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Transaction ID 60162209
Case No. 12201-CB

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

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|---|---|---|
| THE MRS. FIELDS BRAND, INC. | ) | |
| | ) | C.A. No. 12201-CB |
| Plaintiff, | ) | |
| | ) | **PUBLIC VERSION** |
| v. | ) | FEBRUARY 3, 2017 |
| | ) | |
| INTERBAKE FOODS LLC, | ) | |
| | ) | |
| Defendant. | ) | |

**THE MRS. FIELDS BRAND, INC'S COMBINED**
**ANSWERING AND REPLY POST-TRIAL BRIEF**

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January 27, 2017

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A public version of this document will be filed on or before February 3, 2017.

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**Cases**

## REFERENCES

| Abbreviation | Description |
|---|---|
| OB | Plaintiff's December 21, 2016 Opening Post-Trial Brief |
| AB | Defendant's January 13, 2017 Combined Opening and Answering Post-Trial Brief |

Where a document does not contain Bates numbers but does contain page numbers, pin cites refer to the page number on the face of the document, as such: JX100 at 5. To the extent a JX contains multiple documents, we have identified the referenced document by title; for example, JX100, "Strategy Presentation" at 5.

Where a document does not contain Bates or page numbers, pin cites are noted with a "p." and a reference to the specific page of the whole document. Thus, a reference to the 5th page of the document will be cited as: JX100 p.5.

## INTRODUCTION

In April 2015, IBF believed MSF to be a terrific brand, poised for explosive growth and worth offering $50 million for its consumer business segments. (OB16.) Between May and June 2015, IBF decided to exit the MSF business and develop an alternative branded strategy. Between July 2015 and April 2016, IBF's sales of MSF products cratered as IBF wound down and worked to cannibalize the MSF business. On April 12, 2016, IBF purported to terminate the Agreement pursuant to §15(c)(iii) because sales fell below $20 million.

IBF insists that none of its actions harmed MSF's branded retail business (AB69-73), but fails to challenge the evidence MSF laid out showing how IBF: decided to exit the agreement after it could not purchase the brand (OB18-20); immediately reduced its trade spend and marketing support (*id.* 18-20, 23-24) "given that we will continue to be licensees and not own[;]" instructed its sales staff to stop driving distribution on the MSF brand and to push products to replace MSF instead (*id.* 23, 28-30); ceased planning for 2016 MSF sales (*id.* 25, 30-31); cancelled major previously scheduled promotions for Q4 2015 (*id.* 25-26); instructed its supply staff to stop ordering materials to produce MSF products so as to stop producing by June 2016, leading to widespread shortages by April 2016 (*id.* 30-31, 38, 40, 41, 47-49); counter-selling retailers on specific replacement products for MSF (*id.* 29-30, 33-37); and finally, telling retailers that IBF could

supply "Mrs. Fields-style" products because IBF would no longer be producing the real thing (*id.* 28, 33, 34-36, 44-47). Indeed, within hours of telling MSF they were terminating the license, IBF redirected its entire sales staff to kick off a knock-off product with BTN (*id.* 37-43, 47-48, 49-50) to "replace[] Mrs. Fields with Snackwells and Back-to-Nature everywhere Interbake controls it." (*Id.* 41 *citing* JX517 at BTN0001347).

The evidence that IBF secretly wound down MSF's business while seeking to cannibalize it is overwhelming, and IBF points to no facts in 2015 or 2016 that would indicate a brand-wide collapse occurred at precisely the same moment that IBF was unwinding the business. IBF's attack on the brand for "dying" – whether in "the 1980s or 1990s" (Tr. 1548:11-1549:24) or in 2015 – is a litigation contrivance that is contradicted by IBF's own assessment of MSF's brand a month before its decision to exit in May 2015.

IBF's furtive, *de facto* termination breached the Agreement that required IBF to sell, promote and manufacture MSF products as premium products until December 31, 2017. Under the Agreement, MSF had a valid expectation that IBF would not secretly wind the business down mid-term, or use MSF's Protected Information to try to transition the business to itself and return a skeleton to MSF.

MSF has provided a responsible estimate of the amount of damage caused by IBF's breaches. Here, MSF's expert, Weston Anson, proffered two separate

damage models, a standard multiples-based comparable company analysis (or market approach) and an alternative discounted cash flow ("DCF") approach. (OB78-83 (weighting them to arrive at a damages estimate of $28 million).) IBF focuses its criticism of the market approach to: (1) Anson employed the wrong multiple to value the business before IBF began dismantling it in July 2015 and (2) Anson's analysis is inconsistent with annual goodwill tests performed for MSF's audit. Anson's 2.5x is consistent with IBF's contemporaneous offer for MSF's business, as well as other retail brands IBF sought to acquire, and IBF failed to proffer an alternative. There is also no evidence that MSF's goodwill audit valuation is relevant, as IBF's own offer underscores. As for Anson's alternative DCF approach, IBF focuses on the projections used for his "but-for" scenario, but Anson's model uses *IBF's own* projections.

IBF also loosely asserts that Anson's model "attributes 100% of the decline" in MSF sales to IBF. But Anson's market approach does not include in the damage estimate any decline in sales from $29 million, or even $26 million when MSF transitioned the business to IBF in 2012, to the July 1, 2015 starting point for his model. (AB6.) Instead, Anson spots IBF a $20 million starting point – based upon the twelve-month trailing average – more than enough to account for any vagaries in weather or product recalls, and lower than any actual annual sales

figure or projection in 15 years of selling MSF products by Shadewell, MSF or IBF.

The Court should rule that IBF had no right to terminate the Agreement before December 2017 and breached the Agreement in doing so, that MSF was harmed by the early breach and the reasonable award for such harm is no less than $28 million, plus MSF's fees and expenses incurred in this action.

## REPLY STATEMENT OF FACTS

IBF asserts that its sales of MSF products cratered in 2015 because of MSF's "lack of investment" in the brand over the past decade or more, not IBF's decision to stop driving distribution of MSF products and to push replacement products on retailers (AB37.) At trial, MSF showed that IBF stopped selling, marketing and manufacturing MSF products beginning around July 1, 2015 and how the sales of MSF products began to collapse at the same time. (OB20-21, 33.) MSF showed that IBF told its sales staff to stop driving the MSF brand and to instead tell their customers that IBF would replace the MSF products with superior "Mrs. Fields style" products. (OB33-35, 42.)

In fact, MSF showed how IBF's communications with Delhaize, Walgreens and Walmart led directly to those influential retailers removing MSF products from their future modular store plans (OB33-34.) (*See also* JX440 at IBF00011786 (McElroy: "once you lose shelf space it is hard to gain back."); JX486 at

IBF00009182 (Rummel: "we will lose space we will never get back.").) MSF showed how IBF stopped ordering necessary materials resulting in widespread shortages and lost sales. (OB47-49; Tr. 784:15-785:3 (acknowledging accuracy of JX664, Acosta's estimate of 36% drop in sales due to shortages).) MSF showed how as late as *October 2015*, IBF's experienced salespeople forecasted significant growth in 2016 MSF sales across many different retail channels, before IBF pulled the plug on 2016 planning. (OB25, 30-31.) MSF also showed how IBF's senior financial staff projected $24 million in 2016 MSF sales around the same time. (JX379 at 25.) At trial, IBF estimated 2016 and 2017 MSF sales of just $11 million. (AB37.)

