IN THE COURT OF COMMON PLEAS
COUNTY OF PHILADELPHIA
CIVIL TRIAL DIVISION

BBB Industries, LLC	:	**August Term, 2016**
Plaintiff	:	**No. 01387**
	:	
v.	:	**Commerce Program**
	:	
Cardone Industries, Inc.	:	**Control No. 19050151**
Defendant	:	

ORDER

And now, this 11th day of September, 2019, upon consideration of Defendant Cardone Industries, Inc.'s Motion for Summary Judgment on Plaintiff's Failure to Present Admissible, Non-Speculative Evidence of Damages, and Plaintiff BBB Industries, LLC's responses thereto, it is hereby **ORDERED** and **DECREED** Defendant's Motion for Summary Judgment on Plaintiff's Failure to Present Admissible, Non-Speculative Evidence of Damages is **GRANTED**.[1]

BY THE COURT

RAMY I. DJERASSI, J.

[1] This court has reviewed both the Expert Report of Joseph W. Lesovitz and his Supplemental Expert Report and other documents of record. We find the evidence

and particularly Mr. Lesovitz's reports, considered together or separately, cannot establish requisite causation. By this we mean the evidence does not establish a reasonably certain basis on which a fact finder may plausibly calculate damages for lost profits or reasonable royalties. There are many variables at play in NAPA purchasing decisions that are outside the pricing opinions of Mr. Lesovitz. His reports are fatally burdened by the absence of any evidence from NAPA itself. For whatever reason, and certainly not by court order, NAPA employees were not subject to interrogatories, document production or depositions in this case. The result are infinite variables on why and how NAPA made its purchasing decisions between BBB and Cardone.

Put another way, the record establishes many "proximate causes" for the market choices made by NAPA. Competition between BBB and Cardone for NAPA's business was not just about price points such as back end rebate percentages or FOTAB discounts. It was also about market share. BBB and Cardone each compete for exclusivity at NAPA's nine divisions. In this business rivalry, other points of competition also matter. Quality control, supply integrity, jobber preferences, auto shop preferences, are all factors favoring one or the other. But the record is silent on whether these factors are assumed to be equal. And then, if they are factored differently--- which is more important to NAPA? Indeed, the record is silent on the content of NAPA's business strategy in its power steering purchases, and the ways NAPA implemented its strategy to manipulate one against the other.

In *Delahanty v. First Pa. Bank*, 464 A.2d 1243, 1258 (Pa. Super. Ct. 1983), the seminal Pennsylvania case on lost profits, Edmund Delahanty owned a used car dealership which he collateralized. In return Mr. Delahanty received a loan from First Pennsylvania Bank in order to form a new dealership with a different business plan. Within seven months, however, the bank called in the loan by surprise and Mr. Delahanty was forced to liquidate his original dealership to cover. In doing so, Mr. Delahanty lost both his new dealership and his old one too. He sued First Pennsylvania for two types of damages. The first was for "anticipated profits" lost by the new dealership. The second was for lost profits caused by the collapse of his original dealership.

Addressing the new dealership's "anticipated profits," the *Delahanty* Court denied damages because "the basis for estimations and projections" was not established in the record. For example, an assumption that profits would increase at a rate of ten percent per year was not supported by evidence. *Id.* at 1260.

As for Mr. Delahanty's original dealership, the court affirmed damages for lost profits because sufficient evidence was in the record to establish with "reasonable certainty" a basis to award damages. These consisted of testimony and exhibits showing Mr. Delahanty's personal income losses. *Id.* at 1262.

In summary, as first stated in *Delahanty,* the rule is to allow tort damages for lost profits where, 1) there is evidence to establish them with reasonably certainty, and 2) there is evidence to show that they were the proximate consequence of the wrong. *Id.* at 1260.

On summary judgment review, without any evidence from NAPA personnel, a jury can only speculate that a particular trade secret misappropriation was a proximate cause for a particular NAPA purchasing decision. Without a narrowing of variables through evidence from NAPA, an infinite range of factors can be reasons for NAPA's purchasing decisions.

This is not to suggest that we are unmindful of doctrine that holds that "[w]here substantial damage has been suffered, the impossibility of proving its precise limits is no reason for denying substantial damages altogether." *Spang and Co. v. U.S. Steel Corp,* 545 A.2d 861, 867 (Pa. 1988) *quoting* 5 WILLISTON ON CONTRACTS, REV. ED. § 1345, at 3776. Indeed, where an amount can be fairly estimated, "a recovery will be sustained even though such amount cannot be determined with entire accuracy" *Spang,* at 866-867 *quoting Osterling v. Frick*, 131 A. 250 (Pa. 1925). Given Pennsylvania's liberal approach to damages, we understand this may mean that if *any* award is possible, damages may be granted.

Nonetheless, even under a formulation awarding money to BBB for *any* damage caused by misappropriation, it cannot be done on the evidence in this case. Without hearing from NAPA, it's all guesswork.

Finally, we note that Cardone's alleged trade secret misappropriation is presently being used by BBB as a defense in Texas under the unclean hands doctrine. BBB's inability to prove damages in this case is not a finding on the merits of this defense against Cardone. It may be that evidence from NAPA emerges in Texas that would have been useful here, but if so, it will be after discovery has closed here and will be applied in Texas according to the rules of the Lone Star State.