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FLOORGRAPHICS, INC.

Plaintiff,

v.

**NEWS AMERICA MARKETING IN-
STORE SERVICES, et al.,**

Defendants.

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

Civil Action No.: 04-3500 (AET)

**Hon. Anne E. Thompson, U.S.D.J.
Hon. John J. Hughes, U.S.M.J.**

DEFENDANTS' TRIAL BRIEF

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This trial brief of the Defendants (collectively “News America Marketing”) will not discuss every issue in this case, or even most of the issues. Rather, in an effort to assist the Court as it prepares for trial, this brief will explain the structure of the in-store marketing business, and discuss three interrelated facts that are critically important with respect to every claim asserted by plaintiff Floorgraphics. First, Floorgraphics alleges that News America Marketing entered into “uneconomic” contracts with retailers, but in fact News America Marketing expected to, and did, make a profit on each of its contracts with retailers. Second, Floorgraphics relies heavily on inferences from inadmissible hearsay evidence, purportedly involving retailers and consumer packaged goods companies, in an effort to establish that News America Marketing engaged in the alleged tortious conduct. Third, Floorgraphics relies heavily on inadmissible hearsay because it has no admissible evidence that will satisfy the causation standard required to establish liability and recover damages—proof that alleged tortious acts by News America Marketing caused individual retailers and consumer packaged goods manufacturers to do less business with Floorgraphics.¹

INTRODUCTION

Floorgraphics and News America Marketing are competitors in the in-store marketing business—*i.e.*, they compete to place marketing materials (such as shelf signs, shopping cart ads, coupon dispensers, recipe holders and floor ads) on the shelves, shopping carts and floors of

¹ Another significant issue, on which the Court has already received briefs and reserved ruling, is whether evidence of a 1998 letter from Ken Kramer of Kmart (the “Kramer letter”), which Floorgraphics contends forever precluded Kmart from using any floor ad provider other than Floorgraphics, is inadmissible because (a) that letter is parol evidence, and (b) in any event, that letter is inconsistent with, and was superseded by, the August 2000 Addendum to the March 18, 1998 Floorgraphics/Kmart contract. Even if the Kramer letter was part of that contract, News America Marketing did not know of that letter when it negotiated and signed its July 24, 2001 contract with Kmart. News America Marketing cannot be liable for tortious interference with a contract whose existence it did not know about when the alleged tortious interference occurred. *Lightning Lube v. Witco Co.*, 4 F.3d 1153, 1170 (3d Cir. 1993); *DiGiorgio Corp. v. Mendez & Co.*, 230 F. Supp. 2d 552, 564 (D.N.J. 2002).

supermarkets and mass merchandisers (such as Kmart). Before an in-store marketing company may place marketing materials in a retailer's stores, it must get the retailer's permission, typically by signing a contract (akin to a lease) with the retailer and promising to pay the retailer for the right to place marketing materials in the retailer's stores. In-store marketing companies compete to enter into those exclusive contracts with retailers. After a marketing company has signed such a contract with a retailer, it contracts with consumer packaged goods companies, such as Procter & Gamble and Kraft, to place advertisements and promotional materials in that retailer's stores to market the consumer packaged goods companies' products.

Floorgraphics alleges a variety of claims, but they all have the same central thrust: according to Floorgraphics, News America Marketing allegedly interfered improperly with Floorgraphics' relationships with 25 retailers and 27 consumer packaged goods companies,² which supposedly caused a reduction in the volume of business that Floorgraphics did with those retailers and consumer packaged goods companies. Of course, there is a straightforward way to determine (1) whether News America Marketing engaged in the alleged tortious conduct with respect to those retailers and consumer packaged goods companies, and (2) whether the retailers and consumer packaged goods companies reduced their business with Floorgraphics because of that alleged conduct, or for other independent and perfectly legitimate reasons: *ask the retailers and consumer packaged goods companies why they decided to do less business with Floorgraphics*. But Floorgraphics has not done that, apparently because Floorgraphics concluded that it would not like their answers. Indeed, although the parties took approximately 50 depositions in this case, Floorgraphics did not depose *any* representative of any retailer or

² Appendix A to this brief contains a complete list of the retailers and consumer packaged goods companies whose business with Floorgraphics purportedly was harmed by News America Marketing's alleged tortious acts. Floorgraphics identified each of these companies in one of the counts of its Fourth Amended Complaint and/or in its answers to interrogatories.

consumer packaged goods company, and Floorgraphics' most recent list of its potential trial witnesses does not include any representative of a retailer or a consumer packaged goods company. Moreover, the representatives from retailers and consumer packaged goods companies who News America Marketing deposed and will appear at trial uniformly *contradicted* Floorgraphics' allegations. Each of these disinterested persons testified that when his company reduced its business with Floorgraphics, it did so for legitimate business reasons—for example, because News America Marketing offered better terms or was easier to deal with than Floorgraphics, or because a consumer packaged goods company concluded that floor advertising was not a cost-effective means of promoting its product, or that other marketing options (*e.g.*, television, radio, billboards, print media, etc.) were more cost-effective.