1. <u>There Was No Brand-Wide Collapse</u>

IBF's brand expert, Rhonda Harper,[1] performed no independent survey of consumer preferences and assembled no data on brand metrics herself. (Tr. 1550:18-24; Tr. 1551:21-24.) Instead, she used Nielsen data that IBF provided to her. (Tr. 1561:16-1562:3.) There is nothing in the record about what criteria IBF used to select the Nielsen data it provided to Harper and what was omitted.[2] As

[1] IBF offered Harper as a rebuttal expert regarding MSF's affirmative claims. She offered no opinions regarding IBF's counterclaims. (Tr. 1488:2-6.)

[2] *See*, *e.g.*, JX724 at 33, the chart cited at AB66 as allegedly showing "long term" decline in sales as a result of actions taken by MSF years before, shows nothing of the sort. That chart, as well as others (*see* JX48 at 34-39), provide no explanation

Monette admitted, Nielsen store data does not track major MSF channels including Canada, major chains and C-Stores. (Tr. 1131:20-1132:6.)

At trial, Harper testified that she did not perform a consumer survey in this case because "I wasn't asked to do that, nor would it be important, as we already have that perceptual data that exists within the testimony and within the depositions and record of Mrs. Fields." (Tr. 1552:1-6.) When asked to specify the perceptual data, Harper identified only "a report showing that the consumer has a zero to 11 percent unaided awareness" and statements purportedly in that report. (Tr. 1552:7-19.)

The report (JX726 at 21) shows that MSF's aided *and* unaided awareness was competitive with its competitors and exceeded the other cookie companies in unaided awareness. *Id*. The report also shows that Harper's reference to the 0% unaided awareness was for muffins, which MSF does not sell. *Id*. The report describes the data as showing that "Mrs. Fields dominates over Great American Cookies and 1-in-10 name the brand unaided." *Id*. The report concludes that "Mrs. Fields brand recognition is strong" (*id.* at 5). At trial, when challenged with

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for the chosen starting dates, or timeframe, why the IBF agreement is listed as beginning in 2013 as opposed to 2012, and why admittedly incomplete "unit sales" selected by IBF (as opposed to Harper) are used as the metric instead of the actual dollar sales in IBF's records.

the report's conclusions, Harper questioned the reliability of the results. (Tr. 1554:8-15.)[3]

Nevertheless, Harper concluded based on these reports that the MSF brand has been in decline since the 1980's or 1990's. (Tr. 1548:11-1550:17.) The actual data, which Harper did not review, shows that MSF's brand-wide revenue has remained stable or increased, throughout all the years relevant to this case,[4] including for gifting, which is marketed directly to consumers. (OB74.) The data

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[3] IBF elsewhere pointed to a *separate* consumer study, which appeared to show 0% unaided awareness for all of the eight leading cookie brands included in the study. (JX302 at MF00001422.) A former MSF CEO testified that the 0% was a typo. (JX7, 272:11-23.) The study concludes that "[a]mong the national brands, Mrs. Fields enjoys the highest brand awareness[.]" (JX302 at MF00001422.)

[4]

| MSF Revenue for FY Ending: | | |
|---|---|---|
| 1/2/2010 | $52.4M | JX123, MF00018611 |
| 1/1/2011 | $54.9M | *Id.* |
| 12/31/2011 | $58.2M | *Id.* |
| 12/29/2012 | $54.2M | JX199, MF0004484 |
| 12/28/2013 | $35.9M | *Id.* |

Between 2012 and 2013, MSF shut down its $26-29M a year BRG group, replacing it with $2M in royalties from IBF. After FY 2013, the company stopped reporting revenues by brand. MSF is more than five times larger than TCBY. (Tr. 1279:5-6.)

| FB Revenue for FY Ending: | | |
|---|---|---|
| 12/28/2013 | $53.1M | JX199, MF0004484 |
| 12/27/2014 | $43.4M | JX269, MF0032197 |
| 7/2/2016 (12-month period) | $43.1M | *Id.*, p.24 |

also shows that sales of MSF branded retail cookies remained steady for years, dropped when IBF took them over and then fell off a cliff when IBF started its exit.[5] (JX180 at DB001194; JX40 at Ex. 7.)

In previous cases where Harper has not conducted independent consumer research or a survey, her opinions have been criticized or excluded. *See*, *Tovey v. Nike*, No. 1:12CV448, 2014 WL 3510636 (N.D. Oh. July 10, 2014) (excluding report, *inter alia*, for failure to conduct consumer survey and failure to otherwise identify methodology used in reaching conclusions regarding consumer confusion); *see also PNS Stores, Inc. v. Manguia*, 484 S.W.3d 503, 513 (Tex. Ct. App. 2016) (excluding report, *inter alia*, because Harper "had no information about the incident other than what she had been told by [] counsel").

2. MSF Did Not Fail to Support the Brand

The unrebutted evidence shows that MSF *increased* advertising and marketing expenditures throughout the IBF relationship, particularly in 2014 and 2015. For example, MSF spent $703,000 on advertising promotions and $2.6 million in catalog expenses in 2014 and increased those expenditures to $979,000 and $3.1 million in 2015. (*See* Tr. 1300:6-1302:4; JX411 at MF000325658.)

[5] Harper also asserted that MSF's lengthening purchase cycle showed the brand declining. (AB65.) Harper's slide actually shows the opposite: between 2011 and 2015, MSF branded retail products shortened their purchase cycle. (JX724 at 28.)

Dustin Lyman, MSF's CEO, explained that these expenditures were for the MSF brand and were listed under the "Gifting Summary" because of how MSF structures its financial reporting. (Tr. 1300:14-22.) MSF increased the advertising fund – a fee charged to franchisees, which is used to fund advertising for the brand-- from 1 to 3 percent of net sales in 2014 and 2015. (Tr. 1303:7-18.)

Nor is it true that MSF "completely ignored or did not invest in brand marketing or building initiatives." (Tr. 1507:19-20.) MSF added a new facility to produce shelf-stable confections and candy products. (Tr. 1304:3-5.) MSF upgraded its internet sites and e-commerce capabilities, including new consumer personalization initiatives, new initiatives to boost performance on digital ad spend and to increase web demand (JX354, "Appendix" at 21); MSF worked to counteracting the decline in mall traffic by opening kiosks and co-branded stores outside of mall locations (JX8, 90:12-91:16). (*See* JX179 at MF00030325-27 (listing new initiatives to drive brand growth for 2014); *id*. at MF00030328 (2014 initiative investments); JX354, "Appendix" at 22 (listing ongoing initiatives in 2015 regarding brand positioning framework, brand books by channel, e-commerce development and new store designs); *id.* at 25 (MSF developed targeted advertising campaigns and media plans).)

IBF arrives at its conclusion of "no brand support" only by misusing statements from MSF board presentations and board members. IBF relies heavily

on quotes from a single November 2012 presentation made by Tim Casey, MSF's former CEO. (JX134, cited at AB8, 13, 14, 26, 31, 32, 33, 36, 62, 63, 64, 65.) IBF asked Casey what he meant in the presentation and Casey testified – consistent with all of the financial data in this case – that he was not referring to any lack of investment in brand marketing support but instead to "investment outside of the traditional marketing expenditures" such as capital investment in infrastructure projects.[6] (JX12, 112:10-113:19.) The November presentation seeks authority for the board to invest over $7 million in a new "MFC Kitchen" concept which the board rejected. (JX134 at ZC003115, ZC003119.)

