

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

FOSTER POULTRY FARMS, INC., and ) 1:04-cv-5513 OWW SMS  
FRESNO FARMING, LLC, )  
Plaintiffs, ) MEMORANDUM AND DECISION RE  
v. ) GRANTING DEFENDANT  
SUNTRUST BANK, ) SUNTRUST'S MOTION FOR  
Defendant. ) CLARIFICATION AND DENYING  
MOTION FOR DISCOVERY NOM  
AND LEAVE TO SUBMIT  
SUPPLEMENTAL EVIDENCE (Doc.  
223)  
\_\_\_\_\_  
SUNTRUST BANK, )  
Counter-Claimant, )  
v. )  
FOSTER POULTRY FARMS, INC., and )  
FRESNO FARMING, LLC, )  
Counter-Defendants. )  
\_\_\_\_\_  
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On January 18, 2008, Defendant SunTrust filed a post-trial Motion for Clarification, for Discovery Nom and Leave to Submit Supplemental Evidence. (Doc. 216, Motion). Oral argument on this motion was heard on March 31, 2008.

Defendant SunTrust in its memorandum in support of its Motion, requests clarification of the term "interest" as used in the Court's January 11, 2008 Order. (Doc. 214, Jan 11 Order)<sup>1</sup>

<sup>1</sup> This case came before the Court for trial commencing September 18, 2007, in Courtroom 3, the Hon. Oliver W. Wanger presiding. The Court heard evidence during a six-day bench trial

1 SunTrust contends that not all interest received from the Trusts<sup>2</sup>  
2 was profit gained by SunTrust.

3 Plaintiffs filed their Calculation of Damages on January 21,  
4 2008, setting forth their calculations of the interest earned by  
5 SunTrust from March 14, 2004, pursuant to the Jan. 11, 2008  
6 Order, to aid in the calculation of the amount of profit to be  
7 disgorged by SunTrust. Plaintiffs also argue that SunTrust's  
8 filing of its Motion should not delay entry of judgment because  
9 this is the first time in the litigation that SunTrust has  
10 attempted to present an alternative damage calculation, in the  
11 guise of a motion for "clarification" that would greatly reduce  
12 the amount of damages SunTrust would have to pay. (Doc. 217 and  
13 225)<sup>3</sup>

14 The following are the relevant findings of fact and  
15 conclusions of law from the Jan. 11, 2008 Order relating to  
16 disgorgement damages of the interest earned by SunTrust on the  
17 Term Loans<sup>4</sup>:

18  
19 commencing September 18, 2007 through September 27, 2007 and  
20 entered its Findings of Fact and Conclusions of Law on January  
21 14, 2008. (Doc. 214) Please see the Jan 14 Order for the full  
description of the facts of this case.

22 <sup>2</sup> Robert D. Zacky and Lillian D. Zacky Trust ("Zacky Trust")  
23 and the Brand Family Trust ("Brand Trust") (collectively the  
"Trusts"), owners of Zacky Farms, Inc.

24 <sup>3</sup> Plaintiffs filed their opposition to Defendant SunTrust's  
25 Motion on March 3, 2008. (Doc. 225). Defendant SunTrust filed  
its reply to Plaintiffs' Opposition on March 17, 2008. (Doc.  
232).

27 <sup>4</sup> Two Term Loans provided to the Zacky Trust and the Brand  
28 Trust by SunTrust in August 2002 totalling approximately \$85

1 196. During the period from August 14, 2002, the date  
2 the 2002 monetizing Term Loans were originally made to  
3 the Trusts to the date of the final repayment on  
4 October 9, 2006, SunTrust earned \$6,004,886.97 in  
5 interest on the 2002 monetization Term Loans to the  
6 Trusts. Steven Butler, qualified as Plaintiffs damages  
7 expert at trial, testified to that amount. 9/20 Trial  
8 Tr., p. 64:15-19." Findings of Fact, ¶196.

9 117. Damages shall be calculated by taking the amount  
10 of interest and fees earned by SunTrust on the 2002  
11 Term Loans from the date this lawsuit was filed, March  
12 15, 2004 through the end of the term of the Letters of  
13 Credit on October 9, 2005." Conclusions of Law ¶ 117.

