

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
BUSINESS LITIGATION SESSION

THE BURGUNDIAN LLC,
Plaintiff,

v.

Hawthorne Food Company, d.b.a.
EASTERN STANDARD PROVISIONS CO.,
Defendants.

C.A. NO.

2/3/2022

COMPLAINT

The Burgundian LLC (“Burgundian”), by and through its attorneys, files this complaint against the Hawthorne Food Company, d.b.a. “Eastern Standard Provisions Co.” (“Eastern Standard”). The impetus of this action are the wrongful acts and unfair and deceptive practices committed by Eastern Standard against Burgundian.

INTRODUCTION

1. Every November, Oprah Winfrey releases a list of gift ideas for the holiday season. The items on the list are handpicked by Ms. Winfrey herself. Selection for Ms. Winfrey’s “Oprah’s Favorite Things” list results in the “Oprah Effect,” which is a sales boost for the chosen item often in the tens of millions of dollars. For her 2021 list, Ms. Winfrey focused on celebrating small businesses, women-owned brands, and items created by people of color.

2. Eastern Standard is falsely claiming that Ms. Winfrey picked the Liège waffles it is selling and advertising on its website and elsewhere for her 2021 Oprah’s Favorite Things list. In reality, Ms. Winfrey tasted and picked Burgundian’s Liège waffles for her 2021 Oprah’s Favorite Things list. Eastern Standard is knowingly excluding Burgundian from the “Oprah Effect” and the benefits of Ms. Winfrey’s endorsement.

3. Burgundian is a veteran owned-and-operated, small Massachusetts business started out of Hope and Main (a food business incubator and 501(c)(3) non-profit). Burgundian specializes in Liège waffles, which are unlike other waffles (as typically known in the United States). Liège waffles are made from yeasted, brioche-like dough and not a batter. Liège waffles are naturally sweet and complex in flavor, feature a texture that is dense, chewy, and velvety, and do not break down under other foods and sauces. Liège waffles are made with Belgian pearl sugar, which caramelizes on the waffle's outside when cooked for a "built-in-syrup" flavor.

4. Eastern Standard is a Delaware multi-million dollar corporation that sells artisanal pretzels. Eastern Standard realized an over \$15 million revenue increase from 2019 to 2020 after its pretzels were picked for the 2019 Oprah's Favorite Things list. Entering 2021, Eastern Standard sold only pretzels, pretzel toppings, and dips. Eastern Standard faced growing pressure to expand its product line and boost its sales and revenue. Eastern Standard hoped that a diversified product line and increased revenues would make it a more attractive option for investors and/or acquisition.

5. Eastern Standard thus pursued Burgundian to capitalize on Burgundian's growing success with Liège waffles, executing a non-disclosure agreement with Burgundian under the pretense that it was interested in offering Burgundian's Liège waffles in a co-branded venture. Eastern Standard had no prior experience with Liège waffles and actually executed the NDA to learn Burgundian's confidential and proprietary Liège waffle recipe.

6. Eastern Standard then submitted Burgundian's Liège waffles for Oprah's Favorite Things, but only under Eastern Standard's name and branding. The Liège waffles tasted and tried by Ms. Winfrey were made by Burgundian's owner using Burgundian's confidential Liège

waffle recipe. Eastern Standard excluded Burgundian's name and branding from the Oprah's Favorite Things submission without Burgundian's knowledge or approval.

7. Anticipating Ms. Winfrey's endorsement, Eastern Standard rushed to supersede the NDA by making a bad faith proposal for Burgundian's Liège waffle recipe. After Ms. Winfrey picked Burgundian's Liège waffles for her Oprah's Favorite Things list, Eastern Standard abruptly claimed Ms. Winfrey's endorsement as solely its own despite having no Liège waffle product, recipe, or experience. Eastern Standard willfully ignored that Ms. Winfrey picked Burgundian's Liège waffles, the NDA's protections and restrictions, and that it lacked any right to sell Burgundian's Liège waffles or use Burgundian's Liège waffle recipe.