IBF cites "JX11 at 52" for the propositions that (a) MSF admitted that a "broken franchise model was a major problem for the [MSF] brand" and (b) that "maintaining a MSF franchise made no financial sense to franchisees…[and] could not sell enough cookies to stay afloat." (AB14.) The cite does not support either proposition.[7] Nor are they true: in 2015, MSF lost a net of just four stores, but its

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[6] Casey is no longer employed by MSF, but was deposed in this case in Omaha, Nebraska on September 7, 2016. (JX12, 118:10-14.)

[7] This is not an isolated incident. By way of example only, IBF claims David Barr testified that "MSF never spent even $1 million on brand equity" (AB13) and later, citing the same testimony, states "Mrs. Fields continued to spend nothing to revitalize its failed brand[,]" (AB76) but he actually testified that MSF never spent $1 million on any single initiative. (JX11, 110:20-24.) (*See also, e.g.*, JX110, Tr. 1619:23-1620:17, cited at AB27 for the proposition that "MSF knew that 'Store

store-over-store sales increased by 5.6% over 2014 sales. (JX411 at MF00032662.)[8] The proof of MSF's actions to promote the brand is in the actual dollars spent, activities undertaken and brand-wide sales obtained, not IBF's blinkered reliance on just the weaknesses identified in MSF's SWOT analyses without putting them in the context of the strengths, opportunities or threats also identified in them. (*Compare* AB22-23 (citing JX352) *with* JX354 at MF00052478.)

3. MSF Did Not "Predict" or "Forecast" Falling Sales

IBF misreads Casey's November 2012 board presentation to state that "MSF forecasted the 'very predictable result' of falling sales" (AB1) or "predicted a precipitous drop in sales." (AB65; JX134 at ZC003100.) The presentation does not forecast a drop in sales – it criticizes the "very predictable result" of steady sales over the *previous* six years. (*Id*. ("With limited investment over the last 6 years the BRG business has realized a relatively flat top line and a very

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unit economics don't work[,]'" but saying no such thing; JX13 at 268 (AB14), which has nothing to do with store closings.)

[8] The long-term decline in mall traffic has certainly affected the number of MSF franchise locations that are located in malls. (JX23 90:10-18; JX134 at ZC003090 (showing decline since 2007).) However, IBF has presented no evidence of any correlation between any decline in store counts and sales in any MSF business segment, including branded retail cookies.

inconsistent bottom line.”).) Indeed, MSF sought out IBF as a licensee *because* IBF had more resources available to it to grow the branded retail business by expanding into other product categories. (Tr. 58:5-61:17.) Courtney discussed these issues with Monette (Tr. 61:18-23) and IBF reported to Weston that it could grow the business to $60 million within 5 years for the same reason (JX97 at IBF00045417). The Agreement specified IBF would have responsibility for all aspects of the retail channel. (JX104, §6.) As the Opening Brief showed and IBF does not rebut, IBF made a strategic decision to delay that investment until it could purchase the brand so that the benefit of such investment would not return to MSF at the end of the Agreement. (OB11, 13-14.)

4. <u>IBF Considered MSF to be a Strong Brand</u>

Prior to this lawsuit, IBF’s brand professionals conducted their own surveys and analyses about the MSF brand. They found that consumers believed the quality of MSF when compared with its competitors to be “good” and to use “even cleaner ingredients than their competitors.” (JX157.) They found that “Mrs. Fields is a strong brand equity that has the potential for long-term success in the cookie category.” (JX288 at 12.) They “continue[d] to believe that Mrs. Fields is a well-recognized, premium brand that is an attractive component of our product portfolio.” (JX294 at 5.) They consistently touted very high 15-18% EBITDA rates of return on the MSF business in all of their quarterly and annual reports to

Weston, even indicating a 24% rate of return (excluding the royalty payment to MSF) in 2014, which they expected would continue if they gained control of the business. (JX309 at 3; JX310, "Mrs. Fields Revised Growth Plan" at 3.) These statements are entirely consistent with IBF's repeated efforts to purchase the brand and projections for the brand's growth. (OB11-12.)

## ARGUMENT

### I. IBF'S Early Termination Was Invalid

IBF's assertion of a right to terminate under 15(c)(iii) and (ix) is a "litigation construct." *See, e.g.*, *In re Trados Inc. Shareholders Litig.*, Del. Ch., 73 A.3d 17, 57-58 (2013) (rejecting testimony, which contradicted contemporaneous documents, that changed between deposition and trial, and closely coordinated between all of the witnesses at trial as a "litigation construct").

After purporting to terminate pursuant to §15(c)(iii) on April 11, 2016, filing two verified counterclaims asserting that IBF "requested [§]15(c)(iii)" (JX33, ¶58; JX718, ¶97), serving a sworn interrogatory response that IBF requested §15(c)(iii) and discussed the provision with MSF (JX35 at 7-8), and making pre-trial contentions that "[IBF] had the foresight to request a termination provision that, if sales did not reach a certain threshold, the company could

terminate the contract."[9] (Pre-Trial Order, ID59795335 at 11), IBF now relegates its alleged right to terminate under §15(c)(iii) to the third of three grounds for early termination. (AB38.)

As evidence that IBF requested the right to terminate under §15(c)(iii), IBF asserts that Monette sought "downside protection" when negotiating the Agreement (AB38, *citing* Tr. 1090-91) and argues this must have meant §15(c)(iii) (AB38). Whatever "downside protection" means, Monette gave no testimony about requesting §15(c)(iii) or anything like it and admitted that he did not focus on "downside protection." (Tr. 1092:17-20 ("Q: What about this downside protection concept. Did you focus in on that? A. No I did not.").) IBF ignores the evidence of the parties' contemporaneous understandings (OB52), the evidence showing IBF negotiated to limit (not expand) the termination right (*id.*), and the other points made in the Opening Brief (*id.*).

In contrast, the evidence showed that IBF *did* negotiate for the inclusion of §15(c)(ix) (termination on 30-days' notice for commercial unviability) and IBF's contemporaneous and subsequent memos indicate that IBF understood that it had

[9] *See* JX26, 107:14-108:24 (regarding JX309); JX26,116:3-117:23 (regarding JX310).

the right to terminate under that provision.[10] Nevertheless, despite numerous memos, reports and emails planning IBF's early termination, there is no discussion of any justification for terminating under §15(c)(ix). There is no reference in the pre-litigation record about any "commercial unviability" of the MSF business; instead the pre-litigation record is replete with evidence that MSF was IBF's most profitable business unit.[11] IBF planned its termination for nine months, terminated solely pursuant to §15(c)(iii) and then, on April 18, 2016, entered into a Standstill Order whereby it agreed to "take no further steps towards terminating the Agreement." (JX32, ¶2.)

IBF claims that a May 4, 2016 letter to MSF "regarding termination" and "the pleadings in this case, satisfied §15(c)(ix)'s written notice requirement." (AB36.) As other courts have recognized, accepting this argument would effectively read the notice provision straight out of the [contract]." *U.S. Bank Nat. Ass'n v. U.S. Timberlands Klamath Falls, LLC.*, Del. Ch., 2004 WL 1699057, at *3

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[10] JX97 at IBF00045416; JX107 at IBF00042252; JX110 at 3; JX209 at 8; JX213 at 9.

[11] *See* JX181 at GWL000494, JX296 p.15, JX315, "2015-2017 Strategic Plan" at 4, 19, 25, 31. *See also* JX209 at 4; JX211 at 4; JX252 at 4, JX267 at 8; JX290 at 10, 24 (all showing profitability of MSF). *See* JX695 at 6; JX365 at 6; JX400 at 3, JX 373 at 22 (all showing how once IBF decided to exit the MSF business it needed to find replacement EBIT); JX309 at 3, 9 (touting MSF's high margins which commanded large multiple of between 8.8 to 15.9 of EBITA and 2.1 to 4.8 of sales).