Floorgraphics will not call any witnesses from retailers or consumer packaged goods companies to support its claims about why those retailers and consumer packaged goods companies did less business with Floorgraphics. Instead, Floorgraphics apparently will attempt to prove its case largely through documents containing multiple levels of hearsay from which Floorgraphics will make assertions about what retailers and consumer packaged goods companies were thinking when they decided to do less business with Floorgraphics. But (1) the hearsay statements in those documents are often unclear or ambiguous, (2) many of those hearsay statements were made long before Floorgraphics' business with a particular retailer or consumer packaged goods company began to decline, and (3) many of the hearsay statements do not even refer to any entity's decision to do less business with Floorgraphics. As the Court stated at the recent hearing on the motions *in limine*, when a document contains a statement "by a person who is not a witness . . . how do we know if the person is telling the truth if it's being stated in some memo when the person is not under oath, not subject to cross examination?" Tr. Oct. 7, 2008, at 54; see also *id.* at 58-59 (the Court: a hearsay statement in a document "doesn't

prove anything” and “doesn’t seem probative”). Without testimony from the third parties who purportedly made the hearsay statements in the documents—and Floorgraphics will not offer any such testimony—there is no way for the jury to determine whether the statements are true, what the statements mean, and whether the statements are probative on the issues of causation and damages. Therefore, Floorgraphics cannot establish causation—there will be no direct evidence from any retailer or consumer packaged goods company that it did less business with Floorgraphics because of alleged tortious acts by News America Marketing. The cases require such proof in order to establish causation and damages, and Floorgraphics’ inability to provide it will compel a judgment in favor of News America Marketing.

BACKGROUND

The evidence will show that retailers are the key parties in the in-store marketing business, because the retailers own the shelves, shopping carts and floors in their stores where in-store marketing materials are placed. Before an in-store marketing company may offer its in-store marketing programs to consumer packaged goods companies like Procter & Gamble and Kraft, it first must obtain the contractual right to place marketing materials on the shelves, shopping carts, and floors of the retailers’ stores. Retailers’ contracts with in-store marketing companies typically are exclusive for a certain period of time; during the term of such a contract, a single in-store marketing company usually will have the exclusive right to place certain types of in-store marketing materials in a retailer’s stores, in exchange for making specified payments to the retailer.

Not surprisingly, the evidence also will show that retailers usually sign contracts with whichever in-store marketing company offers the most money. In fact, retailers often pushed News America Marketing and Floorgraphics into bidding against each other. The result was what one would expect in a bidding war: when News America Marketing offered a retailer more

money than Floorgraphics, the retailer contracted with News America Marketing; when Floorgraphics offered more money than News America Marketing, the retailer contracted with Floorgraphics. There is no evidence that any retailer contracted with News America Marketing even though Floorgraphics had offered to pay that retailer more than News America Marketing offered to pay.

Consumer packaged goods companies' marketing decisions are guided by two factors. First, consumer packaged goods companies can choose among a wide variety of alternative methods for marketing their products. In addition to in-store advertising, consumer packaged goods companies' marketing choices include television, radio, newspaper, magazine, billboard, and internet advertising. Consumer packaged goods companies' marketing choices vary from product to product and from year to year, based on numerous factors, including the effectiveness of marketing programs used in the past, the preferences of the decision-maker for a particular product (typically the brand manager), and the marketing budget for the product. Second, once a consumer packaged goods company decides to use an in-store marketing program, it then selects the retail stores in which it wishes to advertise. Thus, a consumer packaged goods company's decision on whether to purchase in-store marketing programs from a particular marketing company will depend on whether that marketing company has contracted with the retailers in whose stores the consumer packaged goods company wishes to place its marketing materials. The retailers are the fulcrum of the whole in-store marketing enterprise. Consequently, as News America Marketing contracted with more retailers, its in-store marketing programs naturally became increasingly attractive to consumer packaged goods companies.

Floorgraphics insists that the decline in its business was not caused by legitimate business reasons—such as the fact that News America Marketing won contracts with more retailers by fairly outbidding Floorgraphics. Instead, Floorgraphics contends that retailers and consumer

packaged goods companies did less business with it because of News America Marketing's allegedly tortious conduct. But News America Marketing simply and fairly outbid Floorgraphics for contracts with retailers. And, as noted above, Floorgraphics will not call a representative from any retailer or consumer packaged goods company who will testify that his or her company was influenced by any of the allegedly tortious conduct at issue in this case—for example, no one will testify that his or her company did less business with Floorgraphics because News America Marketing made defamatory statements about Floorgraphics. Instead, Floorgraphics proposes to offer numerous, often multiple, hearsay statements. But those hearsay statements are not admissible without a witness from the retailer or consumer packaged goods company to provide the necessary foundation, testify that the statements are true, and explain what those mostly ambiguous statements mean. Floorgraphics chose not to depose any such witnesses, and no such persons are named on its list of trial witnesses. News America Marketing, on the other hand, will offer the testimony of witnesses from several retailer and consumer packaged goods companies who will testify that they chose not to do business with Floorgraphics for entirely legitimate business reasons.

Finally, Floorgraphics cannot prove causation and damages, because it does not have any admissible evidence that any retailer or consumer packaged goods company decided to do less business with Floorgraphics because of allegedly improper conduct by News America Marketing.

KEY ISSUES AT TRIAL

A. News America Marketing Expected To, And Did, Make A Profit On Every One Of Its Contracts With Retailers.

As discussed above, contracts with retailers are the key to the in-store marketing business; without those contracts, an in-store marketing company cannot place consumer

packaged goods manufacturers' in-store marketing materials anywhere. Floorgraphics' central allegation about retailer contracts is that News America Marketing competed unfairly by making "uneconomic" bids for those contracts—by offering the retailers too much money.

There is a fundamental problem with Floorgraphics' argument: the evidence will show that News America Marketing expected to, and did, *make a profit* on every one of its contracts with retailers. In other words, the contracts were "uneconomic" as far as Floorgraphics was concerned because Floorgraphics did not want to pay as much as News America Marketing was willing to pay. But it is not tortious for a company to enter into a profitable contract simply because its competitor is unwilling to pay as much to get the contract. Indeed, "[a]ggressive pricing policies, though seemingly unfair to businesses unable to compete, may nonetheless be beneficial to the marketplace as a whole." *Ideal Dairy Farms v. Farmland Dairy Farms*, 659 A.2d 904, 935 (N.J. Super. Ct. App. Div. 1995).³

Because News America Marketing expected to, and did, make a profit on all of its contracts with retailers, there is no basis for Floorgraphics' assertion that News America Marketing's bids were "uneconomic." As a result, Floorgraphics cannot prove any of its claims concerning retailers.

B. Floorgraphics' Hearsay Evidence Must Be Excluded.

The central premise of Floorgraphics' claims is that News America Marketing improperly influenced retailers and consumer packaged goods companies. Nevertheless, Floorgraphics will not call a representative from a single retailer or consumer packaged goods company to testify about whether News America Marketing engaged in improper conduct with

³ Moreover, in *LaMorte Burns & Co. v. Walters*, 770 A.2d 1158 (N.J. 2001), the New Jersey Supreme Court endorsed the holding in *Ideal Dairy* that there was *no* tortious interference "even though it had been shown that [the defendant] had targeted [the plaintiff's] customers by setting prices so low as to be *unprofitable*." *Id.* at 1171 (emphasis added).

respect to that retailer or consumer packaged goods company, or about why that retailer or consumer packaged goods company decided to do less business with Floorgraphics. Instead, Floorgraphics will attempt to rely extensively on inadmissible hearsay to try to establish what News America Marketing allegedly told retailers and consumer packaged goods companies, as well as the effect that News America Marketing's allegedly improper conduct supposedly had on Floorgraphics' business.

Floorgraphics will attempt to introduce three principal types of inadmissible hearsay: (1) documents that were exchanged among third parties who were not deposed and will not testify at trial; (2) documents that were sent to Floorgraphics or News America Marketing by third parties who were not deposed and will not testify at trial; and (3) statements by Floorgraphics' own executives that purport to describe hearsay statements allegedly made by third parties who were not deposed and will not testify at trial. However, such hearsay statements—statements sometimes attributed to unidentified third parties—are inadmissible and not probative. Floorgraphics could have deposed the third parties who allegedly made the relevant statements, or included those persons on its witness list, but Floorgraphics did not do that—apparently because those persons would not have supported Floorgraphics' hypothesis as to why Floorgraphics lost business. See *Air Turbine Technology v. Atlas Copco AB*, 295 F. Supp. 2d 1334, 1344-46 (S.D. Fla. 2003) (“consumers’ statements” to Verbruggen, which “linked the false advertising to their decision not to purchase ATT’s product,” were “hearsay and not admissible” because the only evidence of those statements was Verbruggen’s deposition testimony; to be admissible, plaintiff should have “obtain[ed] such consumer statements directly from lost customers”).

Floorgraphics likely will argue that it is not seeking to admit the hearsay for the truth of the matters asserted therein, but the Court should reject this argument out of hand. As noted

above, Floorgraphics will not call a single witness from a retailer or consumer packaged goods company to testify that any alleged tortious act by News America Marketing caused that retailer or consumer packaged goods company to do less business with Floorgraphics. Floorgraphics should not be permitted to plug that large gap in its case with hearsay evidence. And the notion that jurors could consider the hearsay only for limited purposes cannot be taken seriously here. Floorgraphics likely will argue a David and Goliath story, attempting to portray News America Marketing's parent corporation, News Corporation, as the evil conqueror of small competitors. The sheer volume of hearsay that Floorgraphics proffers—an endless array of hearsay statements, many of them vague or incomplete, purporting to describe allegedly improper statements by News America Marketing—could lead the jury to conclude that there must be some truth to the hearsay, no matter how diligently the jury attempts to follow any limiting instructions. See *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (“the naïve assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction”).

There is a “strong preference of Anglo-American courts for live testimony, especially in a case that turns on . . . credibility.” *Griman v. Makousky*, 76 F.3d 151, 153 (7th Cir. 1996) (Posner, C.J.). The reason is simple: juries are able to determine facts and assess credibility much more accurately when they hear live testimony than when they are provided with hearsay statements attributed to people who do not testify. Resort to such hearsay evidence in lieu of live testimony is neither necessary nor appropriate in this case. Floorgraphics had every opportunity to depose witnesses from retailers and consumer packaged goods companies, or to include them as trial witnesses, but it did not do so. The Rules of Evidence do not permit Floorgraphics to remedy that deficiency by relying on hearsay.

C. Floorgraphics Cannot Prevail Unless It Proves That The Alleged Tortious Acts Caused Specific Retailers And Consumer Packaged Goods Companies To Do Less Business With Floorgraphics.

The absence of admissible evidence that any particular retailer or consumer packaged goods company did less business with Floorgraphics because of News America Marketing's allegedly tortious acts is fatal to Floorgraphics' case. Floorgraphics cannot recover unless it proves, on a *customer-by-customer* basis, that News America Marketing's alleged misconduct caused the damages that Floorgraphics allegedly suffered—that is, caused specific retailers or consumer packaged goods companies to do less business with Floorgraphics than those retailers or consumer packaged goods companies otherwise would have done.

The claims for tortious interference with existing contracts (counts 4 and 7) and tortious interference with prospective contractual relations (counts 5, 6, 8, and 9) are at the heart of Floorgraphics' case. This is not an antitrust case, where the focus is on conduct that allegedly lessened competition in a cognizable relevant market. Rather, the Third Circuit has stressed that *tortious interference* claims must be based on the effect of the alleged tortious acts on individual contractual and business relationships:

Unlike federal antitrust law, state tortious interference law is designed to protect competitors not competition. In this regard, it bases liability for competitors, in part, on the means of competition employed and *their effect on a single competitive interaction*.

Brokerage Concepts v. U.S. Healthcare, 140 F.3d 494, 533 (3d Cir. 1998) (emphasis added).

Floorgraphics' claims for tortious interference with its existing contracts with specific retailers (counts 4 and 7) require proof of causation and damages with respect to each retailer. To establish “that the [tortious] interference resulted in damage to the plaintiff[,]” the plaintiff must prove “the pecuniary loss resulting to [it] from the failure of the third person to perform the contract.” *Norwood Easthill Assocs. v. Norwood Easthill Watch*, 536 A.2d 1317, 1320 (N.J.

Super. Ct. App. Div. 1988). For example, in *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1014-15 (3d Cir. 1994), the Third Circuit held that the defendants were entitled to summary judgment on a claim for tortious interference with existing contracts because the plaintiffs “failed to identify with sufficient precision contracts . . . which were interfered with by the defendants” and “failed to identify an existing contract which was terminated because of the defendants’ actions.” See also *DiGiorgio Corp. v. Mendez & Co.*, 230 F. Supp. 2d 552, 561, 564, 566 (D.N.J. 2002) (to recover for tortious interference with an existing contract, plaintiff must show “that a contractual relationship existed,” that “defendant had knowledge of the existing contract” and had “specific knowledge of the contract right upon which his actions infringe,” and “that the defendant’s intentional and malicious interference resulted in a breach or loss of the contract”); *Coast Cities Truck Sales v. Navistar Int’l Transport*, 912 F. Supp. 747, 771-76 (D.N.J. 1995) (in granting summary judgment for the defendants on plaintiff’s claim that “defendants impeded its contractual relations with existing customers,” the court “examine[d] the alleged instances seriatim” with respect to each customer).⁴

The law is equally well settled that Floorgraphics must prove causation and damages on a customer-by-customer basis for its claims alleging tortious interference with prospective contractual relations with specific retailers and consumer packaged goods companies (counts 5,

⁴ Accord, e.g., *Global Crossing Bandwith v. OLS, Inc.*, 566 F. Supp. 2d 196, 213 (W.D.N.Y. 2008) (to survive summary judgment, a plaintiff “must . . . identify a particular contract that has been breached as an alleged result of [the defendant’s] wrongful actions” and must make an evidentiary “showing of some specific customers who were lost as a result of [the defendant’s] acts”); *F.E.L. Pubs. v. Catholic Bishop*, 1989 WL 100006, at *3-4 (N.D. Ill. Aug. 22, 1989) (there was no evidence of causation where plaintiff “presented *no* concrete evidence that *any* of the seventy-one potential victims ever received or even heard of the [defendant’s] ban letters” and plaintiff failed to present any evidence “that any entity terminated its relationship with [plaintiff] due to the [defendant’s] conduct”—the plaintiff “produced *no* affidavits from the potential victims”), *aff’d sub nom., Fitzpatrick v. Catholic Bishop*, 916 F.2d 1254, 1257 (7th Cir. 1990) (the plaintiff had no evidence “linking the reaction of any particular F.E.L. customer to conduct of the defendant”).