8. Eastern Standard employed a "bait and switch" by selling Liège waffles from a different company than Burgundian that Ms. Winfrey has not tasted or tried. Publicly, Eastern Standard claims that Ms. Winfrey picked the Liège waffles it is selling for her 2021 Oprah's Favorite Things list. Privately, Eastern Standard claims that the Liège waffles it is selling are different from Burgundian's Liège waffles because they use a "new recipe and process." Eastern Standard's Liège waffles cannot be different from Burgundian's Liège waffles, but also have been endorsed by Ms. Winfrey.

9. Ms. Winfrey tasted and tried Burgundian's Liège waffles, and then picked them for her 2021 Oprah's Favorite Things list. Eastern Standard is nevertheless realizing the financial, business, and branding benefits from the "Oprah Effect" without Burgundian. Eastern Standard is selling Liège waffles on its website and elsewhere, while heavily promoting (falsely) that they were picked by Ms. Winfrey for her 2021 Oprah's Favorite Things list. Confronted by Burgundian, Eastern Standard refuses to acknowledge any wrongdoing or that Ms. Winfrey's selection would not exist but for Burgundian and its Liège waffles.

PARTIES AND JURISDICTION

10. Burgundian is a Massachusetts limited liability company with a principal place of business at 55 Park Street, Attleboro, Massachusetts 02703.

11. Eastern Standard is a Delaware Corporation operating in Massachusetts with a place of business at 117 Beaver Street, Suite 100, Waltham, Massachusetts 02452.

12. Jurisdiction is proper pursuant to G.L. c. 212 § 4 and G.L. c. 223A §§ 2, 3.

FACTUAL BACKGROUND

Liège Waffles

13. Shane Matlock owns and operates Burgundian.

14. Before starting Burgundian, Mr. Matlock completed ten years of active duty service for the United States Army including two tours to Afghanistan.

15. While he was stationed on the France-Belgium border during his United States Army service, Mr. Matlock learned about and ate the unique Liège waffles native to the region.

16. Liège waffles are central to the “Burgundian” lifestyle of enjoying life and food.

17. Liège waffles are distinct from the waffles that are typically known, purchased, and eaten by United States consumers.

18. Liège Waffles are eaten for in Europe for breakfast, lunch, dinner, and as snack.

19. Liège waffles are naturally sweet and complex in flavor, feature a texture that is dense, chewy, and velvety, and do not break down under other foods and sauces.

20. Liège waffles are made with a yeasted, brioche-like dough and not a batter.

21. Liège waffles are made with Belgian pearl sugar, which caramelizes on the outside of the waffle when cooked to give it a “built-in-syrup” type flavor.

Burgundian

22. Mr. Matlock suffered from numerous knee, back, and nerve issues caused by multiple deployments, trainings, and extreme circumstances.

23. The United States Army placed Mr. Matlock in its Medical Evaluation Board process as he approached 10 years of active duty service.

24. Mr. Matlock received a 60% disabled rating from the Medical Evaluation Board and medically retired from the United States Army with the rank of Major.

25. Mr. Matlock considered his economic and career options including his desire to own and operate a café after his medical retirement from the United States Army.

26. Mr. Matlock enrolled in entrepreneurship classes at the Veterans Business Outreach Center, completed the SBA's Boots to Business startup program, and arranged an apprenticeship for himself at Borealis Coffee Company to learn about running a café.

27. Mr. Matlock observed that Liège waffles are not widely available in the United States and that while numerous businesses were offering specialty donuts, few were offering specialty waffles and even fewer were offering Liège waffles.

28. In March 2017, Mr. Matlock incorporated "Burgundian" as a Massachusetts LLC and enrolled in Hope and Main's (Rhode Island's first food business incubator) Food Incubator Program to explore his insight about Liège waffles.

29. Mr. Matlock graduated from Hope & Main's program with a workable Liège waffle recipe, and Burgundian sold its first Liège waffle at a farmer's market in June 2017.

