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

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| THE MRS. FIELDS BRANDS, INC.,<br><br>Plaintiff,<br><br>v.<br><br>INTERBAKE FOODS LLC,<br><br>Defendant. | C.A. No. 12201-CB<br><br>**PUBLIC VERSION** |

# INTERBAKE FOODS LLC'S PRETRIAL BRIEF

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## INTERBAKE FOODS LLC'S PRETRIAL BRIEF

## PRELIMINARY STATEMENT

This is a case about Mrs. Fields' dying brand. Mrs. Fields licensed its dying brand to Interbake in March 2012. In doing so, Mrs. Fields painted a rosy picture of a thriving brand that was "[redacted]," "[redacted]," "[redacted]" with the "[redacted]," and inspired consumers to buy about [redacted] of cookies a year at retail. Mrs. Fields withheld critical material information like it had done nothing in over a decade to support the brand and the franchise economic model was "[redacted]." Mrs. Fields knew the brand was on a downward spiral toward what Mrs. Fields called "[redacted]"—declining retail sales—but Mrs. Fields did not inform Interbake of this fact. Mrs. Fields knew its cookie formulas tasted like "[redacted]" but never told Interbake. Instead, Mrs. Fields induced Interbake to sign a Trademark License Agreement and now looks for a scapegoat to pay for Mrs. Fields' lack of investment in the brand.

After inducing Interbake into the License Agreement, Mrs. Fields pulled the plug on the brand in the retail channel utilized by Interbake. Mrs. Fields made no investments to support the retail channel. Mrs. Fields admittedly struggled with its personnel and infrastructure. When presented with the opportunity to invest in the Mrs. Fields brand, Mrs. Fields' management team refused to invest the capital necessary to support a brand that it recognized needed "[redacted]." Mrs. Fields repeatedly recognized serious brand problems but did nothing to address them. Mrs. Fields had seven different CEOs over a span of a few years. Mrs. Fields fired all but one individual in its marketing ranks. Interbake reached out to Mrs. Fields for brand support on numerous occasions, but eventually was stuck dealing with an administrative assistant who was managing day-to-day brand issues with Interbake.

Rather than providing support for the branded retail channel, the Chairman of the Mrs. Fields Board of Directors decided that he no longer wanted the retail channel to exist and instructed his subordinates to figure out a way to end the License Agreement. He instructed Mrs. Fields not to [redacted]. As early as January 2014, he said he wanted to "[redacted]." Later, he either wanted to sell the retail channel or make Interbake give a "[redacted]."

As Mrs. Fields management predicted before it ever licensed branded retail to Interbake, sales fell. This is because Mrs. Fields neglected the brand. As a

licensor and owner of the Mrs. Fields brand, Mrs. Fields had an obligation to maintain and attempt to grow the brand. This was required in the License Agreement. Mrs. Fields also told Interbake it would do this before Interbake signed the License Agreement. Indeed, it is customary in the industry for the licensor to invest in its brand, and Interbake had every expectation that Mrs. Fields would adhere to this custom—Mrs. Fields said and agreed it would. Mrs. Fields' brand failures undermined the purpose and terms of the License Agreement.

Outside branded retail, Mrs. Fields struggled with store closings in its franchise channel. Sales of other Mrs. Fields brand licensees fell as well, and litigation with many of Mrs. Fields' licensees ensued.

Interbake did everything it could do to overcome Mrs. Fields neglect of the brand for more than a decade. Interbake innovated new cookie flavors. Interbake implemented new marketing initiatives, such as a "Heroes" program with the USO that generated additional sales (a program that Mrs. Fields complimented Interbake on and wanted to emulate). Interbake increased its trade spend and direct consumer spend to generate new sales. Interbake tried to grow the business, but it did not have a brand owner that made this effort commercially viable.

Despite Interbake's best efforts to drive sales, retailer customers advised that the brand was not strong enough to support good "turns"—a term that describes the number of sales per store per unit of time. Retailers had the ultimate say on

whether to stock Mrs. Fields branded product, and they could not justify keeping the product on their shelves when consumers were not buying. Interbake tried promotions and otherwise resisted the desire of retailers to delist the brand, but sometimes the retailers decided to shelve a different product. Of course, after more than a decade without investment from Mrs. Fields, consumer unaided awareness of the brand had been as low as [redacted] and only as high as [redacted]. Even Mrs. Fields' expert called this Mrs. Fields brand problem. The "[redacted]" were of Mrs. Fields' own making.

In the course of negotiations over the License Agreement, Interbake had the foresight to request a termination provision that, if sales did not reach a certain threshold, Interbake could terminate the contract. This request eventually became Section 15(c)(iii) in the License Agreement. The threshold was [redacted]. In 2015, despite the introduction of new products, greater trade and consumer spend, and special programs and promotions by Interbake, sales fell below [redacted]. Interbake exercised its option to terminate under Section 15(c)(iii).

Interbake also negotiated provisions that provided it with the right to terminate if Mrs. Fields (1) failed to support the brand; (2) rendered the relationship commercially unviable; or (3) made material misstatements at the beginning of the relationship. Interbake addressed these issues and the decline in sales with Mrs. Fields first, in an in-person meeting between business

representatives, advising that Interbake would be terminating but offering to establish an appropriate transition period to permit Mrs. Fields to transition to another company. Rather than accept the plain terms of the License Agreement, or work with Interbake on a reasonable business transition, Mrs. Fields filed this lawsuit, making the incredible and unsupportable claim that Interbake was responsible for brand damage of [redacted].

In accordance with these provisions, Interbake seeks a declaratory judgment determining that it has properly and effectively terminated the License Agreement. Interbake also contends that Mrs. Fields fraudulently induced Interbake to enter into the License Agreement and breached the Agreement. The reasonable relief for Mrs. Fields' actions is damages, rescission, and attorneys' fees.

## FACTUAL BACKGROUND

### A. The Mrs. Fields Branded Retail Business Prior to the License Agreement

Mrs. Fields owns the Mrs. Fields trademark and markets and distributes its products—mainly cookies—through its franchise locations and online.[1] From 2000 to 2006, Mrs. Fields licensed its retail prepackaged cookie business to a company named Shadewell. (JX 76; JX 14 at pp. 16-17) While Shadewell's sales were as much as [redacted] per year in 2001, the yearly sales fell to [redacted]

[1] https://www.mrsfields.com/about/.

by 2005. (JX 76) Moreover, Shadewell needed high promotional and trade spend[2] and a large sales force to achieve these figures. (JX 14 at pp. 29-31) By 2005, Shadewell was in financial trouble, stopped paying royalties to Mrs. Fields, and eventually went bankrupt. (*Id.* at p. 16) This left a gap in production and distribution of the Mrs. Fields cookies to retail customers in 2005 and 2006, meaning that many orders went unfilled. (*Id.* at pp. 17-18; JX 76)

After Shadewell, Mrs. Fields brought the business in-house and managed the business itself utilizing a contract manufacturer to make the cookies. (JX 14 at pp. 15-18) Mrs. Fields managed the retail business from 2006 to November 2012, when Interbake took over under the terms of the License Agreement at issue in this litigation.

### B. Mrs. Fields Approaches Interbake about Licensing the Retail Business

After making the decision to again license the retail business, Mrs. Fields utilized a licensing agent, Stu Seltzer of Seltzer Licensing, to search for potential licensees. (JX 14 at pp. 55-56) Stu Seltzer approached many companies, including Interbake. (JX 17 at pp. 79-81)

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[2] Trade spend refers to money that is provided to retailers to promote the Mrs. Fields business. (JX 4 at p. 170) It includes the amount of rebates or off-invoice credits that are provided to retailers that result in lower prices for the retailer in exchange for promoting Mrs. Fields products, and it often takes the form of "buy one get one free" deals, "dollar off" deals, or other promotional activities that help stimulate sales of Mrs. Fields cookies. (JX 9 at p. 70)

Interbake is headquartered in Richmond, Virginia.[3] Interbake operates as the Biscuit Division of Weston Foods and provides products through four distinct business segments: Retail Private Brands, Girl Scout Cookies, Dairy, and Food Service.[4] Interbake's Retail Private Brands division is a market leading supplier of private brand cookies.[5]

Mrs. Fields viewed Interbake as an ideal licensing partner because it could use its existing relationships with retailers to increase the distribution of the cookies beyond the number of stores it had been able to achieve.[6]

### C. Mrs. Fields Misleads Interbake

In the lead up to execution of the License Agreement, Mrs. Fields told Interbake that the run rate of the business was [redacted] a year. (JX 104 at Ex. D-3) Interbake later discovered that the true run rate of the retail business before Interbake took over was actually about [redacted] per year. (JX 10 at p. 60)

Mrs. Fields failed to disclose other material information to Interbake that would have alerted Interbake to fundamental problems with the retail business.

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[3] http://www.interbake.com/.
[4] http://www.interbake.com/.
[5] http://www.interbake.com/our-divisions/.
[6] JX 14 at pp. 235-236. ("[redacted]

For instance, Mrs. Fields knew the quality and taste of the retail cookies were a problem. (JX 66 at slide 2; *see also* JX 78 ("[redacted]")). Mrs. Fields never told Interbake there was a problem with the cookie quality.[7] In fact, Mrs. Fields gave Interbake the recipes for these poor quality cookies without ever mentioning that they needed any improvement. (JX 14 at p. 81; JX 42 at p. 6)

Mrs. Fields also knew there were problems at major customers but never told Interbake. Mrs. Fields' Board of Directors meeting minutes noted that "[redacted]" (JX 118 at p. 2) [redacted] and [redacted] were some of the largest retail business customers. (JX 14 at pp. 139, 147) Interbake was not told of these problems. Shortly after Interbake took over the retail business from Mrs. Fields, [redacted] discontinued Mrs. Fields. (JX 35 at No. 10, pp. 13-14)

Finally, Mrs. Fields knew that it had not invested in the Mrs. Fields brand in a decade and that the state of the brand was poor. (JX 134 at ZC003101; JX 14 at

[7] JX 14 at pp. 80-85 ("[redacted] *Id.* at p. 120 ("[redacted]"); *Id.* at p. 172.

p. 74) But Mrs. Fields represented to Interbake that its brand and business were healthy. (JX 96)

### D. Mrs. Fields and Interbake Negotiate the License Agreement

From the first meeting between the parties in 2011 until the License Agreement was executed in March 2012, the main negotiators were Tim Casey, Neal Courtney, and Stu Seltzer for Mrs. Fields and Kevin McDonough, Gunther Brinkman, and Seth Monette for Interbake. (JX 5 at pp. 63, 67-68, 114) The Court will hear live testimony from Mr. Courtney, Mr. McDonough, and Mr. Monette at trial. The parties met together in person several times and exchanged drafts of the License Agreement by email. (*See, e.g.*, JX 86, JX 93, JX 94, JX 95, JX 99.)