6, 8, and 9). The “difference” between tortious interference with an existing contract and tortious interference with prospective contractual relations “is simply the existence of a contract, as opposed to plaintiff’s reasonable expectation of an agreement.” *Coast Cities*, 912 F. Supp. at 772; see also *id.* at 772-76 (“examin[ing] the alleged instances seriatim” to determine whether defendants tortiously interfered with plaintiff’s prospective contractual relations). In order to prevail on such claims, a plaintiff must prove that the defendant’s tortious conduct caused specified third parties not to enter into prospective contracts that the plaintiff otherwise would have obtained. Thus, in *Printing Mart-Morristown v. Sharp Elecs.*, 563 A.2d 31 (N.J. 1989), the New Jersey Supreme Court evaluated the plaintiffs’ claim for tortious interference with prospective contractual relations in terms of the specific contract that plaintiffs sought but did not receive: “[o]nce Printing Mart received the offer to submit a bid [for a specific printing contract] and engaged in the bidding, there was established a relationship with the potential of leading to a profitable contract. It is that relationship that the law will protect from undue influence.” *Id.* at 39. Plaintiffs’ allegations that they had “submitted the lowest bid” for the contract, combined with their “nine-year working relationship with Sharp,” together supported the conclusion that plaintiffs “would have gained at least the printing component of the Sharp job,” and thus were “sufficient to meet the ‘causation’ component.” *Id.* at 41-42.

But when there is no evidence that the plaintiff would have received a particular contract, the defendants prevail. For example, in *Mandel v. UBS/PaineWebber*, 860 A.2d 945, 960 (N.J. Super. Ct. App. Div. 2004), the court affirmed summary judgment for the defendants on a claim for tortious interference with prospective contractual relations because “plaintiffs *failed to identify even a single client* who declined to deal with them or made fewer trades because of [defendant’s] calls.” (Emphasis added.) Likewise, in *Dun & Bradstreet Software Servs. v. Grace Consulting*, 307 F.3d 197 (3d Cir. 2002), the Third Circuit, applying New Jersey law,

affirmed judgment as a matter of law on a counterclaim for tortious interference with prospective business relationships. The Third Circuit held that because the counterclaimant “failed to produce sufficient evidence to prove that *any third parties* acted on” an allegedly tortious letter, it had not proven that there was a “reasonable probability that [counterclaimant] would have received the anticipated economic benefit in the absence of interference”—as a result, the counterclaimant “fail[ed] . . . to produce sufficient evidence as to causation.” *Id.* at 220 (emphasis added). *Alvord-Polk* is yet another example: the Third Circuit affirmed summary judgment on a claim for tortious interference with prospective contractual relations because “[p]laintiffs have failed to identify with sufficient precision . . . prospective contracts which were interfered with by the defendants. . . . Nor have they demonstrated a reasonable probability that they would have entered into prospective contracts with third parties but for defendants’ alleged interference.” 37 F.3d at 1015.

Other cases decided under New Jersey law are to the same effect. See *Edelson v. Ch’ien*, 2005 WL 3779146, at *9, 11 (N.D. Ill. Nov. 9, 2005) (applying New Jersey law) (ordering summary judgment for defendants where “no prospective investor ever stated that he or she declined to invest because of” the defendants’ conduct—plaintiff’s “speculat[ion] as to why prospective investors have given him the cold shoulder” and his expert’s “speculation and conjecture” about prospective investors’ reasons for not doing business with plaintiff were insufficient as a matter of law); *Eli Lilly & Co. v. Roussel Corp.*, 23 F. Supp. 2d 460, 494 (D.N.J. 1998) (plaintiffs “must ‘allege facts that, if true, would give rise to a reasonable probability that particular anticipated contracts would have been entered into’”); *Novartis Pharms. v. Bausch & Lomb, Inc.*, 2008 WL 4911868, at *7 (D.N.J. Nov. 13, 2008) (same); *Trans USA Products v. Howard Berger Co.*, 2008 WL 3154753, at *8 (D.N.J. Aug. 4, 2008) (dismissing tortious interference claim because plaintiff did not allege “that it had a reasonable expectation [of] a

continuing business relationship with certain customers” or that it “would have been able to execute sales to those identified customers”).

New Jersey law and Illinois law “have similar elements” with respect to claims of tortious interference with a prospective economic advantage. *Knierim v. Siemens Corp.*, 2008 WL 906244, at *16 (D.N.J. Mar. 31, 2008). In both states, the defendant is entitled to judgment unless the plaintiff proves “that it had a specific business relationship or expectancy that was defeated due to [the defendant’s] improper conduct.” *Republic Tobacco v. North Atlantic Trading Co.*, 254 F. Supp. 2d 1007, 1012 (N.D. Ill. 2003) (granting summary judgment because “North Atlantic fails to provide evidence of any *specific* customers who terminated or altered their relationship with North Atlantic as a result of any conduct by Republic” and “also fails to show damages tied to Republic’s conduct”). See also pp. 12-14, *supra* (collecting cases under New Jersey law); *F.E.L.*, 1989 WL 100006, at *2 (“F.E.L. must prove the existence of a valid business expectancy with a third party”—“specific third parties must be identified”); *Associated Underwriters v. McCarthy*, 826 N.E.2d 1160, 1169 (Ill. App. Ct. 2005) (“A plaintiff states a cause of action only if he alleges a business expectancy with a specific third party as well as action by the defendant directed towards that third party”).⁵

In sum, as Magistrate Judge Hughes held recently in this case, “[t]he critical question in establishing causation in a business torts case is whether plaintiff can identify specific admissible

⁵ Accord, e.g., *Dessert Beauty v. Fox*, 568 F. Supp. 2d 416, 429 (S.D.N.Y. 2008) (granting summary judgment because plaintiff “has not identified any third party or any prospective business relation with which Fox interfered by making false statements”—it is legally insufficient that “Fox spread ‘unfounded claims to the world by issuing a press release and posting statements on her website’”); *Pioneer Leimel Fabrics v. Paul Rothman Indus.*, 1992 WL 73012, at *13 (E.D. Pa. Mar. 31, 1992) (the “assumptions” of plaintiff’s CEO about why “certain customers stopped doing business with [plaintiff]” were “not sufficiently specific to link business loss to defendants” because “[o]ther factors may have contributed to [plaintiff’s] loss of business”), *aff’d*, 993 F.2d 225 (3d Cir. 1993) (table).

evidence in support of its contentions that wrongful conduct by the defendant *caused plaintiff to lose specific business* that it previously had or that it sought and had a reasonable expectation of obtaining.” *Floorgraphics v. News America Marketing*, 546 F. Supp. 2d 155, 177-78 (D.N.J. 2008) (emphasis added; citing *Printing Mart*). “[C]ausation must be demonstrated in this case by showing that decision-makers at the relevant [consumer packaged goods companies] and retailers were *actually influenced* by the alleged Defendants’ misconduct.”⁶ *Id.* at 180 (emphasis

⁶ The same causation principles apply to Floorgraphics’ claims for alleged violations of the Lanham Act (count 3), trade libel/business disparagement (count 10), unfair competition (count 11), trade secrets (count 12), and the New Jersey Computer-Related Offenses Act (count 2). See *Syncsort, Inc. v. Innovative Routines, Int’l*, 2008 WL 1925304, at *11 (D.N.J. Apr. 30, 2008) (granting summary judgment on Lanham Act claim because plaintiff “failed to advance any evidence in support of what is required of a plaintiff seeking [money damages]—actual customer reliance or deception”); *Labware, Inc. v. Thermo Labsystems*, 2005 WL 1541028, at *12 (E.D. Pa. June 29, 2005) (under the Lanham Act, when “a plaintiff seeks monetary rather than injunctive relief, the plaintiff must show ‘actual damages rather than a mere tendency to be damaged,’” and “[a]ctual damages cannot exist without a nexus between [the defendant’s wrongful conduct] and an adverse purchasing decision”) (quoting *Syngy, Inc. v. Scott-Levin, Inc.*, 51 F. Supp. 2d 570, 575 (E.D. Pa. 1999), *aff’d*, 229 F.3d 1139 (3d Cir. 2000) (table)); *Mayflower Transit, LLC v. Prince*, 314 F. Supp. 2d 362, 378 (D.N.J. 2004) (in trade libel/business disparagement action, plaintiff must show “special damages, i.e. pecuniary harm,” which requires evidence of “the loss of particular customers by name”; a trade libel claim predicated on a “general diminution in business” is not permitted unless there are “facts showing the plaintiff could not allege the names of particular customers who withdrew or withheld” their business) (quoting *Juliano v. ITT Corp.*, 1991 WL 10023, at *6 (D.N.J. Jan. 22, 1991)); *C.R. Bard, Inc. v. Wordtronics Corp.*, 561 A.2d 694, 696 (N.J. Super. Ct. Law Div. 1989) (“There is no distinct cause of action for unfair competition. It is a general rubric which subsumes various other causes of action”); *Coast Cities*, 912 F. Supp. at 786 (granting summary judgment on unfair competition claim for the same reasons summary judgment was ordered on tortious interference claims); *Rycoline Products v. Walsh*, 756 A.2d 1047, 1052 (N.J. Super. Ct. App. Div. 2000) (for a trade secrets claim, the plaintiff must prove that “the secret information was used by the competitor to the detriment of plaintiff”); *Syncsort*, 2008 WL 1925304, at *6-8 (no proof of causation where plaintiff did not offer any evidence that defendant’s possession of a trade secret caused plaintiff to lose profits—there was no evidence “of any customers who switched to” defendant’s products or “were given a discount” because of defendant’s possession of the trade secret); *P.C. Yonkers, Inc. v. Celebrations the Party & Seasonal Superstore*, 428 F.3d 504, 509 (3d Cir. 2005) (“no proof of conduct other than access has been shown, thus dooming” the claim under the New Jersey Computer-Related Offenses Act, “which require[s] proof of some activity vis-à-vis the information other than simply gaining access to it”); N.J. Stat. § 2A:38A-3 (plaintiff must be “damaged in business or property”).

added).

Floorgraphics alleges that its business with 25 specific retailers and 27 specific consumer packaged goods companies was adversely affected by News America Marketing's alleged tortious conduct. Consequently, Floorgraphics' total damages necessarily must be no more than the sum of the damages that it allegedly suffered in each of those individual relationships—the damages cannot exceed that amount. “The whole cannot be greater than the sum of its parts.” *Hauptmann v. Wilentz*, 570 F. Supp. 351, 380 (D.N.J. 1983). Given the absence of evidence from *any* retailers or consumer packaged goods companies that News America Marketing's alleged tortious acts caused those companies to do less business with Floorgraphics, the result should be clear. “[I]n law as in mathematics zero plus zero equals zero.” *Henderson v. Kennedy*, 253 F.3d 12, 19 (D.C. Cir. 2001).

Floorgraphics cannot evade the requirement that it must prove causation and damages on a customer-by-customer basis by simply proffering its sales figures before and after the alleged tortious conduct, and asking the jury to award the difference. See, e.g., *Scott Fetzer Co. v. Williamson*, 101 F.3d 549, 556-57 (8th Cir. 1996) (Minnesota law) (although there was evidence

The only remaining count (count 1) alleges violations of the federal Computer Fraud and Abuse Act. That statute limits recovery to “damage” (defined as “any impairment to the integrity or availability of data, a program, a system, or information,” 18 U.S.C. § 1030(e)(8)) or “loss,” which is defined as “the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense” and “revenue lost, cost incurred, or other consequential damages incurred *because of interruption of service.*” 18 U.S.C. § 1030(e)(11) (emphasis added). These statutory definitions mean that under the “plain language” of the statute, “lost revenue” is recoverable under the CFAA “*only* where connected to an ‘interruption in service.’” *Nexans Wires v. Sark-USA, Inc.*, 166 F. App'x 559, 562 (2d Cir. 2006). See also *P.C. of Yonkers, Inc. v. Celebrations! The Party & Seasonal Superstore*, 2007 WL 708978, at *4, 5 n.2 (D.N.J. Mar. 5, 2007) (following *Nexans* and holding that when not caused by an interruption in service, “loss of revenue, loss of good will, and diversion of [plaintiff's] customers...are not cognizable losses under the CFAA”); *Andritz, Inc. v. Southern Maintenance Contractor*, 2009 WL 48187, at *3 (M.D. Ga. Jan. 7, 2009) (alleged damages resulting from “lost revenue” because the defendant purportedly “copied Plaintiff's proprietary information and intellectual property and then used that information to steal customers” are “not recoverable under CFAA”).

“that [plaintiff’s] sales . . . declined during the time of Kirby’s wrongful conduct,” plaintiff “failed . . . to provide any evidence linking his decline in sales to Kirby’s wrongful conduct. Without such evidence, we cannot reinstate the jury’s award for lost profits”); *Kidd v. Bass Hotels & Resorts, Inc.*, 136 F. Supp. 2d 965, 970 (E.D. Ark. 2000) (“It is elementary that some precise business expectancy or contractual relationship [must] be obstructed”; plaintiff, who proved only “that his sales . . . went down during 1998 and 1999,” failed as a matter of law to establish that the defendant’s alleged tortious conduct caused the decline); *Pioneer Leimel Fabrics*, 1992 WL 73012, at *14 (a company’s purported lost sales cannot be extrapolated from its experience with a single customer). Without evidence of a causal link between News America Marketing’s alleged acts and the alleged harm that Floorgraphics suffered in its relationships with specific retailers and specific consumer packaged goods manufacturers, there is only “a coincidence in timing,” which is a patently insufficient basis for the imposition of liability. *Fitzpatrick*, 916 F.2d at 1257.

The requirement that there be a causal link is particularly important in this case, where Floorgraphics contends that the same alleged tortious conduct by News America Marketing caused Floorgraphics’ floor ad business to decline starting in 2003, but somehow did not adversely affect Floorgraphics’ sales of its other in-store marketing programs until 2005, two years later. Floorgraphics obviously cherry-picked the different starting dates in calculating damages for a related part of its business not because the evidence of causation is any different, but because that cherry-picking would maximize its claims. See *R.S.E., Inc. v. Pennsy Supply*, 523 F. Supp. 954, 967-68 (M.D. Pa. 1981) (rejecting plaintiff’s damages model because plaintiff offered “specious reasons” for using two different years as the “base year” for measuring lost profits in two different segments of its business); *In re Aluminium Phosphide Antitrust Litig.*, 893 F. Supp. 1497, 1506 (D. Kan. 1995) (rejecting an expert’s before-and-after damages opinion

because, among other reasons, the expert's selection of a "normative period" from which to measure damages was "arbitrary").

Finally, to ensure that the jury bases its verdict on the evidence pertaining to Floorgraphics' relationship with each retailer and consumer packaged goods company, the court should exercise its discretion under Rule 49(a) to require the jury to return "a special verdict in the form of a special written finding on . . . issue[s] of fact." Fed. R. Civ. P. 49(a). Jurors should be asked, for each retailer and consumer packaged goods manufacturer, (a) whether that company did less business with Floorgraphics because of News America Marketing's alleged wrongful conduct, and (b) if so, what damages Floorgraphics suffered with respect to that company. The Third Circuit has "emphasize[d] the advisability of submitting issues to the jury on special interrogatories." *Eichmann v. Dennis*, 347 F.2d 978, 982-83 (3d Cir. 1965). A special verdict has

several advantages: (1) it enables the trial judge to frame the issues and to relate his instruction to those issues; (2) the instructions as thus related to the issues serve as a more informative guide to the jurors; (3) any confusion in the minds of the jurors from a misunderstanding of the law or its application is readily detected; (4) the tendency of the less conscientious juror to concur in a compromise verdict is minimized; (5) the trial judge is enabled to ascertain the basis of the jury's decision and, if erroneous, to take such measures as may be necessary to correct the verdict.

Id. The benefits of special verdicts are particularly evident in "lengthy multi-issue cases such as this one." *Jamison Co. v. Westvaco Corp.*, 526 F.2d 922, 934-35 (5th Cir. 1976) (reversing and remanding for new trial "on all issues" because "the district court's use of a general verdict leaves us no alternative"). Special interrogatories to the jury help avoid "'confusion,' 'appellate uncertainty,' and 'additional proceedings.'" *Id.* at 935. "In a complicated case such as this, the special interrogatory device localizes and focalizes the specific problems and issues whereas a general verdict often permits improper jury meandering at trial." *Id.*

CONCLUSION

In sum, News America Marketing obtained contracts with retailers through fair, competitive bidding. News America expected to, and did, make a profit on every one of its contracts with retailers. Moreover, the law requires Floorgraphics to prove causation and damages as to each retailer and each consumer packaged goods manufacturer that purportedly did less business with Floorgraphics because of News America Marketing's alleged tortious acts. But Floorgraphics has no such evidence. It will not offer testimony from any representative of a retailer or consumer packaged goods manufacturer that News America Marketing engaged in tortious conduct with respect to that retailer or consumer packaged goods company. Nor will Floorgraphics offer testimony from any retailer or consumer packaged goods company explaining why that retailer or consumer packaged goods company reduced its business with Floorgraphics. Finally, the hearsay statements on which Floorgraphics relies are plainly inadmissible.

Respectfully submitted,

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Services LLC and News America In-Store LLC

Dated: February 20, 2009

APPENDIX

Retailers

A&P
Ahold
Albertson's
American Stores
Bashas'
BI-LO
Brookshire Brothers
Bruno's
CB Ragland
Food Lion (Kash n Karry)
Foodtown
(G&R) Felpausch
Houchens
Kmart
Kroger
Penn Traffic
Piggly Wiggly
Price Chopper
Richfoods
Roundy's
Safeway
Stater Brothers

SuperValu

Winn-Dixie
W. Lee Flowers

Consumer Packaged Goods Companies

1-800-Contacts
Alberto-Culver
Alcone Marketing
Allied Domecq
Campbell's Soup
Clorox
ConAgra
Cumberland Packing
Gardenburger
General Mills
Georgia Pacific
Hershey's
Hormel
Huhtamaki
J. Walter Thompson
Kellogg's (including Keebler)
Kimberly-Clark
Kraft-Nabisco
Masterfoods (including M&M Mars)
Michael Angelo's
Nestle
Pepsico (including Frito-Lay, Quaker, and Tropicana)
Procter & Gamble (including Duracell and Gillette)
Schering Plough
Schick
Smuckers
Unilever (including Best Foods and Lipton)