14 2. Plaintiff FPF shall recover as disgorgement and  
15 shall submit the calculation of damages awarded for any  
16 interest and fees earned on the 2002 Term Loan to the  
17 Trusts by Defendant SunTrust starting from the time of  
18 filing the lawsuit on March 15, 2004 through October 9,  
19 2006." Conclusion, ¶ 2.

20 On January 21, 2008, Plaintiffs' filed their calculation of  
21 damages pursuant to this Court's order (interest and fees paid by  
22 the Trusts to SunTrust plus prejudgment interest, calculated  
23 separately for each quarterly interest payment). (Doc. 217,  
24 Damage Calculations) The calculated damages equal \$3,110,530.40,  
25 plus prejudgment interest of \$979,344.87 (through January 22,  
26 2008), for a total of \$4,089,875.27, plus prejudgment interest of  
27 \$852.20 for each day after January 22, 2008 up to and including  
28 the day judgment is entered. Defendant offers no corrections to  
these specific calculations instead its motion is on  
differentiating between "margin interest" and "LIBOR interest"  
representing the alleged spread between the cost of money loaned  
to the Trusts and the gross interest earned on the Term Loans

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26 million. SunTrust loaned Zacky Trust \$77,115,161.42, under a  
27 Term Loan by note, dated as of August 14, 2002, (DX-201-1), and  
28 the Brand Family Trust \$8,220,939.98, under a Term Loan by notes,  
dated as of August 14, 2002 (DX-202-1).

1 from which Defendant asserts net profit is calculated on the Term  
2 Loans.

3 Plaintiffs contend that SunTrust cannot seek to amend the  
4 Findings of Fact under Rule 52(b) based on post-trial evidence  
5 not in the trial record. Federal Rule of Civil Procedure 52  
6 states:

7 (b) Amended or Additional Findings. On a party's motion  
8 filed no later than 10 days after the entry of  
9 judgment, the court may amend its findings--or make  
10 accordingly. The motion may accompany a motion for a  
11 new trial under Rule 59.

12 Fed. R. Civ. P. 52(b). The Ninth Circuit has recognized that  
13 Rule 52(b) applies to motions to amend the findings prior to  
14 entry of judgment. *Calculators Hawaii, Inc. v. Brandt, Inc.*, 724  
15 F.2d 1332, 1335 (9th Cir. 1983) ("We agree with Professor Moore  
16 that the language of 52(b) suggests that 'a motion made after the  
17 court has indicated the action that it will take but before entry  
18 of the judgment embodying that action is timely.'") The decision  
19 of whether to grant or deny a motion to amend or enlarge the  
20 findings is within the discretion of the trial court. 9C Wright &  
21 Miller, *Federal Practice and Procedure: Civil* 3d § 2582, at 352  
22 (3d ed. 2008). Defendant did not characterize its Motion as a  
23 motion under *Federal Rules of Civil Procedure* 52(b). At oral  
24 argument SunTrust conceded that the motion is brought under Fed.  
25 R. Civ. Proc. 52.

26 Under Rule 52(b), parties have been permitted to seek an  
27 amendment of the Court's findings of fact to correct manifest  
28 errors of law or fact, or in some limited situations to present  
newly discovered evidence, but such a motion is not granted if it

1 is based on arguments that either were, or could have been raised  
2 at any point prior to the Court's entry of judgment. See *Granat*  
3 *v. Schoepski*, 272 F.2d 814, 815 (9th Cir. 1959) ("Plaintiffs  
4 concede that the trial court's findings of fact may not be set  
5 aside unless clearly erroneous (Rule 52(b), Federal Rules of  
6 Civil Procedure, 28 U.S.C.A.)."); *Davis v. Mathews*, 450 F.Supp.  
7 308, 318 (E.D. Cal. 1978) ("Motions under Rule 52(b) are primarily  
8 designed to correct findings of fact which are central to the  
9 ultimate decision; the Rule is not intended to serve as a vehicle  
10 for a rehearing."); *Diocese of Winona v. Interstate Fire & Cas.*  
11 Co., 89 F.3d 1386, 1397 (8th Cir. 1996) (noting that a party  
12 seeking to amend a judgment under Rule 52(b) cannot raise  
13 arguments that could have been raised prior to the issuance of  
14 the judgment).