During one of the in-person meetings, Seth Monette of Interbake discussed with Neal Courtney of Mrs. Fields that Interbake wanted the License Agreement to include protection for Interbake in the event that sales of the Royalty Bearing Products, the Mrs. Fields-branded retail cookies, fell below a threshold level. As a result, when Interbake received the first draft of the License Agreement from Mrs. Fields, it included such a provision, Section 15(e)(iii). Mrs. Fields based the License Agreement with Interbake on a previous Mrs. Fields license with [redacted]. However, the [redacted] license did not contain a provision like 15(e)(iii); in fact, [redacted]. (JX 14 at pp. 84, 91-93, 262;

JX 17 at pp. 120-124; JX 81; JX 85; JX 73) This provision was added to the form of the [redacted] agreement to create the first draft of the License Agreement, because of Seth Monette's request to Mrs. Fields. Section 15(e)(iii) in the first draft was relabeled Section 15(c)(iii) in the final, executed License Agreement.

Prior to execution of the License Agreement, Interbake proposed deletion of Section 5(b) and corresponding Exhibit C from Mrs. Fields' draft License Agreement, and Mrs. Fields agreed to this deletion. (JX 99; JX 81) These provisions would have required Interbake to reach certain minimum sales amounts during each year of the License Agreement's initial five-year term.

Tim Casey and Neal Courtney of Mrs. Fields considered inserting language into the License Agreement that would have required Interbake to spend a minimum amount on advertising and marketing the Royalty Bearing Products. However, Mrs. Fields decided not to insert this requirement into the License Agreement because it would "[redacted]" and was "[redacted]" (*Compare* JX 83 *with* JX 104; JX 14 at pp. 101-104)

**E. The License Agreement**

In March 2012, Mrs. Fields and Interbake entered into the Trademark License Agreement ("License Agreement"). (JX 104) Mrs. Fields licensed to Interbake the four "Names and Mark[s]" listed in Exhibit E to the License Agreement. The License Agreement provided Interbake an exclusive license to

manufacture, market, and sell certain enumerated Mrs. Fields-branded products within a geographic territory that included North America and other select locations. (JX 104 at pp. 4, 42)

The Licensing Agreement includes the following termination provisions:

- For both parties: Under Section 15(c)(iii) of the License Agreement, Net Sales of Mrs. Fields products failed to reach [redacted] during any year of the License Agreement; (*Id.* at p. 17)
- For Interbake: Under Section 15(c)(ix) of the License Agreement, Mrs. Fields (i) made a representation or warranty in the License Agreement that was not correct in any material respect at the time it was given; . . . (iii) materially damaged the value of the Licensed Names and Marks or the goodwill associated therewith, that directly rendered the performance of the License Agreement by Interbake commercially unviable. (*Id.*)

The License Agreement does not provide for liquidated damages for falling sales. A Mrs. Fields Board member testified that [redacted]. (JX 11 at p. 140)

**F. Interbake Invests in the Mrs. Fields Business**

Interbake invested [redacted] in upgrading and modifying its production lines immediately after entering in to the License Agreement to be able to produce the Mrs. Fields cookies. The investment added the required cooling capacity for soft baked cookies as well as several packing requirements, including single serve flow wrap, automated cartoning capability and the associated case pack capability required for the Mrs. Fields business. (JX 107 at IBF00042239)

Since the inception of the License Agreement, Interbake has spent close to [redacted] in consumer spend. In 2013 such consumer spend was [redacted], in 2014 it was [redacted], in 2015 it was [redacted] and in 2016 it is expected to be [redacted]. (JX 525 at p. 4; JX 20 at pp. 125-26)

Interbake also expended considerable time and effort to develop its own unique Mrs. Fields promotional event. Interbake partnered with Walmart and the United Services Organization ("USO") to develop a "Share Your Hero" promotional for the Mrs. Fields branded retail business. The USO is an organization that offers specialized programs to support military service members and their families before and after their terms of service.[8]

The "Share Your Hero" program encouraged consumers to submit stories about their "heroes" from their lives, whether it was an influential teachers or childhood sports coach. Interbake established the website domain "MrsFieldsMoments.com" that allowed customers to submit stories about their individual heroes. The promotional event lasted from May 2015 until July 2015. At the end of the event, Interbake selected ten finalists and one single winner. The top ten finalists had their stories shared on MrsFieldsMoments.com and the nominator of the final winner received one year's worth of free cookies. The winning "hero" also had her biography placed on a box of Mrs. Fields cookies.

[8] https://www.uso.org/about.

Interbake also pledged to make a donation to the USO for every box of Mrs. Fields cookies that were sold during the campaign. The contest resulted in nearly 17,000 entries, 36 million campaign impressions, 55,000 visits to the event website, and more than 74,000 media views on Twitter. (*Id.*)

### G. Mrs. Fields Recognizes Fundamental Problems with its Brand but Cuts Investment in its Brand Rather than Increasing It

In November 2012, the same month Interbake took over the retail business, Mrs. Fields CEO Tim Casey made a major presentation to the Mrs. Fields Board of Directors (JX 134) about the state of Mrs. Fields. In his presentation, the CEO admitted the poor state of the Mrs. Fields brand, that it was Mrs. Fields' fault, and set forth a plan to revitalize the brand.

Mr. Casey admitted:

- "[redacted]" (JX 134 at ZC003079)
- The Mrs. Fields franchise store "[redacted]" (*Id.* at ZC003090)
- "[redacted]" But the number of store fronts [redacted]. (*Id.* at ZC003090-91)
- We have "[redacted]" (*Id.* at ZC003097)
- Mrs. Fields brand [redacted]. (*Id.* at ZC003122)

To address these fundamental problems, Mrs. Fields' CEO recommended a Brand Equity Investment of [redacted] to "[redacted]" (JX 134 at ZC003123) Mrs. Fields did not take its own CEO's advice to invest in the Mrs. Fields brand, instead deciding that the proposals

were too costly. (JX 11 at pp. 109-110) Mr. David Barr, former Board Member of Mrs. Fields, testified that some of the suggested investments in the presentation were approved and some were not, but that Mrs. Fields never spent [redacted] on brand equity prior to his departure from the company in May 2015. (*Id.* at p. 110) The retail business and Interbake were victims of these decisions by Mrs. Fields.

### H. Issues with Mrs. Fields Pre-Packaged Cookie Formula

In addition to having declining sales and profit margins in the branded retail business when it was licensed to Interbake, Mrs. Fields also had issues with its pre-packaged cookie recipe. Mrs. Fields was aware of the quality problems with its cookie recipe prior to entering in to the License Agreement and did not inform Interbake. Despite knowing of the problems, Mrs. Fields failed to work with Interbake to reformulate the recipe to address the problem.

Prior to entering in to the License Agreement, in March of 2012, Mr. Tim Casey, the CEO of Mrs. Fields at the time, sent an email to the board of directors outlining the key initiatives for 2012. (JX 98) The number one initiative for 2012 was to "[redacted]" (*Id.*)

The products offered in the various Mrs. Fields channels (franchise, gifting, and branded retail) are all baked using different recipes. In particular, the pre-packaged cookies require preservatives and other additives to make them "shelf-stable." The fact that Mrs. Fields had three different cookie recipes for its different channels often created what Mrs. Fields employees refer to as "[redacted]" because consumers expected the pre-packaged cookies to taste the same as, or very similar to, the fresh-baked cookies at the franchise stores. (JX 7 at pp. 110-11; JX 1 at pp. 70-73)

Mrs. Fields did not tell Interbake about the problems with the cookie recipe and "[redacted]" prior to entering into the License Agreement. Mrs. Fields did not reformulate the recipe prior to the License Agreement and the problems created by the pre-packaged cookie recipe continued after the business was licensed to Interbake.

The problems with the Mrs. Fields pre-packaged cookie recipe continued into 2015. In April 2015, Interbake and Mrs. Fields held a strategic planning meeting to discuss product quality and branding strategies to improve coordination between the two parties. (JX 311) During the meeting, Interbake and Mrs. Fields representatives had extensive discussion regarding the formula used for the Mrs. Fields retail cookie. (*Id.*) In an email recapping the meeting, Ms. Rebecca Hamilton, a Project Manager at Mrs. Fields, stated that "[redacted]

[redacted]" (JX 311)

Following the meeting, Interbake made several attempts to reach out to work with Mrs. Fields to improve the quality of the cookie being sold in retail locations. However, Mrs. Fields ignored all of Interbake's attempts to work to improve the formula.

In summary, Mrs. Fields knew in 2012 prior to entering in to the Licensing Agreement that it had a brand problem and needed to improve the formula used to bake its pre-packaged cookies. However, rather than endeavoring to improve the formula, Mrs. Fields licensed the business to Interbake. Mrs. Fields then did not make an effort to work with Interbake to improve the cookie recipe despite repeated attempts by Interbake to do so. As a result, the formulas were never updated and the problems created by Mrs. Fields continue to this day. (JX 11 at p. 159; JX 523)

## I. Turnover in Mrs. Fields Management

During the License Agreement, Mrs. Fields has had repeated personnel changes in its leadership ranks that have made it difficult for Interbake to plan and coordinate its business. Mrs. Fields has had repeated turnover in its marketing

department as well as at least six changes at CEO since entering the License Agreement with Interbake. The following individuals have all served as the CEO of Mrs. Fields at one time during the License Agreement: Mr. Tim Casey, Mr. Neal Courtney, Ms. Joyce Hrinya, Mr. Jonathan Drake, Mr. Jeff Werner, and, as of last month, Mr. Dustin Lyman.