(July 29, 2004) (collecting cases rejecting IBF's position). Furthermore, such termination would violate the Standstill Order.

As evidence of the "commercial unviability" of the Agreement in April 2016, IBF relies solely on the 2015 and 2016 "F9 Reports". (AB23, 37.) These reports were prepared post-litigation by an unknown person at an unknown time and calculate costs in a manner different than IBF ordinarily reported the profitability of its business units. (Tr. 1737:14-24 (Reeve could not say whether she ever had seen these F9 Reports prior to two weeks before trial); Tr. 1845:12-1847:11 (Thomas obtained his understanding of the F9 Reports by talking to Reeve two weeks before trial); Tr. 1735:17-22 (the F9 Reports were not produced with IBF's document responses because they were not generated until Thomas asked for them); Tr. 1761:6-11 (Reeve admitted that the methodology used for the strategic plan was more accurate); JX379 (Strategic Plan showing 2015 EBIT of $1.3 million (*id*., 25) and estimating $17 million in 2015 sales (*id*., 26)).)[12] MSF continues its objections to the admissibility of these documents under DRE 802, 901 and 1002. (Tr. 282:2-24.)

[12] Gormley testified that he and Reeve came to the realization that IBF had for years mistakenly calculated profit for its MSF line (Tr. 527:13-528:10) but could not explain why Reeve testified that she had no knowledge of any such mistake (Tr. 528:20-530:22.)

## II. IBF's Use of the MSF Sales and Product Information Breached the Agreement

IBF does not dispute that it used and disclosed to BTN MSF financial information, marketing arrangements, pricing policies, customer data, promotional plans, packaging specifications and die line information to develop specific products to replace the MSF products then on-shelf with retailers. (*Compare* OB56-57 *with* AB49.)[13]

Instead, IBF disputes that information constituted MSF Protected Information "because none of it was supplied by MSF prior to the Agreement." (AB47.) IBF's argument rests on two distinctions contrary to the Agreement's express terms: that Protected Information *only* could refer to "the sales and customer information supplied by MSF to IBF during the due diligence process[]" (AB48); and Protected Information *only* protects the specific data transmitted (AB47).

First, the Agreement has no temporal limitation and specifically includes any information which IBF "receives access to…in connection with the license

[13] IBF does dispute that it was using Mrs. Fields recipes with BTN. (AB49-50.) Although the documents state that IBF would be using the "existing Mrs. Fields private label formulation," (JX506) and BTN requested "samples of the different Mrs. Fields cookies," to use at a trade show (JX488), Stephanie Bagwell's explanation was that IBF uses the term "Mrs. Fields" to refer to all soft baked cookies (Tr. 635:20-636:6).

hereunder." (JX104, Definition l.) IBF's interpretation would exclude even the MSF recipes which were not provided pre-Agreement. (JX112.) Moreover, §15(d)(i) obligates IBF to return all MSF Protected Information at the termination of the Agreement. MSF would need the Protected Information to continue the business itself or with a new licensee. Interpreting §15(d)(i) to mandate only the return of the 2010 and 2011 data provided during the due diligence period makes no sense.

Second, the Agreement specifies that Protected Information is not limited to the specific data provided but includes:

> all modifications, improvements and enhancements which are derived from or relate to such other Party's access to or knowledge of any of the above enumerated materials or information....

(JX104, Def. l.) In transitioning the business to IBF, MSF provided to IBF all of its sales and customer information, trade spend data, off-invoice allowances, and promotional activities at each account. (*See generally* JX122; Tr. 71:5-19 (identifying JX122); Tr. 75:7-13 (explaining that data provided on JX122 was given to IBF by MSF); Tr. 740:3-8, 742:10-16 (MSF told IBF the customer incentives, promotional spending and what was sold in each account).) Under the Agreement, all updates derived from this information remained MSF Protected Information to be returned at the conclusion of the Agreement so that MSF could

continue running the same business, not used as a roadmap with MSF's competitor, BTN. (JX616; JX543; JX544; Tr. 659:8-666:6). The Agreement also prohibited IBF from using Protected Information for its replacement projects, like Project Capricorn. (JX104, Def. l.)

Under the Agreement, IBF bore the burden of proving that any information "(i) was already known to it or developed prior to the execution of [the] Agreement, (ii) was independently developed by it…[or] (iv) was already in the public domain prior to the execution of [the] Agreement. (JX104, §14(d).) IBF presented no evidence, as the Agreement requires (*id.*), that it independently developed the MSF program information and claims, based only on its own say so, that two types of information were publicly known. (AB50.) As noted in the Opening Brief (without rebuttal by IBF), IBF's witnesses admitted that the price, trade spend and promotional plans were not public and had never previously been shared with a competitor. (OB 57.)

IBF used the MSF information, internally and with BTN, to provide products with texture and appearance, price point and story line as close as possible to MSF and convince retailers "why consumers would choose it over a well known brand like Mrs. Fields." (JX434 p.3 (Exec. Summary); *see also* OB27, 28-30, 34-36.) IBF transmitted the package specifications, die lines, recipes and

sales data to BTN so that BTN could get a jump start on selling near-identical MSF replacement products to retailers. (OB41-44.)

IBF argues that the Agreement did not prevent it from selling other cookies. (AB52.) While true, the Agreement *explicitly* prevented IBF from using the MSF information for any purpose other than promoting MSF products. (JX104, §14.) Indeed, the Agreement barred IBF from disclosing that information *internally* to IBF employees unless "necessary." (JX104, §14(c).) Moreover, the Agreement prohibited IBF from using the "Mrs. Fields" name for any purpose other than to "market, distribute and sell Royalty Bearing Products. (*Id.*, §11(a).)[14] While IBF could have gone out and independently developed a marketing and sales campaign for a new line of cookies, IBF could not use the MSF program data to build a direct replacement for MSF in the marketplace. (OB27, 35-36, 41-43.)

### III. IBF's Early Termination Breached the Agreement

The Opening Brief argued that IBF's actions in furtherance of its early termination breached the Agreement and harmed the business which IBF had contracted to return to MSF. IBF's principal defense is that nothing in the Agreement prevented IBF from dismantling the business and returning a shell to

[14] Thus, telling Delhaize that IBF could provide "Mrs. Fields type cookies" (JX427 p.4) or disseminating JX616 to BTN was an express breach of §11(a) of the Agreement.

MSF at the end of the Agreement's term. Thus, IBF argues that §§8(a) and 9 only prevented it from marketing MSF products with unapproved packaging, and that §11 only recognized MSF's goodwill but allowed IBF to misappropriate it (IBF does not address §15(d)(i)). (AB50-54.) Although the Agreement presupposes that the business would return to MSF at the end of the Term, §§15(b), 15(d)(i) and 15(d)(ii), and although Binning testified that the Agreement obligated IBF to transition the customer relationships back to MSF upon termination (JX25, 104:12-19), IBF claims that the Agreement contains no obligation to return anything to MSF (AB48-49). IBF fails to address the arguments actually made by MSF.

Instead, IBF responds to MSF's argument that IBF's early termination of the Agreement before December 31, 2017 was an overriding breach (OB 61-62) by stating that it never actually terminated. (AB45.) But, in fact, IBF began implementing its early exit in July 2015. IBF had no right to tell major customers like Walmart and Delhaize that they were terminating and would no longer be able to supply MSF products for the upcoming modular. (OB28, 44-47.) IBF had no right to shut its manufacturing process down by March 2016 when it was obligated to continue filling orders through December 2017 (OB30-31, 40, 42, 47-49.)