30. Burgundian has expanded its business to include a brick-and-mortar café and restaurant, catering team, food truck, and a "pop-up" schedule including farmer's markets, breweries, and other events and celebrations across Massachusetts, Rhode Island, and New York.

31. By March 2020, Burgundian began to explore selling its Liège waffles wholesale and direct-to-consumers, including identifying possible fulfillment and co-manufacturing options and conducting test cooking and test packaging.

32. Burgundian's growth is driven by its Liège waffles and its confidential and proprietary Liège waffle recipe, know-how, and experience.

Recipe Development

33. Mr. Matlock lacked any baker's training when he started Burgundian.

34. Mr. Matlock embarked on a self-teaching journey about Liège waffles.

35. Mr. Matlock engaged in an arduous trial-and-error process over the course of years concerning Burgundian's Liège waffle recipe.

36. Mr. Matlock's self-teaching journey was complicated because almost all available Liège waffle recipes are for home use only and either do not translate commercially or otherwise produce inauthentic Liège waffles.

37. Mr. Matlock's self-teaching journey was complicated because Liège waffles are a street food that are not traditionally covered or taught in culinary school or baking or culinary classes.

38. Mr. Matlock sought guidance from Liège waffle companies across the United States and inquired about possible apprenticeships with them to no avail.

39. Liège waffle companies are notorious for keeping their Liège waffle recipes confidential, and each company that Mr. Matlock contacted strictly guarded its Liège waffle recipe and would not share it with Mr. Matlock.

40. Sensing the limits of self-teaching, Mr. Matlock arranged to train in Belgium with a master Liège waffle maker to advance his Liège waffle knowledge and improve Burgundian's Liège waffle recipe.

41. Mr. Matlock trained in Belgium with a master Liège waffle maker.

42. Mr. Matlock incorporated what he learned under the master Liège waffle maker's tutelage in Belgium into Burgundian's Liège waffle recipe upon returning to the United States.

43. Burgundian's Liège waffle recipe is the result of years of research, experience, trial-and-error, learning, tweaking, optimizing, and informal and formal training in the United States and Belgium.

Eastern Standard

44. Eastern Standard is a pretzel company.

45. Founded in 2019, Eastern Standard sells pretzels, pretzel toppings, and dips.

46. Eastern Standard's website states, "Our Boston-based team . . . is fiercely passionate in our pursuit of making the best soft pretzels on the planet."

47. Eastern Standard utilizes a logo featuring a pretzel with an overhead knot on its packaging, website, Facebook page, Instagram page, Twitter page, YouTube videos and/or page, and other marketing and promotional materials.

48. Eastern Standard's federally registered trademark (U.S. Reg. No. 6236426) is for "Soft pretzels; Baked goods, namely, pretzels, buns, and rolls; Sauces" and "Dips."

49. Eastern Standard's pretzel recipe is confidential and proprietary and was created by Lauren Moran (Eastern Standard's Chief Product Officer and Head Baker).

50. Eastern Standard’s website states, “Under the guidance of our chief product officer and renowned baker, Lauren Moran, we started on our journey. After months of tasting, tweaking and adjusting, we finally perfected our one-of-a-kind gourmet soft pretzel.”

51. Ms. Moran created Eastern Standard’s pretzel recipe after studying under Jacques Pepin, the renowned French chef and culinary personality, and after working as an executive pastry chef in various Boston restaurants.

52. Eastern Standard’s website states, “Like any artisanal product, it takes time, effort and unwavering commitment. We landed on something we’re truly proud of: a pretzel with the airy qualities of a brioche on the inside and a traditional Bavarian-style crust on the outside.”

Oprah’s Favorite Things

53. Ms. Winfrey selected Eastern Standard’s pretzels for her 2019 Oprah’s Favorite Things list.

54. Oprah’s Favorite Things is a yearly gift list announced by Ms. Winfrey for the holidays, inspired by the song “My Favorite Things” from the musical *The Sound of Music*.