This constant turnover at the top has made it difficult for Interbake to work with Mrs. Fields and resulted in nonexistent brand support from Mrs. Fields. Mr. Lyman acknowledged in his deposition that there were problems with communication as a result of the turnover at Mrs. Fields. (JX 13 at p. 245) He stated that "[redacted]" (*Id.*)

Mrs. Fields' constant turnover also created confusion as to who was responsible for overseeing certain aspects of the relationship between Mrs. Fields and Interbake. Mrs. Fields never provided or appointed a person to work with Interbake on improving the cookie formula because there were "[redacted]" and Mrs. Fields was not sure of "[redacted]" (JX 341)

To further worsen the communication problems, beginning in mid-2014, Mr. Zenni, the Chairman of the Board, formally instructed Mrs. Fields' employees not to speak with Interbake employees for any reason. Mr. Zenni sent an email to then

CEO Mr. Neal Courtney on June 14, 2015 that said "[redacted]" (JX 222)

It is unclear how long the embargo on communicating with Interbake lasted. (JX at pp. 202 – 203) However, it appears to have extended at least several weeks until June 27, 2014 when Mr. Courtney sent an email to Mr. Zenni stating "[redacted]" Mr. Zenni's response was to "[redacted]". (JX 229) Mr. Courtney never got approval to speak with employees from Interbake and was fired shortly thereafter.

**J. Mrs. Fields' Franchise Business Declines**

A decline in the number of Mrs. Fields franchise locations from 2007 to 2016 was a "[redacted]" (JX 13 at p. 268; JX 134 at ZC003090) to Mrs. Fields Leadership. From 2011 to 2013 fifty-five stores, [redacted] of the franchise locations, closed, (*Id.* at ZC003090) even though this was viewed as the "[redacted]" of Mrs. Fields. (JX 17 at p. 35) This was a major blow to the business and the brand.

In fact, a member of Mrs. Fields Board of Directors testified that the economics of opening and maintaining a Mrs. Fields franchise made no financial sense to franchisees. Franchisees could not sell enough cookies to stay afloat.

(JX 11 at p. 52) Despite this, Mrs. Fields lured in Interbake as a licensee with the promise that "[redacted]" (JX 96)

The broken franchise model was a major problem for the Mrs. Fields brand because, as Mrs. Fields admits, franchise stores were the main way that consumers interact with the Mrs. Fields brand. (JX 11 at p. 52) With the number of franchise locations falling and no brand management or brand investment by Mrs. Fields, it should come as no surprise that sales for all of Mrs. Fields licensees, including Interbake, have fallen in recent years. (JX 48 at p. 37)

### K. Mrs. Fields Puts its Brand Up for Sale But No One Offers to Pay Anywhere Near the Inflated Asking Price

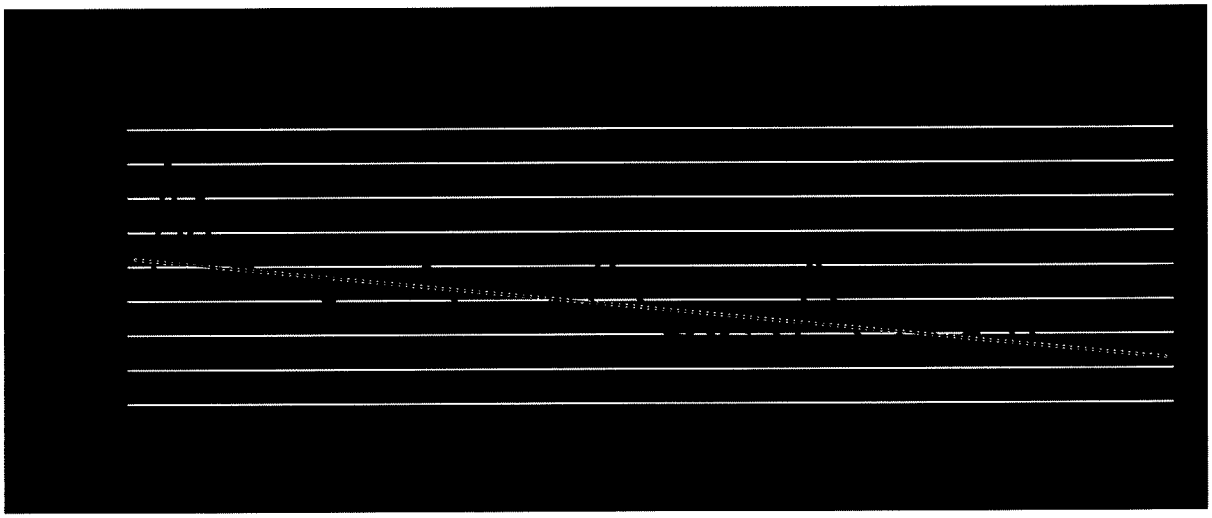
Faced with the obvious need to put further resources behind the failing Mrs. Fields brand, the private equity firm that owns Mrs. Fields, Z Capital, chose to try to sell the brand rather than make any brand investment. Discussions about buying all or part of the brand occurred in 2013-2014 between Mrs. Fields and Interbake. (JX 10 at pp. 37-54) No deal was reached. (JX 10 at pp. 50-54)

In 2015, Z Capital retained an investment banker, Stifel, to auction off the brand along with the company. Stifel went to [redacted] separate potential acquirers to solicit interest in making a bid. (JX 306) Only [redacted] companies expressed possible interest. One of those [redacted] was Interbake. (*Id.*) Mrs. Fields thought its business

(which included not only Mrs. Fields but also other brands owned by Mrs. Fields' parent Famous Brands, including TCBY) was worth at least [redacted]. (JX 11 at p. 250; JX 8 at p. 189) No one expressed interest in proceeding with negotiations at anything higher than [redacted]. Mrs. Fields ended the auction process without a buyer. (JX 8 at p. 200)

### L. Because of the Failing Mrs. Fields Brand, Mrs. Fields Retail Sales have Fallen Consistently from the Beginning of the License Agreement to Now, Despite Interbake's Many Efforts to Drive Sales

Mrs. Fields retail cookie sales followed a stable, downward decline from before the start of the License Agreement and through the term of the License Agreement.



(JX 48 at p. 14)

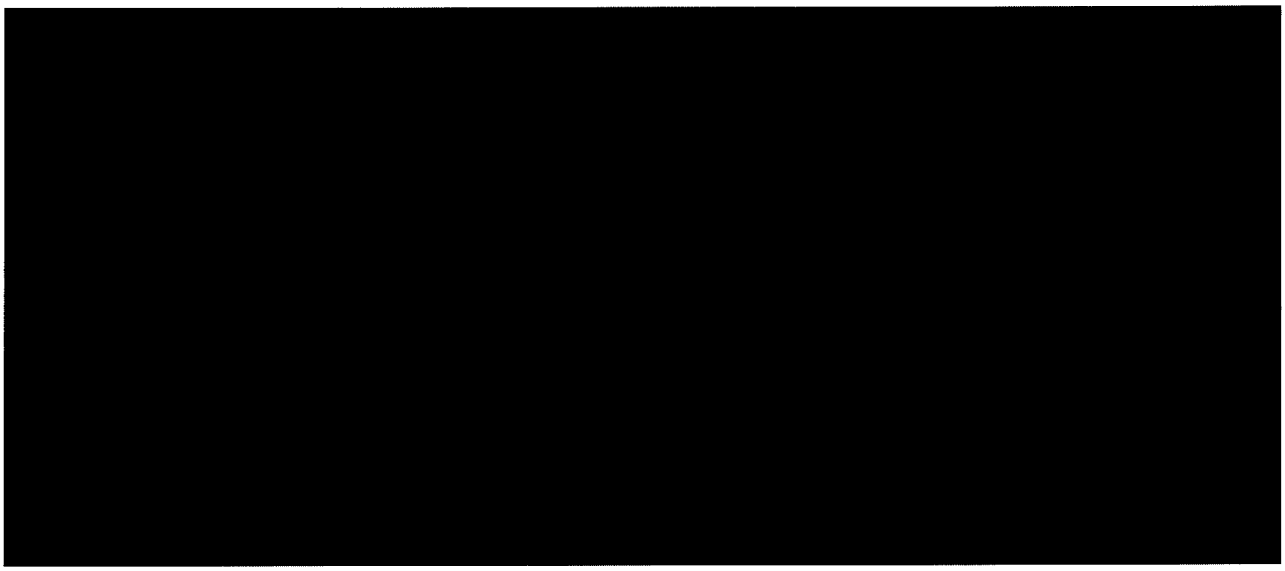
The reason for this decline was the failing Mrs. Fields brand and the inability of the brand to sustain sales velocity at retailers.

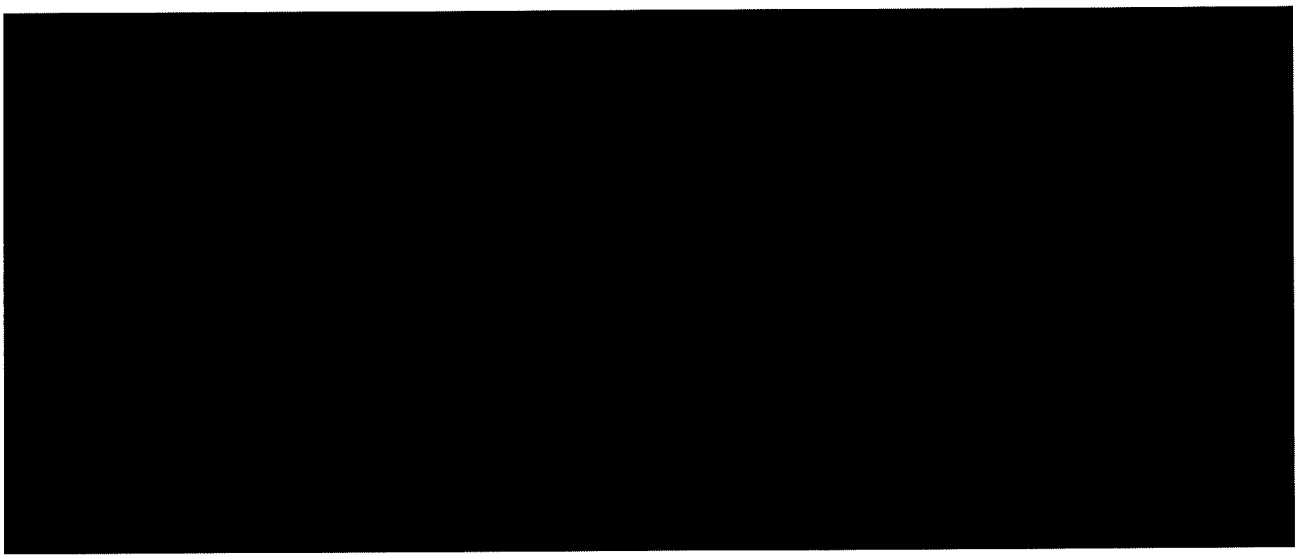
Interbake did everything within its power as a licensee (not a brand owner) to reverse the declining sales trend. These efforts included, for example:

- Marketing research and plans to understand Mrs. Fields customers and what might appeal to them
- New product innovation such as launching new flavors/SKUs
- Trade spend to drive sales
- Consumer marketing spending
- Slotting fees to expand distribution
- A dedicated sales force
- A dedicated brand manager

Interbake's efforts were able to reduce the rate of decline. But, ultimately, the damage to the brand caused by Mrs. Fields was too strong a force to counteract and sales fell.

In August 2015, Mrs. Fields' senior leadership put it bluntly (JX 352):





### M. Sales Fall to a Point Where the Retail Business is not Commercially Viable and Interbake Decides to Terminate the License Agreement

By the end of 2015, sales fell below the [redacted] threshold in the License Agreement to allow for termination. The business is not commercially viable at this sales level. In fact, other potential licensees approached by Mrs. Fields during this litigation realize this—no potential licensees approached by Mrs. Fields want anything to do with the brand. (JX 598; JX 608) Indeed, Mrs. Fields itself has considered and is considering discontinuing the retail business. (JX 11 at pp. 155-160) Because of the lack of commercial viability caused by the poor brand, Interbake made the prudent business decision to pursue termination of the License Agreement under both § 15(c)(iii) and § 15(c)(ix).

Interbake pursued termination in a reasonable way. Interbake made plans to replace the lost production and sales volume that would result from no longer selling Mrs. Fields cookies. These plans included new private label cookies that

could be sold to customers who had discontinued the Mrs. Fields cookies. These plans also included talks with [redacted] about expanding their existing contract manufacturing relationship to produce additional [redacted] branded cookies. Neither of these projects moved past the planning phase, but more importantly, there is no evidence that Interbake steered, or had intent to steer, customers away from Mrs. Fields cookies and toward these projects.

Interbake was reasonable in the way it approached Mrs. Fields about pursuing termination. Rather than immediately ceasing operations as allowed under the License Agreement, Interbake offered to work with Mrs. Fields over a period of months to transition the business. During the April 2016 Toronto meeting both Daryl Gormley and Kevin McDonough discussed with Mrs. Fields that Interbake wanted a cooperative transition of the business. (JX 4 at pp. 309-310; JX 10 at p. 247) Further, Interbake's written communications consistently expressed a desire to work with Mrs. Fields in transitioning the business in a way that would meet Mrs. Fields' needs. (JX 538; JX 569)

Interbake continued, and continues, to abide by all terms of the License Agreement and continues to make considerable financial investment in spend trade and consumer support to promote and sell the Royalty Bearing Products. Further, it has not reduced its sales force or sales efforts since the beginning of the

litigation. Finally, Interbake entered into and is abiding by the Standstill Agreement, which is still in effect.

## ARGUMENT

### I. INTERBAKE HAS THE RIGHT TO RESCIND AND TERMINATE THE LICENSE AGREEMENT

#### A. Mrs. Fields Fraudulently Induced Interbake to Enter into the License Agreement

The elements of a claim for common law fraud are: "(1) the defendant falsely represented or omitted facts that the defendant had a duty to disclose; (2) the defendant knew or believed that the representation was false or made the representation with a reckless indifference to the truth; (3) the defendant intended to induce the plaintiff to act or refrain from acting; (4) the plaintiff acted in justifiable reliance on the representation; and (5) the plaintiff was injured by its reliance." *Abry Partners V, L.P. v. F&W Acquisition LLC*, 891 A.2d 1032, 1050 (Del. Ch. 2006) (citing *DCV Holdings, Inc. v. Conagra, Inc.*, 889 A.2d 954 (Del. 2005).

In February 2012, approximately one month prior to the parties' execution of the License Agreement, Mrs. Fields provided to Interbake written disclosures for purposes of due diligence entitled "Mrs. Fields Famous Brands Organizational Overview." (JX 96) In this presentation, Mrs. Fields represented:

- "[redacted]

[redacted]" (JX 96 at IBF00058194)

- The Mrs. Fields brand is "[redacted]" (JX 96 at IBF00058187)
- [redacted]" (JX 96 at IBF0058187)
- "[redacted]" (JX 96 at IBF00058194)
- "[redacted]" (JX 96 at IBF00058194)

Further, Mrs. Fields represented strong sales of the retail cookies of [redacted] in 2010 and [redacted] in 2011. (JX 104 at Ex. D-3)

Interbake reasonably relied on Mrs. Fields' representations and based its decision to enter into the License Agreement on these representations. These representations were false and Mrs. Fields knew they were false when they were made.

*Franchise model was broken.* Contrary to what Mrs. Fields represented to Interbake, the economics of the Mrs. Fields franchise model were completely broken. Interbake learned during discovery that Mrs. Fields knew this prior to entering into the License Agreement with Interbake. Mrs. Fields knew that "[redacted]" (JX 110) A member of Mrs. Fields' Board of Directors testified that Mrs. Fields knew at this time that the economics of opening and maintaining a Mrs. Fields franchise made no sense to franchisees at this time. Franchisees could not sell enough cookies to stay

afloat. (JX 11 at 52) Mrs. Fields Senior Vice President remarked to his CEO on February 1, 2012 that [redacted] (JX 78) This is the exact opposite of the "[redacted]" for franchisees represented to Interbake. The broken franchise model was a major problem for the Mrs. Fields brand because, as Mrs. Fields admits, franchise stores were the primary connection of consumer to the Mrs. Fields brand. (JX 13 at pp. 33-34)

*The Mrs. Fields brand was poor and neglected.* Mrs. Fields knew before the License Agreement was executed that it had fundamental problems with its brand. Mrs. Fields' CEO stated in his November 2012 Board presentation that [redacted] (JX 134 at ZC003079) that Mrs. Fields had "[redacted]" (*Id.* at ZC003097) and that Mrs. Fields' brand had not been addressed in [redacted] (*Id.* at ZC003101). Mrs. Fields stated that [redacted]" and that [redacted]"" (*Id.* at ZC003100) To address these fundamental problems, Mrs. Fields' CEO recommended a brand equity

investment of [redacted] to "[redacted] [redacted] (*Id.* at ZC003123) Mrs. Fields failed to act on the advice of its CEO to invest in the brand, apparently because the proposals were too costly. (JX 11 at pp. 109-10)

*Mrs. Fields knew its recipes' tastes were bad in all channels, and especially in the retail channel.* Mrs. Fields represented to Interbake that its product was known as "[redacted]" (JX 96 at IBF00058187) and that "[redacted]" (*Id.* at IBF00058194). However, Interbake subsequently discovered that Mrs. Fields knew that the quality and taste of the retail cookies were a problem. Mrs. Fields' CEO explained that "[redacted]." (JX 78) A January 2012 Board presentation concluded that "[redacted]." (JX 76 at slide 3) Mrs. Fields also knew that the recipe for the retail cookie needed to be "[redacted]." (JX 98). Interbake thought it was getting a premium cookie recipe that was "delicious" and desired by consumers. Instead, Mrs. Fields gave Interbake a substandard cookie that Mrs. Fields itself thought needed a reformulation.

Interbake has been injured by its reliance on Mrs. Fields' false disclosures, misrepresentations and omissions. If Interbake had known the franchisee economic model did not work, the poor state of the Mrs. Fields brand, the neglect of the brand by Mrs. Fields, and the problems with the taste of the retail cookie formulas, Interbake would not have entered into the License Agreement. Interbake relied on Mrs. Fields' representations about the health of its brand and franchise business and the quality and taste of its cookies when it agreed to enter into the License Agreement, agreed to pay an [redacted] to Mrs. Fields, and agreed to pay to Mrs. Fields minimum royalty payments for the term of the License Agreement. Interbake's entrance into the License Agreement and sales of the Royalty Bearing Products has injured Interbake's relationships with customers.

Further, instead of attempting to sell cookies under an unsupported and failing brand, Interbake could have used its resources to develop and sell other products to its customers. This has caused Interbake to lose profits, lose opportunities, lose goodwill with customers, and to spend time and money on the Royalty Bearing Products in vain. Interbake requests that this Court rescind the License Agreement because it was fraudulently induced to enter the Agreement.

### B. Mrs. Fields' breached the License Agreement by failing to disclose materially adverse information

The elements of a breach of contract claim are (1) the existence of a contract, whether express or implied, (2) breach of an obligation imposed by that

contract, and (3) resultant damage to plaintiff. *VLIW Technology, LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

In the contract at issue here, the License Agreement, Mrs. Fields warranted that it "had no knowledge of any event, occurrence, fact, condition or change that is, or could reasonably be expected to become, individually or in the aggregate, materially adverse to (a) the business, prospects, condition (financial or otherwise) or assets of MRS. FIELDS, its goodwill, or Licensed Names and Marks, (b) the value or marketability of the Royalty Bearing Products, or (c) the ability of LICENSEE to consummate the transactions contemplated hereby, including but not limited to changes in the current customer base, knowledge of an impending or threatened loss of a material customer, and/or material changes to the Designated Distribution Channels." § 19(d)

In fact, Mrs. Fields knew of many materially adverse conditions that it failed to disclose to Interbake. These conditions were detailed in Mrs. Fields Board of Directors presentations and emails produced during discovery. Undisclosed materially adverse conditions include:

- Mrs. Fields had not invested in the Mrs. Fields brand in a decade. (JX 134).
- Mrs. Fields knew that "[redacted]" (JX 110). And because of this, the number of franchisee store locations had been falling and continued to fall during the License Agreement.

