

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

NATIONAL PASTEURIZED EGGS, INC.,
and NATIONAL PASTEURIZED EGGS, LLC,

Plaintiffs,

v.

OPINION & ORDER

Case No. 10-cv-646-wmc

MICHAEL FOODS, INC., ABBOTSFORD
FARMS, INC., CRYSTAL FARMS
REFRIGERATED DISTRIBUTION COMPANY
and M.G. WALDBAUM COMPANY,

Defendants,

and

MICHAEL FOODS, INC.,

Plaintiff,

v.

Case No. 11-cv-534-wmc

NATIONAL PASTEURIZED EGGS, INC.,

Defendant.

After a jury found in favor of plaintiffs National Pasteurized Eggs, Inc. and National Pasteurized Eggs, LLC (collectively “plaintiff” or “National”) and awarded damages of over \$5,000,000, defendants Michael Foods, Inc., Abbotsford Farms, Inc., Crystal Farms Refrigerated Distribution Company, and M.G. Waldbaum Company (collectively “defendant” or “Michael Foods”) renewed its motions for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50. As to the jury’s liability

verdict, the Rule 50 motion raises challenges to the sufficiency of the evidence supporting (1) the finding of infringement of National's patents, (2) the rejection of Michael Foods' invalidity defense to National's patents, and (3) the finding of invalidity as to Michael Foods' own patents. In the jury's damages verdict, Michael Foods challenges the award of price erosion damages and the finding of a lack of acceptable noninfringing substitutes to support an award of lost profits. For the reasons that follow, the court will deny Michael Foods' motions in their entirety.¹

BACKGROUND²

At trial, the jury considered (1) whether Michael Foods infringed certain asserted claims of U.S. Patent Nos. 6,165,538, 6,632,464, and 6,113,961; (2) whether certain asserted claims of Michael Foods' patents were invalid; and (3) whether certain asserted claims of National's patents were invalid. The jury returned a verdict in favor of National, finding (1) infringement of claims 2 and 3 of the '538 patent, claim 1 of the '464 patent, and claims 5 and 8 of the '961 patent; (2) the asserted claims of the '538, '464, and '961 patents not invalid; and (3) claims 1, 2, 4 and 5 of U.S. Patent No. 6,004,603, claim 4 of U.S. Patent No. 6,303,176, and claim 4 of U.S. Patent No. 6,974,599 invalid. (Liability Verdict (dkt. #491).)³

¹ There are a few other motions currently pending before the court. Most are addressed at the end of this opinion. The one exception is the motions for the bill of costs, which will be addressed in a separate order.

² This opinion assumes a general understanding of the undisputed facts and law of the case set forth in earlier opinions of this court, which will not be repeated here.

³ All docket entries are for 10-cv-646.

Following the finding of liability in National's favor, the jury was asked to answer the following special verdict question:

What amount of damages, if any, will adequately compensate National Pasteurized Eggs for Michael Foods' infringement of U.S. Patent Nos. 6,165,538, 6,632,464, and 6,113,961?

(Dkt. # 94.) The jury awarded \$5,841,646 in damages. (*Id.*)

OPINION

I. Standards

A. Motion for Judgment as a Matter of Law

Under Federal Rule of Civil Procedure 50(a), a court may “enter judgment against a party who has been fully heard on an issue during a jury trial if ‘a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue.’” *Schandelmeier-Bartels v. Chi. Park Dist.*, 634 F.3d 372, 376 (7th Cir. 2011) (quoting Fed. R. Civ. P. 50(a)). In considering a Rule 50 motion, the court is to “construe the facts strictly in favor of the party that prevailed at trial,” including drawing “[a]ll reasonable inferences in that party’s favor and disregarding all evidence favorable to the moving party that the jury is not required to believe.” *May v. Chrysler Group, LLC*, 692 F.3d 734, 742 (7th Cir. 2012) (internal citations and quotation marks omitted). The court is not to make credibility determinations or weigh the evidence, it must determine whether “more than ‘a mere scintilla of evidence’ supports the verdict.” *Id.* (quoting *Hossack v. Floor Covering Assoc. of Joliet, Inc.*, 492 F.3d 853, 859 (7th Cir. 2007)). Said another way, the court’s “job is to decide whether a highly charitable assessment of the evidence

supports the jury's verdict or if, instead, the jury was irrational to reach its conclusion." *May*, 692 F.3d at 742.

B. Waiver

"Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion." *Wallace v. McGlothan*, 606 F3d 410, 418 (7th Cir. 2010); *see also Thompson v. Mem'l Hosp. of Carbondale*, 625 F.3d 394, 407 (7th Cir. 2010) (refusing to consider the defendant's argument that plaintiff failed to demonstrate that he suffered an adverse employment action, in part, because the defendant did not raise argument in its Rule 50(a) motion); *see also* Fed. R. Civ. P. 50 cmt. 1991 Amendments ("A post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion.").

Michael Foods argues against a finding of waiver because the court permitted the parties to preserve motions for judgment as a matter of law pending further consideration while the jury deliberated. (Trial Tr. (dkt. #507) 40-41.) While the court allowed Michael Foods to submit orally a "placeholder" Rule 50(a) motion to avoid delaying the jury trial itself, Michael Foods was given an opportunity to, and eventually did, file a written submission. (Dkt. #471.) Michael Foods should, therefore, have raised all grounds for judgment as a matter of law in its written submission to preserve the

arguments for consideration in its motion after verdict that is now before the court.⁴

Michael Foods' asserted the following arguments in its written Rule 50(a) motion:

- **'464 patent, claim 1**

The last paragraph of claim 1 of the '464 patent provides:

Placing the egg and the fluid heat transfer medium in contact with one another for times sufficient to maintain the temperature of the central portion of the yolk within parameter line A and parameter line B of FIG. 1.

National failed to put forth any evidence that Michael Foods' eggs meet this limitation because Michael Foods' retort system results in "eggs located at different spots in the retort [being] in the heated water for variable periods of time, i.e., 10 minutes of difference across the eggs if not more." (Michael Foods' Rule 50(a) Mot. (dkt. #471) 2.)

- **'538 patent, claims 2 and 3**

Judgment as a matter of law is required because the only evidence demonstrates that Michael Foods' accused eggs have "more readily ruptured eggs yolks" than unpasteurized eggs. (*Id.* at 3.)

- **'464 and '538 patents, all asserted claims**

Judgment as a matter of law is required because National failed to offer any evidence comparing the alleged infringing eggs to corresponding unpasteurized eggs. (*Id.* at 3-4.)

- **'961 patent, claims 5 and 8**

⁴ Michael Foods also contends that having referred to its summary judgment arguments in its oral 50(a) motion, all these arguments should be deemed preserved even though not even referred to, much less set forth, in its written motion. While the court disagrees, these arguments are also rejected for the reasons set forth above.

Judgment as a matter of law is required as to these asserted claims because National failed to put forth evidence that Michael Foods' eggs met the limitation "without substantially impairing functionality of said eggs." (*Id.* at 4.)