15 "This is not to say, however, that a motion to amend should  
16 be employed to introduce evidence that was available at trial but  
17 was not proffered, to relitigate old issues, to advance new  
18 theories, or to secure a rehearing on the merits. [citation]  
19 Except for motions to amend based on newly discovered evidence,  
20 the trial court is only required to amend its findings of fact  
21 based on evidence contained in the record. To do otherwise would  
22 defeat the compelling interest in the finality of litigation."  
23 *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1219 (5th Cir.  
24 1986); *Diebitz v. Arreola*, 834 F.Supp. 298, 302 (E.D. Wis. 1993)  
25 ("However, recognized grounds for such a motion include 'manifest  
26 error of fact or law' by the trial court, 'newly discovered  
27 evidence,' or 'a change in the law.'"); *Lyons v. Jefferson Bank &*  
28 *Trust*, 793 F.Supp. 989, 991 (D. Colo. 1992). As the Fifth

1 Circuit Court stated in *Fontenot* in regards to 52(b) motions:  
2 "Blessed with the acuity of hindsight, [a party] may now realize  
3 that it did not make its initial case as compellingly as it might  
4 have, but it cannot charge the District Court with responsibility  
5 for that failure through [a] Rule 52(b) motion." 791 F.2d at  
6 1220.<sup>5</sup>

7 Here, Plaintiffs were permitted to provide post-trial  
8 evidence in the form of calculations of disgorgement interest  
9 earned on the Trusts' Term Loans for the period specified. This  
10 did not entail receipt of any new evidence, rather calculation of  
11 profit from record evidence. Defendant is entitled to respond  
12 and rebut the evidentiary calculation to provide a legally  
13 accurate calculation of disgorgement damages. This means that  
14 defendant may offer alternate damage calculations so long as  
15 based on admitted evidence of record.

16 SunTrust identifies two documents that it claims were  
17 presented as evidence at trial demonstrating that the interest  
18 rate on the 2002 Term Loans was LIBOR plus a spread of 60 basis  
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<sup>5</sup> 52(b) motions are often filed with 59(e) motions. A  
21 motion under Federal Rules of Civil Procedure 59(e) also provides  
22 for altering or amending an order, but it must be filed no later  
than 10 days after the entry of judgment:

23 (e) Motion to Alter or Amend a Judgment. A motion to  
24 alter or amend a judgment must be filed no later than  
10 days after the entry of the judgment.

25 Fed. R. Civ. P. 59(e). "The history of Rule 59(e) shows that  
26 'alter or amend' means a substantive change of mind by the  
27 court." *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 527  
28 (9th Cir. 1983). Defendant does not proffer any argument  
pursuant to Fed. R. Civ. P. 59(e).

1 points and SunTrust earned only the "margin interest" of the  
2 total amount of interest charged to the Trusts. SunTrust argues  
3 the interest should be separated for accounting purposes into  
4 "LIBOR interest" and "margin interest." The first document cited  
5 as evidence is JX-7, Credit Package for the 2002 Term Loans to  
6 the Trusts, dated May 30, 2002. The Term Loans were entered into  
7 on August 14, 2002. SunTrust does not describe where in JX-7 the  
8 information can be found to support its argument. JX-7, the  
9 Credit Package document, is an internal SunTrust document that  
10 was prepared by Thomas Parrott and approved by Senior Credit  
11 Officers Wayne Riess and Woody Woodring. A review of this  
12 document reveals on page III-2 the description of Pricing and  
13 Fees: "A,B [the two loans to the Trusts] LIBOR + 60 Spread  
14 fixed over the life of the loans Upfront Fee: 25 bps" (JX -7,  
15 III-2).

16 The second document is JX-53, consisting of almost a  
17 thousand pages of documentation that appear to concern the  
18 interest and fees paid under the Term Loans, including bank  
19 statements from each of the Brand and Zacky Trusts, and  
20 spreadsheets listing margin and LIBOR interest breakdowns, and  
21 other financial documents.<sup>6</sup> Neither party discussed or described  
22 this exhibit at trial and SunTrust does not now describe or  
23 explain how JX-53 can be utilized to reach the net figure  
24 SunTrust contends represents its profit on the Term Loan subject

25  
26 <sup>6</sup> JX-53 is a joint exhibit and all joint exhibits have been  
27 entered into evidence. See 9/19 Trial. Tr., pp. 59:4-13 and  
119:14-19.  
28

1 to disgorgement.<sup>7</sup>

2 SunTrust additionally submits a two-page declaration by Hugh  
3 Brown, Director of SunTrust Bank, to describe the difference  
4 between the interest charged to the Trusts and the interest  
5 earned as profit by SunTrust, the "margin interest." Mr. Brown  
6 did not testify at trial nor was he designated as a witness in  
7 the final pretrial order. See Doc. 165. His description of  
8 margin interest vs. LIBOR interest was never introduced or  
9 mentioned at trial.

10 Mr. Brown states the calculated total "margin interest" paid  
11 to SunTrust by the Trusts is approximately \$750,000. But Mr.  
12 Brown in his declaration provides no supporting calculation or  
13 further description of how to calculate net profit on a loan,  
14 other than to declare that "[i]t is generally accepted banking  
15 practice that LIBOR is used to reflect banks' approximate cost of  
16 funding on all U.S. dollar-denominated loans that are priced  
17 using LIBOR as a reference rate. LIBOR reflects the approximate  
18 cost of funds or borrowing costs to SunTrust Bank on LIBOR-based  
19 loans, including the funds that were loaned to the Trusts on the

20  
21 <sup>7</sup> While, the Witness and Exhibit List does not show JX-53  
22 as admitted into evidence, it was entered into evidence. Early  
23 in the trial all joint exhibits were received into evidence. See  
24 Doc. 210, Witness and Exhibit List After Trial. Plaintiffs  
25 lodged exhibits JX 1-60 with the Court on September 11, 2007  
26 prior to the start of trial on September 18, 2007. In Defendant  
27 Suntrust's pre-trial Notice of Potential Trial Witnesses and  
28 Exhibits for Thursday, September 20, 2007, it listed JX-53 as an  
exhibit to be used in conjunction with trial witnesses Marcy  
Lyons and Tommy Parrott. JX-53, however was not referred to in  
the examination of trial witnesses Marcy Lyons and Tommy Parrott.  
Doc. 195.

1 2002 Term Loans." Doc. 223, Brown Decl., ¶ 4. Mr. Brown then  
2 concludes with "SunTrust's profit or 'gain' with respect to each  
3 quarterly interest payment made by the Trusts was only that  
4 portion of each payment which represented the 60 basis points  
5 'spread' also referred to as the 'margin interest.' The  
6 remainder of each quarterly interest payment represented LIBOR  
7 portion which in effect represented SunTrust's costs of borrowing  
8 to fund the 2002 Term Loans." *Id.*

9 This is the first time this information has been provided in  
10 this suit, well after the six-day bench trial in September 2007.  
11 Such information, if provided at trial to challenge Plaintiffs'  
12 damage expert's calculation of damages resulting from the Trusts'  
13 Term Loans, could have been addressed and properly challenged by  
14 Plaintiffs. The proffered testimony of Mr. Brown bears directly  
15 on the issue of net profit.

16 Plaintiffs argue that SunTrust should not be permitted to  
17 introduce new evidence after trial, which is expert testimony  
18 that could have been provided at trial. SunTrust has no excuse  
19 for its failure to designate any expert or to provide any  
20 evidence or argument on damages before or during trial.  
21 Plaintiffs further argue that SunTrust has been fully aware that  
22 Plaintiffs sought as damages all the interest SunTrust from the  
23 monetization through the Trusts' Term Loans since at least April  
24 25, 2005 - the date of Plaintiffs' expert, Mr. Butler's first  
25 report.<sup>8</sup> SunTrust did not challenge Mr. Butler's calculations

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27 <sup>8</sup> Plaintiffs claim that at least since April 28, 2005,  
28 SunTrust has been fully aware that Plaintiffs sought damages, at  
a minimum, for all interest earned from the monetization loans.

1 throughout the course of the litigation nor did it designate a  
2 rebuttal expert witness, or any other witness to testify as to  
3 damages.

4 Plaintiffs cite both SunTrust's opening argument and closing  
5 argument in which Defendant steadfastly argued the all or nothing  
6 position that SunTrust had not breached the contract and that  
7 Plaintiffs suffered no damages and offered no alternative  
8 theories of damages:

9 [MR. COX:] I'll touch a minute on disgorgement. As  
10 we've made the point, Your Honor, that is an equitable  
11 remedy that we believe is not warranted here. There has  
12 been no actual injury, harm or damage to the plaintiff.  
13 There is no -- in the absence of showing actual harm or  
14 damage, there is no basis for -- a breach of contract  
15 case for seeking disgorgement on the fees of the term  
16 loans or the fees that were paid on the letter of  
17 credit, Your Honor.

18 9/27 Trial Tr. at 94 (SunTrust closing argument). And Plaintiffs  
19 cite to the January 11, 2008 Order, Findings of Facts and  
20 Conclusions of Law:

21 199. SunTrust offered no alternative damage  
22 calculations or theories.

23 Doc. 214, Order, Findings of Fact 199. Plaintiffs recognize that

24 Mr. Butler's report, dated April 28, 2005 states:

25 In connection with the monetization of the Fresno  
26 Notes, SunTrust breached its Confidentiality Agreements  
27 with Foster and Fresno as well as the fiduciary duty  
28 SunTrust owed to Foster and Fresno. These breaches have  
resulted in SunTrust being unjustly enriched with  
respect to any fees, interest, or other consideration  
stemming from the monetization transaction.

See PX-101 (Butler report) at 7 (footnote omitted) (emphasis  
added). PX-101 is not entered into evidence.

1 declarant, Hugh Brown, was not listed as a witness in the Final  
2 Pretrial Order. (Doc. 165, p. 29-31, ¶ IX. Witnesses) Defendant  
3 did not designate Mr. Brown or any other expert witness to  
4 testify at trial pursuant to Rule 26(a) (2), and did not do so  
5 under the procedures and timing prescribed in the Court's  
6 Scheduling Order, dated August 12, 2004. (Doc. 27, p. 6, ¶ IX.2)  
7 ("2. The Plaintiffs are directed to disclose all expert  
8 witnesses, in writing, on or before April 29, 2005. Any counter-  
9 designation of experts will be made by Defendants on or before  
10 May 27, 2005.") Plaintiffs argue that Mr. Brown's opinion that  
11 SunTrust followed "generally accepted banking practice" lies  
12 plainly within the province of expert testimony because knowledge  
13 of banking practices is specialized knowledge under Fed. R. Evid.  
14 202.

15 Plaintiffs also disagree with SunTrust's assertion that net  
16 profit on the 2002 Term Loans is limited to "margin interest"  
17 (i.e. the 60 basis points spread over the LIBOR rate cost of  
18 funds) and considers this a factual question which it disputes.  
19 Plaintiffs state they will provide contrary evidence if the need  
20 should arise but do not do so in this motion.

21 Plaintiffs also argue that SunTrust cannot show that it has  
22 substantial justification for nor that no prejudice will result  
23 from its failure to disclose Mr. Brown or any other person as a  
24 damages witness, the standard necessary under Federal Rules of  
25 Civil Procedure 37(c) (1) to permit the use of undisclosed  
26 testimony.

27 Federal Rule of Civil Procedure 37(c) (1) states:

28 (c) Failure to Disclose, to Supplement an Earlier

1 Response, or to Admit.

2 (1) Failure to Disclose or Supplement. If a party  
3 fails to provide information or identify a witness as  
4 required by Rule 26(a) or (e), the party is not  
5 allowed to use that information or witness to supply  
6 evidence on a motion, at a hearing, or at a trial,  
7 unless the failure was substantially justified or is  
8 harmless. In addition to or instead of this  
9 sanction, the court, on motion and after giving an  
opportunity to be heard:

- (A) may order payment of the reasonable expenses,  
including attorney's fees, caused by the failure;
- (B) may inform the jury of the party's failure;  
and
- (C) may impose other appropriate sanctions,  
including any of the orders listed in Rule  
37(b) (2) (A) (i)-(vi).

10 Fed. R. Civ. P. 37(c) (1). Plaintiffs argue that SunTrust made a  
11 strategies choice by not disclosing any expert witnesses nearly  
12 three years ago and provides no justification, let alone  
13 substantial justification for its failure to provide Hugh Brown's  
14 testimony at trial, or any evidence regarding net profit on the  
15 Trusts' Term Loans, before or during trial. Plaintiffs contend  
16 that they have invested extensive resources in the trial and it  
17 would be extremely prejudicial to Plaintiffs and to the orderly  
18 administration of justice to have to address the issue for the  
19 first time after trial. Defendant SunTrust does not bring its  
20 motion pursuant Fed. R. Civ. P. 37(c) (1).

21 Defendant had knowledge Plaintiffs were seeking disgorgement  
22 damages of all interest earned by SunTrust on the Term Loans,  
23 long before trial, and it had knowledge when Plaintiffs presented  
24 their expert testimony of Steven Butler regarding his  
25 calculations of unjust enrichment damages at trial. "The second  
26 element of damages I computed were really unjust enrichment to  
27 SunTrust as opposed to damages specifically to Foster." 9/20  
28 Trial Tr., p. 63: 21-23, Testimony of Mr. Butler. The

1 calculation of that figure was not challenged at trial, except by  
2 omnibus, non-specific denial, and SunTrust provided no rebutting  
3 expert testimony evidence, nor arguments about the amount of  
4 unjust enrichment damages. The following are excerpts from the  
5 trial transcripts regarding Mr. Butler's testimony on  
6 disgorgement damages, demonstrating SunTrust had knowledge of  
7 Plaintiffs' damage theory, but nonetheless failed to rebut or  
8 inquire further about the calculation of disgorgement damages.  
9 Mr. Butler was on the witness stand September 20, 2007 and  
10 September 21, 2007:

11 [THE COURT]: And so I will permit him to testify as to  
12 damage calculations as long as the damage calculations are  
13 based on one, some recognized theory or measure of recovery  
14 for the calculation of damages, and that the underlying  
15 facts that are to be assumed by the expert in making that  
16 opinion are in evidence or will be proved in evidence to  
17 provide the foundation for the expert opinion, and that the  
18 methodology is reasonably recognized among commercial  
19 bankers and other people in the banking industry who would  
20 be able to determine the nature and extent of any economic  
21 harm that would flow from or be caused by any kind of a  
22 breach of a generally accepted banking practices or  
23 standards in any specific requirements of the agreements in  
24 this case for performance, as long as that does not require  
25 a legal interpretation. Is everybody clear about my ruling?  
26 MR. COX: Yes, Your Honor.  
27 MR. ZARLENGA: Yes, Your Honor.  
28 ---

[THE COURT] Q. All right. And in terms of the other element  
of damages, what was the other element the of damages that  
you computed?

[MR. BUTLER] A. The second element of damages I computed  
were really unjust enrichment to SunTrust as opposed to  
damages specifically to Foster.

MR. COX: Objection Your Honor. I think this goes beyond what  
the Court has indicated Mr. Butler would be permitted to  
testify to.

MR. ZARLENGA: I don't agree with that at all. This is  
precisely our main element of damages in the case. This is  
what the two cases --

THE COURT: The Court indicated that I have not decided as a  
matter of law. I denied the motion in limine because there  
is an unjust enrichment case from California in the context  
of, if you will, confidentiality of trade secrets

1 agreements. There is also a covenant not to compete case in  
2 New York. As I said, I'm going to permit the testimony, and  
3 I will give it such weight and will determine what if any  
value it is ultimately to receive. Overruled.

4 BY MR. ZARLENGA:Q. Mr. Butler, you may continue.

5 [MR. BUTLER] A. I calculated damages based on unjust  
enrichment to SunTrust, which comprised the interest paid by  
6 both Zacky and Brand to SunTrust Bank for the notes that  
7 were monetized. There are three numbers which added  
together come to approximately \$6 million.

8 [THE COURT] Q. All right. So we'll call that unjust  
enrichment and tell me the amount again?

9 ---  
10 THE COURT: Well, I've got 6,004,886.97 for the interest.

11 THE WITNESS: I'm sorry, sir. 6 --

12 THE COURT: 004,886.97.

13 BY MR. ZARLENGA:Q. So one more time?

14 THE WITNESS: 6 million 4 thousand --

15 THE COURT: 886.

16 THE WITNESS: 886.97.

17 Q. 97?

18 A. 97.

19 Q. And tell me how you reached that number? What data did  
you use?

20 A. There are three components. They're listed on exhibit B  
in my updated report specifically number 9 which was the  
21 interest paid to SunTrust by both Zacky and brand. There's a  
third piece of that total number, approximately \$223,000,  
22 which is an estimate on my part because I didn't have the  
actual payments made. So I made that estimate based on  
prior quarterly payments and used that for a proxy, so to  
speak, for the five quarters that I did not have data for,  
23 so that is subject to being verified.

24 9/20 Trial Tr., p. 30:23 - 31:14, 63:19-25 - 64:1-25, 65:9-25 -  
66:1-5.

25 [MR. COX] Q. Any other damages to Fosters that -- that you  
26 were asked to consider?

27 [MR. BUTLER] A. The only other damage calculation I made was  
unjust enrichment to SunTrust. Based on the August '02  
transaction. Those are the two elements of damages I was  
asked to look at.

28 [MR. COX] Q. All right sir. Now, the \$6,004,886.97, that's  
money that is -- as I understand it was -- you calculated  
was received by SunTrust with respect to the term loans that  
were made to the Zackys and the Brands.

[MR. BUTLER] A. Correct.

[MR. COX] Q. That is not money that Fosters paid or came out  
of pocket for in any other respect is it?

[MR. BUTLER] A. That's correct.

29 9/21 Trial Tr. p. 67:9-25.

30 SunTrust argues that it seeks clarification of the term

1 "interest" because the proper measure of damages of any  
2 disgorgement award is net profits, not gross revenue. The  
3 damages awarded for breach of the Confidentiality Agreement was  
4 as follows from the Jan. 11, 2008 Order:

5 108. ... Plaintiff FPF's losses are difficult to assess  
6 and quantify, however, SunTrust's gains from the  
7 breach of the Confidentiality Agreement are  
8 specifically quantifiable and represented by the amount  
9 of interest and fees earned under the Term Loans to the  
10 Trusts. Conclusions of Law, ¶ 108.

11 117. Damages shall be calculated by taking the amount  
12 of interest and fees earned by SunTrust on the 2002  
13 Term Loans from the date this lawsuit was filed, March  
14 15, 2004 through the end of the term of the Letters of  
15 Credit on October 9, 2005. Conclusions of Law, ¶ 117.

16 Defendant SunTrust raises these arguments for the first time  
17 in this motion, rather than at the trial, where these arguments  
18 should have been raised and all relevant evidence presented for  
19 consideration by the Court. This juxtaposes the calculation of  
20 net profit, the generally accepted measure for the equitable  
21 remedy of disgorgement damages, against the total failure of  
22 SunTrust to address the issue before or during trial until after  
23 it lost on the issue of breach and damages at trial. However,  
24 unjust enrichment is defined as a "benefit obtained from another,  
25 not intended as a gift and not legally justifiable, for which the  
26 beneficiary must make restitution or recompense." Blacks Law  
27 Dictionary (8th ed. 2004), unjust enrichment. "It is widely  
28 recognized that disgorgement is a remedy intended to prevent a  
wrongdoer from unjust enrichment," *Eckard Brandes, Inc. v. Riley*,  
338 F.3d 1082, 1088 (9th Cir. 2003), therefore disgorgement is  
limited to the amount of the unjust enrichment.

Certain of the decisions relied on in the Jan. 11, 2008

1 Order limit damages to the profit earned by the breaching party  
2 as the measure of damages. In *Snepp v. U.S.*, 444 U.S. 507, 515-  
3 15 (1980), a constructive trust was placed on all profits of a  
4 former CIA employee after it was determined that the former  
5 employee published unreviewed material in violation of his  
6 fiduciary and contractual obligation to submit any material to  
7 the CIA for review prior to publication. The court noted its  
8 concern with granting damages that amount to punishment: "And  
9 since the remedy reaches only funds attributable to the breach,  
10 it cannot saddle the former agent with exemplary damages out of  
11 all proportion to his gain." *Snepp*, 444 U.S. at 515-15.

12 *Y. J. D. Restaurant Supply Co., Inc. v. Dib*, 98 Misc.2d 462  
13 (N.Y. Supp. Ct. 1979), cited in the Jan. 11, 2008 Order,  
14 concerned a breach of a non-competition agreement. The court  
15 awarded plaintiff the profit the defendant reaped from its breach  
16 of the covenant not to compete. Defendant had sold plaintiff its  
17 business and as part of the agreement, agreed not to compete for  
18 a three-year period within a five-block radius. The defendant  
19 did not honor the covenant not to compete and opened another  
20 business within the prohibited time period and location. But  
21 prior to trial, defendant sold the second business for \$250,000,  
22 and testified to expenses and costs of running the business in  
23 the amount of \$214,500, resulting in a profit of \$35,500.00, which  
24 was awarded to the plaintiff. Here, SunTrust provided no  
25 testimony at trial on the expenses and costs involved in lending  
26 money to the Trusts, and the one possible exhibit, JX-53,  
27 admitted into evidence, is a voluminous exhibit consisting of  
28 pages and pages of financial spreadsheets that do not clearly

1 provide an indication of costs and expenses involved in lending  
2 to the Trusts.

3       Unjust enrichment is an equitable remedy that prohibits a  
4 party from retaining the benefit it unlawfully received. If the  
5 total interest and fees paid by the Trusts to SunTrust do not  
6 equal the benefit retained by SunTrust because SunTrust only  
7 retained the "margin interest" then the disgorgement damages  
8 would be equal to exemplary damages -- beyond the purpose of  
9 awarding unjust enrichment damages. However, SunTrust presented  
10 no such argument at trial. Defendant had a fair opportunity to  
11 present its defense at trial. The granting of this motion is  
12 unjustified it requires additional testimony or other financial  
13 evidence. If the calculation of net profit can be made from the  
14 financial information about the loans that is in evidence, this  
15 will be equitable, as disgorgement damages are to deny the unjust  
16 profit, not to punish.

17       Under the totality of the circumstances, the Defendant  
18 presented evidence and tried the case on the basis of an all or  
19 nothing strategy by denying that any breach of contract existed  
20 or that any damages were recoverable. SunTrust consciously  
21 elected not to offer an expert or any calculation of net profits.  
22 It cannot do so now. SunTrust must be held to its informed  
23 choice and thus forecloses the reopening of evidence. However,  
24 disgorgement is an equitable remedy. To do equity, if the  
25 financial data as evidence allows the calculation of net profits  
26 to be made without the introduction of expert testimony or any  
27 new evidence, defendant will be permitted to explain from record  
28 evidence how the calculation is made and how to calculate to

determine net profit. No new evidence is permitted.

## **CONCLUSION**

For all the reasons provided, Defendant SunTrust's Motion for Discovery Nom is DENIED, its Motion for Clarification is GRANTED and its Motion for Leave to Submit Supplemental Evidence is DENIED. Defendant may submit its supplemental calculation of net profit with record references, in accordance with this decision within (5) five days following service by the clerk of court of this decision. Plaintiffs may submit any opposition to Defendant's supplemental briefing within (5) five days following filing of Defendant's calculation. Defendant shall submit an order consistent with this decision, within five (5) days following service by the clerk of court of this decision.

IT IS SO ORDERED.

Dated: May 2, 2008

/s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE