IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC09-1277
L.T. No.: 4D-07-3383

MARC E. BOSEM, M.D., MARC E. BOSEM, M.D., P.A.
d/b/a CORRECT VISION LASER INSTITUTE,
a Florida corporation,

Petitioners,

v.

MUSA HOLDINGS, INC. d/b/a EYEGLASS WORLD, a Florida
corporation, THE LASER VISION INSTITUTE, L.L.C.,
and MARCO MUSA, individually,

Respondents.

RESPONDENTS' ANSWER BRIEF ON MERITS

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INTRODUCTION

Petitioner, MARC E. BOSEM, M.D. will be referred to herein individually as "DR. BOSEM." Petitioner, MARC E. BOSEM, M.D., P.A., d/b/a CorrectVision Laser Institute, a Florida corporation, will be referred to herein as "BOSEM, P.A." "DR. BOSEM" and "BOSEM, P.A." will from time to time be collectively referred to as either "Petitioners" or "BOSEM".

Respondent, MUSA HOLDINGS, INC. d/b/a Eyeglass World, a Florida corporation, will be referred to herein as "MUSA". Respondent, MARCO MUSA, will be referred to herein as "MARCO". Respondent, THE LASER VISION INSTITUTE, L.L.C., will be referred to herein as "LVI". "MUSA", "MARCO" and "LVI" will from time to time be collectively referred to as "Respondents".

References to the Record on Appeal will be prefixed by the symbol "R" followed by the volume and page number of the Court's "Index to Volume on Appeal Appellate Division Civil", and the Amendment thereto. Trial exhibits will be referenced as "P.X" or "D.X." followed by the exhibit number, with "P.X." referring to Plaintiffs' trial exhibits, and "D.X." referring to a Defense exhibit.

STATEMENT OF THE CASE AND FACTS

Introduction. The appeal before this Court can best be described as Petitioners' attempt to take a second bite at the proverbial appellate "apple" by pursuing two separate successive appeals on the same issues, at two separate and distinct appellate levels. Indeed, although Petitioner only sought review by this court on a *single narrow* issue regarding prejudgment interest under Florida law, Petitioners have now jammed two additional issues into their initial brief, both of which have already been rejected by the trial court and the district court. However, for the reasons set forth in a contemporaneously filed Motion to Strike, neither the Florida Constitution, Florida law, nor the Rules of Appellate Procedure authorize Petitioners to pursue these additional issues. Nevertheless, in the event this Court considers Petitioners additional arguments during its review, a more thorough examination of the record is necessary.

Case Facts. Although portrayed in a different light by BOSEM, the salient facts of this case stem from a failed good-faith negotiation effort to form a business relationship between the parties. The petitioners in this appeal consist of an ophthalmologist who specializes in LASIK eye surgery, DR. BOSEM, and his medical practice, BOSEM, P.A.

DR. BOSEM is licensed to practice ophthalmology in Florida and, at all times material to this case, practiced exclusively

in Broward County, Florida. MARCO, one of the respondents herein, is also in the LASIK vision correction business through his company, LVI, which has nationwide office locations offering LASIK eye surgery treatment.

Around the Spring and Summer of 2000, MARCO and DR. BOSEM were engaged in negotiations regarding DR. BOSEM's potential employment with LVI as one of its LASIK eye surgeons. The negotiations became substantial and critical in and around May of 2000. Ms. Elizabeth Bolivar, who was MARCO's longtime personal assistant, served as the conduit through which proposed contracts and messages were exchanged between the parties. *See, e.g.,* (R. at vol. 31, pp. 147, 154, 157; vol. 33, pp. 326, 328; vol. 34, p. 610-11; vol. 35, p. 718); *see also* (R. at vol. 32, p. 328; vol. 35, pp. 718, 720). Importantly, **none** of the proposed contracts contained any express prohibition against using DR. BOSEM's name and/or likeness in LVI's advertising. Instead, the only provision relating to LVI's marketing related to LVI's use of BOSEM, P.A. in connection with external advertising. (P.X. 1-3).

As a result of forward momentum in the negotiations, DR. BOSEM sat for a photo shoot. The photo shoot was arranged to facilitate the taking of photographs of DR. BOSEM to be used in LVI's marketing materials. DR. BOSEM also prepared a written biography for LVI to use in connection with said advertisements.

See (R. at vol. 37, pp. 981-82, 984-85; R. at vol. 35, pp. 707, 736); *see also* (R. at vol. 37, pp. 981-82, 984-85).

Thereafter, Ms. Bolivar communicated with DR. BOSEM whom, she thought, indicated that he had executed the final iteration of the proposed contract, and placed the same in the mail for delivery to LVI. Ms. Bolivar testified at trial that she also understood DR. BOSEM to consent to the publication of marketing material using his photograph and biography.

As such, Ms. Bolivar transmitted these messages to MARCO who, in turn, placed orders to purchase marketing brochures. (R. at vol. 37, pp. 964-65, 982). The marketing brochures were intended to be used primarily as an internal customer pamphlet (*i.e.*, the brochures would be present at an LVI store for the customer to take, or would be mailed to a potential LVI customer upon specific request). These internal brochures bore the names and likenesses of a collage of **nine** LASIK physicians employed by LVI, including DR. BOSEM. (R. at vol. 37, p. 980-81); (P.X. 19).

Additionally, with the full expectation that DR. BOSEM would be joining LVI's team of LASIK eye surgeons, and to announce the grand opening of an office in Sunrise, Florida, LVI prepared newspaper print ads for publication. These ads were to be inserted into the July 2000 Sunday editions of the Sun-Sentinel and Miami Herald newspapers (the internal marketing brochures and newspaper ads will collectively be referenced as

the "Advertisement"). (R. at vol. 37, pp. 980-81).

The newspaper inserts announced the grand opening of LVI in Sunrise, Florida, and identified DR. BOSEM as one of two qualified surgeons at that particular office location. (R. at vol. 37, p. 982). The newspaper insert included the laudatory biography **written by DR. BOSEM** along with the biography of another LVI physician. (R. at vol. 35, p. 716). The Advertisement **did not reference BOSEM, P.A.** (R. at vol. 35, p. 794); see also (P.X. 7, 26).

Though an executed contract was not received from DR. BOSEM at the time the Advertisement was printed, LVI was operating under the verbal agreement Ms. Bolivar believed she had received from DR. BOSEM. LVI had to place the orders for the Advertisement at that point (*i.e.*, before the executed contract arrived by mail) in order to timely and efficiently advertise the grand opening of its new location.

However, days after the first newspaper advertisement ran, DR. BOSEM sent a letter (the "Letter") to MARCO and LVI demanding that LVI cease advertising his name and likeness in connection with LVI's operations until such time as a contract could be finalized. (R. at vol. 35, p. 724); *see also* (D.X. 3). In light of the consent LVI believed was obtained, receipt of the Letter was confusing. Nevertheless, in an effort to accommodate DR. BOSEM's request, MARCO immediately contacted the

newspaper agencies to retract the advertisements. Unfortunately, however, due to the late date of the Letter, there were no practical means by which either newspaper could guarantee that the inserts would not be included in the following weekend's Sunday edition. (R. at vol. 37, pp. 986-88, 1007-09). The evidence is clear, however, that the newspaper inserts only published on two or three consecutive Sundays, and **were not** disseminated post-July 2000. (R. at vol. 35, pp. 767, 789).

Further, because DR. BOSEM expressed his objection to any marketing literature which bore his name and/or likeness, and because he suddenly indicated that he decided not to join LVI, MARCO attempted to retrieve all internal marketing brochures which included any reference to DR. BOSEM. Per DR. BOSEM's request, MARCO instructed LVI personnel to locate, destroy and discard the internal marketing brochures. (R. at vol. 34, pp. 620-26). At the direction of MARCO, Ms. Bolivar led this effort by contacting each of LVI's national locations to ensure that each brochure referencing DR. BOSEM was removed from circulation. (R. at vol. 34, pp. 620-26); (R. at vol. 37, pp. 986, 988-89, 991, 1005-09). Additionally, MARCO immediately contacted Timothy Neilson, the representative of the printing service contracted by LVI, and ordered new brochures, this time without the inclusion of reference to DR. BOSEM. (R. at vol. 39, pp. 1286-87, 1311); (R. at vol. 37, p. 987).

Following this sequence of events, BOSEM, through counsel, sent a demand letter to Respondents requesting significant payment for this advertising mistake. Upon refusal to accede, a lawsuit was filed. Interestingly, at the initial filing, BOSEM only sought an order enjoining Respondents from disseminating or using marketing materials referencing DR. BOSEM.

As such, a preliminary injunction hearing was convened, but counsel for BOSEM failed to produce any witnesses or verified pleadings to justify the entry of an injunction. Thus, the trial court, *left with no option*, deferred ruling on the preliminary injunction claim until a subsequent evidentiary hearing could be properly conducted. *See* (R. at vol. 1, p. 12-19, 34). Notably, BOSEM **never sought to reconvene** the injunction hearing.

Subsequently, sometime during the Fall of 2000, BOSEM caused pre-text calls to be made to LVI operations located in at least the following areas: (1) Sunrise, Florida; (2) Altamonte Springs, Florida; and (3) Colorado Springs, Colorado. In each instance, the caller requested marketing literature on the LASIK procedure offered by LVI. As a result of these requests, seven brochures containing the collage of **nine** physicians, one of which included DR. BOSEM, were received. *See* (R. at vol. 33, p. 485-88; vol. 32, pp. 264-68); (P.X. 19). All of said brochures were sent from LVI's Florida locations, except for a single brochure that was sent from LVI's Colorado Springs location. In

response, BOSEM filed an Amended Complaint against Respondents; however, BOSEM did not reconvene the injunction hearing.

Immediately upon being notified of these mistakes (*via* an Amended Complaint as opposed to a phone call or a letter), MARCO reiterated his direct instruction to all of LVI's key employees to locate, retrieve and otherwise stop using any brochures containing any reference to DR. BOSEM. (R. at vol. 37, p. 991). Since then, there has been no showing that LVI disseminated or used any marketing material containing reference to BOSEM. In fact, the only additional brochures located during litigation were found in the storage departments of a few LVI locations; **none were in use by any of the LVI centers**. (P.X. 29, at ¶ 8).

Moreover, there was absolutely no evidence before the trial court tending to suggest that the Advertisement caused any patient to visit any of LVI's many locations simply because DR. BOSEM was identified as being affiliated with LVI. Further, BOSEM presented absolutely no evidence, beyond mere unsubstantiated speculation and conjecture, that **any** of LVI's sales, post-July 2000, were related to the dissemination of the Advertisement. Indeed, the only alleged "market confusion" presented by BOSEM was in the form of witness testimony from David Mead and Kevin Cox, *two of DR. BOSEM's patients*.

Mead first consulted with DR. BOSEM in the Spring of 2000, whereupon DR. BOSEM recommended that Mead receive LASIK surgery.

(R. at vol. 34, p. 592). As a result of the consultation, Mead contracted with DR. BOSEM to undergo such treatment at a price of $1500 per eye. (R. at vol. 34, pp. 592-93). Shortly thereafter, Mead saw the Advertisement in the Broward Sun-Sentinel newspaper, and noticed that the advertised price was less than what DR. BOSEM quoted. (R. at vol. 34, pp. 598, 600-01). Upon contacting DR. BOSEM, however, Mead learned that BOSEM was not associated with LVI, and that the advertised prices related to LVI, not BOSEM. (R. at vol. 34, pp. 593-94, 600-01). Mead **proceeded to be treated by DR. BOSEM, and paid the full price originally quoted**. (R. at vol. 34, pp. 601-02).

Like Mead, Cox consulted with DR. BOSEM regarding LASIK surgery in the Spring of 2000, and was quoted $1500 per eye for the LASIK treatment. (P.X. 34 at 6-7, 9-10). Also similar to Mead, Cox observed the newspaper insert just weeks before his scheduled surgery, and contacted DR. BOSEM regarding the same. *Id.* at 9-10. Following his discussion with DR. BOSEM, Cox was satisfied with the explanation provided, and Cox proceeded to be treated by DR. BOSEM at the originally quoted $1500 per eye. *Id.* at 14. Cox never doubted DR. BOSEM as a result of the Advertisement, and never solicited another ophthalmologist to perform the surgery at a cheaper price. In fact, **Cox has even recommended DR. BOSEM to others**. *Id.* at 21-23. No other patient testified in any manner regarding the Advertisement.

Although BOSEM attempted to convince the trial and district courts (and now this Court) otherwise, Respondents had absolutely no ill motive or intent to harm DR. BOSEM or his practice. In fact, the evidence before the trial court showed that the printing of the Advertisement was a good faith mistake that occurred because of the reasonable belief that DR. BOSEM consented to the printing of the Advertisement. Despite BOSEM's efforts to twist the record facts, there was no evidence to suggest differently. (R. at vol. 37, pp. 991-93).

Nevertheless, shortly after the filing of the First Amended Complaint, *and despite the reality that the facts of this case had not changed*, Respondents were served with a multi-count Second Amended Complaint. This second amended complaint included the proverbial "kitchen sink" and alleged: (1) injunctive relief pursuant to section 540.08, Florida Statutes; (2) fraud; (3) an action for damages pursuant to section 540.08, Florida Statutes; (4) false advertising under section 817.40, Florida Statutes; and (5) an action for damages under the Lanham Act.

Thereafter, the parties filed competing motions for summary judgment. The trial court granted Respondents' motion for summary judgment on Count I, which sought injunctive relief, and Count IV, which alleged false advertising under Florida Statutes. Summary judgment was entered against the claim for injunctive relief as it was clear that Respondents were no

longer referencing DR. BOSEM in its marketing material. The trial court also granted BOSEM's motion, *in part*, on the issues of liability under the Lanham Act and Section 540.08, but denied BOSEM's motion as it related to the damages sought.

Thereafter, following nearly six-years of pretrial discovery, a bench trial was conducted before the Honorable Ronald J. Rothschild over the two week period between the last week of September 2006 and the first week of October 2006. At trial, the abovementioned facts were deduced from various witnesses.

As *liability* was previously determined to exist under Section 540.08 and the Lanham Act, the bench trial focused on determining whether BOSEM suffered any compensable harm, under said statutes, as a direct result of the Advertisement. The bench trial also addressed the issue of liability for fraud and punitive damages, the latter of which was added to the complaint after three attempts to amend under Section 768.72, Florida Statutes.[1] At trial, the claims for fraud and punitive damages were flatly rejected by Judge Rothschild as being based on pure speculation.

As to compensatory damages, BOSEM assumed the fatal

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[1] Despite the fact that there was no new evidence, the trial court allowed the amendment after disallowing it the first two times requested by BOSEM. *See* (R. at vol. 1., p. 109; vol. 2, p. 515).

strategy of suggesting that damages were *automatically* due since liability was determined, and that the burden of proof was on Respondents to prove otherwise. In connection with this position, BOSEM requested in excess of thirty million dollars from Respondents, and opined that it was incumbent upon Respondents to disprove the same. As noted by the trial court, however, this position turned the burden of proof on its head. The trial court appropriately noted that BOSEM was still required to prove an entitlement to the damages sought, and that the same were rationally related to the harm allegedly sustained as a result of the Advertisement.

As an example of BOSEM's confident, *yet fatally flawed*, position, it should be noted that, other than the Revenue Chart sheet attached to the Final Judgment, BOSEM failed to present any corroborating proof of harm allegedly sustained. Instead, BOSEM only retained an expert to testify on the disgorgement of profits sought, but such testimony was irrelevant and inadmissible once the court found that BOSEM was not "entitled" to such a remedy. Thus, the only evidence presented, other than DR. BOSEM's self serving testimony, was in the form of expert testimony from Respondents' financial expert, Peter Gampel.

Gampel was qualified by the court to testify as a forensic accounting expert. He was retained by Respondents to testify in two discrete areas, *to wit*: on the issue of disgorgement of

profits and on BOSEM's theory of price erosion damage recovery. (R. at vol. 42, p. 1651, 1656). However, as a result of the ruling that this case did not support a disgorgement award, Gampel only testified on the issue of whether BOSEM was entitled to recover any damages based on a price erosion theory. To this end, Gampel conducted an analysis of the extent, *if any*, the Advertisement impacted BOSEM's revenues.

As a part of his analysis, Gampel reviewed financial information and data produced by BOSEM, including tax returns and the Revenue Chart. (R. at vol. 42, p. 1656). As noted by Gampel, however, although the Revenue Chart contained information relating to "the revenues and price per eye on a monthly basis from the period of January 2000 through the end of 2002", it failed to account for any industry or market trends, *i.e.*, emerging competition in the LASIK industry. (R. at vol. 42, p. 1657, 1659-60). Gampel testified that such trends "are important insofar as they impact both price per eye and volume of procedures." Thus, in order to perform an accurate analysis of any harm suffered by BOSEM, Gampel opined that it was critical to evaluate the LASIK industry and the volume of procedures performed against the price per eye charged.

To this end, Mr. Gampel reviewed accepted LASIK industry studies and public market information to determine the state of the LASIK market during the period in question. Such evaluation

revealed that the LASIK industry's average price charged per eye declined between 1999 and the third quarter of 2000, with said price dropping from $2,079 in 1999 to $1,650 in 2000 due to emerging competition. While the average price dropped, however, the analysis also illustrated that the LASIK industry experienced a corresponding increase in the number of LASIK procedures performed. (R. at vol. 42, p. 1657-60, 1667).

In comparing the industry and market trends to the financial data produced by BOSEM, Mr. Gampel concluded that BOSEM's practice was aligned with the industry's movement. In fact, like the LASIK market, the **revenues** from BOSEM's practice during the period in question **increased overall** as he lowered his price per eye, and performed a **higher volume** of LASIK procedures. (R. vol. 42, p.1670, 1673-74). Stated differently, "**the revenues of Doctor Bosem's practice increased for [the] periods beyond the second quarter of 2000, which was the onset of the litigation, as [his] average price per eye came down.**" (R. at vol. 42, p. 1676); *see also* (R. at vol. 32, p. 315). In this vein, Mr. Gampel concluded that, based on his evaluation, BOSEM did not suffer any damages as a result of the Advertisement. (R. at vol. 42, p. 1676-79). The trial court considered Gampel's testimony, but did not accept it in its entirety. Rather, the court apparently factored Gampel's testimony into the final calculation of damages. (R. at vol. 16.

p. 2935-36, ¶¶14-16).

The trial court, however, rejected all other forms of compensatory relief sought by BOSEM. In so doing, the trial court observed that the presentation of evidence by BOSEM was filled with "many inferences and conclusions drawn from [BOSEM's] theories of the case." (R. at vol. 16. p. 2944-46). The court further noted "there was a lack of evidence presented that would persuade the Court to grant much of the relief, that there were a lot of assertions, particularly in financial matters and impact upon Dr. Bosem and his practice that were mostly predicated upon speculation and conjecture..." *Id.*

Simply put, although BOSEM may have thoroughly "argued" many legal "theories" at trial, BOSEM failed to prove the majority of the same in the required evidentiary manner. Now, apparently displeased with the decisions of *two courts*, BOSEM attempts to place blame on the trial and district courts for BOSEM's evidentiary deficiencies by suggesting that both courts applied erroneous legal standards in assessing the claims of relief. However, as discussed in detail below, the district court applied the correct legal standards, and operated well within its realm of jurisdiction to render its decision in this case.

Nevertheless, BOSEM has sought yet another bite out of the proverbial "appellate apple" and, as such, this appeal follows.

SUMMARY OF THE ARGUMENT

Issue I. Petitioners argue that prejudgment interest should be available in **every case** where damages are awarded. Such a sweeping proposition, however, ignores nearly three decades of established Florida jurisprudence requiring that, in order to trigger prejudgment interest, it must be determined that a specific out-of-pocket pecuniary loss was suffered on a date certain. Where, as here, a specific loss is not calculable until the verdict is reached, and the date of loss is similarly unascertainable until such time, prejudgment interest cannot be awarded. The district court's decision is consistent with this proposition, and does not present a conflict.

Issue II. Petitioners also argue (*albeit improperly*) that the district court erred in affirming the trial court's denial of royalty damages under Section 540.08, Florida Statute. First, this issue should not be considered as it was not included in Petitioners' request for review, and this Court granted review only on the narrow issue of prejudgment interest. Nevertheless, should this issue be reviewed at this juncture, Petitioners' argument fails as it is premised on the fatal assumption that Section 540.08 royalty awards are *automatically due* upon a finding of liability. Such a position is contrary to the law governing this category of relief, and the district court properly rejected this argument when raised on appeal.

Issue III. Petitioners next posit that the district court reversibly erred in affirming the trial court's calculation of lost profit damages. Petitioners also improperly raise this argument on appeal, as it was not included as a basis in the petition seeking review. Nevertheless, for the reasons set forth herein, Respondents suggest that the district court acted well within its authority in affirming the trial court's ruling. Here, just as with their argument on royalty damages, Petitioners appear to erroneously suggest that they were entitled to lost profits, irrespective of the mitigating factors that case law requires a trial court to consider in assessing such damages. Such a theory is devoid of merit, and must be rejected, *again*.

ARGUMENT

I. WHETHER THE DISTRICT COURT PROPERLY REVERSED THE TRIAL COURT'S AWARD OF PREJUDGMENT INTEREST? *Yes.*

Petitioners' first issue, *and the only one presented to this Court in the petition seeking conflict review*, focuses on whether the district court erred in reversing that portion of the Final Judgment granting BOSEM's post-trial motion seeking prejudgment interest. To this end, a district court properly reverses a prejudgment interest award when such an award is made contrary to the legal precedent of this state. *See Air Ambulance Prof'l, Inc. v. Thin Air*, 809 So.2d 28 (Fla. 4th DCA 2002)(prejudgment interest award reversed where there was no basis for the same). That is precisely what occurred in this instance, and the cases cited by BOSEM alleging the existence of a conflict support the district court's decision.

At bar, BOSEM filed a post-trial motion seeking the imposition of prejudgment interest on the damages awarded by the trial court. BOSEM argued that the damages were liquidated and, consequently, prejudgment interest should be awarded on that amount starting with the 2001 calendar year, the date of the alleged injury. Respondents defended the motion on the premise that the damages awarded were **unliquidated**; Respondents posited that the damages were not susceptible to the imposition of prejudgment interest. Ultimately, although concurring that the

damages were not liquidated, the trial court granted BOSEM's motion and awarded prejudgment interest. *See* (R. at vol. 16, pp. 2942-43). Upon a cross-appeal, however, the district court disagreed with the trial court, and properly reversed the award of prejudgment interest. BOSEM now suggests that such a result creates a conflict in Florida law with regard to a litigant's entitlement to prejudgment interest. Respondents disagree.

Florida law is well settled that the availability of prejudgment interest on a damage award depends on the nature of the damages awarded. The damages must be liquidated. Otherwise, as Petitioners would have this Court conclude, prejudgment interest would be awarded ***in every instance, in every case***; Petitioners' theory would effectively turn nearly three decades of established Florida law on its head, a result that must be avoided in this instance. A review of the pertinent case law on this issue will unequivocally demonstrate that the district court's decision in this case is in lockstep with established Florida law.

In *Argonaut Insurance Co. v. May Plumbing Co.*, 474 So.2d 212 (Fla.1985), this Court adopted what has been termed the "loss theory" approach to prejudgment interest, declaring that an award of prejudgment interest is to be considered another element of "pecuniary damages", and shall not serve as a "penalty" for a defendant's act in disputing an amount due. *Id.*

at 214-15. This Court further delineated that prejudgment interest is ***only available*** in those cases where the judgment has the effect of ***liquidating damages*** as of a date certain. *Id.* This legal tenet has been applied in nearly every cited case addressing the issue of prejudgment interest.

For example, accepting this principle, the Fourth District in *Air Ambulance, supra,* explained,

> In *Argonaut Insurance Co. v. May Plumbing Co.*, 474 So. 2d 212 (Fla.1985), the supreme court reiterated that in Florida, prejudgment interest is considered to be another element of pecuniary damages, and not a "penalty for the defendant's 'wrongful' act of disputing a claim found to be just and owing." *Id.* at 214-15. **Prejudgment interest is allowed on only liquidated claims, that is, sums which are certain, but which the defendant refuses to surrender**. *Id.* **Thus**, Florida espouses the "loss theory" instead of the "penalty theory."

Air Ambulance, 809 So. 2d at 31 (emphasis added). Further review of the factual and legal analysis in *Air Ambulance,* which applies the "loss theory", as well as other legal precedent from *Argonaut's* progeny, solidifies the point that prejudgment interest is **not** permitted in cases where, *as here*, the damages awarded were not certain until a verdict was rendered.

Similar to the facts at bar, the plaintiff in *Air Ambulance* filed a multi-count lawsuit which sought various levels of compensatory and punitive relief. *Id.* There, the trier of fact found in favor of the plaintiff on all claims, and the trial court awarded prejudgment interest on ***all*** compensatory damages.

On appeal, however, the district court reversed the award

of prejudgment interest, noting that prejudgment interest was only available on the claim for "open account" -- the only "liquidated" claim. The district court held,

> **the only claim which was liquidated was [the plaintiff's] claim for open account. The amount of money that [the defendant] was withholding due to his dispute over excess charges was the only amount certain.**

Air Ambulance, 809 So. 2d at 32 (emphasis added). The court further explained that any additional loss incurred by the defendant's actions, whether characterized as past or future losses, "**were not fixed**" and, as such, ***not liquidated***. Accordingly, such amounts were not subject to prejudgment interest. *Id.* at 32 (emphasis added).

Similar to the decision in *Air Ambulance*, the cases cited by Petitioners in their initial brief actually support the proposition that entitlement to prejudgment interest is present only where the damages are "**certain, but which the defendant refuses to surrender**." Due to the number of cases cited, the following string citation of Petitioners' cases illustrates the consistent nature of the district court's ruling with <u>each case</u> cited by Petitioners:

> *Alvarado v. Rice*, 614 So.2d 498 (Fla. 1993) (prejudgment interest available in personal injury action only on portion of damages attributable to "past medical expenses" that "have an amount certain and were incurred at a specific date" prior to judgment); *see also, e.g., Celotex Corp. v. Buildex, Inc.*, 476 So.2d 294 (Fla. 3d DCA 1985) (prejudgment interest available in contractual relationship from date payment is due under contract); *Kissimmee Util. Auth. v. Better Plastics, Inc.*, 526 So.2d

> 46 (Fla. 1988) (prejudgment interest available against company for specific overcharge amounts); *RDR Computer Consulting Corp. v. Eurodirect, Inc.*, 884 So.2d 1053 (Fla. 2d DCA 2004) (prejudgment interest is available on a contractual debt due in a case alleging breach of contract and open account); *Fidelity & Guar. Ins. Underwriters, Inc. v. Federated Dept. Stores, Inc.*, 845 So.2d 896 (Fla. 3d DCA 2003) (prejudgment interest available in coverage dispute upon determination that coverage existed); *Glover Distrib. Co., Inc. v. F.T.D.K.*, 816 So.2d 1207 (Fla. 5th DCA 2002) (prejudgment interest available when based on debt due under contractual relationship); *Underhill Fancy Veal, Inc. v. Padot*, 677 So2d 1378 (Fla. 1st DCA 1996) (prejudgment interest proper where loss was ascertainable on a date certain prior to judgment); *Scheible v. Joseph L. Morse Geriatric Ctr., Inc.*, 988 So.2d 1130, 1134 (Fla. 4th DCA 2008) (the determination of "whether prejudgment interest is allowed depends on the nature of the damages claimed"); *Quality Engineered Installation, Inc. v. Higley South, Inc.*, 670 So.2d 929 (Fla. 1996) (holding that prejudgment interest is available on an attorneys' fee award from the date an entitlement to fees is determined); *Sostchin v. Doll Enter., Inc.*, 847 So.2d 1123 (Fla. 3d DCA 2003) (prejudgment interest not addressed in substantive decision); *H&S Corp. v. U.S. Fidelity & Guar. Co.*, 667 So.2d 393 (Fla. 1st DCA 1995) (prejudgment interest not available where neither the exact amount of damages, nor the exact date of loss were certain, and the date of loss was not fixed by the trial court).

See (Pet. Br. at 11-15, n. 3). Notably, the only other case cited by Petitioners, *Perdue Farms, Inc. v. Hook*, 777 So.2d 1047 (Fla. 2d DCA 2001), actually reversed an award of prejudgment interest on grounds relevant to the issue present here.[2]

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[2] Indeed, all of the other cases cited by Petitioners in their jurisdictional brief to this Court, but omitted from the initial brief on the merits, are similarly consistent with the district court's ruling in this case. *See, e.g., Bergen Brunswig Corp. v. Dep't of Health & Rehab. Serv.*, 415 So.2d 765 (Fla. 1st DCA 1982) (prejudgment interest available from date of termination of contractual relationship for misappropriate of particular funds); *Indian River Colony Club, Inc. v. Schopke Constr. & Eng'g*, 619

Specifically, the *Hook* Court provided the following pointed analysis in reversing the prejudgment interest award:

> [i]n regard to the award of [prejudgment interest], we reverse on the additional ground that the underlying damage award...is not one which can be liquidated to a date certain. **[The plaintiff's] damages were not liquidated because the ascertainment of their exact sum required the taking of testimony to ascertain facts upon which to base a value judgment**.

Id. at 1054 (emphasis added) (internal citations omitted). As the district court noted in the case *sub judicie*, Petitioners originally sought damages "between $300,000 and $400,000"; but, after the taking of testimony and other evidence, the ultimate sum was only determined to be $93,306. Clearly, just as in *Hook*, Petitioners' alleged damages here "**were not liquidated [and subject to prejudgment interest] because the ascertainment of their exact sum required the taking of testimony to ascertain facts upon which to base a value judgment**." *Id.* (emphasis added). The decision of the district court in this case is absolutely consistent with *Hook* and all of the other cases cited herein. Accordingly, conflict is not present, and, as such,

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So.2d 6 (Fla. 5th DCA 1993) ("breach of contract damages for lost profits constitute liquidated damages if such damages are due as of a certain date"); *Developers of Am. Corp. v. ABC Promotions Unlimited, Inc.*, 549 So.2d 1042 (Fla. 3d DCA 1989) (accord); *Montage Group, LTD v. Athle-Tech Comp. Sys., Inc.*, 889 So.2d 180 (Fla. 2d DCA 2004) (prejudgment interest available on damages incurred on a date certain, even where liability challenged); *Pilkington PLC v. Metro Corp.*, 562 So.2d 709 (Fla. 3d DCA 1990) (one paragraph opinion with no real discussion on case facts).

this Court should affirm the district court's decision.

As an important aside, Respondents have consistently agreed that prejudgment interest *may* be awarded in cases involving unliquidated damages where a final judgment is not entered immediately upon rendition of a verdict. In such a scenario, prejudgment interest would be appropriate between the date of the verdict (*i.e.*, the date the damages become "liquidated") and the date of the final judgment. Although Petitioner has never sought such relief in this case, the decision in *Palm Beach County School Board v. Montgomery*, 641 So.2d 183 (Fla. 4th DCA 1994) is instructive on this issue, and adds further clarity on the application of the "loss theory."

Similar to the facts at bar, the damages in *Montgomery* were unliquidated and not certain until a verdict was rendered. *Id.* There, the district court addressed the issue of whether a claimant in a case involving unliquidated damages is entitled to prejudgment interest between the time a verdict is rendered and the entry of a final judgment. Just as in *Air Ambulance*, the court started its analysis with recognition of the principles of the "loss theory" of prejudgment interest as established by this Court in *Argonaut*. *Id.* (citing *Argonaut*, 474 So.2d 212).

Applying the principles of the "loss theory", the *Montgomery* Court determined that prejudgment interest was available on an unliquidated claim only **after** a verdict is

rendered fixing the amount of damages. Even at that point, however, prejudgment interest is **not** available from the time the cause of action accrued and, instead, only becomes available from the time the verdict fixes the amount of damages. *See id; see also Tolin v. Doudov*, 626 So.2d 1054, 1056 (Fla. 4th DCA 1993) (prejudgment interest "must be calculated from the fixed date; not amortized over the prior years"). Simply put, therefore, prejudgment interest is only allowed where the damages are "**certain, but which the defendant refuses to surrender**". *Air Ambulance*, 809 So. 2d at 32 (emphasis added).

Furthermore, although dismissed as incorrect by Petitioners, the district court properly recognized the legal precedent making clear that prejudgment interest is **not available** on damages awarded in the form of lost profits or price erosion where said amount is not certain until the rendering of a final judgment. *See, e.g., Jones v. Sterile Products Corp.*, 572 So. 2d 519 (Fla. 5th DCA 1990) (held that prejudgment interest was inappropriate as the damages were based on an un-liquidated amount of "lost profits and price erosion"); *see also Miami-Dade County School Bd. v. Ruiz School Bus Svc., Inc.*, 874 So. 2d 59 (Fla. 3d DCA 2004) (prejudgment interest on an un-liquidated damage award such as "lost profits" is inappropriate); *Checkers Drive-In Restaurants, Inc. v. Tampa Checkmate Food Svc., Inc.*, 805 So. 2d 941 (Fla. 2d DCA 2001).

Accordingly, based on the foregoing analysis, the district court was absolutely correct to reverse the trial court's improper award of prejudgment interest in this case. Indeed, it would have been error for the district court to allow the award to withstand Respondents' cross-appeal. *At most*, prejudgment interest in this case *may* only *have been* available for the period of December 8, 2006 (the date damages became *fixed*) through June 7, 2007 (the date judgment was rendered). Importantly, however, BOSEM has never sought this relief and, as such, the same cannot be awarded at this juncture.

For all of the foregoing reasons, Respondents respectfully request that this Court affirm the decision of the district court reversing the trial court's award of prejudgment interest in this case. Anything short of such an affirmance would run afoul to the settled principles of *Argonaut* and its progeny.

II. WHETHER THE DISTRICT COURT ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF ROYALTIES UNDER SECTION 540.08? *No.*

Introduction. As alluded to in the introduction section of this brief, Respondents believe this issue has been improperly brought before the Court in this appeal. Petitioners sought limited review based on an alleged conflict in the district court's decision as it related to prejudgment interest, but *never* sought review of the decision as it related to any other aspect of the district court's decision. As such, Respondents

believe that this issue, which interestingly is double in length compared to the single issue properly before this court, should not be considered at this juncture.[3] Nevertheless, in an abundance of caution, Respondents respond in full to Petitioners' flawed argument on the issue of royalties.

a. BOSEM's theory that Section 540.08 automatically entitles BOSEM to recovery of a reasonable royalty immediately upon proof of liability is unfounded and devoid of merit.

Distilled to its core, the theory espoused by BOSEM here (*and at the district and trial court levels*) is that the damage provision of Section 540.08 is automatic, *requiring no proof of harm sustained*. However, conspicuously and continuously absent from BOSEM's briefs is citation to any authority which would arguably substantiate such a theory *under Florida law*.

Instead, BOSEM continues to advance the unsupported proposition that the decision in *Loft v. Fuller*, 408 So. 2d 619 (Fla. 4th DCA 1981), dictates that a plaintiff is automatically entitled to a reasonable royalty, without any proof of the harm, immediately upon a finding of liability under Section 540.08, Florida Statute. Tellingly, *Fuller* is the **only** Florida case cited and relied upon by BOSEM in direct support of this theory.

Importantly, however, and finally conceded by Petitioners at this appellate level, the *Fuller* Court did not address the

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[3] Respondent has filed a motion to strike contemporaneously with this brief to address this concern.

damage provision of the statute. Rather, *Fuller* focused on the propriety of a trial court's dismissal of a plaintiff's complaint with prejudice. *Fuller* contained absolutely no discussion on the issue of royalties or any other measure of damages in the context of Section 540.08, Florida Statutes. The *Fuller* decision is inapplicable to the present issue. BOSEM's futile attempt to apply its holding to the facts *sub judice* can best be described as a reaching effort to extrapolate that from case law which does not exist, *an effort that has already been rejected by the trial and district courts*.

The plain wording of the damage provision of Section 540.08 unmistakably indicates that recovery is available only for those injuries that a plaintiff is able to prove were sustained. More specifically, the relevant portion of Section 540.08 states that, upon a finding of liability, a plaintiff:

> ***may...recover damages for any loss or injury sustained***..., including an amount which would have been a reasonable royalty, and punitive or exemplary damages.

§ 540.08 (2), Fla. Stat. (2005 (emphasis added). "Sustained" by definition requires proof of injury. *See* BLACK'S LAW DICTIONARY 1461 (8th ed. 2004) ("sustain" is defined as "To undergo; suffer" and "To substantiate or corroborate"). Furthermore, the above quoted language lacks any compulsory verbiage, such as the use of the word "shall" or "must", words commonly employed in the context of many other statutes. To this end, it is clear that the

language of Section 540.08 is not mandatory in any sense.

An excellent comparison to the language in Section 540.08 is found in the text of the federal copyright statute relating to damages for patent infringement; *to wit*: 35 U.S.C. § 284. That particular statute provides, *in pertinent part*, as follows:

> [u]pon finding for the claimant ***the court shall award*** the claimant damages adequate to compensate for the infringement, ***but in no event less than a reasonable royalty*** for the use made of the invention by the infringer, together with interest and costs as fixed by the court.

35 U.S.C. § 284 (emphasis added). It is no surprise that Petitioners have finally chosen to address this simple, yet illustrative, comparison in its brief before this Court, as Petitioners have failed to directly address the same comparison at either the trial or district court levels. Nevertheless, regardless of Petitioners' sudden attempt to artfully avoid the true impact of this comparison, it is undeniably clear that Section 540.08 does not entitle a plaintiff to mandatory recovery of damages in every case; the damages must compensate for harm that is "proven" to have been "sustained."

As illustrated in the above comparison, unlike Section 540.08, the federal Legislature in 35 U.S.C. s. 284 has imposed a direct obligation upon **all trial courts** to award damages in **all cases** where liability is determined, *regardless of proof of harm sustained*. In stark contrast, Section 540.08 does not

impose any sort of similar duty or obligation. Instead, BOSEM was required to prove an entitlement to a royalty award through the proper presentation of evidence at trial. BOSEM failed to fulfill this burden.

b. BOSEM failed to prove an entitlement to royalties.

Reasonable royalty awards are commonly associated with those cases where a defendant continued to use a mark beyond a license term. *See, e.g., Howard Johnson Co. v. Khimani*, 892 F.2d 1512 (11th Cir. 1990); *see also Ramada Inns, Inc v. Gadsden Motel Co.*, 804 F.2d 1562 (11th Cir. 1986). In more limited situations, however, such an award is also used in cases where the plaintiff and defendant have not had prior licensing relationships. This latter scenario is typically associated with cases where a defendant illegally used the status of a celebrity type person, or well known product name, to promote their own business. *See, e.g., Weinstein Design Group, Inc. v. Fielder*, 884 So. 2d 990 (Fla. 4th DCA 2004) (reasonable royalty appropriate where the defendant used the name and likeness of a nationally known baseball superstar in its advertising and promotional materials). Under either scenario, however, the award is used as a means to determine and calculate compensation ***for harm sustained***. Therefore, as royalty compensation is merely another form of compensatory relief, *such an award must not be*

speculative. Royalty awards, just like any other form of compensatory relief must be "**rationally related**" to the conduct at issue. *A&H Sportswear Co., Inc. v. Victoria's Secret Stores, Inc.*, 967 F. Supp. 1457, 1479 (E.D. Pa. 1997).

It is fundamental that the "determination of a reasonable royalty...is based ***not on the infringer's profit margin***, but on what a willing licensor and licensee would bargain for at hypothetical negotiations on the date the infringement started." *State Industries, Inc. v. Mor-Flo Industries, Inc.*, 883 F. 2d 1573 (Fed. Cir. 1989) (citing *Radio Steel & Mfg. Co. v. MTD Prod., Inc.*, 788 F. 2d 1554 (Fed. Cir. 1986). Even where there are no prior dealings between the parties, a trial court's "approach should take into account 'what the parties' would have agreed upon, if both were reasonably trying to reach an agreement.'" *Victoria's Secret*, 967 F. Supp. at 1480 (citation omitted); *see also Fielder*, 884 So. 2d 990; *Sun Int'l. Bahamas, Ltd. v. Wagner*, 758 So.2d 1190 (Fla. 3d DCA 2000; Ramada, 804 F. 2d 1562. In applying this basic formulation, a trial court "must take into account the realities of the bargaining table and subject the proofs to a dissective scrutiny." *Victoria's Secret*, 967 F. Supp. at 1480.

Furthermore, as reasonable royalty awards are based on what a plaintiff would have bargained for in a hypothetical setting, such an a award, *if appropriate*, is determined principally by

the course of performance, industry trends and other similar factors to determine what the plaintiff would have likely charged for the use of its name/mark. *See id.; see also Wagner*, 758 So.2d 1190; *Ramada Inns, Inc.,* 804 F. 2d 1562; *Victoria's Secret*, 967 F. Supp. 1457; *Fielder*, 884 So. 2d 990. For example, the calculation of an appropriate royalty should involve a trial court's consideration of factors such as prior royalty rates charged by the plaintiff, prior royalty rates paid by the defendant, the nature and scope of the infringement, and expert testimony regarding industry trends and standards on reasonable royalty rates prior to the commencement of the infringement. *See, e.g., Victoria's Secret,* 967 F. Supp. at 1479; *see also Fielder*, 884 So. 2d 990; *Wagner*, 758 So.2d 1190. This basic application is used by federal and state courts dealing with royalty awards. A review of Florida case law addressing royalties under Section 540.08 unambiguously illustrates that this analysis is consistent and applicable to the analysis the trial court at bar performed before deciding whether a royalty award was appropriate.

In *Fielder*, for example, the district court addressed the appropriateness of a royalty award in a case involving the misappropriation of the plaintiff's name and likeness in advertising materials. There, the defendant used the plaintiff's name and likeness in brochures and in a widely circulated

magazine to advertise and promote her business. *Fielder*, 884 So. 2d 990. The advertising materials were printed and published at least twice a year for more than a two year period without the plaintiff's consent. The infringing advertisements were circulated throughout fifty-seven different countries. *Id.*

At trial, the jury awarded the plaintiff $300,000 in compensatory damages as a "reasonable royalty" for harm sustained. *See id.* On appeal, this Court affirmed this compensatory award. *Id.* at 1001. In so doing, this Court started its analysis by recognizing that the infringement occurred over a two-year span and reached over fifty seven countries. This Court further noted that the plaintiff was a nationally recognized professional athlete who had previously entered into national endorsement contracts for the use of his identity in advertising materials. The evidence deduced at trial showed that the endorsement compensation yielded the celebrity plaintiff an average of $7,500 per endorsement, with the largest endorsement being $250,000 for a contract with Reebok®.

In light of this evidence, namely, prior royalty rates received by the plaintiff, the nature and scope of the infringement, the national recognition the plaintiff maintained, the suggested amount that the plaintiff would have agreed upon in voluntary negotiations with the defendant, and expert testimony relating to the same, the district court determined

that the royalty was reasonable under the circumstances and founded on credible evidence, **not just mere speculation**. *See id.* Clearly, the factors alluded to above were applied in assessing the reasonableness of the royalty award. *See id.; cf. Victoria's Secret*, 967 F. Supp. at 1479; *see also Wagner*, 758 So.2d 1190 (540.08) damage award was made in light of the parties' prior licensing relationship and was aimed at compensating the plaintiff for the harm sustained).

Dissimilar to the evidence used in the above referenced cases, BOSEM absolutely failed (*at trial and on appeal*) to address any of the requisite factors used to assess whether a royalty award should have been awarded. Indeed, at this juncture BOSEM interestingly omits all argument from their brief discussing the evidence, or lack thereof, that was presented to the trial court. BOSEM simply continues to advocate a legally inaccurate theory of an automatic "entitlement" to a reasonable royalty.[4] In light of the above stated principles, however, it

[4] In fact, BOSEM never asked the trial court to award a specific amount. Rather, during closing arguments, BOSEM merely argued as follows: "*As far as royalty goes, Judge, you know, how much royalty would it have taken for him to ruin himself like this for if the ads had gone on into perpetuity? The royalty, he would have said, okay, fine, give me your retirement money and I'll let you use my name and sully it and I'll get out of the practice of medicine.*" Clearly, BOSEM provided absolutely no direction to the trial court, leaving the judge to speculate on an appropriate award, if any. (R. at vol. 40, p. 1404).

is clear that the trial court adequately addressed the issue of royalties. (R. at vol. 16, pp. 2940-41). Indeed, the trial court poignantly noted, in a final comment, that "there was a lack of evidence presented that would persuade the [trial court] to grant much of the relief, that there were a lot of assertions, particularly in financial matters and impact upon Dr. Bosem and his practice that *were mostly predicated upon speculation and conjecture and that's why the [trial court] rejected aspects of that relief*." (R. at vol. 16, pp. 2943-44) (emphasis added).

BOSEM has failed to point to a single fact that would cast doubt over the trial court's ruling, or on the district court's affirmance of the same. As such, the trial court's determination that there was "*no supportable basis for an award of royalties*", and "*there is no basis in fact in this case to provide such*", and the district court's affirmance of such a finding, must not be disturbed. Accordingly, for the foregoing reasons, Respondents respectfully request this Court affirm the district court's ruling affirming the trial court's denial of royalties to BOSEM.

III. WHETHER THE DISTRICT COURT ERRED IN AFFIRMING THE TRIAL COURT'S COMPENSATORY DAMAGE AWARD? *No*.

Introduction. Similar to the immediately preceding issue, Respondents contend that this next issue has been improperly brought before this Court. Again, Petitioners did not include

this issue in their brief on jurisdiction, which set forth the *single basis* for this Court to accept a limited review of the district court's decision. Petitioners' improper attempt to circumvent the Rules of Appellate Procedure and the guidelines for second-tier appellate review should not be permitted. Nevertheless, as with the prior issue, Respondents address this next argument in an abundance of caution in the event this Court decides to entertain this portion of Petitioners' appeal.

Legal Argument. At trial, BOSEM sought recovery of alleged "lost profits", using a "price erosion" theory of recovery. Ultimately, the trial court awarded BOSEM $93,306 in total damages, and based its calculation on a chart submitted by BOSEM during trial, and on the testimony of Respondents' expert, Peter Gampel. (R. at vol. 16, pp. 2944, 2947). Although Respondents argued at trial and on appeal that BOSEM was not entitled to any damages based on the lack of evidentiary support to sustain the same, Respondents concede that the district court acted well within its discretion in affirming the trial court's generous award. The discussion herein sets forth the legal parameters, and record facts, that necessarily guided the trial and district courts to render their harmonious decisions.

Price Erosion. It is well settled that an award of lost profits, a form of compensatory relief, "may not be speculative." *BIC Leisure Prod, Inc. v. Windsurfing Int'l,*

Inc., 1 F.3d 1214 (Fed. Cir. 1993) (citing *Water Tech Corp. v. Calco Ltd.,* 850 F. 2d 660, 671 (Fed.Cir.), *cert. denied*, 488 U.S. 968 (1988)). Instead, "[t]o recover lost profits on a theory of price erosion, a [plaintiff] **must show** that 'but for' the infringement, it would have sold its product at a higher price." *Collegenet, Inc. v. XAP Corp.*, 442 F.Supp.2d 1036 (D. Or. 2006) (quoting *Ericsson, Inc. v. Harris Corp.*, 352 F.3d 1369, 1378 (Fed. Cir. 2003); *see also BIC Leisure Prod, Inc.,* 1 F.3d 1214 (a plaintiff "must prove a causal relation between the infringement and its lost profits"). Price erosion lost profits are merely another form of compensatory relief which correlates to "the amount awarded to a complainant in compensation for his **actual and real** loss or injury." *McMillian v. F.D.I.C.,* 81 F. 3d 1041, 1055 (11th Cir. 1996) (emphasis); *Kehoe v. Fidelity Fed. Bank & Trust,* 421 F. 3d 1209 (11th Cir. 2005) (accord).

To recover actual damages under the Lanham Act, the claimant must show "actual confusion among consumers" who sought to purchase the claimant's product and instead unknowingly purchased the infringing product. *Keg Tech., Inc. v. Laimer*, 436 F.Supp.2d 1364 (N.D.Ga. 2006) (citing *Web Printing Controls Co. v. Oxy-Dry Corp.*, 906 F. 2d 1202, 1204-05 (7th Cir.1990) ("A plaintiff wishing to recover damages for a violation of the Lanham Act must prove the defendant's Lanham Act violation, *that the violation caused actual confusion among consumers of the*

plaintiff's product, and, as a result, that the plaintiff suffered actual injury") (emphasis in original).

Additionally, before an award of damages based on a price erosion theory is made, the plaintiff must "present evidence of the (presumably reduced) amount of product the [plaintiff] would have sold at the higher price.... Moreover, the [plaintiff's] price erosion theory **must account** for the nature, or definition, of the market, similarities between any benchmark market and the market in which price erosion is alleged, and the effect of the hypothetically increased price on the likely number of sales at that price in the market." *XAP Corp*, 442 F.Supp.2d at 1066-67 (quoting *Crystal Semiconductor Corp. v. TriTech Microelectronics Int'l, Inc.*, 246 F.3d 1336, 1357 (Fed. Cir. 2001)) (emphasis added). Failure to meet these prerequisites generally will serve to preclude a plaintiff from recovery of damages based on a price erosion theory of recovery. *See, e.g., Keg,* 436 F.Supp.2d 1364 (Lanham Act damages denied where the plaintiff failed to demonstrate actual consumer confusion between its product and that of the defendant).

In *BIC*, *supra*, for example, the trial court denied, and the appellate court affirmed, the plaintiff's request for price erosion damages. There, the court "evaluated the documentary and testimonial evidence on price erosion and found it too speculative to support an award of price erosion lost profits."

Id. at 1220. The court noted that the plaintiff failed to account for "market forces", industry trends and other reasonable factors that would have impacted the pricing and sales of its product. *Id.* Accordingly, the Court concluded that the plaintiff "did not prove that it could have sold its [product] at higher prices 'but for' [the defendant's] infringement." *Id.* The request for price erosion damages was denied as too speculative. *See id.; see also Rooney v. Skeet'r Beat'r of Southwest Fla.*, 898 So. 2d 968 (Fla. 2d DCA 2005).

Similarly, Florida's Second District in *Rooney, supra,* reversed a trial court's decision to grant compensatory relief where it was determined that the data submitted in support of the same was too speculative. The *Rooney* Court held:

> [a]lthough it is clear that [the defendant] engaged in unfair competition, the evidence presented as to [the plaintiff's] lost profits was **entirely speculative and** the amount awarded was **not supported by substantial, competent evidence**. [The plaintiff's] expert testified that [the plaintiff] had a $214,292 net loss in profits over a three-year period. The trial court did not utilize the calculation advanced by [the plaintiff's] expert in arriving at its figure for compensatory damages. Instead, the trial court limited the damage award to a single year and subtracted the actual net profit for that year from a "projected" net loss. **Both the trial court's and [the plaintiff's] expert's calculations assumed that [the plaintiff's] lost profits were entirely attributable to [the defendant's] unfair competition. Neither calculation considered other factors presented during the bench trial which might have caused a drop in [the plaintiff's] projected earnings, for example, legitimate competition or a reduction in [the plaintiff's] sales force.**
>
> **Because the damages could not be determined with any degree of certainty on the evidence presented, we reverse the compensatory damage award...and remand with directions that**

judgment be entered in favor of [the plaintiff] for nominal damages....

Rooney, 898 So. 2d at 969-70 (emphasis added) (internal citations omitted). Consistent with the holding in *BIC*, the *Rooney* court recognized the well regarded principle in Florida that, "[w]hile a trial judge is vested with reasonable discretion in awarding damages, there must be a reasonable basis in the evidence for the amount awarded." *Forest's Mens Shop v. Schmidt*, 536 So.2d 334 (Fla. 4th DCA 1988) (quoting *E.F.K. Collins Corp. v. S.M.M.G., Inc.,* 464 So. 2d 214 (Fla. 3d DCA 1985). Absent such proof, a claim for damages based on a lost profits theory of price erosion fails. *See Rooney*, 898 So. 2d at 969-70; *see also Schmidt*, 536 So.2d 334; *BIC,* 1 F.3d 1214.

Reflecting on this law and lack of evidentiary support submitted by BOSEM at trial, together with the rulings of the trial and district courts, Respondents believe that BOSEM likely benefited from Respondents expert, Peter Gampel. Gampel was the only witness that evaluated the nature of the market at issue, and the other requisite factors that must be considered in a price erosion context. Had the trial court not had the benefit of Respondents' expert witness on this point, it is questionable whether the single financial chart submitted by BOSEM would have been sufficient to sustain the burden of proving an entitlement to price erosion lost profits.

For example, similar to the plaintiffs in *BIC* and *Rooney*, BOSEM failed to satisfy any of the factors looked upon to determine entitlement to compensatory relief. BOSEM failed to demonstrate any actual consumer confusion caused by the conduct at issue. On this point, it is critical to recall that the requisite "confusion" is only present where a plaintiff can prove there are consumers who sought to purchase his product (or service), but **instead unknowingly** purchased the product (or service) from the infringing party. Keg, 436 F.Supp.2d 1364.

Here, the only "consumer" witnesses offered by BOSEM were David Meade and Kevin Cox. Neither of these witnesses, however, established the type of consumer confusion necessary to entitle a plaintiff to compensatory relief. For example, each of these witnesses testified that they immediately **contacted DR. BOSEM directly** upon viewing the Advertisement -- obviously, no confusion existed as they knew how and where to reach DR. BOSEM. Further, each witness also unequivocally testified that they **paid DR. BOSEM the full price** originally quoted for the LASIK procedure as they were comfortable with the explanation given by DR. BOSEM on his affiliation with LVI -- again, no confusion. (R. vol. 34, pp. 593-94, 600-02) (P.X. 34 at 6-10, 14, 21-23).

Clearly, it cannot be argued that either Cox or Meade sought to purchase DR. BOSEM's services, but **instead unknowingly** purchased the services of another ophthalmologist. Such a

conclusion would be inconsistent with the evidence submitted by BOSEM at trial, and would be unrealistic as it is highly improbable that a patient would undergo surgery of any kind without knowing the identity of their treating physician. This is not a case where one can easily (*and realistically*) pawn off **a product** as something that it is not -- *i.e.*, selling counterfeit name brand clothing to unsuspecting buyers. *Cf. Tommy Hilfiger,* 2003 WL 22331254 (defendant was selling counterfeiting name brand clothing).

Aside from the presentation of Mead and Cox, BOSEM merely submitted a calculation sheet to the trial court noting the difference between the prices charged prior to the filing of the lawsuit, versus the prices charged thereafter. BOSEM failed, however, to account for market forces, industry trends, emerging competition, and other relevant factors to determine fair, just and accurate compensation due. Again, the only testimony on this particular issue came from Respondents' forensic accounting expert, Peter Gampel; the trial court considered this testimony and factored it in to the final calculation of the lost profits awarded in this case. (R. at vol. 42, p. 1645-92).

As more fully set forth in the "Statement of the Case and Facts" portion of this Brief, Mr. Gampel conducted a market analysis of the LASIK industry during the period in question. Mr. Gampel's analysis revealed that the fluctuation in prices

charged per eye for LASIK treatment **was not** unique to DR. BOSEM or his practice. Instead, Mr. Gampel's evaluation of industry studies illustrated that the average prices charged per eye in the industry sharply *decreased* between 1999 and 2001 as a result of emerging competition. (R. at vol. 42, p. 1657-60, 1667). A comparison of the industry trends to the price changes experienced by BOSEM demonstrated that the fluctuations experienced by BOSEM were aligned with the industry trends *responding to emerging competition*. In fact, like the industry, the volume of procedures performed by BOSEM increased as the average price per eye decreased, which resulted in increased overall revenue to BOSEM. (R. at vol. 42, p. 1670, 1673-74, 1676). In light of these factors, Mr. Gampel concluded that BOSEM did not suffer any damages as a result of the Advertisement. (R. at vol. 42, p. 1676-79). The trial court considered this testimony, but did not accept Mr. Gampel's final conclusion. (R. at vol. 16. p. 2935-36, ¶¶14-16). Again, had Respondents not called Mr. Gampel as a witness at trial, it is highly questionable whether BOSEM's speculative theory of recovery would have been able to withstand challenge.[5] *See BIC*

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[5] Respondents respectfully contend that absent Gampel's testimony, the trial and district courts would have been unable to assess the requisite factors to be considered in a price erosion context, and BOSEM's financial chart would have been considered "little more than an unsupported wish list of what [BOSEM] hoped would occur in the coming years." *North Dade Cmty. Dev. Corp. v. Dinner's Place,*

Leisure Prod, Inc, 1 F.3d 1214; *see also Rooney*, 898 So.2d 968.

In light of the foregoing, Respondents respectfully suggest that the district court acted well within its discretion when it affirmed the trial court's generous award. Accordingly, should this Court entertain this issue on appeal, Respondents request that the decision of the district court be affirmed. Anything short would reward BOSEM for the failure of submitting evidentiary support at the trial level, and further penalize Respondents for properly preparing for and defending against a frivolous damage claim.

CONCLUSION

At the trial and district court levels, Petitioners attempted to advance flawed arguments premised on misinterpretations of Florida law. Petitioners now seek to do the exact same at this level, under the guise of an alleged conflict between Florida law and the district court's decision in this case. No such conflict exists.

For all of the reasons set forth in this brief, Respondents respectfully request that this Court affirm the district court's

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Inc., 827 So. 2d 352 (Fla. 3d DCA 2002). Such an unsubstantiated and unrealistic calculation would have been unreliable and insufficient "to satisfy the mind of a prudent, impartial person as to the amount of profits lost." *Id.* at 353 ("[a]n award of lost profits cannot be based on mere speculation or conjecture").

decision in all respects. After nearly a decade of litigation, this case needs to finally be put to its rest.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via U.S. Mail to: **Jeffrey A. Norkin Esq.,** Jeffrey A. Norkin, P.A., 2901 NW 126 Avenue, # 2-209, Sunrise, FL 33323, Counsel for Petitioners, and **Joel S. Perwin, Esq.**, Joel S. Perwin, P.A., 169 E. Flagler Street, Suite 1422, Miami, FL 33131; on **this ____ day of December, 2009**.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that, pursuant to Florida Rule of Appellate Procedure 9.210(2), this Answer Brief has been printed in Courier New 12-point font.

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