

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

U.S. DIAMOND & GOLD, et al.,)	CASE NO. 3:06-cv-371
)	
Plaintiffs,)	JUDGE THOMAS M. ROSE
)	
v.)	<u>DEFENDANT JULIUS KLEIN</u>
)	<u>DIAMONDS, LLC'S RENEWED</u>
JULIUS KLEIN DIAMONDS, LLC, et al.,)	<u>MOTION FOR JMOL AND MOTION</u>
)	<u>FOR NEW TRIAL (FED. R. CIV. P. 50(b),</u>
Defendants.)	<u>59) (ORAL ARGUMENT REQUESTED)</u>

Defendant Julius Klein Diamonds LLC (“JKD”) moves, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, to renew its motion for judgment as a matter of law on Plaintiffs U.S. Diamond & Gold, Inc., d/b/a Stafford’s Jewelers and John Stafford’s claims of conversion, civil liability for theft, and unjust enrichment. In addition and in the alternative, JKD moves for a new trial under Rule 59 of the Federal Rules of Civil Procedure.

I. PERTINENT PROCEDURAL FACTS

On October 23, 2006, U.S. Diamond & Gold, Inc., d/b/a Stafford’s Jewelers and John Stafford (collectively “Plaintiffs”) sued Julius Klein Diamonds (“JKD”) in Montgomery County Common Pleas Court, asserting numerous claims arising out of the alleged tortious handling of a pink diamond that Stafford Jewelers maintains it shipped to JKD. JKD removed the matter to this Court based on diversity jurisdiction.

Critical to JKD’s defense was a video recording of a JKD employee opening the package allegedly containing the pink diamond, and finding an empty box. After Plaintiffs retained an expert to testify that something was allegedly “wrong” with the video recording, JKD retained Robert Sanderson, President of Audio Video Forensic Lab Inc., to provide expert opinion testimony on the authenticity and validity of the recording. [Doc. 27.] Plaintiffs moved to

exclude Sanderson from testifying, on the grounds that his pretrial report failed to comply with Fed. R. Civ. P. 26(a)(2)(B). [Doc. 27.] This Court granted the motion, notwithstanding JKD's explanation that any inadequacies in the report were the direct result of inadequacies in the Plaintiffs' expert's report – i.e., the failure of Plaintiffs' expert to identify the tests or techniques used to conclude that something was “wrong” with the recording. [Doc. 71, Doc. 81.]

Thereafter, in ruling on Plaintiffs' Motion in Limine, this Court precluded Sanderson from testifying as a lay witness, and ruled that he could testify as an expert witness only if Plaintiffs' expert presented new expert opinions that were not offered in their original expert reports. [Doc. 131, Doc. 138.] Plaintiffs ensured that no “new” opinions were presented at trial by declining to present their own expert's testimony at trial.

JKD also sought to present evidence of recent and substantially similar “empty box” claims made by Plaintiff Stafford. This Court denied Plaintiffs' in limine attempt to exclude such evidence [Doc. 130, Doc. 167], but proceeded to exclude the evidence at trial. (Tr. 11/7/08 at p. 158-164; Tr. 11/10/08 at p. 2.)¹

A jury trial on Plaintiffs' liability and compensatory damage claims (the first phase of the bifurcated trial) commenced on November 3, 2008. Prior to the submission of the claims to the jury, this Court denied JKD's oral and written motions for judgment as a matter of law (JMOL). [Doc. 196, Tr. 11/17/08 at p. 1.] The jury returned a verdict against JKD on all three claims and returned interrogatory answers awarding dramatically different compensatory damages on each claim. (Attached as Exh. A.)² With the jury still empanelled, prior to the start of the second, punitive damage phase of trial, and before the entry of any judgment, JKD filed a motion for a

¹ All transcript citations are to the daily transcripts. Upon completion of the sequential trial transcript, JKD will amend this motion to include citations to the completed trial transcript.

² It appears as though the verdict forms and interrogatories have not been filed. Both Exhs. A and B are the verdict forms and interrogatories as executed by defense counsel upon the announcement of the jury's verdict and answers to the interrogatories after each phase of this trial.

new trial (essentially a motion for a mistrial³) based on the fatally inconsistent interrogatory answers. [Doc. 209] The motion expressly reserved JKD's right to file additional motions. [Doc. 209 at fn.1.]

Following the second phase of the bifurcated trial, the jury returned interrogatories finding: 1) Plaintiffs had failed to show acts or omissions by JKD demonstrating malice; 2) JKD nevertheless authorized, participated in or ratified the actions of an agent "that you have determined to have demonstrated malice"; and 3) Plaintiffs were entitled to "-0-" punitive damages. (Attached as Exh. B.)

No judgment was entered on any of the jury verdicts during the pendency of JKD's mistrial motion. On May 13, 2009, this Court entered its Order and Opinion denying JKD's motion, but sua sponte vacated the jury verdict on Plaintiffs' claim for damages based on civil liability for theft. [Doc. 222, hereinafter "Order and Opinion"] The ruling also denied Plaintiffs' "election" of statutory treble damages, filed after the jury declined to award punitive damages. *Id.* Consistent with its rulings in the Order and Opinion, this Court entered judgment on the remaining jury verdicts, awarding Plaintiffs \$1,708,400.00, plus post-judgment interest, and noting that the "amount, if any, of attorneys' fees and costs due to the Plaintiffs will be separately determined by this Court.". [Doc. 221, Judgment Entry (5/13/09), hereinafter "JE".]

This Court's May 13 entry of judgment triggered the time for JKD to file post-judgment motions under Fed. R. Civ. P. 50 and 59.⁴

³ No Federal Rule of Civil Procedure specifically relates to motions for mistrial; JKD cited the most substantively similar Rules, 49(a) and 59(a)(1)(A). Courts look to the substance of the pleading rather than its title to determine its nature and purpose. See *Martin v. Taft*, 222 F. Supp. 2d 940, 946 (S.D. Ohio 2002).

⁴ A motion under Fed. R. Civ. P. 59(e) is being filed simultaneously with this motion.

II. EVIDENCE AT TRIAL

The following summary of evidence presented at the trial of this matter is consistent with this Court's obligation under Fed. R. Civ. P. 50 to construe the evidence most favorably towards the non-movant.

A. Julius Klein Diamonds (JKD)

Founded by Julius Klein after World War II, JKD is one of the largest diamond dealers in the United States. (Tr. 11/04/08 at p. 52.) JKD buys and sells diamonds from all over the world. (Tr. 11/14/08 at p. 8.) JKD also employs skilled crafters who cut and polish rough diamonds. *Id.* Over the years, billions of dollars of diamonds have come and gone through the business. *Id.*

B. John Stafford and Stafford Jewelers

Stafford Jewelers is a family-run business in Dayton, Ohio with John Stafford's wife and all four of his children working at the store. (Tr. 11/04/08 at p. 18, 19, 25, 26.) The company lost almost \$81,000 in the first two months of 2006 and its accounting for January 2006 listed negative assets of \$52,289.27. (Tr. 11/07/08 at p. 24, 27.)

Stafford's relationship with JKD started between 1997 and 1999, with Moshe Klein of JKD in New York. (Tr. 11/04/08 at p. 15, 51.) In 2000, Stafford began dealing with Zuri Mesica, a California employee of "JKD West," who became his "exclusive" contact with JKD. (Tr. 11/04/08 at p. 14, 15, 60, 67.) When Stafford needed to purchase diamonds or to send diamonds to New York for potential purchase, he would tell Mesica and Mesica would tell JKD that a purchase order or shipment was coming. Stafford testified that Mesica used the phrase "cheat a goy[] but never a jew," which Stafford interpreted as meaning that Mesica could get a better price from JKD than Stafford, a Christian, could get himself. (Tr. 11/04/08 at p. 16.)

C. The Pink Diamond

Stafford testified that he purchased the pink diamond from a man named “Carl Vagner.” According to Stafford, Vagner is a German citizen who first contacted Stafford in 1999 or 2000 after seeing Stafford’s advertisement in a national magazine. (Tr. 11/04/08 at p. 7.) Stafford testified that although the two did not meet until June 2005 in Las Vegas, they spoke several times about Vagner’s interest in buying gemstones. (Tr. 11/04/08 at p. 7; Tr. 11/7/08 at p. 55.)

Stafford testified that Vagner called at the end of May, 2005, indicating that he had items to sell. (Tr. 11/04/08 at p. 86.) According to Stafford, Vagner never left a number when he called, which Stafford described as standard practice. *Id.* Stafford testified that while in Las Vegas for a trade show, Vagner contacted him and they arranged to meet on June 3, in a restaurant in the Bellagio Hotel. (Tr. 11/04/08 at p. 85, 86.) Stafford testified he happened to be carrying \$9,000.00 in cash, in case he wanted to play blackjack or buy an item at the show. (Tr. 11/04/08 at p. 90.)

Stafford testified that during the meeting, Vagner showed him a discolored box with a pink diamond inside. (Tr. 11/04/08 at p. 93.) Vagner told Stafford that he wanted “8” for the diamond, which Stafford assumed meant \$800,000.00. (Tr. 11/04/08 at p. 95-96.) Stafford was “shocked” when he realized that Vagner wanted only \$8,000.00 for the purported rare diamond. (Tr. 11/4/08 at p. 96.)

Stafford testified that Vagner did not know the value of the diamond and would not listen to Stafford’s valuation because “there was no telling Carl anything.” (Tr. 11/7/08 at p. 69-70, 90.) Further, he said Vagner, “became arrogant, a bigot and a racist. That upset me.” (Tr. 11/7/08 at p. 70.) Specifically, Vagner allegedly stated “You Jews always want a better price” at some point in the conversation, which upset Stafford because “First of all, I’m not Jewish. I’m just a good Catholic kid working hard for a living.” (Tr. 11/7/08 at p. 67; Tr. 11/04/08 at p. 98.)

Stafford testified that he eventually agreed to purchase the diamond for \$8,000.00, but could not produce a receipt to document this purchase. Stafford testified that he typically paid by check as a way to document a purchase of a gem, and filled out an IRS form for purchases over \$10,000.00, but paid with \$8,000.00 in cash from his pocket this time. (Tr. 11/04/08 at p. 44-45.) Stafford testified that he asked for Vagner's drivers' license so he could fill out a receipt, but when Vagner left the restaurant ostensibly to retrieve his license from his car, he took the \$8,000.00 in cash with him and never returned. (Tr. 11/04/08 at p. 9.)

Stafford took the diamond to the jewelry trade show and examined it using some of the display equipment at the show. (Tr. 11/04/08 at p. 103.) It weighed 5.56 carats. (Tr. 11/04/08 at p. 106.) He described the diamond as being "fancy intense pink in the high range bordering on vivid." (Tr. 11/05/08 at p. 21.) He felt it was an old stone and not one that is man-made or treated in any way. (Tr. 11/05/08 at p. 23-25.) Stafford estimated the wholesale value to be \$1.5 million to \$1.7 million. (Tr. 11/05/08 at p. 30.)

D. Stafford's Possession of the Diamond

Stafford did not tell anyone at the store about the diamond when he returned to Dayton. (Tr. 11/05/08 at p. 103.) Even though his wife was the President of Stafford Jewelers, Stafford did not show her the pink diamond, because they were having "marital issues." (Tr. 11/04/08 at p. 12, 26.) Mesica stated that when Stafford discussed the pink diamond with him in February of 2006, Stafford said that he had bought it from an older woman many years before. (Tr. 11/13/08 at p. 206.) Stafford did, however, show a pink stone to two customers, neither of whom had any experience as a gemologist or with jewels. (Tr. 11/13/08 at p. 7, 10; Tr. 11/07/08 at p. 145, 146.)

E. Stafford's Sale of the Diamond to Stafford Jewelers and Shipment to JKD

Stafford testified that in early February of 2006, he decided that he wanted to sell the pink diamond, and called Mesica in California. (Tr. 11/05/08 at p. 61-62.) During this conversation,

Stafford and Mesica also discussed a diamond necklace that Stafford had purchased from JKD for a client who was getting married, but sent to Mesica after the sale fell through. (Tr. 11/05/08 at p. 63-64.) Because Mesica did not have a buyer, he returned the necklace again to Stafford. (*Id.*) Stafford told Mesica that the necklace had been damaged and that he was going to send it to New York for JKD to repair. (Tr. 11/05/08 at p. 64, 67.)

Stafford testified that when he brought up the pink diamond, Mesica was anxious to see it. (Tr. 11/05/08 at p. 69.) Stafford told Mesica that the diamond had not been shopped around and that Stafford wanted between \$1.5 million and \$1.7 million for it. *Id.* Stafford testified that Mesica indicated JKD may want to buy the stone. (Tr. 11/05/08 at p. 81.)

On Friday, February 10, 2006, Julie Ralston, a Stafford Jewelers employee of 27 years, packaged the necklace to be sent to JKD in New York via Brinks. (Tr. 11/05/08 at p. 69.) Stafford explained that the necklace was not wrapped on the day it was ultimately shipped (February 13) because he knew they would be busy on the day before Valentine's Day. (Tr. 11/05/08 at p. 78.) Also on February 10, but after Julie Ralston had left for the evening, Stafford made the decision to send the pink diamond to New York instead of California, because Martin Klein would ultimately have to examine the diamond before JKD would buy it. (Tr. 11/05/08 at p. 79, 81, 82.)

According to Stafford, on Monday, February 13, the whole Stafford family was working in the store. (Tr. 11/05/08 at p. 86.) With no witness, Stafford said he retrieved the pink diamond from the safe, picked up the shipping materials, packed the diamond, and typed up the shipping memo. (Tr. 11/05/08 at p. 87, 93.) Stafford testified he packed the diamond and the shipping memo himself, put them into a shipping box, put the box into a Brinks bag and sealed the Brinks bag himself. (Tr. 11/5/08 at p. 90-91.) Stafford explained that although they were both going to the same address in New York, he did not put the pink diamond in the same package as the

necklace because he did not want to reopen that earlier packaged necklace. (Tr. 11/05/08 at p. 101.)

Stafford also testified that “the second he took the diamond out of the safe,” he mentally sold it from himself to Stafford Jewelers for \$1.5 million. (Tr. 11/05/08 at p. 97; Tr. 11/07/08 at p. 106; Tr. 11/10/08 at p. 12-13.) This “sale” was not reported on Stafford’s taxes. (Tr. 11/10/08 at p. 13.) Nor was the diamond recorded in Stafford Jeweler’s inventory system, because the store was “too busy” on the day of the sale to record the \$1.5 million purchase. (Tr. 11/07/08 at p. 118-119.)

F. JKD Receives an Empty Package

Joel Berkowitz is the shipping controller at JKD. (Tr. 11/13/08 at p. 21.) He signs for the packages, inspects them, and then turns them over to Chaim Eichenstein, who is responsible for opening the packages. (Tr. 11/13/08 at p. 23, 32.) Berkowitz received the Brinks bag and, noticing no problem with it, took it to Eichenstein. (Tr. 11/13/08 at p. 58.)

Eichenstein testified that he would not have opened the Brinks bag if there were anything wrong with it. (Tr. 11/13/08 at p. 100.) After finding no cuts or tears in the sealed bag, he opened it and removed a box. (Tr. 11/13/08 at p. 104-105.) While he noticed the box looked “indented” he did not notice any cuts, tears, or problems. (Tr. 11/13/08 at p. 95,103-106.) When Eichenstein cut open the box, there was no diamond in the box and no packing slip. (Tr. 11/13/08 at p. 105-107.) The indentation he had noticed was caused by a tear on the inside of the box. (Tr. 11/13/08 at p. 164.)

Immediately after opening the box and finding nothing there, but some packing material, Eichenstein called for Joel Berkowitz, whose office is “2 seconds away.” (Tr. 11/13/08 at p. 106, 112, 127.) A number of JKD employees came into the room; but no one could find the alleged

5.56 carat diamond or packing slip. (Tr. 11/13/08 at p. 37-39, 113.) Berkowitz promptly called Brinks to come back to JKD. (Tr. 11/13/08 at p. 35-36.)

When a Brinks investigator (Oded Hadani) arrived, he was shown the secured, video-monitored area where packages are opened. (Tr. 11/14/08 at p. 84; Tr. 11/13/08 at p. 33-34.) Moses Lensky, the operations manager at JKD, showed Hadani all the scenes from the video surveillance. (Tr. 11/14/08 at p. 84-85.) Lensky made two CDs from the surveillance recording. He stated both were true and accurate reflections of the digital recording of Berkowitz accepting the Brinks bag, and Eichenstein opening the Brinks bag and UPS box. (Tr. 11/14/08 at p. 92.)

Mesica was called by Martin Klein to inform him of the empty box. (Tr. 11/05/08 at p. 111.) Mesica then called Stafford and informed him that there was a problem with the shipment of the pink diamond. (Tr. 11/13/08 at p. 217.) Mesica stated that Stafford was “very calm,” which Mesica found “very strange.” (Tr. 11/13/08 at p. 217.) Stafford immediately began blaming Brinks saying, “They don’t like me. I have always had a problem with them. And I already – because they lost one package.” (Tr. 11/13/08 at p. 215.) Mesica told Stafford to call JKD in New York and ask for Eichenstein. (Tr. 11/05/08 at p. 113.)

When Stafford spoke to Eichenstein that afternoon, he repeatedly told him to check the box and shipping bag for holes. After Eichenstein was unable to find any hole in the Brinks bag, Stafford directed him to look underneath a flap at the bottom of the Brinks bag. When he did, Eichenstein discovered the stitching of the bag beneath the covering flap was loose. (Tr. 11/05/08 at p. 117, Tr. 11/13/08 at p. 117-119, 184.)

III. JKD'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW (JMOL)

A. JMOL Standard

JKD challenged the sufficiency of evidence supporting each of Plaintiffs' three claims, both orally and by written motion. (Tr. dated 11/14/08 at p. 176-184; Doc. 196, filed 11/13/08.) JKD now renews that motion. *See* Fed. R. Civ. P. 50(b).

In diversity cases, this Court applies the standard of review used by the courts of the state whose substantive law governs the action to a Rule 50 motion based on insufficiency of the evidence. *Morales v. Am. Honda Motor Co.*, 151 F.3d 500, 506 (6th Cir. 1998). Under Ohio law, the test for such motions "is whether the movant is entitled to judgment as a matter of law when the evidence is construed most strongly in favor of the nonmovant." *Sanek v. Duracote Corp.*, 43 Ohio St. 3d 169, 539 N.E.2d 1114, 1117 (Ohio 1989).

Even when viewing the evidence in a light most favorable to Plaintiffs, it is apparent that Plaintiffs were not held to their burden of proof. In denying JKD's motions for summary judgment and JMOL, this Court concluded that Stafford's uncorroborated testimony regarding his packaging and release of the pink diamond to Brinks constituted sufficient circumstantial evidence to create a jury issue. But elements of all three claims – whether it be the "affirmative act of dominion and control over property" required to prove conversion; the knowing possession of stolen items necessary to establish civil liability for theft; or the "retention of the benefit" required for unjust enrichment – imposed a burden on Plaintiffs to present affirmative evidence that *JKD received, possessed, and was enriched by*, the pink diamond. In other words, Plaintiffs had to present sufficient evidence not only of what happened in Dayton, Ohio, but also of what happened in New York, New York.

B. Plaintiffs Presented Insufficient Evidence of Conversion

JKD is entitled to judgment as a matter of law on conversion because Plaintiffs failed to present sufficient evidence in support of each essential element of that claim. Under Ohio law, “a party asserting a claim for conversion must demonstrate some affirmative act by the defendant in order to prove conversion . . . mere inaction is not enough.” *Wheeler and Clevenger Oil Company v. Doan*, No. 2:04-CV-0558 (D.Ct. S.D. Ohio 2005). At trial, Plaintiffs failed to produce any evidence that JKD exerted “dominion and control” over the pink diamond. While both Plaintiffs and this Court cited to Stafford’s testimony that he *sent* the diamond from Dayton, such evidence does not support the essential element of JKD’s “dominion and control” over the diamond in New York City.

Ohio law does not allow for an inference of dominion and control without evidence of an *affirmative act* of dominion and control over property. For that reason, Ohio courts have consistently dismissed conversion claims when plaintiffs merely present evidence that the property is missing and the defendant had the opportunity to take it. In *Essig v. Sara Lane Corp.*, 10th Dist. No. 99AP-1432, 2000 WL 1072463 (Aug. 1, 2000), for example, the plaintiff sued her maid service over missing jewelry. Because the plaintiff produced no evidence that any maid service employee ever *possessed* the jewelry (“the record is simply devoid of evidence that implicates any employee . . . in the conversion of the jewelry”), the court of appeals affirmed summary judgment on the conversion claim. *Id.* at *2.

Similarly, in *Kurincic v. Stein Inc.*, 8th Dist. No. 79089, 2001 WL 1398412 (Nov. 1, 2001), the plaintiff sued his employer for conversion after money he left in his work locker was missing. The court of appeals affirmed summary judgment in favor of the defendant-employer based on the absence of evidence that the employer exercised dominion and control over the money. See also, *Property Asset Management, Inc. v. Shaffer*, 3rd Dist. No. No. 14-08-06, 2008-

Ohio-4645 (“no claim in conversion can be proven” where there is no evidence that the defendant ever possessed or exerted control over the property).

Ohio law is consistent with other jurisdictions and the Restatement (Second) of Torts in requiring evidence of an intentional, affirmative act of dominion and control to support a claim for conversion. The Restatement defines conversion as “an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.” *Id.*, § 222A. Applying this principle, the Court in *Isik Jewelry v. Mars Media, Inc.*, 418 F.Supp. 2d 112 (E.D.N.Y. 2005) granted summary judgment to a defendant that had allegedly converted plaintiff’s jewelry. The jewelry store plaintiff in *Isik* rented jewelry to a musician filming a music video. On the day of the shoot, the musician was robbed at gunpoint. The jewelry store alleged that the musician converted the jewelry “by giving it to one or more co-conspirators who were waiting outside the shoot site.” The court granted summary judgment for the defendant because the plaintiff failed to present evidence that the defendant engaged in an “affirmative act” that constituted an “intentional exercise of dominion and control” over the jewelry. *Id.* at 126-127. Plaintiffs’ proof in this case suffered from the same flaw – they failed to present any evidence of any intentional affirmative act of dominion and control over the pink diamond by any JKD employee.

C. Plaintiffs Presented Insufficient Evidence of Civil Liability for Theft

In its May 13, 2009 Opinion and Order, this Court *sua sponte* vacated the jury verdict in favor of Plaintiffs on their claim for civil liability for theft on the grounds that Plaintiffs offered insufficient evidence to support the essential element of damages on that claim. [Doc. 222 at p. 18.] JKD now renews its motion for JMOL on that claim on the additional ground that the evidence was insufficient to support liability – i.e., Plaintiffs failed to present any direct or

circumstantial evidence that JKD knowingly obtained or exerted control over Plaintiffs' property without Plaintiffs' consent.

Ohio law allows for the civil recovery of damages if the actions of the defendant constitute a violation of Ohio's theft laws. Even though the ultimate burden of proof is civil as opposed to criminal, civil liability for theft is more difficult to prove than conversion. That is because the definition of theft states: "no person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either . . . property or services . . . without the consent of the owner or person authorized to give consent." Ohio Revised Code 2913.02(A)(1). "Knowingly" refers to *mens rea* -- a criminal intent to steal -- that distinguishes civil theft from the "less malevolent instances of the tort of conversion." *Champlin v. Corrections Corp. of America, Inc.*, N.D. Fla. No. No. 5:08-cv-76-RS-AK, 2008 WL 2686189 (N.D. Fla., June 26, 2008); *Darcars Motors of Silver Spring, Inc. v. Borzym*, 150 Md. App. 18, 818 A.2d 1159 (Md. App. 2003)

Because *mens rea* cannot be established absent evidence of the defendant's actual possession of property, the lack of such evidence precludes a criminal theft charge. *See State v. Fayne*, 8th Dist. No. 50056, 1985 WL 4383 (Dec. 12, 1985) (state failed to present a *prima facie* case for theft where there was no evidence that the defendant possessed the stolen items); *In re C.S.*, 8th Dist. No. 82838, 2004-Ohio-857 (civil finding of delinquency based on violation of theft statute vacated because there was "no evidence that [the juvenile] had in his possession the stolen property"); *Wellston v. Kerr*, 4th Dist. No. 99CA852, 2000 WL 557630 (May 1, 2000) (theft conviction vacated where there was no evidence that the stolen merchandise was found in the defendant's possession); *State v. Burke*, 12th Dist. No. CA88-04-006, 1988 WL 102405 (Sept. 30, 1988) (reversing theft conviction when there was no evidence that the defendant had possession or control of stolen item found in his presence); *U.S. v. Davis*, 568 F.2d 514 (6th Cir.

1978) (conviction on federal theft charges vacated where the government did not present evidence that the defendant possessed the specific property that was reported stolen.)

At trial, Plaintiffs failed to present a) any evidence that JKD ever possessed the pink diamond or b) any evidence of any criminal intent to steal an alleged pink diamond. Stafford's uncorroborated testimony that he **sent** an alleged diamond from Dayton, Ohio is insufficient evidence that JKD **stole** such a diamond in New York.

D. Plaintiffs Presented Insufficient Evidence of Unjust Enrichment

Plaintiffs also failed to present evidence to support their unjust enrichment claim. To establish a claim for unjust enrichment, a plaintiff must show (1) a benefit conferred by the plaintiff on the defendant, (2) the defendant's knowledge of the benefit, and (3) the defendant's *retention of the benefit in* circumstances where it would be unjust to do so. *Anderson v. Baker*, 10th Dist. No. 08AP-438, 2008-Ohio-6919. Here, as with the conversion and theft claims, while there is some evidence that Stafford sent a diamond, there is absolutely no evidence that JKD was unjustly enriched in any way. Simply put, Plaintiffs presented no evidence that JKD sold, marketed, or added to their inventory a 5.56 fancy pink diamond.

IV. MOTION FOR NEW TRIAL

If this Court should determine that Plaintiffs presented sufficient evidence to support one or more of the three claims presented to the jury, JKD moves, in the alternative, for a new trial on any such claim.

A. New Trial Standard

To be granted a new trial, movants must show that they were "prejudiced by an error of law and that a failure to grant a new trial is inconsistent with substantial justice." *Black-Hosang v. Mendenhall*, S.D. Ohio No. 2:01-CV-00623, 2005 WL 3299070, *1 (S.D. Ohio Dec. 5, 2005), citing *Erskine v. Consolidated Rail Corporation*, 814 F.2d 266, 272 (6th Cir.1987). A new trial

may be granted for a number of reasons, including: error in the exclusion of evidence (*Morales v. American Honda Motor Company, Inc.*, 151 F.3d 500, 514 (6th Cir.1998)); where the trial was tainted by appeals to bias or prejudice (*Holmes v. City of Massillon*, 78 F.3d 1041, 1045-46 (6th Cir.1996) *cert denied*, 519 U.S. 935, 117 S.Ct. 312, 136 L. Ed.2d 228 (1996)); or where the verdict is clearly against the weight of the evidence (*J.C. Wyckoff & Assoc. v. Standard Fire Ins. Co.*, 936 F.2d 1474, 1487 (6th Cir.1991)). All three bases apply here.

B. Evidentiary Errors Requiring a New Trial

First, JKD is entitled to a new trial because it was precluded from presenting evidence regarding Stafford's previous experience with the delivery of empty jewelry packages.

The key fact issues presented to the jury were: 1) Stafford's purchase and evaluation of the pink diamond; 2) Stafford's packaging of the pink diamond; and 3) events following the arrival of the sealed Brink's bag at JKD in New York. The *only* evidence offered on the second critical event was John Stafford's testimony. JKD, in contrast, presented several witnesses (and a video recording) of the events that unfolded after the Brinks bag arrived in New York, including testimony that when Stafford was told about the empty box arriving in New York, he was able to direct JKD employees to a small opening caused by loose stitching under the flap of the bag.

Evidence of Stafford's prior empty box claims – and particularly the insurance claim Stafford made in the summer of 2005 in which he claimed that a box shipped from a New York jeweler to Stafford containing a diamond was empty when Stafford opened the box – was relevant and admissible to corroborate JKD's evidence. The facts of this case are strikingly similar to the facts of the excluded claim. The claim was based on the delivery of an empty package that was supposed to contain a diamond. The Final Report from Parcel Pro noted that Julie Ralston, the woman who normally does the shipping and receiving for Stafford, knew nothing about the shipment, and further stated that “we find it most unusual that no one can

remember any details about the package and the diamond. As a family owned business we would expect that Mr. Stafford Sr. would have informed his staff and family about the missing diamond[.]” [Doc. 140, ex. B, Report at p. 4.]

JKD sought to present evidence of Stafford’s prior empty box claims not to establish character, but to establish knowledge under Federal Rule of Evidence 404(b). The similarity of the conduct alleged and the closeness in time of the claim at issue at trial would tend to show Stafford’s knowledge and intent, as well as an absence of mistake or accident. Both are permissible purposes under Rule 404(b). In other words, because the evidence would have explained for the jury where Stafford learned what happens upon the receipt of an empty jewelry shipment, it was relevant and admissible and should have been admitted. *See U.S. v. Welch*, E.D. Pa. No. 05-618-1, 2007 WL 3287394 (E.D. Pa. Nov. 5, 2007) (in a prosecution for tax fraud, the government was permitted under Rule 404(b) to establish the defendant’s knowledge of how to operate a scam by admitting other fraudulent tax returns which demonstrated a strikingly similar method.)

Given the absence of *any* evidence offered to corroborate Stafford’s testimony regarding his purchase of the pink diamond, his estimate of its value, his sale of the diamond to Stafford Jewelers for \$1.5 million, and his packaging of the pink diamond for delivery to JKD in New York, the exclusion of evidence showing knowledge and intent was highly prejudicial, requiring reversal and a new trial.

Second, the exclusion of the expert testimony of Robert Sanderson prejudiced JKD. As more fully explained in JKD’s motion papers [Doc. 156], Plaintiffs’ expert was unable to offer any basis for his opinion that something was “wrong” with the video recording. This Court nevertheless excluded Sanderson’s testimony as to the authenticity and accuracy of the video recording unless and until Plaintiffs’ expert offered “new” opinions at trial. [Doc. 162.]

By not presenting their flawed expert testimony, Plaintiffs were able to ensure that the jury would not hear any evidence regarding the tape's authenticity. Instead, Plaintiffs relied on innuendo to plant the seed in the jury's mind that the irrefutable evidence of JKD's receipt of an empty box was somehow "doctored." It is respectfully submitted that any insufficiency in Mr. Sanderson's pretrial report cannot justify exclusion of this critical testimony. *See, e.g., Lory v. General Electric Company*, 179 F.R.D. 86, 88 (N.D.N.Y. 1998) (precluding expert testimony because of violation of a pretrial disclosure deadline was too severe because exclusion of expert testimony would "significantly impair" the plaintiff's ability to prove his case.)

C. A New Trial Is Also Required Because Bias and Prejudice Infected the Trial

Third, a new trial is necessary because Plaintiffs injected inflammatory testimony calculated to incite bias and prejudice as a substitute for evidence. *See, e.g., Holmes v. City of Massillon*, 78 F.3d 1041, 1045-46 (6th Cir. 1996) (a new trial is warranted when the jury has reached a "seriously erroneous result" as evidenced by, among other things, "the proceedings being influenced by prejudice or bias.") The seed of innuendo Plaintiffs were able to plant following the exclusion of highly relevant evidence was nurtured through the injection of religious prejudice.

JKD is from New York City and a number of its employees are Hasidic Jews – a religion and culture generally unfamiliar to residents of the Southern District of Ohio. Religion was first injected into the trial in voir dire, when Plaintiffs' counsel asked prospective jurors about their attitudes toward Hasidic Jews. Then Stafford gratuitously inserted overtly racist remarks (allegedly made by others) during his testimony. Although it had little or no relevance to any issue in the case, Stafford testified that Mesica allegedly told him to send diamonds to him because JKD would "cheat a goy[] but never a jew." (Tr. 11/04/08 at p. 16.) Stafford again injected inflammatory religious stereotypes into evidence by testifying that he was shocked when

Vagner accused him of being Jewish (“Jews always want a better price” (Tr. 11/7/08 at p. 67)). Stafford’s “defense” to this accusation was equally inflammatory, informing the jury “First of all, I’m not Jewish. I’m just a good Catholic kid working hard for a living.” (Tr. 11/04/08 at p. 98.)

In a case in which the jury could find for Plaintiffs only by rejecting the testimony of every eye witness to the events that transpired upon the delivery of the Brinks bag in New York – including the “eye witness” video camera that *recorded* those events – the injection of inflammatory evidence intended to stereotype and degrade members of a particular religious group mandates a new trial. Our system of justice does not condone the use of bias and prejudice as a substitute for evidence.

D. A New Trial Is Required Because the Verdict Is Against the Weight of the Evidence

Finally, JKD is entitled to a new trial because the verdict is against the manifest weight of the evidence. *See J.C. Wyckoff & Assoc. v. Standard Fire Ins. Co.*, 936 F.2d 1474, 1487 (6th Cir.1991) (trial courts considering motions for new trial based on the weight of the evidence must “compare the opposing proofs, weigh the evidence, and set aside the verdict if it is of the opinion that the verdict is against the clear weight of the evidence.”)

Here, virtually every fact that the jury had to find in order to return its multi-million dollar verdict in favor of Plaintiffs runs contrary to common sense and logic.

Source and price of the pink diamond – Stafford told Mesica that he had purchased the pink diamond from an older woman many years earlier. But he testified in discovery and at trial that he purchased the diamond from a German citizen who was unknown, unfindable, and adverse to receiving receipts for gem sales, and who, although experienced in gems, believed that a 5.5 carat fancy pink diamond was only worth \$8,000.00. This remarkable asking price for the million-dollar diamond not only happened to be \$1,000.00 less than what Stafford was

carrying in cash, but also was \$2,000.00 below the \$10,000.00 threshold for reporting a transaction to the Internal Revenue Service.

Possession of the diamond – Having the good fortune of multiplying the net worth of his company many times over with the purchase of this million dollar diamond, Stafford told no members of his business or his own family about the coup. And, after mentally transferring the diamond to his store for \$1.5 million, Stafford never made the effort to log this important, valuable asset in the store’s inventory system.

Stafford’s reaction – Stafford’s calm reaction to news of the disappearance of the pink diamond was inconsistent with its \$1.5 million value. Then, on the phone with Eichenstein, Stafford was insistent that he find the problem with the outer Brinks bag. Eichenstein was able to find loose stitches on the outer Brinks bag only after Stafford directed Eichenstein directly to the exact spot under the flap of the bag.

Contrast these dubious facts with the testimony and actions of the JKD employees whose acts were uniformly consistent with the opening of an empty box. JKD routinely handles deliveries of jewelry worth millions of dollars. It would have no incentive to jeopardize its business by converting a single gem. Moreover, JKD fully accounted for the chain of custody of the Brinks bag and its contents. Eichenstein and Joel Berkowitz followed all normal procedures. Eichenstein summoned his supervisors when he found the box to be empty. Brinks was immediately called to investigate. Neither the investigation nor the surveillance indicates a diamond was ever received by JKD. To the contrary, the video recording confirms and corroborates the testimony of JKD employees.

Accordingly, the jury’s verdict was against the manifest weight of the evidence and should be vacated and a new trial awarded.

V. CONCLUSION

For all of the reasons stated more fully above, Defendant Julius Klein Diamonds respectfully requests an order vacating the judgment on the jury verdict entered May 13, 2009 and entering judgment in its favor as a matter of law. In the alternative, Defendant seeks an order vacating the judgment on the jury verdict and ordering a new trial.

Respectfully submitted,

s/ Irene C. Keyse-Walker

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CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2009, a copy of the foregoing **Defendant Julius Klein Diamonds, LLC's Renewed Motion for JMOL and Motion for New Trial (Fed. R. Civ. P. 50(b), 59)** was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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