C. Motion for New Trial

"When considering whether the jury's verdict goes against the manifest weight of the evidence, a court analyzes the 'general sense of the evidence, assessing the credibility of the witnesses and the comparative strength of the facts put forth at trial.'" *Willis v. Lepine*, 687 F.3d 826, 836 (7th Cir. 2012) (quoting *Mejia v. Cook Cnty.*, 650 F.3d 631, 633 (7th Cir. 2011)). "A verdict will be set aside as contrary to the manifest weight of the evidence only if 'no rational jury' could have rendered the verdict." *Moore ex rel. Estate of Grady v. Tuelja*, 546 F.3d 423, 427 (7th Cir. 2008) (quoting *King v. Harrington*, 447 F.3d 531, 534 (7th Cir. 2006)).

II. Challenges to Liability Findings

A. Infringement of the Davidson Patents

Michael Foods would now challenge the jury's findings of infringement of the asserted claims in the '538 and '464 patents on a myriad of grounds. Michael Foods failed to preserve a number of these arguments, which relate to limitations on calibration, Haugh unit functionality and whipping qualities. While noting arguments waived, the court addresses each ground on the merits below.

i. Comparison of Michael Foods' eggs to corresponding unpasteurized eggs

Consistent with the court's construction of the term, the jury was instructed that "corresponding unpasteurized egg" means "an egg of corresponding shape, weight, age, flock and processing history as that of the pasteurized egg." (Closing Instructions (dkt. #489) 5.) Michael Foods contends that National's expert Dr. Theodore Labuza failed to compare Michael Foods' eggs with a corresponding unpasteurized egg and even conceded that such a comparison would be impossible. (Trial Tr. (dkt. #510) 117-18.) Accordingly, Michael Foods argues that "National's failure to offer any evidence comparing the functionality of Michael Foods' pasteurized shell eggs to the requisite eggs of the same flock, age, and processing history means that there is no legally sufficient basis from which a reasonable jury could find the functionality limitations of the Davidson patents are met." (Michael Foods' Liability Br. (dkt. #531) 14.)

In response, National argues that infringement can be demonstrated by either direct or circumstantial evidence, and that Dr. Labuza's use of Roundy's eggs as a "proxy for a 'corresponding unpasteurized egg' provided substantial circumstantial evidence of infringement that a reasonable jury could have relied upon in reaching its verdict." (National's Liability Opp'n (dkt. #538) 18 (citing *Liquid Dynamics Corp. v. Vaughn Co.*, 449 F.3d 1209 (Fed. Cir. 2006) ("A patentee may prove direct infringement . . . by either direct or circumstantial evidence."))).)

This court agrees with plaintiffs. Michael Foods challenged Dr. Labuza's use of Roundy's eggs as corresponding unpasteurized eggs, and Dr. Labuza testified as to why he selected these eggs and his reasons for finding them an appropriate proxy for

corresponding unpasteurized eggs. While free to reject Labuza's testing as flawed, the jury obviously opted not to do so.⁵ If anything Dr. Labuza's testimony, along with that of Michael Foods' expert Dr. Curtis, supported a jury finding that the use of the Roundy's eggs was a conservative selection, since those unpasteurized eggs were fresher than the pasteurized eggs, resulting in higher quality measurements for the control. (Trial Tr. (dkt. #511) 17, 154-155.)

Even if Labuza's comparisons were flawed, Michael Foods cites in support of its argument cases where courts granted the defendant relief because of a flaw in plaintiff's testing. (Michael Foods' Liability Br. (dkt. #531) 14-15.) Each of these cases is distinguishable, however, for at least one of two reasons: (1) the indirect or circumstantial evidence was insufficient to support the jury's verdict; or (2) the control selected was so flawed as to render the tests unreliable. Neither is true here.⁶

ii. Evidence of Yolk Weakness or More Readily Ruptured Egg Yolks

Consistent with the court's finding of a prosecution disclaimer, the jury was instructed that the phrase "having an albumen functionality measured in Haugh units

⁵ While the court was critical of Dr. Labuza's approach at summary judgment, labeling National's critique of his testing methodology and conclusions "persuasive" (5/18/12 Op. & Order (dkt. #394) 53), Dr. Labuza's testimony at trial provided a sound basis for the jury accepting his selection of eggs as a proper control or proxy for corresponding unpasteurized eggs. (Trial Tr. (dkt. #510) 56-58.)

⁶ Importantly, the jury was correctly instructed that in considering infringement of the asserted claims, the jury should consider whether the claims limitations were found in Michael Foods' pasteurized eggs. In other words, the jury was asked to consider whether "the accused device falls within the scope of the asserted claims as properly interpreted." *Envirotech Corp. v. Al George, Inc.*, 730 F.2d 753, 758 (Fed. Cir. 1984). This proof, however, can come in the form of direct or indirect evidence.

not substantially less than a corresponding unpasteurized eggs” excludes eggs that exhibit “some weakness of the yolk membrane/more readily ruptured egg yolks.” (Closing Jury Instructions (dkt. #489) 4-5.) Michael Foods contends that this instruction required National “to prove by a preponderance of the evidence that Michael Foods’ eggs have neither characteristic.” (Michael Foods' Liability Br. (dkt. #531) 17.) Michael Foods further argues that the evidence showed the opposite -- its eggs had some weakness of the yolk membrane and were more readily ruptured than unpasteurized eggs, specifically pointing to Dr. Labuza’s testing which showed that 2 of 12 unpasteurized egg yolks ruptured, as compared to 4 of 12 Abbotsford Farms eggs and 3 of 12 Crystal Farms eggs.⁷ Dr. Curtis testified that these tests -- showing a 50% to 100% increase in breakage -- demonstrated that the yolks of the Michael Foods’ eggs were more readily ruptured than those of corresponding unpasteurized eggs. (Trial Tr. (dkt. #511) 57-58.) Finally, while Dr. Labuza opined that Michael Foods’ eggs met the yolk strength limitation because of a lack of significant difference compared to unpasteurized eggs, Michael Foods points out that the claims construction describes only “some” not “significant” weakness of the yolk membrane.

⁷ As it did at summary judgment, the court agrees that Dr. Labuza’s treatment of three of the Abbotsford Farms eggs, whose yolks ruptured while breaking, was questionable. When questioned about his methodology and testing at trial, however, Dr. Labuza testified that the yolks ruptured due to his egg breaking technique, which was in turn impacted by his arthritis. (Michael Foods’ Liability Br. (dkt. #531) 19.) While effective cross-examination, the jury was free to accept his testimony (or could rely on other evidence described herein) in finding that Michael Foods’ eggs fell outside of the disclaimer.

In response, National cites the testimony of Michael Foods' senior food scientist, Dr. Li, and a related report, that the April 2010 process changes improved the weak yolk membranes previously experienced. (Trial Tr. (dkt. #504) 143-44, 155.) National also relies on the concession of Michael Foods' designated trial expert, Dr. Curtis, that some of the photos of post-April 2010 eggs showed "good-looking yolks," an opinion confirmed by the testimony of Greg West, National's President. (Trial Tr. (dkt. #511) 144; Trial Tr. (dkt. #509) 12-13, 27-31.)⁸ Finally National cites to portions of the Schuman paper, explaining that "yolk index values were unaffected by immersion heating, coupled with Dr. Labuza's testimony that yolk index and yolk strength are "very related." (PTX 527 (available at Declaration of Bryan C. Mulder ("Mulder Decl."), Ex. 5 (dkt. #539-5); Trial Tr. (dkt. #510) 78.)

Whatever weaknesses were uncovered in Dr. Labuza's opinions and testing, the court agrees that a reasonable jury could find based on all the evidence that Michael Foods' *post-April* 2010 eggs neither demonstrated "some weakness of the yolk membrane," nor were "more readily ruptured." than unpasteurized eggs.

iii. Calibrating Step of the '464 Patent

Michael Foods also argues that no reasonable jury could find it performed the "calibrating" step of claim 1 of the '464 patent. Based on the parties' agreed

⁸ As National argued in its closing argument, National did not have to prove that *all* of Michael Foods' post-April 2010 eggs infringed the asserted claims of the Davidson patents. (Trial Tr. (dkt. #507) 60-61.) As the evidence demonstrated, there was a range of quality of eggs, some of which might have had functional limitations falling outside of the disclaimer, while others fell within.

construction, the jury was instructed this claim element required National to demonstrate that Michael Foods “determin[ed] and set[] a temperature of the fluid heat transfer medium” in April 2010 or later. (Closing Jury Instructions (dkt. #489) 5.) Michael Foods argues that the only evidence it determined and set a temperature for pasteurizing occurred on March 31, 2010, when Patrick Melena, Michael Foods’ processing manager, changed the water tank temperature from 136° F to 135° F. (Trial Tr. (dkt. #504) 44-45.)

As an initial matter, National neither raised this argument in its Rule 50(a) motion, nor at any other point before the present motion, which prevents the court from granting judgment on this basis. *See Wallace*, 606 F.3d at 418 (“Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion.”). Even if not waived, the argument lacks merit. As National points out, Michael Foods’ effort to escape liability runs counter to Federal Circuit law that “[i]nfringement arises when all of the steps of a claimed method are performed.” *Smith & Nephew, Inc. v. Ethicon, Inc.*, 276 F.3d 1304, 1311 (Fed. Cir. 2001); *see also Centillion Data Sys., LLC v. Qwest Commc’ns Int’l, Inc.*, 631 F.3d 1279, 1286 (Fed. Cir. 2011) (“For process patent or method patent claims, infringement occurs when a party performs all of the steps of the process” (quoting *BMC Res., Inc. v. Paymentech, L.P.*, 498 F.3d 1373, 1379 (Fed. Cir. 2007))). While Michael Foods adjusted the temperature of the water bath tank on March 31, 2010, the first set of eggs were not processed until April 1, 2010, meaning all of the steps were not performed until that day.

Michael Foods points to Federal Circuit authority requiring performance of “every step” for infringement to occur (*see* Michael Foods’ Liability Reply (dkt. #544) 20), but this case law does not bolster its argument. Since performance of at least the last step -- the actual processing of the eggs -- did not occur until at least April 1, 2010, the jury’s finding of infringement in April 2010 or later was supported by the evidence and consistent with Federal Circuit law on infringement of method patents.

iv. “Within Parameter Line A and Parameter Line B” Limitation

Michael Foods seeks judgment as a matter of law because no reasonable jury could find that it meets the limitation in claim 1 of the ‘464 patent of “placing the egg and the fluid heat transfer medium into contact with one another for times sufficient to maintain the temperature of the central portion of the yolk within parameter line A and parameter line B of FIG. 1.” Specifically, Michael Foods argues that the ordinary meaning of this claim required “the fluid heat transfer medium temperature to be calibrated such that the yolk reaches *a* certain temperature and is maintained at *that* temperature for a time that falls within parameter lines A and B.” (Michael Foods’ Liability Br. (dkt. #531) 23 (emphasis added).)

This is a different argument than the one offered in support of Michael Foods’ Rule 50(a) motion. In that motion, Michael Foods argued the evidence at trial demonstrated its system fell outside this limitation because “eggs located at different spots in the retort will be in the heated water for variable periods of time, i.e., 10 minutes of difference across the eggs if not more.” (Michael Foods’ Rule 50(a) Mot. (dkt. #471)

1.) As such, Michael Foods has waived its Rule 50(b) motion on this ground. Moreover, this argument is really one for claims construction, something Michael Foods did not seek before trial.⁹

Finally, even if considered on its merits, the intrinsic evidence, in particular the specification of the patent, does not support Michael Foods' construction. *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1315 (Fed. Cir. 2005) (*en banc*) (“[T]he specification ‘is always highly relevant to the claim construction analysis. Usually, it is dispositive; it is the single best guide to the meaning of a disputed term.’” (quoting *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996))). As National notes, the specification repeatedly contemplates that the yolk temperature will be controlled within a range and not necessarily at a single temperature:

- “As a third primary discovery, it was found that, in order to effectively pasteurize an egg, the yolk temperature of that egg must be controlled within relatively narrow temperature limits.” (‘464 patent, 4:60-63.)
- “FIG. 1 is a graph showing the required correlation between temperatures of a central portion of the yolk of an egg during the pasteurization process and the log (base 10) of time at which that central portion of the yolk of the egg dwells at such temperatures.” (‘464 patent, 5:40-44.)
- “Several or more different medium temperatures may be used, so long as the resulting temperatures and dwell times of the yolk fall within parameter lines A and B of FIG 1. This provides some latitude in fine adjustment of the process for optimum pasteurization and retention of functionality of the egg even with varying egg input and input egg conditions.” (‘464 patent, 8:20-26.)

⁹ As National points out, while Michael Foods sought a jury instruction limiting the claim to a single temperature in its original trial submissions, Michael Foods did not pursue this instruction in later proposed drafts of jury instructions. (National’s Liability Opp’n (dkt. #538) 40-41.)

v. Haugh Unit Albumen Functionality Limitation

Michael Foods also challenges the sufficiency of the evidence showing that the Haugh unit albumen functionality limitation was met. The asserted claims of the '538 and '464 patents require that the Haugh units of the pasteurized shell eggs not be "substantially less" than those of a corresponding unpasteurized egg. (Closing Jury Instructions (dkt. #489) 4.) Michael Foods contends that the only testing offered by Dr. Labuza showed that the average Haugh units of Michael Foods' pasteurized shell eggs is 6.5 units less than that of the Roundy's eggs. (Dkt. #518-4 at 11.) Michael Foods also takes issue with Dr. Labuza's methodology and the conclusions that can be drawn from his testing.

Again, Michael Foods did not make this argument in its Rule 50(a) motion, waiving any similar challenge to National's evidence in support of the jury's finding. Even if properly preserved, however, the court would reject this argument on the merits. In response to Michael Foods' motion, National points to the testimony of Michael Foods' Vice President of Research and Development, Dr. Merkle, who testified the pasteurization process increases the egg's Haugh units as compared to unpasteurized eggs: "[W]hen we pasteurize, we heat treat the eggs. That's going to cause the proteins to interact and would result in a higher Haugh unit for both -- for a pasteurized shell egg or even for a hard-cooked egg. It's a measurement of the height of the egg white." (Trial Tr. (dkt. #509) 98-98.) While Dr. Merkle was referring to certain tests conducted in support of Michael Foods' FDA submission, the jury could rely on this testimony, as well as the FDA report, in finding that the Haugh unit limitation was met. Even Michael

Foods' expert, Dr. Curtis, testified that the "Haugh units of [Michael Foods] pasteurized eggs actually have higher values than its unpasteurized eggs." (Trial Tr. (dkt. #511) 117.) Further, Michael Foods' criticism of Dr. Labuza's testing is not sufficient to reject it out of hand. Instead, it was within the jury's power to give his testimony and testing the weight it deserved.

vi. Whipping Qualities

The court previously construed claims of the '538 and '464 patents to disclaim eggs having "consumer-noticeable differences with respect to whipping qualities, including whip volume or height (as described in Table 3 of the disclosure of the Vandepopuliere patent)." (Closing Jury Instructions (dkt. #489) 3.) Table 3 of the Vandepopuliere patent describes whipping time of pasteurized shell eggs, and Michael Foods interprets this table as disclosing a whipping time of as little as 2.44 times longer than unpasteurized eggs.¹⁰

Without recounting the specific reasoning for each decision, the court shifted its treatment of whipping time disclaimer leading up to trial. In its original claims construction order, the court included whipping time in the disclaimer. (12/2/11 Claim Construction Order (dkt. #111) 28 (including "consumer-noticeable differences with respect to whipping qualities; adverse [e]ffect to whip volume and *whip time* (as described in Table 3 of the disclosure of the Vandepopuliere patent)" (emphasis added)).) After

¹⁰ National challenges whether this table can form the basis for reliable conclusions about whip time ratios (*see* National's Liability Opp'n (dkt. #538) 42-44), but the court and the parties considered this table and the resulting ratios throughout this case and will not disregard them now.

National moved for reconsideration, arguing that the Davidson patents disclosed longer whipping time, the court amended its claims construction to remove whipping time from the characteristics of the disclaimer. (1/5/12 Order (dkt. #141) (amending relevant portion of disclaimer to read “consumer-noticeable differences with respect to whipping qualities, including whip volume or height (as described in Table 3 of the disclosure of the Vandepopuliere patent”).) Still, the court allowed Michael Foods to present evidence and argue at trial that increased whipping time is a “consumer-noticeable” difference.

The evidence presented at trial, including evidence from Dr. Labuza, found that (1) the whip time of Michael Foods’ eggs was “six to eight times longer” than unpasteurized eggs, and (2) this increase was a “consumer noticeable difference.” (Trial Tr. (dkt. #510) 136.) Dr. Smith confirmed that his testing showed an increase in whipping time between 7.54 and 8.32 times longer than that of an unpasteurized egg. (Trial Tr. (dkt. #504) 86.) On the other hand, National presented evidence of Michael Foods’ FDA submission and the Thoms/SJTA report that Michael Foods commissioned and submitted to the FDA, indicating that despite having longer whipping times its pasteurized eggs can function like an unpasteurized egg and, in particular, can be used to prepare meringues. (PTX 527 (available at Mulder Decl., Ex. 5 (dkt. #539-5) at 32.) Finally, Dr. Merkle confirmed that Michael Foods’ eggs could be used to prepare meringues, although additional whipping time would be required. (Trial Tr. (dkt. #509) 93-94.)

Thus, while the evidence conclusively established that the whipping time of Michael Foods' pasteurized eggs is substantially longer than that of an unpasteurized egg, the jury could have reasonably found on this record this increased time does not result in a consumer-noticeable difference in whipping qualities. The evidence also established that the Michael Foods' eggs could produce the same stiff peaks required in making meringues and, therefore, it was within the jury's discretion to discount the importance of whipping time.

vii. "Without substantially impairing functionality" limitation of the Polster '961 patent

Finally, claims 5 and 8 of the '961 patent disclose a process for pasteurizing shell eggs "without substantially impairing functionality of said eggs." Michael Foods contends that National's entire proof of infringement of this claim rested on Dr. Labuza's testimony that this claim was "a little less stringent" than the Davidson functionality limitation, and therefore if the jury found that the Davidson functionality limitation was met, necessarily this Polster limitation was also met. In response, National points to Michael Foods' own statements to the FDA and in advertisements that its "egg functionality is identical to ordinary shell eggs," "retain function," and "will look and function very much as non-pasteurized fresh shell eggs." (PTX 219 (available at Mulder Decl., Ex. 19 (dkt. #539-19) at 38; PTX 157 (available at Mulder Decl., Ex. 20 (dkt. #539-20); PTX 527 (available at Mulder Decl., Ex. 5 (dkt. #539-5) at 32.)

The jury's finding of infringement is supported by the evidence submitted in support of infringement of the Davidson patent claims, as well as Michael Foods' own

representations about the functionality of its pasteurized eggs. National was not required to introduce unique evidence specific to the “without substantially impairing functionality” limitation given the similarity between it and the functionality limitations in the Davidson patents.

B. Validity of Polster and Davidson Patents

Michael Foods also seeks judgment as a matter of law because the asserted claims of the Davidson and Polster patents are invalid, additional arguments it failed to raise in its Rule 50(a) motion. Even though waived, the court considers the merits of the arguments below as well.

i. Davidson Patents

Michael Foods contends that the asserted claims of the ‘538 Davidson patent are invalid because they are anticipated by the Vandepopuliere patent, which teaches pasteurizing a shell egg to kill *Salmonella enteritidis* and a pasteurization process that results in Haugh units over 60. The jury, however, found the Vandepopuliere patent invalid and disregarded it in determining whether the ‘538 patent is invalid as anticipated. *See, e.g., Impax Labs, Inc. v. Aventis Pharms., Inc.*, 545 F.3d 1312, 1314 (Fed. Cir. 2008) (“In order to anticipate a claimed invention, a prior art reference must enable one of ordinary skill in the art to make the invention without undue experimentation.” (internal citation omitted)); *Elan Pharms., Inc. v. Mayo Found. for Med. Educ. & Research*, 346 F.3d 1051, 1054 (Fed. Cir. 2003) (same)). As Michael Foods acknowledges, its

anticipation argument only has legs if the court were to throw out the jury's finding of invalidity with respect to the Vandepopuliere patents. The court declines to do.

Michael Foods also argues that if the jury's finding of infringement is allowed to stand, then the Davidson patents must be invalid because the pasteurized eggs disclosed in Vandepopuliere have better functionality than the Michael Foods' eggs. (Michael Foods' Liability Br. (dkt. #531) 32.) In support, Michael Foods points to faster whipping times disclosed in Table 3 of the Vandepopuliere patent compared to the whipping time of Michael Foods eggs. While Vandepopuliere eggs may compare more favorably to unpasteurized eggs on this one characteristic, Michael Foods' own expert, Dr. Curtis, testified that "Vandepopuliere does not meet the Davidson quality requirements[.]" (Trial Tr. (dkt. #507) 9-10.)

Michael Foods also argues that a reasonable jury should have found that claims 2 and 3 of the '538 patent and claim 1 of the '464 patent are obvious in view of Vandepopuliere and the Cox '211 patent. The jury's finding of invalidity with respect to the Vandepopuliere patent also undermines any argument that the jury lacked a sufficient basis in rejecting Michael Foods' obviousness claim. *See Beckman Instruments, Inc. v. LKB Produkter AB*, 892 F.2d 1547, 1551 (Fed. Cir. 1989) ("In order to render a claimed apparatus or method obvious, the prior art must enable one skilled in the art to make and use the apparatus or method."). Michael Foods also failed to develop any claim that the Davidson patents were rendered obvious by the Cox '211 patent. Indeed,

Dr. Curtis only relied on Vandepopuliere in offering her invalidity opinion. (Trial Tr. (dkt. #507) 4.)¹¹

ii. Polster Patent

Michael Foods also contends that the stacking requirement of the '961 patent is anticipated by its 1996 commercial process, rendering the asserted claims of this patent invalid. In support, Michael Foods relies on its April 12, 1996, press release, referring to stacking:

[T]he process . . . begins with very fresh (less than 48 hours old) Grade AA large eggs that are carefully washed and sorted. The eggs are then placed on shelves in a large holding tank which is sealed and filled with heated water. The temperate of the water is carefully maintained for an exact length of time. The water is then drained and the eggs are then cooled and rinsed prior to packaging.

(Declaration of Elizabeth Cowan Wright ("Wright Decl."), Ex J, DTX 1144 (dkt. #532-10).)

National posits two main arguments in response, either of which are sufficient on their own and considered together certainly support the jury's verdict. First, National argues that the press release was not disclosed to the public before Polster's application date. The jury was instructed on how to determine whether another item, process or reference constitutes prior art, including that (1) "[a]n invention is known when the information about it was reasonably accessible to the public on that date," and (2) "[a]

¹¹ Perhaps recognizing the weakness of this argument, in reply, Michael Foods simply stood on the arguments made in its opening brief with respect to invalidity of the '538 and '464 patents.

process for making a product is not prior art against another's process patent if the process was private or secret." (Closing Jury Instructions (dkt. #489) 8-9.) Dr. Merkle testified that Michael Foods' manufacturing processes, including the details of the immersion process mentioned in the 1996 press release, were considered confidential and were not available or shown to the public. (Trial Tr. (dkt. #509) 110-11, 147.) Moreover, Michael Foods presented no evidence that the 1996 press release -- even assuming it contained the limitations of the Polster patent -- was actually released to the public; in other words, evidence that it actually appeared in a periodical or other publication.

Second, National contends that this press release does not disclose the specific stacking requirement in asserted claim 5 -- requiring at least six layers of stacking -- and in asserted claim 8 -- requiring at least 30 eggs per layer. In order to establish anticipation, Michael Foods had the burden to demonstrate by clear and convincing evidence that "every claim element and limitation is set forth in a single prior art reference, in the same form and order as in the claim." *Abbott Labs. v. Sandoz, Inc.*, 544 F.3d 1341, 1345 (Fed. Cir. 2008). Other than this press release describing the immersion of whole eggs in very broad strokes, Michael Foods fails to point to any other evidence, much less public disclosure, of its 1996 process for pasteurizing eggs, and, specifically, of its process for stacking eggs in the retort.¹²

¹² Michael Foods cites Dr. Merkle's testimony about stacking of eggs, but (as National points out) this testimony concerned the stacking of eggs *after* the pasteurization process, not the stacking of eggs in the retort during pasteurization. (National's Liability Opp'n (dkt. #538) 70.)

Michael Foods' challenge to the jury's rejection of its obviousness challenge fares no better. In support, Michael Foods appears to argue that the pasteurization process disclosed in Davidson combined with the use of stacks in the egg industry renders the Polster '961 patent obvious. The fact that stacks were used to transport and store eggs, however, does not make it a known use for the large-scale pasteurization of eggs using a retort. At the very least, a reasonable jury had a legally sufficient evidentiary basis to reject Michael Foods' obviousness claim on this basis.

C. Invalidity of the Vandepopuliere Patents

Michael Foods also moves for judgment as a matter of law with respect to the jury's finding of invalidity of the Vandepopuliere patents. Having failed to raise this argument in its Rule 50(a) motion, Michael Foods waived it for the purposes of its Rule 50(b) motion. Nonetheless, the court will consider the merits of this argument as well.

Consistent with the evidence presented at trial, the parties' post-trial briefs primarily focus on the lack of written description and enablement. Accordingly, the court will do the same. Pursuant to 35 U.S.C. § 112, the written description "must clearly allow persons of ordinary skill in the art to recognize that [the inventor] invented what is claimed." *Ariad Pharm., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010) (*en banc*) (citation and quotation marks omitted). The disclosure must demonstrate that "the inventor had possession of the claimed subject matter as of the filing date." *Id.* Even putting aside Dr. Labuza's testimony of the lack of written description, Dr. Vandepopuliere's *own* testimony is sufficient to support the jury's finding

of invalidity. Most notable, Dr. Vandepopuliere testified at his deposition, which was presented to the jury via video, that the specification did not describe a 5-log kill in the yolk. (Trial Tr. (dkt. #513-5) 292.) Dr. Vandepopuliere also testified that the specification does not “identify any specific times or temperatures for obtaining any specific amount of log kill in, for example, the yolk of the egg.” (*Id.* at 49.) Finally, he testified that one skilled in the art would not know whether a 5-log reduction was obtained absent experiments, which he did not run. (*Id.* at 65.) While Dr. Vandepopuliere testified that the specification provides “the framework for accomplishing” the claimed invention, the jury was free to find his testimony confirmed that he had “a mere wish or plan for obtaining the claimed invention,” but not “an adequate written description.” See *Boston Scientific v. Johnson & Johnson*, 647 F.3d 1353, 1362 (Fed. Cir. 2011) (internal citation and quotation marks omitted).

The evidence in support of a jury finding of invalidity because of lack of enablement is also persuasive. “The enablement requirement is met where one skilled in the art, having read the specification, could practice the invention without ‘undue experimentation.’” *Streck, Inc. v. Research & Diagnostic Sys., Inc.*, 665 F.3d 1269, 1288 (Fed. Cir. 2012) (quoting *In re Wands*, 858 F.2d 731, 736-37 (Fed. Cir. 1988)). Yet Dr. Vandepopuliere conceded that he did not “identify any specific times or temperatures for obtaining any specific amount of log kill . . . in the yolk of the egg.” (National’s Supp. Trial Record, Ex. 5 (Vandepopuliere Tr.) (dkt. #513-5) at 49.) Similarly, Michael Foods’ expert, Dr. Curtis, conceded that the patent does not disclose the required times and temperatures. (Trial Tr. (dkt. #511) 170-71.)

Moreover, there was sufficient evidence to support the jury's finding that specific times and temperatures could not be identified without undue experimentation. Specifically, Dr. Labuza testified about the subsequent Schuman research conducted to produce a 5-log kill in the yolk, and how this research required substantial experimentation to obtain that result. (Trial Tr. (dkt. #510) 34-45.) The jury could have reasonably relied on this testimony in support of its finding that practicing the Vandepopuliere patents -- and in particular, achieving a 5-log kill in the yolk -- required undue experimentation. Accordingly, the court finds sufficient evidence to support the jury's finding of invalidity of the Vandepopuliere patents based on lack of enablement pursuant to 35 U.S.C. § 112.¹³

D. Claimed Errors by the Court

Michael Foods alternatively posits reasons for the court to grant a new trial based on various errors committed by the court in claims construction, at summary judgment, and during trial. The court disagrees.

i. Excluding whip time from disclaimer

The court has already considered at length (and even reconsidered) the arguments Michael Foods makes in support of its motion for a new trial based on the court's exclusion of whip time from the disclaimer, which will not be recounted again here. For

¹³ Having concluded that a reasonable jury could have found the Vandepopuliere patents invalid because of lack of enablement or lack of written description, the court need not consider whether the jury would have also been reasonable in finding the patents invalid as obvious. *See Mitsubishi Elec. Corp. v. Ampex Corp.*, 190 F.3d 1300, 1303-04 (Fed. Cir. 1999).

the reasons stated in its opinion granting National's motion for reconsideration of its claims construction of the whipping qualities disclaimer (dkt. #141), the court finds no error in its construction.

ii. Not construing “without substantially impairing functionality” limitation in ‘961 patent

Michael Foods also takes issue with the court's decision to not construe the “without substantially impairing functionality” in the ‘961 patent. Michael Foods' proposed construction defined the term to disclaim seven characteristics. These characteristics were mentioned in the ‘961 specification as “a number of methods” by which the “functionality of the pasteurized in-shell egg may be measured.” (‘961 patent, 2:1-2.) While the patent instructs that the functionality may be measured by reference to certain characteristics, it does not so require. Similarly, the court declined to limit the term “without substantially impairing functionality” to these characteristics and instead instructed the jury to give the term its ordinary meaning. The court finds no error in rejecting Michael Foods' proposed construction.

Even if the court acted in error, the error is harmless on the evidence presented here. Michael Foods specifically latches onto the proposed disclaimer of eggs “which manifest an inordinately reduced whipping volume, a substantially increased whipping time and/or the like.” (Michael Foods' Liability Br. (dkt. #531) 65.) In light of the jury's finding that Michael Foods eggs did not fall within the whipping characteristics disclaimer of the Davidson patents, it is highly unlikely that the jury would have reached a different conclusion with respect to the ‘961 patent if asked.

iii. Preventing testimony about how a person of ordinary skill in the art would understand “without substantially impairing functionality”

Michael Foods also argues that the court erred when it prevented Michael Foods from eliciting testimony from Dr. Labuza and Dr. Curtis about how a person of ordinary skill in the art would understand the term “without substantially impairing functionality” in the asserted claims of the ‘961 patent. Michael Foods contends that absent this testimony, “the jury did not realize the importance of increases in whip time and whip volume in the infringement analysis and consequently found Michael Foods infringed the ‘961 patent.” (Michael Foods’ Liability Br. (dkt. #531) 66.) The fundamental problem with this argument is that the record is to the contrary.

Michael Foods did not seek testimony from Dr. Labuza about how a person of ordinary skill in the art would understand that term. As for Dr. Curtis, Michael Foods was allowed to ask her “how a person of ordinary skill in the art [would] understand the term *without substantially impairing functionality*?” (Trial Tr. (dkt. #511) 60.) The court only sustained objections to Michael Foods’ attempt to elicit testimony from Dr. Labuza in support of *its* proposed claims construction of this phrase, which the court had already rejected. (See Trial Tr. (dkt. #510) 147-148 (asking Dr. Labuza about the meaning of language in the specification). The court properly rejected this testimony because it concerned a matter of law for the court to determine. See, e.g., *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 970-71 (Fed. Cir. 1995) (“[T]he interpretation and construction of patent claims, which define the scope of the patentee’s rights under the patent, is a matter of law exclusively for the court.”).

iv. Holding that Example 1 could not achieve a 5-log reduction

The court rejects this argument for the reasons previously provided in the court's order on the parties' cross-motions for summary judgment. (5/18/12 Order (dkt. #394) 29-32.)

v. Rejecting Michael Foods' actual 5-log reduction argument

The court rejects this argument for the reasons previously provided in the court's order on the parties' cross-motions for summary judgment. (5/18/12 Order (dkt. #394) 46-49.)

vi. Admitting Larry Nixon's testimony

Finally, Michael Foods argues that it was unfairly prejudiced by the court's decision to allow Larry Nixon to testify about the invalidity of the Vandepopuliere patents. Specifically, Michael Foods takes issue with Nixon's testimony that the "parent Vandepopuliere application did not disclose experimental results demonstrating that it achieved a 5D reduction of salmonella in the yolk as of its filing date, and that the examiner only allowed the Vandepopuliere patents because the applicants convinced him that [the] parent Vandepopuliere patent application achieved a 5D reduction of salmonella in the yolk." (Michael Foods' Liability Br. (dkt. #531) 76 (internal citations omitted).)

Contrary to Michael Foods' characterization, Nixon did not testify as to the validity of the Vandepopuliere patents or offer any technical testimony. Indeed, Nixon

was not qualified as a technical expert; rather, he is patent attorney, who was asked to testify about the prosecution history of the Vandepopuliere patents. Nixon's testimony was, therefore, properly limited to discussing the prosecution history of both the Davidson and Vandepopuliere patents, and specifically to what was or was not disclosed in the application and subsequent documents. *See Sundance, Inc. v. Demonte Fabricating, Inc.*, 550 F.3d 1350, 1361 n.2 (Fed. Cir. 2008) ("We have no reason to doubt that [the expert] -- an experienced patent attorney -- is qualified to testify as to patent office procedure generally.").

III. Challenges to Damages Award

In a separate brief, Michael Foods challenges the jury's award of damages in National's favor. National presented the jury with two approaches to determine its damages. The first was based on lost profits in the form of price erosion and lost sales coupled with a reasonable royalty on units not included in lost profits. Under that approach, National requested total damages in the amount of \$8,691,520, consisting of \$1,153,290 in lost sales, \$6,994,974 in price erosion, and \$543,356 in a reasonable royalty on units not included in lost sales. (National's Supp. Trial Record, Ex. B (Peterson Demonstratives) (dkt. #513-2) at 30.) Under the second approach, National requested a reasonable royalty for all units of \$2,234,281. (*Id.* at 31.)

Michael Foods challenges the first approach to damages on the grounds that National failed to establish (1) evidence of consumer demand necessary to support an award of price erosion damages; and (2) an absence of acceptable noninfringing

substitutes required to support any lost profits damages. Alternatively, Michael Foods argues that the damage award was so excessive that a new trial or remittitur is necessary. However, Michael Foods' briefs on damages read more like a closing argument than legal grounds to reverse or remit, both in its selective discussion of the evidence presented and the favorable inferences it would draw from them. Just as the jury rejected these arguments, so does this court.

A. Price Erosion

In *Crystal Semiconductor Corp. v. Tritech Microelectronics Int'l, Inc.*, the Federal Circuit considered what evidence is necessary for the patentee to lay claim to price erosion damages:

[T]he patentee'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 that market.

246 F.3d 1336, 1357 (Fed. Cir. 2001).

Michael Foods takes issue with National's proof of this last element -- the effect of the hypothetically increased price on demand for pasteurized, whole shell eggs. The Federal Circuit explained that "in a credible economic analysis, the patentee cannot show entitlement to a higher price divorced from the effect of that higher price on demand for the product. In other words, the patentee must also present evidence of the (presumably reduced) amount of product the patentee would have sold at the higher price." *Id.* That is why the court instructed the jury here that "National was required to present credible

economic evidence to show the effect of the higher prices on the demand for National's product." (Damages Instructions (dkt. #493) 3.) Contrary to Michael Foods' assertions, National did just that.

National's damages expert, Mark Peterson, opined that it had suffered approximately 20 cents of price erosion due to the availability of Michael Foods' infringing product in the marketplace. This represented a 12% increase in price per dozen of pasteurized shell eggs over National's actual price of \$1.69 in 2011. Michael Foods contends that National failed to put forth any evidence of the impact of this increased price would have on demand, let alone evidence that any consumers would have tolerated higher prices. But as National points out, Peterson's analysis of pre-infringement pricing trends, as well as Michael Foods' prices post-infringement, were the basis for his opinion. As Peterson testified at trial, both Michael Foods' and National's pre-infringement prices fluctuated with the price of inputs, represented by the *Urner Barry* index. Historically, this meant National had been able to maintain a price premium over Michael Foods. After Michael Foods began selling an infringing product, however, National was no longer able to increase its prices in response to an increase in the *Urner Barry* index. Instead, it held down prices to remain competitive with Michael Foods. In contrast, Michael Foods was able to maintain demand while increasing its prices for shell eggs pasteurized using the infringing process. Based on this historical pattern, Peterson concluded that but for Michael Foods' infringement, National could have raised its prices while continuing to grow its sales volume, just as Michael Foods had done. Peterson's analysis was bolstered by the testimony of National Vice President of

Business Development, Jay Berglind, that National had been able to increase its prices *and* grow its sales volume simultaneously before Michael Foods introduced its infringing product, but not after.

While the jury was certainly free to reject this evidence, the court finds it more than sufficient to support the jury's finding that the demand would have been relatively inelastic in response to a 12% increase, particularly in light of what was proven to be a rapidly expanding market for premium-priced, pasteurized shell eggs.¹⁴ Moreover, the jury awarded *less* than National requested, which may well have reflected a discount in the award to reflect a lower price differential and/or sagging demand in response to a price increase.

B. Absence of Acceptable Noninfringing Substitutes

Next, Michael Foods argues that National failed to put forth evidence of the absence of any acceptable noninfringing substitutes in seeking lost profits. Michael Foods is correct in asserting that to recover damages for lost profits, “the patent owner must show causation in fact, establishing that but for the infringement, he would have made additional profits.” *Siemens Med. Solutions USA v. Saint-Gobain Ceramics & Plastics, Inc.*, 637 F.3d 1269, 1287 (Fed. Cir. 2011) (quotations omitted). So, too, Michael Foods correctly points out that this requires the patent owner to demonstrate an absence of acceptable noninfringing substitutes. *Id.*

¹⁴ Because the court finds sufficient evidence to support the jury's finding of damages premised on price erosion, the court need not consider Michael Foods' argument that the price erosion claim also “infected” the jury's award of a reasonable royalty.

As the Federal Circuit has explained:

[A] fair and accurate reconstruction of the “but for” market also must take into account, where relevant, alternative actions the infringer foreseeably would have undertaken had he not infringed. Without the infringing product, a rational would-be infringer is likely to offer an acceptable noninfringing alternative, if available, to compete with the patent owner rather than leave the market altogether. The competitor in the “but for” marketplace is hardly likely to surrender its complete market share when faced with a patent, if it can compete in some other lawful manner.

Grain Process Corp. v. Am. Maize-Prods. Co., 185 F.3d 1341, 1350-51 (Fed. Cir. 1999).

But to constitute an acceptable noninfringing substitute, the alternative must possess the advantages of the patented product. *See Stryker Corp. v. Intermedics Orthopedics, Inc.*, 96 F.3d 1409, 1418 (Fed. Cir. 1996). To prove that there are no acceptable noninfringing substitutes, the patent owner must show either that (1) the purchasers in the marketplace were generally willing to buy the patented product for its advantages; or (2) at least the specific purchasers of the infringing product purchased for that reason. *Standard Havens Prods., Inc. v. Gencor Indus., Inc.*, 953 F.2d 1360, 1373 (Fed. Cir. 1991).

Michael Foods contends that “no reasonable jury could find that Michael Foods’ pre-April 2010 eggs and process are not acceptable non-infringing alternatives to Michael Foods’ sales for which National seeks lost profits.” (Michael Foods’ Damages Br. (dkt. #530) 23.) In support of this argument, Michael Foods contends that the evidence at trial -- including testimony from National’s witnesses -- established that safety, rather than quality, was the driver of sales of pasteurized shell eggs. For example, Michael Foods points to National’s expert Peterson, who testified that the vast majority of Michael Foods’ sales (roughly 73%) would have remained with Michael Foods had it

continued its pre-April 2010 process. Michael Foods also points to National's marketing manager Joseph Berglind's testimony that safety drives the demand of pasteurized shell eggs is evidenced by (1) increased demand after the 2010 Wright County egg recall; and (2) any further egg recalls could be expected to result in even greater consumer demand. Lastly, Michael Foods relies on Berglind's testimony that the respective market share of the two parties stayed the same from 2009 (pre-infringing) to present day (post-infringing). *See Slimfold Mfg. Co. v. Kinkead Indus., Inc.*, 932 F.2d 1453, 1458 (Fed. Cir. 1991) (“[T]he fact (found by the district court) that neither Slimfold's nor Kinkead's market share changed significantly after introduction of the ‘new’ doors is very probative” evidence that the previously-sold, non-infringing product constitutes an acceptable noninfringing substitute.).

While the jury was free to so find, National presented contrary evidence that (1) quality *is* an important advantage of National's patented product; and (2) since Michael Foods' pre-April 2010 eggs lacked that quality, its noninfringing eggs were not an acceptable substitute. *See Kalman v. Berlyn Corp.*, 9214 F.2d 1473, 1482 (Fed. Cir. 1991) (“[A] product lacking the advantages of a patented device can hardly be termed a substitute ‘acceptable’ to the customer who wants those advantages.”). National also points out that it “only sought lost profits for sales to those portions of the market that demanded a high-quality pasteurized shell egg for which there was no noninfringing substitute,” consistent with the Federal Circuit's practice of allowing lost profits award for certain sales, but not for others. (National's Damages Opp'n (dkt. #536) 18 (citing cases).)

In defense of its lost profit recovery, National points specifically to testimony at trial that its pasteurized shell eggs had been considered to be of higher quality than Michael Foods up until April 2010, at which point Michael Foods changed its process, resulting in higher quality eggs. Berglind testified it was at that point that large purchasers like Compass and Aramark, “felt comfortable enough to put [Michael Foods’] product on their contracts.” (Trial Tr. (dkt. #515) 55:5-13.) National also relied on evidence, which was acknowledged by Michael Foods’ damages expert, that Michael Foods captured approximately 30% of the growth in the market after April 2010, compared to approximately 10% of the growth in the market before that date. (Trial Tr. (dkt. #516) 55:5-9.) All of this, coupled with the evidence that National was able to charge a higher price than Michael Foods before April 2010, but not after, supported National’s assertion to the jury that customers care about quality in purchasing pasteurized shell eggs. (Trial Tr. (dkt. #515) 73:18-74:1 (describing chart and explaining “that part of the market actually was willing to pay a higher price . . . to get product from National than accept Michael Foods’ lower-price, lower-quality product”).)

Accordingly, the court finds that there was an evidentiary basis for the jury to find “the purchasers in the marketplace generally were willing to buy the patented product for” its quality advantages despite paying a higher price. *See Standard Havens Prods.*, 953 F.2d at 1373. No doubt, safety is also an important customer criteria in the purchase of shell pasteurized eggs, but National presented evidence that certain customers purchased pasteurized eggs based on their quality. As such, National presented sufficient evidence

to support the jury award of lost profits based on sales to certain customers where quality contributed to, if not drove, their purchasing decision.

C. Motion for a New Trial or Remittitur

Finally, Michael Foods contends that it is entitled to a new trial or remittitur because the damages award was excessive, contrary to the court's instructions, and against the weight of the evidence. *Mejia v. Cook Cnty., Ill.*, 650 F.3d 631, 633 (7th Cir. 2011) ("If, after evaluating the evidence, the district court is of the opinion that the verdict is against the manifest weight of the evidence, a new trial is appropriate."). In the alternative, Michael Foods seeks remittitur of the jury's damages award. *See Oiness v. Walgreen Co.*, 88 F.3d 1025, 1030 (Fed. Cir. 1996) ("This court has adopted the 'maximum recovery rule' which requires this court to remit the damage award to the highest amount the jury could properly have awarded based on the relevant evidence." (internal quotation marks and citation omitted)).

Unfortunately for Michael Foods, the only arguments advanced in support of this motion are the same ones the court has previously found without merit as set forth above. While a motion for new trial may be granted even if a motion for judgment as a matter of law is denied, *Mejia*, 650 F.3d at 634, the court finds no basis for granting a motion for new trial here. Similarly, the only bases offered by Michael Foods for remittitur have already been rejected by this court.

IV. Other Pending Motions

Having upheld the jury's findings as to liability and damages, only a few, additional motions remain to be addressed.

A. Joint Motion to Correct Trial Exhibits Lists (dkt. #500)

The parties move this court to correct the trial exhibits lists (dkt. ##495, 496), noting several exhibits which the parties believe were admitted. The court will grant this motion.

B. National's Motion for Award of Prejudgment Interest (dkt. #519)

National seeks an award of prejudgment interest. Michael Foods opposes this motion as premature, pending its now-decided post-verdict motions. As such, the court will grant National's motion and amend the judgment to award interest in the amount of \$157,391.00.

C. Michael Foods' Unopposed Motion to Alter or Amend the Judgment Under Rule 59(e) (dkt. #525)

Finally, Michael Foods moves the court to alter or amend the judgment under Rule 59(e) to include: (1) an order directing the PTO to cancel U.S. Trademark Registration No. 3,487,479 for the Circle P mark; (2) a declaration that National's Application Serial No. 85/157,725 for the unregistered Red Circle P mark is generic and invalid; and (3) a statement that the court's dismissal on summary judgment was with prejudice as to National's claims for infringement of all asserted claims of U.S. Patent

No. 5,916,617, National's claims for infringement of claim 9 and the asserted claims dependent on claim 9 of U.S. Patent No. 6,113,961, and National's trademark and unfair competition claims. Michael Foods represents that National does not oppose the motion and National has not indicated otherwise. Finding Michael Foods' requests consistent with the court's prior rulings at summary judgment in any event, the court will grant this motion as well.

ORDER

IT IS ORDERED that:

- 1) the parties' joint motion to correct trial exhibit lists (10-cv-646, dkt. #500; 11-cv-534, dkt. #457) is GRANTED;
- 2) plaintiffs National Pasteurized Eggs, Inc. and National Pasteurized Eggs, LLC's motion for award of prejudgment interest (10-cv-646, dkt. #519; 11-cv-534, dkt. #476) is GRANTED;
- 3) defendants Michael Foods, Inc., Abbotsford Farms, Inc., Crystal Farms Refrigerated Distribution Company, and M.G. Waldbaum Company's unopposed motion to alter or amend the judgment under Rule 59(e) (10-cv-646, dkt. #525; 11-cv-534, dkt. #482) is GRANTED;
- 4) defendants' renewed motion for judgment as a matter of law on damages, or, in the alternative, for a new trial or for remittitur (10-cv-646, dkt. #528; 11-cv-534, dkt. #485) is DENIED;
- 5) defendants' renewed motion for judgment as a matter of law, or, in the alternative, for a new trial (10-cv-646, dkt. #529; 11-cv-534, dkt. #486) is DENIED; and
- 6) the clerk of the court is directed to amend the judgment to include (a) \$157,391.00 in prejudgment interest, for a total damages award of \$5,999,037.00; (b) an order directing the PTO to cancel U.S. Trademark Registration No. 3,487,479 for the Circle P mark; (c) a declaration that National's Application Serial No. 85/157,725 for the unregistered Red Circle P mark is generic and invalid; and (d) a statement that the court's dismissals on summary judgment of National's claims for infringement of all asserted claims

of U.S. Patent No. 5,916,617, National's claims for infringement of claim 9 and the asserted claims dependent on claim 9 of U.S. Patent No. 6,113,961, and National's trademark and unfair competition claims were with prejudice.

Entered this 29th day of March, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge