is Not Entitled to Judgment in the Amount of $500,000 on Its Claim for Breach of Contract Related to the Beanies' Non-Disclosure Agreement.

In its Motion, Dalmatia seeks entry of judgment in its favor and against Lancaster and Earth Pride in the amount of $500,000 on Dalmatia's claim that Lancaster and Earth Pride breached the Beanies' Non-Disclosure Agreement (the "NDA"), which is the same amount awarded on the trade secrets claim. *See* NDA at Exhibit PTX 81. *See also* Verdict Form, Dkt. No. 280 at Questions 3f and 20. For the reasons set forth herein, Dalmatia is not entitled to the requested judgment on this claim.

A. Neither Lancaster nor Earth Pride Are Bound by the Beanies' NDA as a Matter of Law.

It was established at trial that neither Lancaster nor Earth Pride signed the Beanies NDA (PTX 81) or assumed Beanies' obligations under the NDA when Earth Pride purchased limited assets from Beanies under the Asset Purchase Agreement (DTX 15). Furthermore, analysis of the Beanies' NDA and Supply Agreement (PTX 3) demonstrates that the NDA terminated and is unenforceable as a matter of law. Accordingly, Dalmatia is not entitled to the entry of any judgment on its claim for breach of the NDA.

First, neither Lancaster nor Earth Pride are parties or signatories to the NDA. This is fatal to Dalmatia's claim on the NDA. *Polito v. Sch. Comm. of Peabody*, 69 Mass. App. Ct. 393, 396, 868 N.E.2d 624, 626–27 (2007) ("We must interpret the words in a contract according to their plain meaning.").[1] At trial, Dalmatia's 50% owner, Ms. Maia Magee, testified that the Beanies' NDA was an agreement only between "Beanies of Lancaster" and Dalmatia. *See* (01/31/2017 Tr. at 229:3-4) It did not bind Lancaster or Earth Pride. It *only* binds non-party, Beanies of Lancaster. And, Beanies' owner, David Esh, understood that while he was bound by the NDA while operating Beanies, he was not sure whether he was bound while working for Lancaster stating, "I suppose. I don't really remember." (02/02/2017 Tr. at 114:7-14)

Moreover, Section 1(a) of the Beanies NDA makes it clear that the NDA applies only to Dalmatia and its "affiliates, subsidiaries or investments," but, critically, *not to Beanies'* "affiliates, subsidiaries or investments" or to any other third party, such as Lancaster or Earth Pride. "Under accepted canons of contract construction, when certain language is omitted from a provision but placed in other provisions, it must be assumed that the omission was intentional."

[1] The Beanies' NDA contains a provision stating that the Agreement is to be governed and construed in accordance with the laws of Massachusetts. *See* PTX 81 at ¶ 4(e).

Innovative BioDefense, Inc. v. VSP Techs., Inc., No. 12 CIV. 3710 ER, 2013 WL 3389008, at *5 (S.D.N.Y. July 3, 2013). *See also Quigley v. Zieff*, No. 916969E, 1994 WL 879937, at *9 (Mass. Super. Jan. 6, 1994), *aff'd*, 38 Mass. App. Ct. 1129, 652 N.E.2d 166 (1995) (recognizing that courts must examine the full scope of an agreement and consider each part in relation to others, including the omission of certain terms). Moreover, Ms. Magee testified that Dalmatia's counsel prepared the NDA as well as other documents with the "BIO" footer. (02/2/17 Tr. at 90:5-19) This is critical because of the rule that ambiguities, if any, in a contract are construed against the drafter. *Fid. Nat. Title Ins. Co. of N.Y. v. Crowley*, 88 Mass. App. Ct. 1101, 35 N.E.3d 447 (2015) (recognizing that ambiguities must be construed against the drafter). Because the NDA is only binding as to Beanies, it cannot be said to bind Lancaster or Earth Pride as a matter of law.

Second, both Ms. Magee and Mr. Doug Harris, the signatories to the Supply Agreement (PTX 3), testified that Beanies and Dalmatia were bound by that agreement. [2] The jury, however, found that the Supply Agreement did not bind either Lancaster or Earth Pride. This is fatal to any claim against Lancaster or Earth Pride under the NDA (PTX 81) since the Supply Agreement plainly superseded the NDA and rendered it a nullity. Specifically, section 11.4 of the Supply Agreement is clear and unambiguous. It provides that that the Supply Agreement "supersedes all prior written or oral agreements or understandings with respect to the subject matter hereof." *See* PTX 3 at ¶ 11.4. And much of the "subject matter" of both the superseding Supply Agreement and the NDA are the same.

Specifically, the NDA governs Dalmatia's stated intent to "disclose" to Beanies "certain *confidential* and *proprietary* information, including, but not limited to, *recipe* specifics for [Dalmatia's] food products produced and distributed by [Beanies]." *See* PTX 81, at First

[2] (01/31/2017 Tr. at 240:7-241:14 (Maia Magee)); (02/02/2017 Tr. at 162:16-163:16 (Doug Harris)).

WHEREAS clause (emphasis added). *The Supply Agreement covers this precise topic*. It provides for the disclosure by Dalmatia to Beanies of a "certain *proprietary recipe* for certain fig spreads more particularly described on Exhibit A." *See* PTX 3 at §1.1. *See also id.* at § 1.2 (defining the "Product" as the fig spread noted on Exhibit A to the Supply Agreement); §1.4 (defining the "Specifications" as reflecting the anticipated disclosure by Dalmatia of the "formulations, specifications, processes, instructions…" to manufacture fig jam as reflected on Exhibit A to the Supply Agreement); § 2.10 (further limiting Beanies' rights to use Dalmatia's Intellectual Property, including its "*trade secrets*" and "other proprietary rights" which remain the "*exclusive property*" of Dalmatia.). And Exhibit A to the Supply Agreement is a three-page exhibit, reflecting Dalmatia's "Formula, Product and Specification," its "Product Parameters" and "Product Specifications" which are facially deemed as "*Confidential*" on the first page of the Exhibit. *See* (PTX 3, at DIG 467-469).

In the NDA, Beanies agreed to keep such proprietary information "strictly confidential". *See* PTX 81, at 1 (Third WHEREAS clause) and § 1(b). The Supply Agreement imposed a similar obligation on Beanies through its multiple references to the disclosure of Dalmatia's "proprietary", "trade secrets" and "confidential" information disclosed to Beanies.[3] The purposeful selection of this quoted language in the document drafted by Dalmatia[4] reflects the parties' understanding that Beanies was not authorized or permitted to disclose to third parties the confidential, proprietary information reflecting Dalmatia's recipe and processes as disclosed

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[3] For example, use of the word "Confidential" as used in Exhibit A to the Supply Agreement is intended to convey the parties' agreement that such information is "intended to be kept secret". *See, e.g.*, Black's Law Dictionary (10th ed. 2014) (CONFIDENTIAL, "Meant to be kept secret; imparted in confidence."); (TRADE SECRET, "A formula, process, device, or other business information that is kept confidential to maintain an advantage over competitors.").

[4] The Supply Agreement, like the NDA were both drafted by Dalmatia, as both contain the "BIO" footer. *See supra*, at, 4.

to it under the Supply Agreement. *See, e.g., Curtiss-Wright Corp. v. Edel-Brown Tool & Die Co.*, 381 Mass. 1, 3, 407 N.E.2d 319, 322, n. 2 (1980) (recognizing that a confidential relationship is implied where disclosures have been made between parties subject to an understanding of confidentiality). As such, the Supply Agreement imposed upon Beanies the same restrictions against disclosure of Dalmatia's confidential and proprietary recipe and processes as did the prior NDA. For this reason, the operative provisions of the NDA ceased to exist and were "supersede[d]" by the terms of the Supply Agreement when Beanies and Dalmatia executed it. *See* Supply Agreement, § 11.4. This precludes entry of a judgment against Lancaster and Earth Pride for breach of the NDA.

In short, under the plain language of the operative documents drafted by Dalmatia, the Beanies NDA was "supersede[d]" and extinguished once Beanies and Dalmatia entered into the Supply Agreement. For this reason, Dalmatia has no right to any judgment – and certainly not in the amount of $500,000 – for breach of the NDA as it did not even exist once the Supply Agreement was executed on July 16, 2008.

Third, Section 4(a) of the Beanies NDA states the contract would terminate once the "co-packing relationship" between Beanies (and only Beanies, *not* any of its affiliates, subsidiaries or investments) and Dalmatia ended. As Dalmatia acknowledged in its Second Amended Complaint, that co-packing relationship ended on July 31, 2008 when "Beanies of Lancaster, Inc. ceased all operations." SAC at ¶ 71. Consistently, there is no record evidence to suggest that Dalmatia has an ongoing relationship with Beanies. Accordingly, the Non-Disclosure Agreement, by its terms, terminated on July 31, 2008.

Fourth, as with the Beanies' Supply Agreement, neither Earth Pride nor Lancaster acquired the NDA when Earth Pride acquired certain, limited assets of Beanies through the Asset

Purchase Agreement executed on or about July 31, 2008 (the "APA"). *See* Exhibit DTX 15. Section 1.1 of the APA states that Earth Pride "shall purchase from Seller . . . all of Seller's assets used in the Business." Section 1.1(e) notes that one type of asset – the Assigned Contracts – are listed on Exhibit A. The NDA is not listed on Exhibit A. In Section 2.6 of the APA, Beanies represented and warranted that "all contracts or agreements for the purchase or sale of products or services" and "all secrecy agreements" were listed on Schedule 2.6. The NDA is not listed in Schedule 2.6. Thus, under the unambiguous language of the APA, the Beanies NDA did not, in any event, transfer from Beanies to Earth Pride.

Importantly, the NDA is dated May 21, 2007, over nine months *before* execution of the APA and more than a year *prior to* the closing of the APA. Significantly, the NDA was *never included* on Exhibit A or Schedule 2.6 *either* when the APA was originally executed in February 2008 or later on, July 31, 2008, when it was updated just before the closing. (02/02/2017 Tr. at 129:6-17 (David Esh) and 02/15/2017 Tr. 180:20-181:6 (Michael S. Thompson)) The parties' repeated and purposeful omission of the NDA from the APA's schedule of assets being transferred evidences their intent to consciously exclude it from the list of transferred assets. Consistently, Michael Thompson testified that he only intended to acquire those assets specifically set forth in the Schedules to the APA. *See* (02/15/2017 Tr. at 178:13-179:18) As a matter of basic contract law, the Court cannot rewrite the terms of the APA, but this is what would be required to conclude that the NDA[5] was intended to be an asset transferred from Beanies to Lancaster or Earth Pride through the APA. *See, e.g., Harvey v. Liberty Mut. Grp., Inc.*, 8 F. Supp. 3d 666, 675 (E.D. Pa. 2014) (recognizing that courts may not rewrite a contract or give it a construction that conflicts with the plain, ordinary, and accepted meaning of the

[5] In any event, the NDA had been "supersede[d]" *before* closing on the APA, so it could never have been assigned to Earth Pride or Lancaster.

words); *Mathewson Corp. v. Allied Marine Indus., Inc.*, 827 F.2d 850, 855 (1st Cir. 1987) ("It is no appropriate part of judicial business to rewrite contracts freely entered into between sophisticated business entities.") (citation omitted).

B. Even if Dalmatia Was Entitled to Judgment on the Beanies' NDA Breach of Contract Claim (And It Is Not), Dalmatia Is Not Entitled to Judgment in the Amount of $500,000, Which is Speculative and Unlawfully Duplicative of the Misappropriation of Trade Secret Damages.

Dalmatia introduced no evidence at trial supporting the jury's award of $500,000 for damages for breach of the Beanies' NDA. *See* Verdict Form, Dkt. No. 280 at Question 20. The jury's award of damages on this claim is speculative and clearly duplicative of the ***identical*** damages awarded for Defendants' misappropriation of trade secrets, which arises from the same conduct and operative facts. Moreover, Dalmatia is not entitled to a damage award based on mere speculation nor may it recover duplicative damages for the same conduct. Accordingly, Dalmatia is not entitled to judgment in the amount of $500,000 for the breach of the Beanies' NDA.

Unlike punitive damages that are intended to punish and deter, "[c]ompensatory damages are intended to redress ***the concrete loss that the plaintiff has suffered*** by reason of the defendant's wrongful conduct." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) (quotations omitted) (emphasis added). "A jury's damages award will not be upset so long as there exists sufficient evidence on the record, which if accepted by the jury, would sustain the award." *Cortez v. Trans Union, LLC,* 617 F.3d 688, 718 (3d Cir. 2010) (quoting *Thabault v. Chait,* 541 F.3d 512, 532 (3d Cir. 2008)).

Here, there is no evidence to support an award of $500,000 on this claim. Indeed, Dalmatia's own economic expert, James Malackowski, who incurred over $250,000 in fees in this matter, stated that, notwithstanding his significant expenditure of time, he did not calculate *any* specific damages related to the claimed breach of the NDA:

> **Q:** . . . So my question deals with Lancaster Fine Foods. And as I understand your testimony, you are saying that . . . you have assumed [that Lancaster Fine Foods] has breached the Nondisclosure Agreement. Is that your testimony? Can you answer that with a yes or no?
>
> **A:** No, my testimony is [that] I need to see the Complaint to give you the specific identification because I don't want to speculate from memory. **The matching of the contract to the calculation is not core to the accounting analysis**.

(02/08/2017 Tr. at 23:25-24:21) (emphasis added)

In the absence of *any* evidence of compensatory damages related to a breach of the Beanies' NDA, it is clear that, in awarding $500,000, the jury merely duplicated the identical amount of compensatory damages it awarded against the Defendants for their misappropriation of trade secrets. Dalmatia alleged that the Beanies' NDA was breached by the same disclosure of trade secrets.

"The basic principle of compensatory damages is that the plaintiff may be made whole ***only once***, no matter how many legal grounds may support recovery for a particular injury." *Young v. Pleasant Valley Sch. Dist.*, No. 3:07-CV-00854, 2012 WL 1827194, at *26 (M.D. Pa. May 18, 2012), *aff'd*, 601 F. App'x 132 (3d Cir. 2015) (internal citations omitted) (emphasis added). Double recovery has been found where a jury awards multiple damages and a single course of conduct supports multiple causes of action. *Id.* "[I]n determining whether there has been an impermissible double recovery of damages, the inquiry focuses on whether the damages issue arose from the same set of operative facts." *Aero Products Int'l, Inc. v. Intex Recreation Corp.*, 466 F.3d 1000, 1018 (Fed. Cir. 2006) (internal citations omitted). *See also Hailey v. City of Camden*, 650 F. Supp. 2d 349, 357 (D.N.J. 2009) (recognizing that an award of damages under two theories of law arising from "the same operative facts" will constitute "double recovery") (internal citations omitted).

As is the case, here, an award of damages for the breach of a confidentiality agreement ***and*** for trade secret misappropriation is an impermissible double recovery for the same injury. *See, e.g., Texas Advanced Optoelectronic Sols., Inc. v. Intersil Corp.*, No. 4:08-CV-451, 2016 WL 1659926, at *3 (E.D. Tex. Apr. 26, 2016) (acknowledging, in resolution of motion for entry of final judgment, that plaintiff elected not to seek damages for breach of confidentiality agreement and for trade secret misappropriation because such a judgment would constitute an unlawful "double recovery for the same injury"). *See also Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 300 (5th Cir. 2007) (recognizing that district court eliminated awards for misappropriation of trade secrets on the grounds that the damages represented an impermissible double recovery for damages that were also included in awards on the breach of fiduciary duty claim stemming from the disclosure of confidential information).

Because the breach of the Beanies NDA and the misappropriation of trade secrets arise from the same operative facts – the disclosure and/or use of Dalmatia's recipe and processes for use in FoodMatch's Divina product as was alleged – a separate award of $500,000 for ***each*** claim represents an impermissible double recovery. Accordingly, Dalmatia is not entitled to entry of judgment in the amount of $500,000 on this claim.

III. Dalmatia Is Not Entitled to Judgment as Requested on Its Lanham Act Claims.

A. At Trial, Dalmatia Failed to Establish It Has a Validly Registered, Enforceable Trademark.

Dalmatia did not prove that **it** is the owner of the "DALMATIA" mark registered with the United States Patent and Trademark Office ("PTO"). The "DALMATIA" mark was introduced as PTX 1. It is *not* registered to Plaintiff, but to a separate and differently named entity: "Dalmatia**n** Import**s**, Inc." (emphasis added). The registration for the jar configuration (PTX 2) is also under the separate and differently named entity "Dalmatia Import**s**, Inc.," (emphasis added) not Plaintiff. Both of these names differ from each other and each differs from Plaintiff, as neither include the word "Group" or the singular "Import" in their corporate name as used by Plaintiff: "Dalmatia Import **Group**, Inc." (emphasis added).

The only evidence Plaintiff offered to establish ownership of the "DALMATIA" mark, as is necessary to assert standing for infringement of it, were the PTO registrations (PTX 1 and 2) and a few seconds of oral testimony offered by Ms. Magee, unsupported by documentary proof. The lack of documentary evidence is not surprising. Records from the State of Florida show that "Dalmatia**n** Imports, Inc." dissolved in 2003. *See* Florida Department of State Corporate Search Results, attached as **Exhibit "B"**. Given the experience of Dalmatia's counsel, the lack of documentary proof of Plaintiff's legal ownership of the marks was not an oversight. It just does not exist. Ms. Magee's testimony was offered in the hope of glossing over the issue, but that testimony is hopelessly confusing, at odds with the official records of the PTO and insufficient to support a claim that Plaintiff, Dalmatia Import Group, Inc., owns the registered "DALMATIA" mark.

Specifically, when asked about ownership of the "DALMATIA" mark (PTX 1), registered to "Dalmatia**n** Imports, Inc." (emphasis added), Ms. Magee *twice* focused on a different entity, "Dalmatia Imports, Inc.", the registered owner of the jar configuration mark, PTX 2. When testifying on direct about the "DALMATIA" mark, Ms. Magee contradicted the actual PTO registration:

> **Q:** To whom was this trademark [PTX 1] registered?
>
> **A:** To our company, Dalmatia. It might have been *Dalmatia Imports* at that time. *Dalmatia Imports*, that was our old name.
>
> **Q:** Is that company now known as Dalmatia Import Group?
>
> **A:** Yes, we changed our name.

(01/31/2017 Tr. at 185:2-8) (emphasis added)

If it proves anything, this demonstrates "Dalmatia Imports" (which owns the jar configuration mark and *not* the "DALMATIA" mark about which Ms. Magee was asked) changed *its* name to Plaintiff, "Dalmatia Import Group, Inc." As noted, this minimal testimony regarding the alleged change of name was elicited in connection with the ownership of the "DALMATIA" mark (PTX 1), officially registered to "Dalmatia**n** Imports, Inc." There is no evidence that *this* entity (which appears to have been dissolved) ever changed *its* name to Plaintiff, "Dalmatia Import Group, Inc." Thus, there is no evidence that Plaintiff actually owns the registered "DALMATIA" mark (PTX 1), as that mark is registered to a different entity, denominated "Dalmatia**n** Imports, Inc." (emphasis added) There is no evidence that the entity which actually owns the "DALMATIA" mark ever changed its name to "Dalmatia Import Group, Inc." Without any such evidence, there is nothing to support a claim that Plaintiff is the actual owner of the "DALMATIA" mark as registered with the PTO.

Parties must have standing to bring claims they advance in litigation. An "irreducible constitutional minimum of standing" requires "[f]irst, the *plaintiff* must have suffered an 'injury in fact' – an invasion of a legally protected interest…". *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (emphasis added). To assert standing, Plaintiff *itself* must have a "personal stake" in the outcome of the litigation. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 478 (1990). On this record, Plaintiff did not make that showing. *It* is not entitled to assert standing with respect to the registered "DALMATIA" mark since *it* is a stranger to that mark and cannot show that *it* suffered what *Lujan* describes as the "invasion of a legally protected interest". 504 U.S. at 560. Absent proof of ownership in the registered mark, Plaintiff cannot show that it suffered the type of "clear *de facto* injury" that the Third Circuit requires to assert standing. *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 274 (3d Cir. 2016), *cert. denied sub* *nom. C. A. F. v. Viacom Inc.*, 137 S. Ct. 624, 196 L. Ed. 2d 516 (2017) (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550 194 L.Ed.2d 635 (2016)).

The jury's answers to questions 6a ("DALMATIA" mark) and 7a (jar configuration) cannot support the entry of a judgment for infringement of a registered mark where Plaintiff has not demonstrated that it is the rightful owner of the registration itself. Plaintiff has not shown that *it* – as opposed to some other entity, separately incorporated and with a different name that its owners may have also formed - owns the mark at issue. Accordingly, the record does not support the entry of a judgment on Plaintiff's registered trademark claim for PTX 1.

Even if Plaintiff proved ownership of one of the two registered marks, it failed to prove ownership of both. This precludes the entry of judgment because the jury's damage determination (question 11) lumped both claims of infringement together. It failed to separately calculate damages for each of the two marks, as compared to two together. Accordingly, the judgment which the Court might enter as to one claim of infringement would necessarily be speculative as the jury was never asked what that judgment should be. While it may be tempting to halve the damages under these circumstances, that would leave a judgment based on speculation, as there is no proof that the damages allegedly associated with the infringement of the "DALMATIA" mark are equal to those found as to the jar configuration mark. This is supported by the fact that the "DALMATIA" mark (under which Plaintiff lacks standing to assert claims) is prominently displayed on each of the two labels affixed to the jar, on the top and front, as well as on the hang tag. Conversely, the jar configuration has a number of elements common in the industry, including use of the ORCIO jar shape, with "little handles" on the side. (02/10/17 Tr. at 33:16-34:23) Only one element of the jar configuration is unique to Dalmatia. What differentiates the jar configuration mark (PTX 2) from other similar jars is the fact that the

Dalmatia jar has a "circular lid with a label adhered to the top and wrapped around the edges." *See* PTX 2. Thus, even if Dalmatia proved ownership of the jar configuration, the lumped-together damage determination cannot be parsed out to award Dalmatia for the portion of intellectual property protected by that registration.

B. Dalmatia Is Not Entitled to Treble Damages.

Given that the jury repeatedly found no "willful" conduct, Dalmatia's application for treble damages under 15 U.S.C. §1117(b) must and should be denied.

15 U.S.C. §1117(b) provides, in relevant part, that "in a case involving use of a counterfeit mark or designation…the court shall, unless the court finds extenuating circumstances, enter judgment for three times such profits or damages, whichever amount is granted, together with a reasonable attorney's fee, <u>if</u> the violation consists of:

(1) *intentionally* using a mark or designation, *knowing* such mark or designation is a counterfeit mark…" (emphasis added).

Thus, a trebling application cannot be based upon a mere "use of a counterfeit mark." It must be based upon a finding that there was an *intentional* use of the counterfeit mark, *knowing* that the mark was counterfeit, i.e. that the infringement was "willful."

Section 1117(b)'s requirement that the violation consist of "*intentionally* using a mark or designation, *knowing* such mark or designation is counterfeit" is the very definition of "willful." Every decision cited by Dalmatia in its motion involved a finding of "willful" infringement or counterfeiting. Dalmatia has not cited one case where a court awarded treble damages under 15 U.S.C. §1117(b) where there was no finding of willfulness. In fact, Dalmatia has not cited one case where a court awarded treble damages under 15 U.S.C. §1117(b) where, as here, the jury specifically found no "willful" conduct.

The very first case cited by Dalmatia, *Georgia-Pac. Consumer Prod. L.P. v. von Drehle*

Corp., 781 F.3d 710 (4th Cir. 2015) states that the trebling of damages under Section 1117(b) requires a finding of "willful or intentional" infringement (781 F.3d at 717-719), and actually vacated the treble award there. All of the other cases cited by Dalmatia dealt with a finding of "willful" infringement. Here they are in the order in which they are cited and noting the requirement of "willful" infringement. *Louis Vuitton Malatier S.A. v. Ly USA, Inc.*, 676 F.3d 83, 110, 111 (2d Cir. 2012) (Section 1117(b) provides for a reasonable attorney's fee "in cases of willful counterfeiting" and "we have no trouble agreeing with the district court on the facts as we have described them that the infringement here was willful, involving instances of fraud and bad faith"); *Covertech Fabricating, Inc. v. TVM Bldg. Prods.*, 124 F. Supp. 3d. 489, 540 (W.D. Pa. 2015) (after a bench trial, the Court found that defendant had "willfully used a counterfeit mark"); *Act II Jewelry v. Mu Ying Zhu*, 2010 WL 2521340 at *1, 3 (E.D. Va 2010) (jury found that the infringement was "willful"); *Microsoft Corp. v. CMOS Techs. Inc.*, 872 F. Supp. 1329, 1339 (D.N.J. 1994) ("the Lanham Act permits the Court to award treble profits in cases of willful infringement"); *Jama Corp. v. Gupta*, 2008 WL 53101 at *11 (M.D. Pa 2008) (jury finding of "willful infringement," but court still denied trebling); *Fendi S.A.S. Di Paola Fendi E. Sorelle v. Cosmetic World, Ltd.*, 642 F. Supp. 1143, 1147 (S.D.N.Y. 1986) ("willful infringement"); *Louis Vuitton, S.A. v. Lee*, 875 F.2d 584 (7th Cir. 1989) (bench verdict for defendants vacated where the defendants stipulated that they "knowingly and willfully" sold hand bags with copies of plaintiffs' registered trademarks); *Days Inn Worldwide, Inc. v. Mayu & Roshan, LLC*, 2007 WL 1674485 at *8 (D.N.J. 2007) ("willful trademark infringement," damages trebled from $11,697.73 to $35,093.19); *Ramada Worldwide, Inc. v. Jay-Dharma*, 2006 WL 304108 at *8 (D.N.J. 2006) (default judgment, "willful trademark infringement") *Microsoft Corp. v. Gonzales*, 2007 WL 2066363 at *5 (D.N.J. 2007) (default judgment, proof of "willfulness" and "willful conduct”).

Indeed, in one of the cases cited by Dalmatia, *Minitube of America, Inc. v. Reproduction Provisions, LLC*, 2014 WL 1761317 at *21-22 (E.D. Wisc. 2014), the Court specifically held that under Section 1117(b), the “question is whether that infringement was willful.” It stated that the first question to answer is “whether the defendants placed a ‘counterfeit’ mark on the products,” and that the second question to answer is “whether they did so willfully.” *Id. See* also, *Lindy Pen Company, Inc. v. Bic Pen Corp*., 982 F.2d 1400 (9th Cir. 1993) (denied treble damages under Section 1117(b) because there was no willful infringement).

While Dalmatia baldly and erroneously asserts that “[c]ourts reject Defendants’ position that ‘willfulness’ is required under Section 1117(b)” (Dalmatia Motion at 8), it cites but one case (*Koon Chun Hing Kee Soy & Sauce Factory, Inc. v. Star Mark Management, Inc.*, 409 Fed. App’x 389 (2d Cir. 2010)) and that case actually found “willful” infringement. It held that “the evidence adduced by the plaintiff supports a finding of willfulness under either a preponderance of evidence or a clear and convincing standard of review.” 409 Fed. App’x at 390. By noting that treble damages under Section 1117(b) requires the “intentional” and “knowing” use of a counterfeit mark, and by noting that the evidence supported the Court’s finding of “willfulness,” the Court’s decision actually supports defendants’ position here that Section 1117(b) requires “willful” conduct and that the jury’s finding of no “willful” conduct mandates denial of Dalmatia’s application.

It bears repeating that Dalmatia does not cite any decision where treble damages under Section 1117(b) were awarded where a jury or court specifically found no “willful” conduct. Dalmatia erroneously asserts that the jury was only asked about “willfulness” because “that finding governed the range of statutory damages it could award under Section 1117(c), which does discuss 'willful' use of a counterfeit mark." (Dalmatia Motion at 6). But, the jury was not told that. In fact, at Dalmatia's request, the jury was asked whether defendant's trademark infringement (under Section 1117(a)) was willful. (Jury Questions Nos. 6a, 6b, 7a, 7b).

Again, Dalmatia misrepresents the case law. Dalmatia tells this Court that "the Third Circuit has held that Congress's addition of the word 'willful' in Section 1117(c) bars courts from interpreting another provision of Section 1117 to require willfulness" by citation to *Banjo Buddies, Inc. v. Renosky*, 399 F.3d 168 (3d Cir. 2005); however, all that *Banjo* held was that a finding of "willful" conduct was not required to recover profits under Section 1117(a). It bears repeating that all of Dalmatia's cited decisions involved findings of "willful" conduct and that it has not cited any decision awarding treble damages under Section 1117(b) where there was no "willful" conduct.

Dalmatia's reliance upon a "willful blindness" standard for knowledge (Dalmatia Motion at 7) does not help it. It still required the very finding of "willfulness" which the jury rejected.

The jury's finding of no "willful" conduct was based up the following charge on willful infringement (2/23/17 Tr. at 242-243):

> If you find FoodMatch, Lancaster, Earth Pride, C.O. Nolt, and/or Michael S. Thompson infringed Dalmatia's trademark, you must also determine whether they willfully infringed the trademark. You should find that a Defendant willfully infringed Dalmatia's trademark if it used the trademark with either an intent to infringe or a deliberate disregard of Dalmatia's rights. The use of a trademark by a Defendant is willful if the Defendant shows an "aura of indifference to plaintiff's rights" or a "deliberate and unnecessary duplicating of a plaintiffs mark ... in a way that was calculated to appropriate or otherwise benefit from the good will the plaintiff had nurtured." In making this determination, you may consider whether the defendants had a reasonable and good faith belief that their conduct in selling the product bearing the Dalmatia marks was not infringing and whether the defendants used the Dalmatia marks with the intent to deceive and confuse consumers. In determining whether the defendants had a reasonable or good faith belief, you may consider the extent to which the defendants reasonably relied on the advice of counsel.

By finding no "willful" conduct, the jury determined that defendants did not use a counterfeit mark with intent to infringe, or with knowledge that it was counterfeit or with deliberate disregard of Dalmatia's rights or with "willful blindness" to Dalmatia's rights or with indifference to Dalmatia's rights.

Since Dalmatia cannot establish the predicate for a trebling application, namely the intentional and knowing use of a counterfeit mark, the Court does not need to even address whether there are "extenuating circumstances" which should lead the Court to deny the application. However, should the Court believe that the jury's finding of no "willful" conduct does not mandate denial of this application, then the same factors and evidence that led the jury to conclude that there was no "willful" conduct should establish that there are "extenuating circumstances" to deny the application.

The jury's finding of no "willful" conduct is, itself, an "extenuating circumstance." The evidence was that defendants did not use the mark with intent to infringe or with deliberate disregard of Dalmatia's rights. The evidence was that defendants had a reasonable and good faith belief that their conduct was not infringing and that defendants did not use the marks with the intent to deceive and confuse consumers. This case involved the unique legal issue of whether defendants were entitled under the Uniform Commercial Code to sell the allegedly "counterfeit" product (allegedly "counterfeit" only because Dalmatia did not authorize its sale). This issue was one of first impression in this Circuit and one on which this Court recognized there was "a split of authority." (2/22/17 Tr. at 26). All of these factors are "extenuating circumstances", as is the fact that the Defendants sought and followed the advice of counsel before filling any of the previously accepted purchase orders and selling the "unauthorized" Dalmatia fig jam.

In addition, it is clear that the jury generously awarded more than defendants' net profits. It awarded Dalmatia the gross sales from the sales of the allegedly "counterfeit" product. This, too, is an "extenuating circumstance." In *Jama Corp. v. Gupta, supra*, one of Dalmatia's cited cases, the Court denied the trebling of damages because it would grossly overcompensate the plaintiff.[6] It held as follows:

> In the present case, the trebling of damages would result in a very high award for the Plaintiff, and would result in a manifest injustice. If the Court finds the recovery on profits to be excessive or inadequate, the Court may enter any sum it finds to be just. 15 U.S.C. §1117(a). In this case, the sum of $1,530,000 is far greater than any amount presented by the parties with respect to damages. The Lanham Act does not provide for punitive damages; rather, such damages are meant to be compensatory and to make the infringed party whole. Such a sum would go beyond the compensatory nature of the Lanham Act's damages provision. Therefore, the Court will amend the judgment so that damages are not trebled, and the judgment will read to be $510,000, the amount awarded by the jury.

2008 WL 53101 at *16. The same is true here.

"What constitutes an extenuating circumstance is determined on a case by case basis." *Microsoft Corp. v. CMOS Technologies, Inc. supra*, 872 F. Supp. at 1339. "Despite the mandatory tone of §1117(b), courts have found that, even with the finding of requisite intent, an award of treble damages is 'never automatic and may be limited by equitable considerations.'" *Dialogo, LLC v. Bauza*, 549 F. Supp.2d 131, 139 (D. Mass. 2008) (citations omitted). The *Dialogo* court cited to decisions where the courts found "extenuating circumstances" and declined to award treble damages where there was no intent to deceive, no wrongful intention, no bad faith, no fraudulent behavior and the conduct was "simply not egregious enough." *Id.* The *Dialogo* court then found that there were "extenuating circumstances" and denied treble damages because, *inter alia*, "the evidence in the case simply does not support a finding of willful intent to copy Plaintiff's mark." Defendant's use of the mark was "mistaken but it had a good faith

[6] The Court addressed the same concern about overcompensating Plaintiff, noting that: "…Remittitur is always available if a jury's verdict does not seem to be consistent with the factors that are required to be considered". Dalmatia's counsel responded: "Correct. That is always available". (2/20/17) Tr. 271:12-17.

basis." *Id*.

Finally, Dalmatia erroneously asserts that "extenuating circumstances" is an affirmative defense which must be plead. There is nothing in Section 1117(b) which provides for that or limits the Court's consideration of "extenuating circumstances" as equitable considerations. The apparent source of its position is *Louis Vuitton S.A. supra*, 875 F.2d at 590 (7th Cir. 1989) where the Court stated *in dicta*, in vacating a bench defense verdict where the defendants stipulated that they "knowingly and willfully" sold counterfeit goods, that "we needn't worry about the defense of extenuating circumstances to treble-damage or treble-profit liability under Section 1117(b) because as an affirmative defense it must be pleaded *or otherwise presented to the district court*." (emphasis added). Here, the trial was all about the "extenuating circumstances", *i.e.* defendants' reasonable and good faith belief that it was entitled under the Uniform Commercial Code to sell the allegedly "counterfeit" product, their reliance upon the advice of counsel, and their conduct not being willful. Dalmatia fully engaged in discovery and at trial on these issues. There was no waiver.

The treble damages provision of Section 1117(b) was enacted as part of the 1984 Trademark Counterfeiting Act to combat counterfeiting and the intentional and knowing trafficking in goods using a mark known to be counterfeit. The intent required to trigger the statute is similar to that used in the criminal counterfeiting statute, except for the burden of proof. 5 *McCarthy on Trademarks and Unfair Competition* §30:94 (4th Ed.). The situation before this Court is not the case for which Section 1117(b) was enacted.

C. Dalmatia Is Not Entitled to Pre-Judgment Interest.

For the same reasons, the Court should deny Dalmatia's application for pre-judgment interest under Section 1117(b).

Section 1117(b) is wholly discretionary. It provides that "[i]n such a case, the court *may* award prejudgment interest…" (emphasis added) Where there is no intentional and knowing use of a counterfeit mark and where there are "extenuating circumstances," then "such a case" has not been established and the required predicate for this application has not been shown. Even then, the statute provides that the Court "may" not "shall" award pre-judgment interest, so that the decision is entirely within the discretion of the Court.

Dalmatia has not cited any decision where pre-judgment interest was awarded where there was no "willful" conduct. The two cases cited by Dalmatia under its "Pre-Judgment Interest" heading are not even trademark or Section 1117(b) cases. Even where there was "willful" conduct, pre-judgment interest may be denied. *See e.g. Chicago World Soccer, Inc. v. Grapa, Inc*. 1991 WL 113185 (N.D. Ill. 1991).

Finally, there is no reason to award Dalmatia any pre-judgment interest since they were over compensated by the jury's award of all gross sales from the allegedly "counterfeit" product rather than just defendants' net profits from the sales. Accordingly, there is no need to compensate Dalmatia for the "time value" of these revenues.

D. Dalmatia Is Not Entitled to $1,000,000 in Statutory Damages.

At trial, the jury was charged as follows:

> If you find that Dalmatia proved that FoodMatch, Lancaster, Earth Pride, C.O. Nolt and/or Michael S. Thompson committed trademark counterfeiting, you must determine an amount of statutory damages between $1,000 and $200,000 per counterfeit trademark (between $2,000 and $400,000 for Dalmatia's two trademarks). **However, if you find that Defendants' trademark counterfeiting was willful, you may award up to $2,00,000 for each counterfeit trademark (between $2,000 and $4,000,000 total for Dalmatia's two trademarks).**

(02/23/2017 Tr. at 253:10-21) (emphasis added)

On the Verdict Form, the jury found Defendants liable for trademark counterfeiting but determined that the Defendants had not acted willfully. *See* Verdict Form, Dkt. No. 280 at Questions 9a-9b. Nonetheless, the jury awarded $1,000,000 in statutory damages in contravention of the charge, *id.* at Question 17, and 15 U.S.C. § 1117(c).

The jury's award of $1,000,000 in statutory damages on Dalmatia's Lanham Act claim was made in direct contravention of the Court's charge and Section 1117(c). Accordingly, Dalmatia is not entitled to an award of judgment in its favor for this amount, which is contrary to law. [7] *See, e.g.*, *McKenna v. City of Philadelphia*, 649 F.3d 171, 173 (3d Cir. 2011) (holding that district court did not err or abuse discretion when, *inter alia*, it applied a compensatory damages cap to reduce the jury's award); *Gucker v. U.S. Steel Corp.*, No. CV 13-583, 2016 WL 4539614 (W.D. Pa. Aug. 31, 2016) (holding that jury's award of $5,000,000.00 in punitive damages would be limited to $300,000 statutory cap).

If the jury's intent was to award 25% of what it perceived as the maximum allowable statutory damages (or $1,000,000 out of $4,000,000), then, at most, Dalmatia is entitled to 25% of $400,000 – the actual maximum allowable statutory damages – or $100,000. However, even then, the award of statutory damages is overstated. Based on the Verdict Form, it is unclear whether the jury awarded these damages based on trademark counterfeiting for one or both of Dalmatia's claimed trademarks. And, as argued, *supra*, Dalmatia did not prove that it is the owner of the "DALMATIA" mark. It is, therefore, impossible to determine to what extent the statutory damages apply to Dalmatia's invalid trademark claim. Any award of statutory damages for the remaining trademark would be the product of guesswork, speculation or conjecture – which are impermissible bases for an award of damages. *See, e.g.*, *Eagle v. Morgan*, No. CIV.A. 11-4303, 2013 WL 943350, at *5 (E.D. Pa. Mar. 12, 2013) (declining to award damages where it would be pure guesswork based on lack of evidence at trial). *See also Cortez*, 617 F.3d at 718

[7] In its Motion for Judgment on the Verdict, Dalmatia concedes as much. *See* Dalmatia's Motion for Judgment on the Verdict, Dkt. No. 296 at pg. 10 ("The jury awarded $1,000,000 in statutory damages. That award is inconsistent with the jury's answer to the willfulness question on counterfeiting.").

(3d Cir. 2010); *Thabault,* 541 F.3d at 532.

Furthermore, Dalmatia has not yet decided whether it even intends to seek any statutory damages. The Lanham Act provides that Dalmatia may elect to recover statutory damages instead of its actual damages and profits "at any time before final judgment is rendered by the trial court." 15 U.S.C. § 1117(c). Dalmatia has not made an election and has represented to the Court that it does not intend to do so anytime soon. *See* Dalmatia's Motion for Judgment on the Verdict, Dkt. No. 296 at 10. Instead, Dalmatia suggests that the non-final judgment it seeks "need not address statutory damages." *Id.* at 11.

Defendants believes that Dalmatia refuses to make an election as part of its effort to smear them, by bloating the jury's verdict and advertising the incorrect amount to the trade. Specifically, a February 27, 2017 *National Law Journal* article reporting the verdict in this case *falsely* reported: (i) the amount of damages; (ii) a jury finding of willfulness; and (iii) that damages had been trebled. It attributed those statements to counsel. The article incorrectly stated: "An Easton, Pennsylvania jury found *willful* trade secret misappropriation, along with trademark infringement and counterfeiting, and *awarded treble damages* that will bring the judgment to *$5.2 million*, said McDermott Will & Emery partner Michael Nadel." *See* NLJ Original Article, attached as **Exhibit "C"**. The article was later corrected. *See* NLJ Corrected Article, attached as **Exhibit "D"**. Dalmatia's counsel further inflated the victory by having posted on its website the claim that counsel "secured a $5 million trade secret victory." *See* McDermott Will & Emery Website Excerpt, attached as part of **Exhibit "A"**.

Dalmatia's insistence on keeping an unlawful award of statutory damages untouched furthers its false narrative, advanced in the market to the trade in an effort to injure the Defendants. Dalmatia's efforts to do so should be rejected and the Court should decline to enter judgment in Dalmatia's favor on these damages.

E. Dalmatia Is Not Entitled to a $67,000 Damage Award on the Conversion Claim Because this Award Is Not Supported by the Evidence of Record, Which Supports an Offset.

A jury's damages award will not be upset so long as there is sufficient evidence on the record, which, if accepted by the jury, would sustain that award. *See Cortez v. Trans Union, LLC*, 617 F.3d 688, 718 (3d Cir. 2010) (quoting *Thabault v. Chait*, 541 F.3d 512, 532 (3d Cir. 2008)).

At the conclusion of trial, the jury awarded $67,000 against Lancaster and Earth Pride for Dalmatia's claim of conversion. This award is not supported by the evidence insofar as it fails to account for the fact that Dalmatia retained the value of certain property upon its return, which was negotiated through counsel, and that the other property "converted" was worthless and unusable.

At trial, Dalmatia's own damages expert, James E, Malackowski, conceded that his calculations had failed to take into account that Dalmatia could have or had, in fact, reused the jars returned to it and that the labels and hangtags were worthless based on the fact that Dalmatia had, as of November 2015, terminated FoodMatch and relocated manufacturing overseas rendering the labels and hangtags worthless. (02/08/2017 Tr. at 58:15-61:21) If any damages are awarded on conversion, Lancaster is entitled to an offset in light of the evidence at trial that the labels and hangtags were valueless at the time of conversion and that Dalmatia could have mitigated its damages since the jars were used upon their return.

Unsurprisingly, the Court repeatedly expressed skepticism about Dalmatia's conversion claim and whether it had established actual damages at trial. (02/07/2017 Tr. at 121:10-16) ("On the conversion claim . . . I see that as being a relatively weak claim on the part of the plaintiffs."); (02/20/2017 Tr. at 244:1-6; 250:10-11) ("On Dalmatia's conversion claim, this was

$66,000 in jars, hangtags and labels. ***This is one of the stranger claims only because the jars, hangtags and labels, some appear to be worthless*** but all those were ultimately returned but only after negotiations between counsel . . . I do consider this one of the claims that is somewhat problematic.") (emphasis added).

Upon review of the record, and with the Court's observations, there is no basis for an award of $67,000 in damages on Dalmatia's conversion claim. Accordingly, Dalmatia's requested judgment on this claim should be rejected.

IV. CONCLUSION

For the foregoing reasons, the Defendants oppose the entry of judgment sought by Dalmatia.

Respectfully submitted,

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Date: April 3, 2017

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2017 a true and correct copy of the foregoing Defendants' Opposition to Dalmatia's Motion for Judgment on the Verdict was served via ECF, providing notice and a copy to all counsel of record, including:

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