- Mrs. Fields had experienced wild swings in the profitability of the business caused by increased need for trade spend to maintain sales velocity. (JX 76).
- Mrs. Fields retail cookies had poor quality and taste. (JX 76, JX 78).
- The recipe for the retail cookie needed to be "[redacted]." (JX 98).
- Mrs. Fields was experiencing pressure from the introduction of premium private label cookies and deep retail discounts from key competitors, resulting in poor warehouse movement, reduced shelf space, and more frequent and deeper discounts to retailers. (JX 650).
- There were problems at major customers like [redacted] and [redacted]. (JX 118).
- The price of the Mrs. Fields retail cookie had "[redacted]" (JX 66 at slide 2).
- Mrs. Fields had not "[redacted] (JX 11 at 230).
- Mrs. Fields had declining sales in many of its channels. (JX 134).
- Velocity at [redacted] was [redacted] (JX 650 at slide 23).
- "[redacted]." January 2012 Board presentation at slide 32. (JX 252).

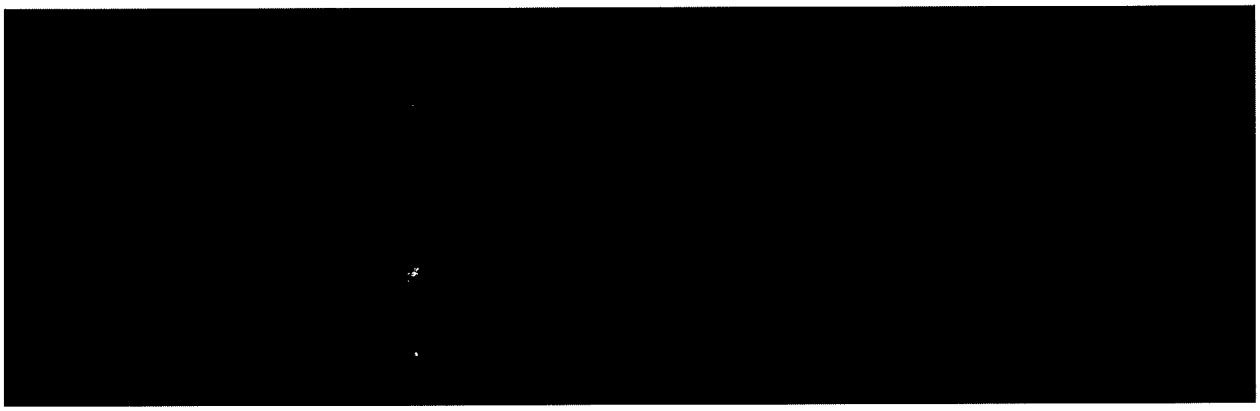
### C. Mrs. Fields breached the License Agreement by failing to support the Mrs. Fields brand

Mrs. Fields agreed that it would "continue to support the brand through advertising and marketing efforts consistent with past practice." Section 19(c). But Mrs. Fields knew that it had not meaningfully invested in its Mrs. Fields brand in over a decade and had no plans to start. And, absent investment, the brand would "[redacted]." (JX 134, ZC003100)

In November 2012, the same month Interbake started as licensee of the retail business, Mrs. Fields CEO Tim Casey made a major presentation to the Mrs. Fields Board of Directors (JX 134) about the state of Mrs. Fields. In his presentation, the CEO admitted the poor state of the Mrs. Fields brand, that it was Mrs. Fields' fault, and set forth a plan to revitalize the brand. Mr. Casey admitted:

- "[redacted]" (JX 134, ZC003079)
- The Mrs. Fields franchise store "[redacted]" (JX 134, ZC003090)
- "[redacted]." But the number of store fronts was falling. (JX 134, ZC003091)
- We have "[redacted]" (JX 134, ZC003097)
- Mrs. Fields brand has not been addressed in over 10 years. (JX 134, ZC003101)

Snapshots of slides from the presentation depict the dire situation:



[redacted]

To address these fundamental problems and support the brand, Mrs. Fields' CEO recommended a brand equity Investment of [redacted] to [redacted]" (ZC3123) Mrs. Fields did not take its CEO's advice to invest in the Mrs. Fields brand, instead deciding that the proposals were too costly. (JX 11 at p. 109-110)

Mrs. Fields likely will argue that it has not breached this provision because its future practice of not supporting the brand is consistent with its past practice of not supporting the brand. That is, Mrs. Fields has never supported the brand so its actions have been consistent—consistent failure to support the brand. But by warranting that Mrs. Fields would "[redacted]," absent some statement by Mrs. Fields to the contrary, Interbake reasonably expected that Mrs. Fields had been investing in the brand and that this investment would continue. Indeed, the due diligence presentation given to Interbake by Mrs. Fields represented that [redacted]

[redacted]." (JX 96) Mrs. Fields' subsequent failure to support the brand, then, was a breach of Mrs. Fields' obligation under § 19(c).

### D. Mrs. Fields breached the covenant of good faith and fair dealing

In the alternative, to the extent that the Court finds that Mrs. Fields has not breached the express requirements of the License Agreement, Mrs. Fields has breached the implied covenant of good faith and fair dealing, which supplies additional implied terms necessary to prevent the business purpose of the agreement from being frustrated that the parties would have agreed to had they given the matter explicit consideration during drafting, as required by the overall structure of the transaction and/or trade custom and practice in the relevant industry. Such implied terms relevant to this dispute include (to the extent not covered by the express terms of the License Agreement):

i. A licensor or brand owner would support the brand through investment in brand development and management.

ii. A licensor or brand owner would create and support strategies to differentiate its product in the marketplace, including segmentation, positioning, pricing, promotion, marketing, distribution, and innovation strategies.

iii. A licensor or brand owner would be a good licensing partner to its licensees, including implementation of an annual communications plan with its licensees, appointment of a licensing manager to ensure the success of the contractual obligations of the licensee, and cooperation in the development of products and packaging.

iv. A licensor would not interfere with business already approved by the licensor for the licensee to conduct, and thus preclude the licensee from sales it was making in accordance with the licensing agreement.

As will be shown at trial, Mrs. Fields has failed to support the brand despite its legal obligation to do so and the industry custom and reasonable expectation of Interbake that Mrs. Fields, the licensor and brand owner, would do so. At trial, Rhonda Harper, an expert in branding, licensing, product innovation, and marketing will testify that based on her review of the record, Mrs. Fields has failed to support the brand, resulting in significant brand decline both before and during the term of the License Agreement. This is a strong rebuttal to Mr. Anson who completely ignored Mrs. Fields' failures to assume his damage model. Mrs. Fields' failures included the lack of a branding program, a failure to understand what a brand is, failure to understand consumer behaviors and preferences, failure to invest in the brand, and failure to manage the brand. These failures led to a steep decline in brand equity and, not surprisingly, declines in sales across Mrs. Fields' business channels, including the retail channel.

Further, the evidence and testimony will show that Mrs. Fields, the licensor and brand owner, was a poor licensing partner. Mrs. Fields did not update its licensees regarding key learnings and brand strategy. Mrs. Fields did not hold regular meetings with its licensees. Mrs. Fields did not meet with licensees to review products lines, sales, or marketing initiatives.

Also, Mrs. Fields did not have a dedicated person to manage the licensing relationship. Instead, Mrs. Fields had a rotating number of unqualified persons assigned as the Interbake point of contact, along with a rotating slate of CEOs—seven so far during the License Agreement. The Mrs. Fields executive assistant assigned to Interbake admitted that the role was "[redacted]" and that a senior licensing expert was needed. (JX 1 at pp. 21, 28, 34)

In 2014, a Mrs. Fields strategic planning presentation expressly stated that Mrs. Fields [redacted]. (JX 179 at slide 11) Not surprisingly, In August 2015, Mrs. Fields informed its Board that "[redacted]" (JX 354).

This lack of focus by Mrs. Fields deprived Interbake of the business purpose of the License Agreement—sales of the Royalty Bearing Products. Had Mrs. Fields adhered to customary branding and licensing standards and practices, the Mrs. Fields brand would not have declined to the point of irrelevance, and Interbake would have made much higher sales of the Royalty Bearing Products. Because of Mrs. Fields' breaches, Interbake is entitled to rescission of the License Agreement and money damages.

### E. Interbake may properly and effectively terminate the License Agreement

Because of Mrs. Fields' material mispresentations and failure to support the brand, which caused decreased sales in the retail channel, Interbake has the right to

terminate under both § 15(c)(ix) and § 15(c)(iii) of the License Agreement. On April 5, 2016, Interbake met with representatives of Plaintiff to discuss the License Agreement and the state of the relationship, which discussion also included discussion of grounds for termination, including a discussion of Plaintiff's lack of support for the Mrs. Fields Brand. (JX 4 at pp. 53-54) On April 12, 2016, Interbake sent a letter to Plaintiff regarding termination of the License Agreement. (JX 538) Prior to sending the April 12th letter, Daryl Gormley of Interbake sent an email to Dustin Lyman stating that Interbake would be sending a termination letter, and Interbake hoped to work out a solution to transition the business. (JX 538) On May 4, 2016, Interbake sent another letter to Plaintiff regarding, among other things, termination of the License Agreement under § 15(c)(ix). (JX 569) As discussed below, Interbake may properly terminate the License Agreement.

**1. Interbake properly and effectively terminated under Section 15(c)(ix) of the License Agreement**

Section 15(c)(ix) allows Interbake to terminate upon 30 days written notice "If MRS. FIELDS (i) has made a representation or warranty in this Agreement that was not correct in any material respect at the time it was given; . . . or (iii) materially damages the value of the Licensed Names and Marks or the goodwill associated therewith, that directly renders the performance of this Agreement by LICENSEE commercially unviable (including but not limited to, a change that materially changes the market for the Royalty Rearing Products and/or materially

changes the cost structure of the Royalty Bearing Products) (each a "Material Program Change")." § 15(c)(ix)

Mrs. Fields made many representations and warranties that were materially incorrect. In § 19(d), Mrs. Fields warranted that it was not aware of any materially adverse conditions. The many materially adverse conditions hidden by Mrs. Fields were outlined above, including lack of brand investment, the broken franchise model, and various material problems with the sales of the Mrs. Fields cookies at retail. Because of these hidden conditions, Mrs. Fields knew that its historical sales representations [redacted] per year) were not correct in material respects. Yet Mrs. Fields said nothing.

Further, Mrs. Fields materially damaged the value of the licensed Mrs. Fields trademark and the goodwill associated with those marks, rendering Interbake's performance under the License Agreement commercially unviable. Although Interbake did everything in its power to increase sales of the Royalty Bearing Products, Mrs. Fields' lack of investment in the brands, poor brand management, lack of marketing efforts, and the subsequent decline of the Mrs. Fields brand caused sales to decrease to a point that continuing the business became commercially unviable.

Mrs. Fields' failure to support the brand resulted in poor sales velocity (the number of cookies sold per store per week), which in turn caused retailers to delist

the Mrs. Fields products. Failure to support the brand also resulted in Interbake needing to "buy" business at retailers with increasing levels of trade spend and promotional support. The increasing need for trade spend is indicative of a failing brand. The falling sales and high trade and promotional spend were changes to the market and cost structure, respectively, showing that the business is not commercially viable.

### 2. Interbake properly and effectively terminated the License Agreement under Section 15(c)(iii)

Section 15(c)(iii) provides either party the right to terminate "if LICENSEE fails to reach Net Sales of twenty million [redacted]) dollars per Contract Year." The plain language of the License Agreement makes clear that either party has the right to terminate under Section 15(c)(iii). This is made even clearer when 15(c)(iii) is read in context. Other provisions in Section 15(c) expressly identify the party with the right to terminate. Section 15(c)(iii) does not, showing that either party can terminate under § 15(c)(iii).

This interpretation is confirmed by the parties' negotiations that led to the signing of the License Agreement. Seth Monette and Kevin McDonough will testify that they each requested the protection of Section 15(c)(iii) to provide Interbake with a right to terminate if sales fell. When Interbake received the first draft of the License Agreement from Mrs. Fields, it included such a provision, Section 15(e)(iii). (JX 81)

Mr. Monette and Mr. McDonough's testimony will be corroborated by the fact that the previous [redacted] license agreement on which Mrs. Fields based the License Agreement did not contain a provision like 15(e)(iii) (15(e)(iii) became 15(c)(iii) in the final version). In fact, [redacted] (JX 14 at pp. 84, 91-93, 262; JX 17 at pp. 120-124; JX 81; JX 85; JX 73) From these facts, the only logical conclusion is that §15(c)(iii) was added to the form of the [redacted] agreement to create the first draft of the License Agreement because of Seth Monette's request to Mrs. Fields.

Interbake did everything within its power as a licensee (not a brand owner) to drive sales. These efforts included, for example:

- Winning new customers and new points of distribution
- Marketing research and plans to understand Mrs. Fields customers and what might appeal to them (JX 159, JX 162)
- New product innovation such as launching new flavors/SKUs (JX 42)
- Trade spend to drive sales
- Consumer marketing spending (JX 525)
- Slotting fees to expand distribution
- National and international sales force
- A brand manager
- Partnering with the USO to increase goodwill and drive sales
- The "Share your Hero" marketing campaign that Mrs. Fields recognized as very successful

Interbake's efforts were able to reduce the rate of decline. But, ultimately, the damage to the brand caused by Mrs. Fields was too strong a force to counteract and sales fell. By the end of 2015, sales fell below the [redacted] threshold in the

License Agreement to allow for termination. (JX 712) On April 12, 2016, within 15 days of the annual report to Mrs. Fields, Interbake sent a termination letter to Mrs. Fields and offered to transition the business as Mrs. Fields chose.[9]

## II. MRS. FIELDS' BREACHES OF THE LICENSE AGREEMENT DAMAGED INTERBAKE

Interbake will present the testimony of its damages expert, Vincent Thomas, to reasonably quantify the damage to Interbake from Mrs. Fields' breaches. Mr. Thomas will testify that his review of the record shows that Interbake was not able to generate level of sales it expected to generate because of Mrs. Fields' misrepresentations and failures to disclose material information, including failing to disclose that certain customers were on the verge of de-listing, that Mrs. Fields was artificially propping up sales to certain customers and that Mrs. Fields was not supporting the brand through advertising and marketing efforts. Mr. Thomas' opinion is that Interbake has suffered lost profit damages of approximately [redacted] for the period 2013 through 2016, and these damages are likely to increase to approximately [redacted] million if Interbake is forced to continue to operate under the License Agreement through the end of 2017.

[9] To the extent Mrs. Fields claims Interbake's notice was untimely under either section 7(b) or 15(c)(iii) of the License Agreement, Interbake contends that, at minimum, it substantially complied with the notice requirements. *See, e.g., Kelly v. Blum*, 2010 WL 629850 No. 4516-VCP at fn. 52 (Del. Ch. Feb. 24, 2010) (noting that substantial compliance is "that which, despite deviations from contract requirements, provides the important and essential benefits of the contract.").

## III. INTERBAKE DID NOT BREACH THE LICENSE AGREEMENT

### A. Interbake did not breach Section 15(d)(i)

Section 15(d)(i) states that "on any cancellation, termination, or expiration of this Agreement," "LICENSEE agrees to immediately pay to MRS. FIELDS any amounts due and earned through the date of termination and to return all MRS. FIELDS Protected Information, confidential documents and other material supplied by MRS. FIELDS to LICENSEE and agrees never to use, disclose to others, nor assist others in using such MRS. FIELDS Protected Information." "Protected Information" is defined in the License Agreement to include all of Mrs. Fields' recipes, formulations, systems, programs, procedures, manuals, confidential reports and communications, marketing techniques and arrangements, purchasing information, pricing policies, quoting procedures, financial information, and employee, customer, supplier and distributor data. The definition makes clear that "[i]nformation which is **independently developed by a Party**, or which was already in the possession of a Party prior to the date of this Agreement and which was **not obtained in connection with the transactions contemplated by this Agreement**, or **information which becomes publicly available . . . shall not be considered Protected Information** of the other Party hereunder." Further, the License Agreement makes clear that Mrs. Fields' "Protected Information" is

"confidential documents and other material **supplied by MRS. FIELDS to LICENSEE** [Interbake]." § 15(d)(i).

It appears that Mrs. Fields will argue that Interbake breached § 15(d)(i) by disclosing to [redacted] Interbake's sales information for selected customers. *See* Ex. 12 to Mrs. Fields' Motion to Amend (showing Interbake's 2015 and 2016 sales information on various customers). This is **Interbake's** Protected Information, not **Mrs. Fields'** Protected Information. This sales information is all dated ***after*** the start of the License Agreement, or post-November 2012. The License Agreement does not put any restrictions on what Interbake may choose to do with its own confidential information. Mrs. Fields did not "supply" this sales information to Interbake. It is clearly Interbake's information and not Mrs. Fields'. Thus, by the terms of the License Agreement, the information Mrs. Fields alleges was improperly disclosed was not Mrs. Fields' Protected Information, and therefore cannot support Mrs. Fields' breach of contract claim.

**B. Interbake met its audit requirements under Section 7(c)**

Section 7(c) of the License Agreement states:

> Licensee will make all of its **relevant financial books and records** available to Mrs. Fields or its designated representative at all reasonable times for review and audit by Mrs. Fields or its designee at any time during regular business hours on not less than 48 hours prior written notice....If an audit conducted by Mrs. Fields results in a determination that the Running Royalties paid Mrs. Fields are deficient (underpaid) by more than two percent (2%), Licensee will pay Mrs. Fields for the reasonable costs and expenses that it has

> incurred as a result of the audit. If pursuant to audits, the Running Royalties have been deficient by more than four percent (4%), this will be considered a material breach of this Agreement.

(emphasis added).

On June 1, 2015, Mrs. Fields sent a letter to Interbake requesting samples of the Mrs. Fields cookies, formulas, marketing materials, information regarding the distributors, and financial records regarding the gross sales of the Mrs. Fields' cookies. (JX 323) The letter requested a response by June 15, 2015. Interbake responded to the request on June 4, 2015 and stated that it would comply with the terms of the audit as set forth in the License Agreement. (JX 325)

Interbake heard nothing more on the request for the financial audit until November 16, 2015, when Mrs. Fields sent a letter requesting audit information and an onsite visit. (JX 402) The parties agreed on what information Interbake would provide and that Mr. Crystal could come to Interbake for a site visit in February 2016. At this time, and throughout the audit process, Interbake explained that the sales data for Mrs. Fields cookies were kept within Interbake's general ledger which also contained sales information for non-Mrs. Fields products. Therefore, although Interbake would give Mrs. Fields access to the Mrs. Fields data, under no circumstances would Interbake allow the auditor to review Interbake's full general ledger as such request was outside the scope of Section 7(c) of the License Agreement.

Interbake, through Tiffany Reeve, began sending Mr. Crystal sales information related to the Mrs. Fields cookies and responding to his repeated requests for more information before his site visit in February 2016. Interbake sent copies of invoices, purchase orders, payment remittances, price lists, and inventory roll forwards. The testimony will demonstrate that Interbake offered to allow Mr. Crystal to work with an independent auditor, KPMG, who conducted yearly audits of Interbake's general ledger. Interbake suggested that by working with KPMG, a company with permission to access Interbake's entire general ledger, Mr. Crystal would then have the comfort level he wanted since he could have carte blanche access to Interbake's entire general ledger. Mrs. Fields refused this offer.

When Mr. Crystal arrived for the audit on February 22, 2016, Interbake continued to provide him with all of the information he requested. During the audit, Mrs. Fields' executives mentioned that the auditor had found "[redacted]" (JX 472)

The testimony at trial will demonstrate that Interbake has complied with its requirements under Section 7(c) of the License Agreement, and that, to the extent any additional information is outstanding, it was information that was outside the scope of Section 7(c) and/or provided during discovery in this litigation.

### C. Interbake did not breach Section 8

Section 8 states in relevant part that "All Royalty Bearing Products shall be developed, manufactured, marketed, and sold as "premium" products consistent with MRS. FIELDS then existing image." Mrs. Fields' contention interrogatory response on this provision stated that:

> Interbake reduced the total sales of the Royalty Bearing Products by [redacted] percent from 2014 to 2015 and by over [redacted] percent from 2015 to 2016. Interbake did not develop, manufacture, market, and sell the Royalty Bearing Products as "premium" products, including with respect to the quality of the Mrs. Fields cookies, the sale of the Mrs. Fields cookies to a factor, and the changes in personnel assigned to work on the Royalty Bearing Products. Additionally, Mrs. Fields believes that Interbake may not have incurred the required slotting fees and/or trade spending in order to support the sales of the Mrs. Fields products.

(JX 36 at No. 8)

The evidence will show that Interbake developed, manufactured, marketed, and sold the Mrs. Fields retail cookies as "premium" products. Interbake used recipes provided by Mrs. Fields to bake the cookies, and Mrs. Fields approved the cookies, packaging, and marketing materials before they were used by Interbake. (*See, e.g.*, JX 683) Mrs. Fields itself said it best—when the Chairman of the Board characterized the retail cookie as "[redacted]," another Board member correctly noted that [redacted]." (JX 98) Interbake complied with Section 8.

Mrs. Fields' contentions about reduced total sales and insufficient slotting fees and/or trade spending are irrelevant to Section 8. Nothing in Section 8 requires Interbake to meet a sales target or spend a minimum amount on slotting fees or trade spend. In fact, prior to execution of the License Agreement, Interbake proposed deletion of Section 5(b) and corresponding Exhibit C from Mrs. Fields' draft License Agreement, and Mrs. Fields agreed to this deletion. (JX 99; JX 188) These provisions would have required Interbake to reach certain minimum sales amounts during each year of the License Agreement's initial five-year term. But they were deleted prior to execution, showing that there is no minimum sales requirement in the License Agreement.

With respect to trade spend and slotting fees, the story is similar. Tim Casey (CEO) and Neal Courtney of Mrs. Fields considered inserting language into the draft License Agreement that would have required Interbake to spend a minimum amount on advertising and marketing the Royalty Bearing Products. However, Mrs. Fields decided not to insert this requirement into the License Agreement because it would "[redacted]" and was "[redacted]." (*Compare* JX 83 *with* JX 104; JX 14 at pp. 101-104)

Despite the lack of a contractual obligation, Interbake spent heavily to increase the distribution and sales velocity of the Mrs. Fields cookies. Interbake spent [redacted] on slotting fees and consumer marketing

during the License Agreement. (JX 43 at Nos. 25 and 27) Interbake spent [redacted] in trade spend to retailers. *Id.* at 26 (citing JX642, JX 643, JX 644, JX 645) Even more importantly, Interbake utilized its existing relationships with retailers forged over years of private label cookie sales to put them to use for Mrs. Fields.

Thus, Interbake's conduct was at all times more than compliant with all requirements of Section 8.

**D. Interbake did not breach Section 9(a)**

Section 9(a) requires that Interbake "shall market Royalty Bearing Products as premium products or as is otherwise consistent with MRS. FIELDS' then existing image so that such marketing shall not reflect adversely upon Royalty Bearing Products, the good name of Mrs. Fields, or the Licensed Names and Marks." Interbake complied with Section 9(a) by only using marketing materials that were approved by Mrs. Fields under the approval provisions of the License Agreement. (JX 104 at Section 10) Mrs. Fields should not be heard to complain about Interbake's marketing when Mrs. Fields expressly approved the marketing.

Mrs. Fields argues that Interbake breached this provision by pitching customers on the superiority of a new line of cookies. Mrs. Fields' argument fails. Section 9(a) does not apply to the conduct Mrs. Fields complains of. Pitching

another line of cookies, even if true, is not the marketing of the Royalty Bearing Products. Thus, Section 9(a) simply does not apply.

Further, the License Agreement cannot be construed to forbid Interbake from pitching new lines of cookies to its retail customers because Interbake has been doing this since long before the License Agreement. Interbake is in all parts of the cookie business and Mrs. Fields was well aware of this. In fact, Interbake's relationships with retailers from its other lines of cookies was the main reason Mrs. Fields saw Interbake as an ideal licensing partner. (JX 14 at pp. 235-236)

Finally, the testimony will show that Interbake strongly marketed Mrs. Fields cookies to its customers, sought to change customers' minds when they wanted to delist Mrs. Fields, and only marketed alternative cookies when it was clear that Mrs. Fields was no longer an option. Thus, even if the License Agreement could be construed to require Interbake to market the Mrs. Fields cookies ahead of all its other cookies, Interbake complied.

**E. Interbake did not breach Section 11(b)**

Section 11(b) states that "LICENSEE recognizes the value of the goodwill associated with the Licensed Names and Marks and acknowledges that the Licensed Names and Marks and all rights therein and goodwill pertaining thereto belong exclusively to MRS. FIELDS." It is not clear how Interbake could have breached this provision. Mrs. Fields has not articulated its breach contention

regarding this provision (or any of the provisions). The provision does not require any action by Interbake. Interbake has not and is not asserting that it owns any of the Licensed Names or Marks. Interbake reserves the right to oppose any argument Mrs. Fields might later make related to this provision.

## IV. INTERBAKE DID NOT BREACH ANY OF MRS. FIELDS' PROPOSED IMPLIED TERMS OF THE LICENSE AGREEMENT

### A. No terms should be implied into the License Agreement

The implied covenant is "a limited and extraordinary legal remedy." *Nemec v. Shrader*, 991 A.2d 1120, 1128 (Del. 2010). It applies only in "rare" cases, and even then its application should be a "cautious enterprise." *Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 992 (Del. 1998). It may not be used to change contractual language, or retroactively to adjust the parties' rights and duties to what the plaintiff or the Court now deems "fair." *Klig v. Deloitte LLP*, 36 A.3d 785, 797 (Del. Ch. 2011).

Delaware law "emphasize[s] that courts will not rewrite contractual language covering particular topics just because one party failed to extract as complete a range of protections as it, after the fact, claims to have desired during the negotiation process." *Allied Capital*, 910 A.2d at 1033. This means that "the implied covenant does not provide relief . . . where the [plaintiff] asks the Court to imply a right for which it did not contract and should have foreseen." *Halpin v. Riverstone Nat'l, Inc.*, No. CV 9796-VCG, 2015 Del. Ch. LEXIS 49, at *38 (Del.

Ch. Feb. 26, 2015) (Ex. K). It "only applies to developments that could not be anticipated, not developments that the parties simply failed to consider." *Nemec*, 991 A.2d at 1126.

Importantly, this means that the implied covenant may "only be applied when the contract is truly silent with respect to the matter at hand." *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1032 (Del. Ch. 2006). Where the contract in question addresses the same subject matter as the plaintiff's implied covenant claim, that claim must fail as a matter of law, because "there is no gap for th[e] Court to fill." *Halpin*, 2015 Del. Ch. LEXIS 49 at *38.

Here, the parties clearly addressed their duties in the transition of the business from Mrs. Fields to Interbake. (JX 104 at Ex. H) They likewise addressed minimum sales as a basis for termination in the Agreement, and expressly chose not to include a schedule of minimum net sales thresholds in the Agreement. Finally, the License Agreement directly addresses the recognition of goodwill term that Mrs. Fields attempts to imply. (JX 104 at § 11(b)) Thus, the terms Mrs. Fields attempts to imply are subjects that the parties thought about at the time of entering into the License Agreement. Mrs. Fields cannot now attempt to turn back the hands of time and rewrite the License Agreement to include a requirements that Mrs. Fields could have but failed to request during negotiations.

Further, there is no evidence that the parties would have agreed to Mrs. Fields' proposed implied terms had they considered them at the time. For example, Interbake would not have agreed to vague terms like "reasonable best efforts" to "ensure a smooth transition." The provisions in the License Agreement pertaining to the transition from Mrs. Fields to Interbake are not this vague. (JX 104 at Ex. H) Nor are the existing provisions about sales. (JX 104 at § 15(c)(iii)) These existing terms of the Agreement are conclusive evidence by themselves that Interbake would never have agreed to Mrs. Fields' proposed implied terms.

### B. Interbake complied with each of the three terms Mrs. Fields attempts to imply into the License Agreement

Even if the Court decides that Mrs. Fields' three proposed terms should be implied into the License Agreement, Interbake has complied with these terms.

#### 1. Interbake used "reasonable efforts to cooperate with Mrs. Fields to ensure a smooth transition"

Interbake was reasonable in the way it approached Mrs. Fields about pursuing termination. Rather than immediately ceasing operations as allowed under the License Agreement, Interbake offered to work with Mrs. Fields over a period of months to transition the business. During an April 2016 Toronto meeting of the parties, both Daryl Gormley and Kevin McDonough discussed with Mrs. Fields that Interbake wanted a cooperative transition of the business. (JX 4 at

pp. 309-310; JX 10 at p. 247) Further, Interbake's written communications, including the termination letter, consistently expressed a desire to work with Mrs. Fields in transitioning the business in a way that would meet Mrs. Fields' needs. (JX 569; JX 538) After Mrs. Fields filed this suit, Interbake traveled to Chicago to meet with Mrs. Fields and attempt a business resolution.

Interbake continued, and continues, to abide by all terms of the License Agreement and continues to make considerable financial investment in to spend trade and consumer support to promote and sell the Royalty Bearing Products. Further, it has not reduced its sales force or sales efforts since the beginning of the litigation. Finally, Interbake entered into and is abiding by the Standstill Agreement, which is still in effect. Interbake remains ready to transition business as Mrs. Fields wants.

**2. Interbake did not "deliberately try to drive sales of Royalty Bearing Products below the [redacted] per year"**

Mrs. Fields argues that Interbake decided to tank the retail business because Mrs. Fields' decided not to sell the brand to Interbake and Mrs. Fields initiated an audit of Interbake's finances. Neither of these events played a role in Interbake's decision to pursue termination. In fact, the idea that Interbake would intentionally decrease its revenue by [redacted] and jeopardize its valuable customer relationships so it could invoke a termination clause and save at most [redacted]

[redacted] per year in minimum royalties makes no sense. Interbake, like any business, wanted to have higher revenue, not lower revenue. Mrs. Fields' concocted motivation falls flat.

Contrary to Mrs. Fields' illogical and unsupported accusations, Interbake's sales efforts intensified in 2015, particularly in the second half of 2015 when Mrs. Fields alleges Interbake was deliberately tanking.

Interbake chose to pursue termination because Mrs. Fields failed to support the brand and failed to meet its obligations under the License Agreement, which led to decreased sales and a commercially unviable business. Interbake did not decide to pursue an exit of the License Agreement until the first quarter of 2016, and promptly informed Mrs. Fields of its decision. (JX 538)

**3. Interbake did not "seek to destroy, diminish, or misappropriate for its own use the valuable goodwill associated with the Mrs. Fields brand and the pre-existing business Mrs. Fields transferred over to Interbake pursuant to the Licensing Agreement in 2012, including without limitation the longstanding business relationships with major retailers and the shelf space allocated by those retailers to Mrs. Fields' branded products"**

Mrs. Fields' claims that Interbake has sought to misappropriate Mrs. Fields' "longstanding business relationships with major retailers and the shelf space allocated by those retailers to Mrs. Fields' branded products." This claim is flawed for at least three reasons.

First, Mrs. Fields had no longstanding business relationships with major retailers. Mrs. Fields took over the retail business from its bankrupt previous licensee, Shadewell, in 2006. (JX 14 at pp. 16-18) Thus, Mrs. Fields had the business for only a few years before licensing it to Interbake; any relationships Mrs. Fields had were not long-standing relationships. Further, Mrs. Fields' damages expert alleges that "[redacted]" (JX 49) This further undercuts the premise that Mrs. Fields had long-standing shelf space that it licensed to Mrs. Fields. The numerous delistings experienced by the business immediately after the transition also show that whatever relationships Mrs. Fields thought they had were tenuous at best—likely because of the weak brand.

Second, none of the projects being considered advanced beyond the planning phase such that they could conceivably have harmed Mrs. Fields. Interbake was in the process of developing contingency plans to replace the lost production and sales volume that would result from no longer selling Mrs. Fields cookies. These preliminary plans included [redacted](e.g., [redacted]) that would occupy different shelf space and were aimed at different consumers than Mrs. Fields' branded cookies. These plans also included discussions with [redacted] about expanding the parties' existing contract manufacturing relationship to

produce additional [redacted] branded cookies. No cookie has been sold pursuant to the [redacted] or [redacted] projects cited by Mrs. Fields.

Third, Mrs. Fields ignores Interbake's successes in increasing distribution of the Mrs. Fields cookies and gaining shelf space. Interbake did everything it could to sell the Royalty Bearing Products: trade spend, consumer spending, slotting fees, and innovation such as launching new flavors/SKUs. Interbake more than doubled the number of customers and increased the number of points of distribution. (Number of Customers, JX 464, "Mrs. Fields Meeting Prep 3/31/16"; Total Distribution Points and Sales Per Distribution Point, JX 464, "Mrs. Fields Brand Health Assessment March 2016, p. 11 - Sales Comparison [MFLDS DRP M-CH-CP IN-WFF 8 oz.]). Even in 2016, as compared to when it began in 2012, the retail business had gained [redacted] new customers. *Id.* Interbake sought to grow the business, not diminish it.

## V. MRS. FIELDS RECOVERY IS BARRED BY INTERBAKE'S AFFIRMATIVE DEFENSES

### A. Mrs. Fields' own breaches of the License Agreement

"Under Delaware law, a party to a contract is excused from performance if the other party is in material breach of its obligations." *Henkel Corp. v. Innovative Brands Holdings, LLC*, C.A. No. 3663-VCN, 2013 WL 396245, at *7 (Del. Ch. Jan. 31, 2013) (quoting *BioLife Solutions, Inc. v. Endocare, Inc.*, 838 A. 2d 268,

278 (Del. Ch. 2003) as revised (Oct. 6, 2003) (internal quotation marks and other punctuation omitted).

As shown above, Mrs. Fields has breached at least Sections 19(c) and (d) of the License Agreement. These breaches preceded any alleged breach by Interbake. Therefore, any breaches by Interbake (and Interbake contends there were none) are excused by Mrs. Fields' prior breaches.

**B. Unclean hands**

"Under the unclean hands doctrine, a court of equity may close its doors to an applicant seeking equitable relief where the applicant has acted in violation of a fundamental concept of equity in connection with the matter in controversy. Courts applying this doctrine therefore consider whether the litigant's own acts offend the very sense of equity to which he appeals. Traditionally, application of the unclean hands doctrine rests within the Court of Chancery's sound discretion, unbound by restrictive formulas." *Reserves Dev. LLC v. Severn Sav. Bank.*, C.A. No. 2502-VCP, 2007 WL 4054231, at *18-19 (Del. Ch. Nov. 9, 2007) (citations omitted).

Here, Mrs. Fields should take none of its requested relief because of Mrs. Fields' inequitable actions. Mrs. Fields induced Interbake to license what it knew to be a dying brand and business by painting a false picture of brand health, delicious cookies, and a thriving franchise business. Mrs. Fields' many

misstatements and material omissions are detailed earlier in this brief. On these facts, Mrs. Fields' hands are unclean and therefore this court of equity some give Mrs. Fields none of its requested relief.

### C. Statute of Limitations, Waiver, Estoppel, and Laches

The statute of limitations in Delaware for breach of contract actions is three years. *See* 10 *Del. C.* § 8106. "Under Delaware law, a waiver is the voluntary and intentional relinquishment of a known right . . . and implies knowledge of all material facts, and intent to waive. A waiver "must be unequivocal." *James J. Gory Mech. Contracting, Inc. v. BPG Residential Partners V, LLC*, No. C. A. 6999-VCG, 2011 WL 6935279, at *3 (Del. Ch. Dec. 30, 2011) (internal quotation marks and citation omitted).

Equitable estoppel arises when a party by his conduct intentionally or unintentionally leads another, in reliance upon that conduct, to change position to his detriment. To establish equitable estoppel, the party claiming estoppel must demonstrate that: (1) they lacked knowledge or the means of obtaining knowledge of the truth of the facts in question; (2) they reasonably relied on the conduct of the party against whom estoppel is claimed; and (3) they suffered a prejudicial change of position as a result of their reliance. *Reserves Dev. LLC v. Severn Sav. Bank.*, C.A. No. 2502-VCP, 2007 WL 4054231, at *14 (Del. Ch. Nov. 9, 2007) (citation omitted).

> The equitable doctrine of laches derives from the maxim that "equity aids the vigilant, not those who slumber on their rights." The doctrine provides that a plaintiff's request for equitable relief may be barred where she has unreasonably delayed in seeking that relief, and such delay has prejudiced the defendant. Although there is no bright-line test, there are three generally accepted elements that the defendant must prove to show laches: (1) knowledge by the plaintiff of the basis for a legal claim; (2) the plaintiff's unreasonable delay in bringing the claim; and (3) resulting prejudice to the defendant. Simply put, like most equitable concepts, laches entails a balancing: has a plaintiff's dilatory approach to litigation disadvantaged the defendant so that equity should deny the plaintiff the right to a decision on the merits?

*Houseman v. Sagerman*, No. C.A. 8897-VCG, 2015 WL 7307323, at *5 (Del. Ch. Nov. 19, 2015) (citations omitted).

Mrs. Fields' claims are barred by these affirmative defenses because Mrs. Fields has known of the declining sales of the retail Mrs. Fields cookies and the quality of the retail cookie for years but failed to bring suit until April 2016. Sales in the retail channel immediately dropped after Interbake became a licensee. The parties dispute the cause for the drop in this litigation. But the fact that sales immediately dropped from Mrs. Fields' alleged run rate of about [redacted] per year to about [redacted] per year is undisputed. This drop occurred in November 2012, more than three years before Mrs. Fields brought this suit. With respect to the quality and taste of the cookies, Interbake has been baking the cookies using the same recipes provided by Mrs. Fields since October 2012. Mrs. Fields approved the taste of the cookies before any sales began. (JX 14 at pp. 119-120) To the extent Mrs. Fields' breach theories are based on Interbake selling Mrs.

Fields cookies and other private label cookies to the same retailers, Mrs. Fields has been aware of this since long before the License Agreement began. (JX 14 at pp. 235-236) Mrs. Fields' breach claims fail because Mrs. Fields waited too long to bring them and Interbake detrimentally relied on this delay.

## VI. MRS. FIELDS' DAMAGES CLAIMS ARE FLAWED AND DO NOT PROVIDE A REASONABLY CERTAIN MEASURE OF DAMAGES

Mr. Anson, Mrs. Fields' purported damages expert, has offered a flawed opinion. First, he presents a speculative case for damages to the overall brand as far out as the year 2036. He cannot link any Interbake actions to actual harm to Mrs. Fields, and instead his damages model assumes a harm that is not supported by the facts in this case, much less as far out as 2036.

Second, Mr. Anson will testify (and did in deposition) that he cannot offer opinions about Mrs. Fields' failures to support its brand, and his damages model thus mistakenly assumes that all decreases in retail sales are Interbake's fault. In fact, deterioration in brand equity is not a result of any breach or wrongdoing by Interbake. Mrs. Fields admitted in 2012 that it had not invested in its brand for over a decade, among many other problems it created with its brand. (JX 134). Mr. Anson's model ignores the key facts that any alleged brand damage was admittedly a result of Mrs. Fields' own conduct.

Third, because he had not read the entire record in this case, Mr. Anson made fundamental errors in his calculus—some merely because he was not aware

of the facts in the case, and some as simple as basic math errors (e.g., not annualizing sales numbers that, when pointed out to him, caused him to reverse his opinions).

Fourth, Mr. Anson committed so many errors in his calculus that Mr. Thomas submitted a 60-page rebuttal report detailing these errors and demonstrating that Mr. Anson's opinions are fundamentally flawed. For example, Mr. Anson projects lost sales for 2017 that are greater than any actual sales since 2012, and his projected lost sales for years 2018 and 2019 (long after the License Agreement would terminate of its own accord) are assumed to be greater than any actual sales that Mrs. Fields had since at least 2006, including when Mrs. Fields had the business.

Fifth, Mr. Anson presupposes damages, but does so only based on industry customs that he wants to read into the agreement, not any actual breach of the License Agreement that the parties had. In the end, his opinions are wholly speculative and cannot support any recovery.

## CONCLUSION

For the reasons stated above and to be established at trial, Interbake respectfully requests the Court enter an Order granting Judgment in its favor, granting the relief Interbake seeks in its pleadings, and denying all relief requested by Mrs. Fields.

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