In addition to the overriding breach, MSF also argued that many of the termination actions undertaken by IBF were independent breaches of §§8, 9, 11 and 15 of the Agreement (*i.e.*, they would have breached the Agreement even if

they had not been part of IBF's termination strategy). (OB50-53.) IBF's characterization of these sections (AB50-54) does not withstand scrutiny.

Sections 8 and 9. IBF does not dispute that the Agreement obligated it to actually manufacture, sell and promote MSF products during the Term and §§8 and 9 explicitly require IBF to do so (MSF products "shall be developed, manufactured, marketed and sold as premium products" and IBF "shall market Royalty Bearing Products as premium products[.]") Gormley admitted this. (Tr. 366:9-17; JX593 at BTN000244.) The qualifier "as premium" does not limit the imperative to actually sell, manufacture and market, it qualifies it. There is an entirely separate provision of the Agreement that requires IBF to adhere to packaging and quality guidelines. (JX104, §10.)

Section 11(b) and §15(d)(i). In these sections, IBF recognizes "the *value* of the goodwill associated with the Licensed Names and Marks" (emphasis added), acknowledges that the goodwill belongs exclusively to MSF and agrees to return all the MSF Protected Information, with which one might monetize that goodwill, to MSF at the conclusion of the Term. IBF responds that §11(b) merely prevents it from "asserting that IBF owns any of the Licensed Marks." (AB53.) IBF confuses this section with §11(c), which explicitly prevents IBF from challenging the title to the Licensed Marks. By recognizing the value of the goodwill, confirming that it

belonged to MSF and agreeing to return it to MSF at the conclusion of the Term, IBF agreed not to deliberately harm or misappropriate the business' goodwill.

Implied Term to Transition the Business. While the Agreement calls for the business to be returned to MSF at the end of the Term, together with all of the MSF Protected Information, the Agreement does not explicitly spell out how the return is to occur. MSF argued that the Agreement contained an implied term that IBF would provide reasonable cooperation to MSF at the end of the term to facilitate a smooth transition of the customer relationships. (OB67.) IBF argues, without citation, that "IBF would never have agreed to" this term. (AB56-57.) However, Binning, IBF's parent's CEO acknowledged that not only *would* IBF have agreed, he understood the Agreement to *actually* impose such an obligation. (*See* OB67-68.) To continue the sales of MSF products to retailers in 2018 (in the middle of existing modular periods) will necessarily require cooperation from IBF, and require IBF to inform MSF of planned promotions, sales and customer relationships. IBF's secret, mid-term, transition to itself breached this implied term if it did not breach an express term.[15]

[15] Since the mediation in this case, the parties have been working to facilitate the inevitable transition on or before January 1, 2018. MSF's expectation is that the parties will report any areas of agreement or disagreement at the scheduled March 2, 2017 hearing.

## IV. The Court Should Award MSF $28 Million in Damages

### A. IBF Conflates Proving Harm and Estimating Damages

Under Delaware law proving the *fact* of harm and estimating the *quantum* of damages are not the same, although IBF appears to believe they are (AB69). *See Nucar Consulting, Inc. v. Doyle Eyeglasses*, Del. Ch., 2005 WL 820706, at *12 (Apr. 5, 2005) ("The court must first determine whether the plaintiff has proven that an injury or damage occurred and then must determine whether the plaintiff has adequately proven the amount of his damages."); *Total Care Physicians, P.A. v. O'Hara*, Del. Sup. Ct., 2003 WL 21733023, at *3 (June 30, 2003) (same).

To prove harm, MSF must show by a preponderance of the evidence that IBF's breaches harmed a valid expectation interest of MSF. *See Siga Tech., Inc. v. PharmAthene, Inc.*, Del., 132 A.3d 1108, 1131 (2015). Once MSF meets that burden, it need only proffer a responsible estimate of the amount of its damage. *Id.* ("Where the injured party has proven the *fact* of damages—meaning that there would have been some profits from the contract—less certainty is required of the proof establishing the *amount* of damages.") (emphasis in original); *Beard Research, Inc. v. Kates*, Del. Ch., 8 A.3d 573 (2010) *aff'd sub nom ASDI, Inc. v. Beard Res., Inc.*, Del., 11 A.3d 749 (2010) ("the quantum of proof required to establish the amount of damage is not as great as that required to establish the fact of damage.")

"Reasonable estimates that lack mathematical certainty are permissible so long as the court has a basis to make a responsible estimate." *Beard*, 8 A.3d at 613; *accord Siga*, 132 A.3d at 1131, n.128 (quotation omitted). By contrast, a calculation based upon "mere speculation or conjecture" will fail to satisfy this standard. *Beard*, 8 A.3d at 613. As discussed below, MSF's quantification of its damages are not based on speculation or conjecture. IBF does not dispute the presumption reaffirmed by *Siga* that "doubts about the extent of damages are generally resolved against the breaching party." *Siga*, 132 A.3d at 613.

B. IBF's Early Termination Harmed MSF's Interest in the Branded Retail Business

MSF proved that Interbake's breaches harmed the business that IBF was obligated to manage until December 31, 2017 and then return to MSF. As the Supreme Court approvingly quoted in *Siga* "[t]he standard remedy for breach of contract is based upon the reasonable expectations of the parties *ex ante*." 132 A.3d at 1130. There is no doubt that MSF expected IBF to continue to sell, market, promote and manufacture MSF products through the end of 2017, not to dismantle the business mid-term and not to transition MSF's customers to replacement products. IBF's breaches of the Agreement undermined MSF's expectation of *these* interests – not MSF's interests in the payment of royalties,

which are protected by other sections such as §§4, 5 (the guaranteed minimum royalty) and 7.

IBF fully understood that the Agreement protected MSF's interest in the long term value of the licensed business and that without modifying the Agreement that value would return to MSF at the end of the term. (JX310, "Revised Growth Plan" at 3 ("To date we have been reluctant to make material investments in the brand due to lack of ownership and risk of losing the license in the future.").) This is why IBF attempted to purchase the licensed business for between $30 and $36 million between January 2013 and April 2015: "Acquiring the [MSF] license into perpetuity enables us to protect our investment in the brand and ensuing cash flows beyond the current 10 year agreement." (JX213 at 4.) Because IBF set out to wrongfully dismantle and cannibalize the business once it could not purchase it, diminution to business value is the correct theory of damages here.

According to IBF, "MSF's damages claim focuses not on the remedies provided in the Agreement…." (AB74.) But §22(m) of the Agreement confirms MSF's right to recover "any actual damages it sustains" in the event of a breach. (OB71.) Limiting MSF to recovering just unpaid royalties or terminating under §§15(i)-(v), as IBF urges (AB80), would impermissibly limit MSF's remedies and read §22(m)'s express preservation of rights out of the Agreement. *Seabreak Homeowners Ass'n, Inc. v. Gresser*, Del. Ch., 517 A.2d 263, 269 (1986) ( "[A]

contract must be construed as a whole, giving effect to all of its provisions and avoiding a construction which would render any of those provisions illusory or meaningless.") Contrary to IBF's characterizations, none of MSF's witnesses testified that MSF had *only* these two remedies under the Agreement. (AB80, *citing* JX11, 138:6-141:4, Tr. 99:14-100:1; Tr. 1379:5-10.)

Delaware law allows for recovery of the damage to the value of a business. (OB78-79.) To argue otherwise, IBF attempts to limit *True North Composites, LLC v. Trinity Indus., Inc.*, D. Del., 191 F. Supp. 2d 484, 524-25 (2002) (*aff'd in relevant part*) to its facts and distinguish it as a post-verdict decision. (AB76-78.) However, the decision rejected the *legal* argument that Delaware law prohibits recovery for injury to the value of a business, even a relatively new and untested business. *True North*, 191 F.Supp.2d at 523-24 (the "proper measure of damages for destruction of a business is not lost profits, but the difference between the value of the business before and after the defendant's wrongful acts") *quoting Zaleski v. Mart Assocs.*, Del. Super. Ct., 1988 WL 77779, *1 (July 25, 1988). *See also Beard*, 8 A.3d at 615-618 (awarding loss of business value damages).

C. Anson's Model Is a Responsible Estimate of the Harm Caused

Anson's estimate of the diminution in value to MSF's business between July 2, 2015 and September 16, 2016 is a responsible one. Anson is a qualified expert in valuing intellectual property ("IP") assets, teaches IP valuation and specializes

in advising companies on IP valuations in connection with proposed transactions. (Tr. 1327:12-1330:8.) He employed two standard valuation methodologies, neither of which IBF challenges in its Answering Brief.

1. The Market Approach

IBF challenges Anson's selection of standard industrial classification ("SIC") code 209 (manufacturing, food and kindred products) as an appropriate benchmark for the "healthy company" multiple (AB83) in Anson's market approach. IBF asserts SIC 209 disqualifies it from being used as a comparison. (*Id.*) (attempting to distinguish MSF from Frito Lay by, *inter alia*, its size). IBF misstates the methodology used to select SIC 209, and Anson's testimony about it. (*Compare* AB83 (Anson "used an SIC code . . . based on the assumption that MSF's business was akin to Frito-Lay....") *with* Tr. 1337:17-1342:9 (Anson selected 209 because it was the best code available and was in the same group as 205).)[16]

[16] Anson derived the 2.5x multiple used in his model from the Composite for SIC 209, which is a five-year average composite of healthy companies which derive 75% of their revenues from that particular SIC. (Tr. 1340:17-1341:5; JX40 at 30 *quoting* Duff & Phelps, *2015 Valuation Handbook*: *Industry Cost of Capital*, at SIC 209.) While a member of SIC 209, is not included in the SIC Composite. SIC 209.

As argued in the Opening Brief without rebuttal by IBF (OB81), the data in the SIC Composite tracks the *financial characteristics* of the MSF branded retail business. *Compare* SIC 209 five-year average operating margins of 15% *with* IBF's operating margins on the MSF business (15-18%). (OB81.)[17] IBF's attack on SIC 209 for the *products* sold by companies in the composite misses the point. (AB83.) As Anson explained, the point of the multiple approach is to "provide a reasonable indication as to the value of a business, relative to the revenues it generates. It establishes a ratio between a financial metric, such as sales, EBIT or EBITDA, and the size or value of a business." (JX40 at 30.)

Significantly, IBF employed the same methodology and similar multiples when formulating its purchase offer for the MSF and other branded retail businesses. (*See* JX309 at 9 ("Cookie and Biscuit Businesses typically trade for ~9.0x EBITDA multiple; however, branded, high growth players could trade for 15.0x EBITDA.").) The SIC 209 Composite reports an EBITDA multiple within this range, 13.6x. (SIC 209.) IBF's $36 million bid for the MSF branded retail business is in line, if not slightly below, approximately 8-10 times IBF's reported margins (15-18%) on its MSF sales in 2013 ($22.8 million) and 2014 ($23

[17] At trial, IBF's expert refused to state which D&P SIC would be more appropriate (Tr. 1842:12-1843:20); however, in his report, he cited to SIC 514, retail grocery businesses, where margins (4.1%) and multiples (.5) are much lower. (JX47 at 51-52); SIC 514.)

million). *See LongPath Capital, LLC v. Ramtron Int'l Corp.*, Del. Ch., 2015 WL 4540443, at *10 (June 30, 2015) (explaining why "Delaware law clearly prefers valuations based on contemporaneously prepared management projections").

In formulating its purchase offer for the MSF branded retail business (JX309), IBF considered as "Cookie and Biscuit Precedent Transaction Multiples" recent sales for four companies (JX309 at 9), including two companies for which IBF had unsuccessfully submitted bids (Tate's Bake Shop and Lesley Stowe Fine Foods) (*id.* at 6-7). IBF reported an average revenue multiple of 3.2x and that the two companies IBF unsuccessfully bid upon ultimately sold for 4.8 and 2.7 times revenue, all more than the 2.5x multiple selected by Anson. (*Id*. at 9.)

IBF, through its damages rebuttal expert, also criticizes Anson's multiples approach as inconsistent with a valuation prepared by Lone Peak when conducting an impairment test of MSF's goodwill. (Tr. 1821:17-23; AB82.) IBF laid no foundation for the methodology used in the Lone Peak report, nor the relationship, if any, between the Lone Peak valuation and an actual market valuation. *See Chemipal Ltd. v. Slim-Fast Nutr. Foods Int'l*, D. Del., 350 F. Supp. 2d 582, 589-90 (2004) (rejecting expert's reliance on valuation of market prepared by third party consultant for opposing party because expert "d[id] not understand the methodology used to gather the information in the [report] or methodology used by those who performed the research for the secondary sources").

The evidence showed that neither IBF nor MSF valued the MSF business anywhere near the goodwill test valuation in their extensive negotiations over the branded retail business. Anson's conclusions are consistent with IBF's $36 million offer of the MSF branded retail business in 2014 and $50 million offer for MSF's entire licensing and gifting business in 2015, which MSF rejected. IBF's Answering Brief nowhere addresses its valuation and numerous offers for the business. (*See* OB12-13, 17, 82-84.[18]) Anson's valuation of the MSF branded retail business at $50 million as of July 1, 2015 is consistent with the parties' own behavior.[19]

2. The DCF Approach

IBF argues that Anson assumed the business could not reach the "but-for" scenario until 2036, whereas MSF "restored a bankrupt and shuttered business

[18] IBF misleadingly states that *another* party offered $38 million for the MSF business in 2015. The Steifel auction generated three bids: (1) an $80-100 million offer; (2) a $38 million offer and (3) a $50 million offer for just a part of the business from IBF. (JX306 p.4). MSF believed the business was worth more and declined to accept any of the offers. (JX8, 188:21-189:11.)

[19] At least one of IBF's internal analyses indicate projected EBITDA levels of 24%, earning $5.3 million on $23 million in 2014, which when multiplied times 9 results in a valuation very near Anson's $50 million (JX309 at 3; JX310 at 3), and is consistent with IBF's attempts to acquire assets for less than perhaps what the market will bear. (*See, e.g.*, JX309 at 6-9, describing IBFs unsuccessful bids for Tate's Bake Shop and Lesley Stowe Fine Foods.)

from Shadewell in only 6 months." (AB83.) Not true.[20] IBF put on little evidence about the Shadewell transition and no evidence that Shadewell had taken actions to dismantle and supplant the MSF business.

More importantly, IBF fails to engage with Anson's reasons for selecting his inputs. Anson's DCF model relies on IBF's *own* projections for 2015-2017 sales. (*See* JX40 at 39-40, Ex. 5; JX309; JX288.) IBF mocks the projections but ignores the rationale proffered by Anson (Tr. 1351:22-1352:4) which is consistent with Delaware law's emphasis on contemporaneous projections prepared pre-litigation. IBF does not challenge Anson's selection of a 3.4% growth rate after 2020 (OB82-83). (*Cf.* JX107 at IBF00042244 (IBF assured Weston that a 3-5% growth rate was conservative).)

IBF argues that Anson wrongly assumed a 6.5% royalty rate for the but for DCF when he should have used a 4% royalty rate. (AB83.) Once again, Anson relies upon the parties' ordinary, arms-length behavior. Anson *did* assume a 4% royalty rate in the as-is case (OB83, n.38; JX39 at 45, Sch. 4.) Anson used the

[20] MSF took back the existing business from Shadewell sometime in 2005. (Tr. 10-13.) In 2005, Shadewell achieved MSF sales of $39 million. (JX76 at 4.) After taking the business back, MSF achieved just $23.4 million in sales by the end of 2007. (*Id*.) Between 2008 and 2011, MSF achieved sales ranging between $27.8 and $29.6 million, and entered into the Agreement with the purpose of relying on IBF's resources to return the business to its previous levels. (*Id*.)

6.5% rate in the but-for scenario – the blended rate under the Agreement the parties entered into in their arms-length transaction (OB83, n. 38; JX97 at IBF00045416.)

### 3. IBF's Criticism That Anson's Estimate Attributes 100% of the Drop in Value to IBF

IBF argues that Anson's model is not a "responsible estimate" because it attributes 100% of the drop in the value of the MSF business to IBF's actions and fails to take account any drop in MSF's value due to other causes.[21] This challenge misunderstands Anson's model. As IBF admits (AB1), MSF achieved "very predictable results" ($27.8 to $29.6 million) in the four years (2008-2011) before MSF transitioned the branded retail business to IBF. In the eight-year period between 2007 and 2014, MSF's branded retail sales remained steady between $23.2 and $29.6 million (the low, which represents IBF's first year in the business, excludes at least CVS, the previous year's single largest customer). (JX180 at DB001194; JX40, Ex. 7.)

Instead of measuring the diminution of the business from the $29 million MSF achieved in 2011, or an average of the sales, or even from the sales that IBF predicted it would achieve, Anson spots IBF a $20 million business based upon the

[21] IBF repeatedly attacks Anson for assuming causation and not considering certain alleged facts it contends bear on causation. (AB61-62.) However, "generally, a damages expert is not responsible for proving causation." *See Beard*, 8 A.3d at 613-14.

twelve-month trailing average and measures damages *solely* from those sales. (JX40, Ex. 3.) The twelve-month period prior to July 1, 2015 included the fallout from the Jacobson weather event, and *two* major product recalls. The twelve-month period also included the results of IBF's strategy to avoid investing in the business until it purchased it.[22]

By beginning at $20 million, Anson's model excludes *all* of these vagaries from its estimate of damages. More importantly, IBF has failed to show any similar event to the Jacobson warehouse disaster or the Macadamia product recall between July 2015 and April 2016 which would justify beginning from a lower annual sales figure.

4. Anson's Model Satisfies the Reasonable Estimate Standard

Anson's model is not based on "mere speculation and conjecture." *Beard*, 8 A.3d at 613. Anson provided justifications for each of the inputs into his methodology, and performed "sanity checks" by comparing his inputs with the actions of IBF pre-litigation. As noted, Anson's $50 million valuation of the business on July 1, 2015 is not inconsistent with IBF's $36 million offer for the branded retail business in 2014 or IBF's $50 million offer for the branded retail

[22] The twelve-month period does not take any consideration of the evidence that IBF understated its sales.

and gifting business in 2015 – both offers which MSF rejected.[23] Nor is it inconsistent with MSF own contemporaneous valuation. (JX8, 36:22-37:7.)

IBF challenges the relative weight Anson assigns the multiple and DCF models, 75 and 25%, respectively. However, as Anson explained, the multiple model accounts for the overall value of the business, including additional costs and expenses incurred as a result of IBF's actions, while the DCF measures the narrower loss of royalties based on the pre-dispute expectations of the parties under the Agreement. (Tr. 1355:21-1356:5.) IBF does not proffer any competing estimate of the damage suffered by MSF.[24] IBF's assertion that contrary evidence exists to select differing inputs "demonstrates only that the amount of damages was contested, not that it is speculative." *True North Composites*, 191 F.Supp.2d at 526. The Court should accept Anson's model because it is "reasonable and grounded in profit estimates made by the parties themselves." *True North Composites*, 191 F.Supp.2d at 526.

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[23] As noted, IBF's 24% EBITDA projections and 9 times multiple assigned a price of $47.2 million at a time when IBF was offering to buy the MSF business for $36 million. (JX309 at 6-9.)

[24] *Cf. Beard*, 8 A.3d at 615-618 (where the defendants had offered a competing model of damage).

## V. IBF'S COUNTERCLAIMS ARE MERITLESS

### A. IBF Has No Claim for Fraudulent Inducement

Just days before trial and after the final pre-trial conference, IBF asserted a new claim for fraudulent inducement. At oral argument, IBF limited its fraud claim to a single presentation made on February 16, 2012 generally describing the MSF company. (Tr. 167:14-18, 171:18-172:19; JX97.) IBF admitted that the sales information that MSF provided before the Agreement was executed was accurate. (Tr. 1132:7-19; *see also* Tr. 38:6-15 (describing JX70, the MSF P&L shared with IBF during due diligence).)

There is no claim for fraudulent inducement based on this presentation. First, statements of opinion regarding skills, experience and resources are non-actionable. *See Solow v. Aspect Resources, LLC*, Del. Ch., 2004 WL 2694916, at *3-4 (October 19, 2004). Second, there are no false statements of fact in the presentation concerning the franchise model or the quality of the MSF cookie: the presentation *explicitly* states that MSF is working to improve its franchise model and that it felt its cookie quality was "missing the mark." (JX97, "Organizational Overview" at 17.) Third, IBF did not justifiably rely on those statements. Fourth, the three-year statute of limitations bars such a claim and IBF has no facts to show that it could not have discovered any fraud through the exercise of reasonable

diligence such that tolling would be warranted. *See Solow*, 2004 WL 2694916, at *3-4.

IBF took over the branded retail business and operated the MSF business for years without raising any problems with the business, the brand or the taste of the cookies. (*See, e.g.*, JX157 (2013 report concluding that the quality of the MSF cookie was good); JX288 (April 2015 favorable review of MSF business); JX295 at 4 (April 2015 summary of opportunity).) Starting November 2012, IBF employed Robert Rummel, MSF's principal sales person, who was open and honest with IBF. (Tr. 746:11-16.) As discussed above, IBF liked the business so much that it tried to purchase it, offering more money the more experience it had with the brand. Even in exiting, IBF sought to develop replacement products that were as close to the MSF brand architecture and MSF cookie taste as possible. (JX532; *see generally* OB27, 35.)

B. MSF Did Not Breach Section 10(a) of The Agreement

Although not in its pre-trial contentions, *see* Pre-Trial Order 12-13, IBF seeks damages from MSF for breaching §10(a) of the Agreement because MSF failed to approve the sale of unpackaged cookies to SCM Designs. But the Agreement specifically prohibits any claim against MSF for failing to grant any approval under §10. (JX104, §10(a)(viii).) Second, MSF never "rescinded its prior approval" for 2015 sales to SCM. On May 20, 2014, IBF submitted a request

to sell a holiday 2014 item to SCM designs. (JX245 at 3.) This was not a retail packaged product under the License Agreement: instead, Interbake proposed to sell 130 "bulk packed" cookies to SCM for SCM to repack and then sell to Sam's Club. (*Id*.) MSF approved IBF's request for Holiday 2014 items. (JX245.) MSF did not approve IBF's request for Holiday 2015 items. (JX258 at MF00022168.) Third, IBF put on no evidence of its future sales to SCM other than to say it could have sold the same amount of product as in 2014 in any (and every) future year. *See Medicalgorithmics S.A. v. AMI Monitoring, Inc.*, Del. Ch., 2016 WL 4401038, at *26 (Aug. 18, 2016).

C. MSF Did Not Breach §19(c)

Under §19(c), MSF agreed "to continue to support the brand through advertising and marketing efforts consistent with past practice." The evidence showed that MSF did so and actually increased its support in both respects over the course of the Agreement. In any event, IBF offers no evidence to the contrary.

D. MSF Did Not Breach §19(d)

To establish a claim for breach of a material adverse condition ("MAC") clause, IBF is required to prove that (1) MSF knew of the MAC at the time it signed the agreement – March 16, 2012 – and (2) the condition as judged by a reasonable investor, and taking into account the total mix of available information, would "substantially threaten the overall earnings potential of the target company

in a durationally significant manner." *Frontier Oil v. Holly Corp.*, Del. Ch., 2005 WL 1039027, at *34 (Apr. 29, 2005). MAC clauses are high bars to clear, and courts will reject claims asserting conditions, even though serious, which could be overcome or should have been known to the plaintiff. *Id.* (holding that a toxic tort litigation was not a materially adverse event because the defendant was likely to be able to absorb the costs of defending the litigation).

Here, IBF claims that on March 16, 2012, MSF knew (a) that the "run rate" for the branded retail group was not $29 million but $22 million (AB6); (b) that its alleged lack of investment in the brand had led to "very predictable" and stable results in the branded retail segment for years; (c) it needed to increase its trade spend to maintain sales; and (d) that the cookies tasted bad. None of these alleged conditions are MACs in breach of §19(d).

Whatever "run rate" means, IBF's witnesses have admitted the accuracy of the financial information provided concerning MSF's sales. (Tr. 1132:7-19.) As discussed above, there has been no lack of investment in the brand, and MSF indeed achieved stable, predictable results in the branded retail segment throughout its stewardship regardless of 'investment' level. MSF provided all of its actual trade spend information to IBF in the due diligence period. (Tr. 38:6-15; JX70.)

### E. MSF Did Not Breach Any Implied Term to Support the Brand

Like the fraud claim, IBF also asserted its implied good faith claim on the eve of trial preventing any discovery into its assertions. Nevertheless, the claim is clearly barred because the Agreement has an express provision governing what MSF is obligated to do to generally support the brand, which is to continue to support it through advertising and marketing consistent with past practice. (JX104, §19(c).) *Frontier Oil v. Holly Corp.*, Del. Ch., 2005 WL 1039027, at *28 (Apr. 29, 2005) (citing *Dave Greytak Enters., Inc. v. Mazda Motors of Am., Inc.*, Del. Ch., 622 A.2d 14, 23 (1992), *aff'd*, Del., 609 A.2d 668 (1992)) (courts will not imply a term when there is an express provision in the contract regarding the same issue).

In any event, IBF's rhetoric is not supported by the evidence. MSF did not "fire[] almost everyone charged with maintaining the brand." (AB34.) It restructured its small marketing department early in 2014. (Tr. 1597:15-1598:16.) IBF's expert may have opined that MSF needed to be "reposition[ed]" (AB34) but she conducted no research into MSF's branding strategies, marketing strategies or customer surveys. Lauren Reynolds may have testified that at Hershey's (a multi-billion company) she once was given $13 million to oversee a product relaunch (AB34), nevertheless, in her pre-litigation assessment of the MSF brand she reported generally positive reviews. (JX288 at 8, 12; Tr. 1680:11-22.)

F. IBF's Damages Are Fatally Flawed

IBF put forth one expert on its own damages – Thomas – who initially asserted $5.3 million in lost profits, but on the stand reduced his calculation to $4.3 million. The last page of IBF's brief asserts $8.3 million, four million dollars more than Thomas's calculation. (AB86.) IBF nowhere explains this increase. IBF *does* bury a new claim for $5 million allegedly for "equipment that is of no use to the business." (AB44 (There is no evidentiary citation for this claim that wrapping equipment is of no use or value to IBF.).) There is no claim in this case for equipment damage, IBF submitted no valuation of the equipment and little if any testimony about it.

Thomas' model assumes that IBF would sell the exact same amount of MSF products in future years (including years after IBF voluntarily terminated) to certain specified retailers. (JX39 at 34-45; JX725 p.16.) Thomas does not start at any particular year, but takes the highest year of sales (whether MSF or IBF) and then presumes that sales would be identical to that year for each subsequent year. (JX39; JX49 at 9.) Thomas then claims to subtract the total lost sales from the cost of sales to arrive at lost profits. (JX39 at 47.) Thomas states he relied on the F9 Reports for the cost of goods sold, and yet his trade spend, COGS and manufacturing margins are all different than that shown on the F9 Reports. (*Id.*; JX643; JX644; JX645.)

Thomas' selection of stores (and testimony regarding them) bears no relation to the evidence. For example, Thomas claims that MSF hid falling 2012 CVS sales from IBF. (*Cf.* JX116 (reporting falling 2012 CVS sales to IBF).) Thomas claims that IBF sold just $400,000 to CVS in 2013 and stopped purchasing MSF products in April. (*Compare* JX186 p.2 (IBF sold $1.3 million to CVS in 2013) *with* Tr. 747:19-24 (CVS purchased products throughout the year).) Thomas claims that Rummel told him that Publix "felt like" MSF failed to live up to some unexplained "bargain" and therefore delisted MSF. (Tr. 1801:4-1802:12.) Rummel gave no such testimony and there is no such evidence in the record. (*See generally* JX49 at 10-14.)

## VI. THE COURT SHOULD ORDER AN AUDIT

IBF has two responses to the audit claim: that (1) MSF should have paid to have IBF's MSF sales audited by IBF's own auditor, KPMG, in contradiction of the contract; and (2) MSF's auditor should have asked better questions. IBF fails to address why its expert concluded that sales were $1 million higher in 2015 than reported and identified $500,000 in sales to stores for which IBF never reported any sales; why its F9 reports show millions of dollars in unreported intercompany sales, or "eliminations"; why IBF reported zero dollars to major chains like CVS and Publix for multiple quarters when its internal reporting shows sales; why the sales to its distributor affiliates were 50% of arms-length transactions. (OB58-61.)

Given the numerous irregularities in IBF's financial data and its inability to produce proper documents concerning its sales or trade spend, it is all the more imperative that the Court order an audit into these issues.

## CONCLUSION

For these reasons and those stated in MSF's Opening Brief, judgment should be entered in MSF's favor as follows:

declaring IBF's termination of the License Agreement invalid;

granting a permanent injunction against termination on or before December 31, 2017;

directing IBF's cooperation with MSF in returning the business to MSF (as necessary);

granting Mrs. Fields a preliminary and permanent injunction prohibiting IBF from using, disclosing to others, or assisting others in using MSF's Protected Information;

directing IBF to cooperate in completion of the audit; awarding damages to MSF in the amount of no less than $28 million, together with pre-and post-judgment interest;

awarding MSF attorneys' fees and costs; dismissing all of IBF's counterclaims;

and awarding such other and further relief as this Court deems just and proper.

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