55. The so-called “Oprah Effect” is a sales boost often in the tens of millions of dollars for an item endorsed by Ms. Winfrey and/or picked for her Oprah’s Favorite Things list.

56. After Ms. Winfrey selected Eastern Standard’s pretzels for her 2019 Oprah’s Favorite Things list, Eastern Standard experienced the “Oprah Effect.”

57. As Mark Dimond (Eastern Standard’s Chief Revenue Officer) remarked to the press, “[Eastern Standard] received thousands of orders every hour [after being selected for OPRAH’S FAVORITE THINGS] and it never stopped.”

58. Mr. Dimond further stated, “you fantasize about wining when the process begins [and when] you do win, you realize just how incredible the Oprah effect is.”

59. After its pretzels were picked for the 2019 Oprah's Favorite Things list, Eastern Standard realized an over \$15 million revenue increase from 2019 to 2020.

60. Eastern Standard owns a fulfillment center in Waltham, Massachusetts, which it purchased following its pretzels being selected for Oprah's Favorite Things in 2019.

Plans and Pressure

61. Entering 2021, Eastern Standard sold only pretzels, pretzel toppings, and dips.

62. Entering 2021, Eastern Standard desired to expand its product options beyond pretzels and specifically into a breakfast item.

63. Eastern Standard projected that its net revenue would increase over \$20 million dollars from 2021 to 2022 based on the planned expansion of its product line.

64. Eastern Standard hoped to again experience the "Oprah Effect" with another product to meet its 2022 net revenue projections and further grow its sales and revenue.

65. Eastern Standard hoped to be acquired by a larger food company and/or business.

66. Eastern Standard hoped to again experience the "Oprah Effect" with another product to become a more attractive target for acquisition and/or investment.

Burgundian Pursued

67. In April 2021, with commerce in the United States greatly affected by the COVID-19 pandemic, Mr. Dimond emailed Mr. Matlock about an "interesting idea."

68. Mr. Dimond asked to arrange a phone call with Mr. Matlock.

69. Mr. Dimond and Mr. Matlock spoke by phone in May 2021.

70. Mr. Dimond explained that Eastern Standard's sales had "plateaued" and that its advisors had recommend that it expand its product options beyond pretzels.

71. Mr. Dimond explained that Eastern Standard explored adding a biscotti to its product line, but that biscotti was not a good fit alongside Eastern Standard's soft pretzels.

72. Mr. Dimond explained that Eastern Standard hoped to collaborate with Burgundian because it considers Burgundian's Liège waffles as similar to Eastern Standard's pretzels, but with a higher sales ceiling.

73. Mr. Dimond explained that Liège waffles can be eaten daily at any time of day as a meal or as a snack and that people generally have more waffles in their freezer than pretzels.

74. Mr. Dimond asked Mr. Matlock for Burgundian's Liège waffles to give to Ms. Moran so that she could taste and evaluate them.

75. Mr. Dimond inquired about producing a test run of Burgundian's Liège waffles for Eastern Standard to sell and proposed a test run of 2,500 waffles with the potential of 5,000 waffles weekly and 7,500-10,000 waffles per week for the 2021 holiday season.

76. On May 5, 2021, Mr. Matlock emailed Mr. Dimond to memorialize their conversation, writing that Eastern Standard's "ask" was "to start shipping Liege waffles under [Eastern Standard] branding (while giving some background branding to Burgundian in the info sheet) to expand [its] portfolio with a breakfast offering."

77. In his May 5, 2021 email, Mr. Matlock wrote under the heading "assumptions" that, "My branding will be somehow tied into your marketing."

78. On May 6, 2021, Mr. Dimond told Mr. Matlock that Ms. Moran had tried Burgundian's Liège waffles and loved them.

79. On May 6, 2021, Mr. Dimond visited Burgundian's café in Attleboro, Massachusetts to pick up additional Liège waffles for other Eastern Standard executives to try.

80. Mr. Dimond arranged a meeting for May 18, 2021 to discuss how Eastern Standard and Burgundian might collaborate around Burgundian's Liège waffles.

81. During the May 18, 2021 meeting, Mr. William Deacon (Eastern Standard's Chief Executive Officer), Mr. Dimond, and Ms. Moran spoke to Mr. Matlock about Eastern Standard and Burgundian being a "team."

82. On June 15, 2021, Mr. Matlock met Mr. Dimond in person at Eastern Standard's fulfillment center in Waltham, Massachusetts.

83. During the June 15, 2021 conversation, Mr. Dimond explained that having Eastern Standard's pretzels selected for Oprah's Favorite Things was a "boon" but that Eastern Standard "needed something different" like Liège waffles to continue its growth.

84. During the June 15, 2021 conversation, Mr. Dimond explained that Eastern Standard viewed Liège waffles as potentially being "bigger than the pretzels."

Co-Branding

85. On June 24, 2021, Mr. Matlock, Ms. Moran, Mr. Dimond, and Randy Shoemaker (Eastern Standard's Chief Marketing Officer) met at Burgundian's café.

86. During the June 24, 2020 meeting, Mr. Dimond, Ms. Moran, and Mr. Shoemaker asked Mr. Matlock what Burgundian wanted from a relationship with Eastern Standard.

87. Mr. Matlock explained that he would like to co-brand Burgundian's Liège waffles with Eastern Standard and access its business infrastructure including marketing and distribution.

88. Mr. Dimond, Mr. Shoemaker, Ms. Moran, and Mr. Matlock discussed the marketability of a United States Army veteran (Mr. Matlock) learning about Liège waffles while stationed on the France-Belgium border, training under a master Liège waffle maker in Belgium, and developing an award-winning Liège waffle recipe through years of trial-and-error.

89. Mr. Dimond, Mr. Shoemaker, Ms. Moran, and Mr. Matlock discussed Eastern Standard using Burgundian's federally registered trademark (U.S. Reg. No. 5991343) to sell "Burgundian Liège Waffles" alongside or in association with the Eastern Standard brand.

90. Mr. Dimond, Mr. Shoemaker, Ms. Moran, and Mr. Matlock discussed the printout that is featured inside boxes for Eastern Standard's pretzels that describes Ms. Moran's backstory and how Eastern Standard's pretzels were created by her.

91. Mr. Dimond, Mr. Shoemaker, Ms. Moran, and Mr. Matlock discussed how a similar printout could be created by Eastern Standard for Mr. Matlock and featured inside Eastern Standard boxes for "Burgundian Liège waffles."

92. Mr. Dimond, Mr. Shoemaker, Ms. Moran, and Mr. Matlock discussed Eastern Standard selling Liège waffles under the name "Burgundian Liège Waffles" or similar.

93. Neither Ms. Winfrey nor Oprah's Favorite Things were discussed at the June 24, 2021 meeting; specifically, no plans to submit Burgundian's Liège Waffles for Oprah's Favorite Things were discussed or mentioned.

Confidential Recipe

94. At the June 24, 2021 meeting, Ms. Moran asked Mr. Matlock to share Burgundian's confidential and proprietary Liège waffle recipe with her and Eastern Standard.

95. Ms. Moran emailed Mr. Matlock on June 24, 2021, "Hi Shane! Please send along your formula and method when you can :) Ty!"

96. Burgundian keeps its proprietary Liège waffle recipe and other trade secrets confidential due to the competitive and economic advantages they provide in the highly competitive food and/or restaurant marketplace.

97. Burgundian does not share its proprietary Liège waffle recipe, confidential information, or trade secrets with employees or others unless they have first executed a non-disclosure agreement.

98. Mr. Matlock did not share Burgundian's Liège waffle recipe with Ms. Moran or anyone at Eastern Standard in June 2021.

Co-Packer/Co-Manufacturer

99. As of July 11, 2021, Burgundian was securing a production space at the Hope Artiste Village in Pawtucket, Rhode Island to meet increased demand for its Liège waffles.

100. On July 11, 2021, Ms. Moran informed Mr. Matlock that Eastern Standard had identified a co-packer (i.e., a co-manufacturer) for Burgundian's Liège waffles.

101. Eastern Standard did not discuss finding a co-packer with Burgundian before July 11, 2021 or before beginning its search for a co-packer for Burgundian's Liège waffles.

102. On July 11, 2021, Ms. Moran texted Mr. Matlock, "here's what I need from you ASAP: Formula and method to start testing with Ardalin foods."

103. On July 12, 2021, Ms. Moran and Mr. Matlock spoke by phone about the co-packer Eastern Standard had identified, Ardalin Foods.

104. Ms. Moran explained to Mr. Matlock that Eastern Standard had paid to secure a "research & development slot" with Ardalin Foods to explore scaling Burgundian's Liège waffles and meet increased demand.

105. Eastern Standard did not discuss working with Ardalin Foods with Burgundian before securing a "research and development slot" for scaling Burgundian's Liège waffles.

106. Burgundian did not secure a production space at the Hope Artiste Village in Pawtucket, Rhode Island because Eastern Standard had paid to secure a “research and development slot” with Ardalin Foods.

NDA Required

107. Mr. Matlock explained that Burgundian could not share its confidential and proprietary Liège waffle recipe or other confidential information or trade secrets unless Eastern Standard executed a non-disclosure agreement.

108. Eastern Standard drafted a mutual non-disclosure agreement to govern Eastern Standard and Burgundian’s discussions about a possible business relationship.

109. Eastern Standard drafted a mutual non-disclosure agreement so that Burgundian could safely, securely, and confidentially disclose its trade secrets, including without limitation its Liège waffle recipe.

110. Erin Hill (Eastern Standard’s Director of Operations) executed the Mutual Non-Disclosure Agreement (“NDA”) on behalf of Eastern Standard.

111. On July 12, 2021, Ms. Hull emailed Mr. Matlock Eastern Standard’s signed NDA along with an executed non-disclosure agreement between Eastern Standard and Ardalin Foods.

112. Mr. Matlock agreed to the NDA with Eastern Standard.

113. Eastern Standard did not have a Liège waffle recipe when it signed the NDA.

114. Eastern Standard did not have a Liège waffle product when it signed the NDA.

NDA Purpose

115. The NDA provided that:

“the parties desire to engage in certain investment discussions, business arrangements, or contractual relationships; and . . . such investment discussions, business arrangements, or contractual relationships may involve the disclosure of Confidential

Information (as defined below) of either or both of Company and NDA Party.”

116. The NDA further provided that:

“the parties desire to define their rights and obligations with respect to such Confidential Information.”

NDA Protections

117. Section 1 of the NDA defined “Confidential Information” as:

“confidential information (including proprietary information) related to its business . . . including, but not limited to, know-how, trade secrets, product design . . . design documents . . . product development plans, marketing and business strategy plans, pricing information and strategic alliance information . . . “

118. Section 1 of the NDA further defined “Confidential Information” as:

“information furnished, disclosed, or transmitted to the Recipient by the Discloser of whatever nature which gives Discloser an opportunity to obtain an advantage over its competitors who do not know or use it.”

119. Section 7 of the NDA limited Eastern Standard’s use of “Confidential Information,” and specifically stated that:

“The Recipient shall use such Confidential Information only in connection with the furtherance of the business relationship between the parties, and the Recipient shall make no further use, in whole or in part, of any Confidential Information.”

120. Section 8 of the NDA clarified that Burgundian did not grant Eastern Standard any rights to the “Confidential Information,” and specifically stated,

“No rights or obligations other than those expressly recited herein are granted or implied by this Agreement.”

121. Section 15 of the NDA clarified that the NDA was the entire agreement between Eastern Standard and Burgundian and that the NDA could only be amended by the parties in writing, and specifically stated,

“This Agreement constitutes the entire agreement between the parties . . . and shall supersede all previous communications, representations, understandings, and agreements, either oral or written, between the parties . . . This Agreement may not be changed or modified save by a written agreement signed by the parties hereto.”

Recipe Shared

122. In reliance on the NDA, Burgundian shared its confidential and proprietary Liège waffle recipe with Eastern Standard and explained it to Eastern Standard and Ardalin Foods.

123. Neither Eastern Standard, nor Ardalin Foods had experience with Liège Waffles or had previously made or produced Liège waffles in any form or manner.

124. Eastern Standard scheduled a call for July 16, 2021 with Burgundian and Ardalin Foods about Burgundian’s confidential and proprietary Liège waffle recipe.

125. Joe Gigante and David Feldman from Ardalin Foods; Molly Hamilton (Eastern Standard’s Product Development Specialist), Mr. Dimond, and Ms. Moran from Eastern Standard; and Mr. Matlock from Burgundian attended the July 16, 2021 meeting.

126. During the July 16, 2021 meeting, Mr. Matlock explained Burgundian’s confidential Liège waffle recipe step-by-step in great detail.

127. Burgundian shared its know-how and the experience it gained about Liège waffles over the course of years through its efforts, research, and experiences.

128. Mr. Matlock helped ensure that Ardalin Foods and Eastern Standard could quickly and efficiently source the necessary and correct Liège waffle irons, ingredients, and tools to properly prepare the Liège waffles.

129. Burgundian shared additional and other confidential and proprietary information and trade secrets with Eastern Standard under the protections of the NDA.

Recipe Scaled

130. On July 29, 2021, Ardalin Foods sent Mr. Matlock and Ms. Moran a first test batch of Liège waffles prepared from Burgundian's confidential and proprietary recipe.

131. On July 30, 2021, Mr. Matlock sent his feedback on the Liège waffles to Mr. Gigante, Mr. Feldman, and Ms. Moran and also asked to visit Ardalin Foods to help improve the scaling process.

132. Ms. Moran told Mr. Matlock that he may be allowed to visit Ardalin Foods but that she would first need to have a conversation with her production team on the Liège waffles.

133. On August 11, 2021, Ardalin Foods sent Mr. Matlock two new test batches of Liège waffles for his review and comment.

134. The next day, on August 12, 2021, Mr. Matlock met with Mr. Gigante, Mr. Feldman, Ms. Hamilton, and Ms. Moran about the test batches of the Liège waffles.

135. Though tweaked, each batch of Liège waffles produced by Aradalin Foods was based on Burgundian's confidential and proprietary Liège waffles recipe and know-how.

Opportunity and Pitch

136. Ms. Winfrey's 2021 Oprah's Favorite Things list is celebrating small businesses, women-owned brands, and items created by people of color.

137. Burgundian is a veteran owned-and-operated small business.

138. On August 2, 2021, Ms. Moran called Mr. Matlock with Mr. Dimond to discuss submitting Burgundian's Liège waffles for Oprah's Favorite Things.

139. On August 8, 2021, Ms. Moran texted Mr. Matlock about Burgundian's Liège waffles, writing "our PR team wants to pitch [Liège waffles] to Oprah's favorite things list and we need new samples on Monday."

140. Burgundian reasonably believed that the submission of Burgundian's Liège waffles to Oprah's Favorite Things would be co-branded and would highlight Burgundian and Eastern Standard's brands.

Liège Waffles Submitted

141. On August 8, 2021, Mr. Matlock personally prepared Burgundian's Liège waffles using Burgundian's confidential Liege waffle recipe and delivered them to RJ Hinman (Eastern Standard's Senior Director of Sales).

142. On August 9, 2021, Mr. Hinman hand-delivered the Liège waffles prepared by Mr. Matlock to Ms. Winfrey's representatives in New York City for Oprah's Favorite Things.

143. On August 10, 2021, Ms. Moran informed Mr. Matlock that Ms. Winfrey's representatives had advanced the Liège waffles to the final round (i.e., being personally tasted by Ms. Winfrey for final approval into Oprah's Favorite Things).

144. Ms. Moran asked Mr. Matlock for more Liège waffles for submission for the final round of Oprah's Favorite Things.

145. Mr. Matlock personally made more Liège waffles using Burgundian's confidential Liege waffle recipe for submission for the final round of Oprah's Favorite Things.

146. On August 11, 2021, Mr. Hinman picked up the Liège waffles made by Mr. Matlock and had them shipped to Ms. Winfrey and Oprah's Favorite Things.

147. Burgundian reasonably believed that the Burgundian brand was included in the Liège waffles submitted for Oprah's Favorite Things and/or Ms. Winfrey.

Anticipated Selection

148. Once an item has been advanced to Ms. Winfrey for her to personally consider, it has a good chance of being selected by her for Oprah's Favorite Things list.

149. Aware that Burgundian's Liège waffles were sent to Ms. Winfrey for her final consideration, Eastern Standard anticipated that Burgundian's Liège waffles would be selected for her 2021 Oprah's Favorite Things list.

150. Before knowing whether the Liège waffles would be selected for Oprah's Favorite Things, Eastern Standard projected that its revenue would increase by tens of millions of dollars from 2021 to 2022 due to selling Liège waffles.

151. Eastern Standard sought to secure the rights to sell Burgundian's Liège waffles, which the NDA prohibited unless a superseding agreement was reached by Eastern Standard and Burgundian.

Bad Faith Term Proposed

152. On August 12, 2021, Mr. Shoemaker and Mr. Dimond set up a meeting with Mr. Matlock to present Eastern Standard's term sheet to sell Burgundian's Liège waffles.

153. Following the August 12, 2021 meeting, Mr. Shoemaker sent Mr. Matlock the term sheet and asked Mr. Matlock to sign it even though it was "non-binding."

154. Eastern Standard's term sheet did not represent the nature and structure of the discussions that Burgundian previously had with Eastern Standard.

155. Eastern Standard's term sheet did not propose a co-branding agreement, co-venture, or any other type of collaboration with Burgundian and instead proposed a "recipe buy."

156. Eastern Standard's term sheet described a per waffle royalty with a capped, non-guaranteed fee for the perpetual, unrestricted use of Burgundian's Liège waffle recipe.

157. Eastern Standard's term sheet described that Eastern Standard would solely own all derivative versions of the recipe (e.g., a peanut butter Liège waffle).

158. Eastern Standard's term sheet described that Eastern Standard would have the right to unilaterally transfer and sublicense the Liège waffle recipe without limitation.

159. Eastern Standard's term sheet described excluding any manner or form of Burgundian branding when selling the Liège waffles.

160. Eastern Standard's term sheet described excluding Burgundian from any decision making concerning the production, sales, promotion, or otherwise concerning the Liège waffles.

161. Eastern Standard's term sheet described prohibiting Burgundian from advertising that the Burgundian's Liège waffle was selected for Oprah's Favorite Things.

Burgundian Selected

162. On August 25, 2021, Eastern Standard and Burgundian learned that Ms. Winfrey selected Burgundian's Liège waffles for her 2021 Oprah's Favorite Things list.

163. On August 25, 2021, Ms. Moran texted Mr. Matlock, "[MS. WINFREY] CHOSE US ON THE REGULAR [WAFFLES] WITH OUR TWO SAUCES AND SUGARS."

164. Numerous executives from Eastern Standard congratulated Mr. Matlock for Ms. Winfrey selecting Burgundian's Liège waffles for Oprah's Favorite Things.

165. Mr. Hinman texted Mr. Matlock, "Congrats to you my good sir!" about Burgundian's Liège waffles being selected for Oprah's Favorite Things.

166. Mr. Dimond also texted Mr. Matlock, "Great stuff yes congrats Shane look forward to growing this category with you" about Burgundian's Liège waffles being selected for Oprah's Favorite Things.

But For Burgundian

167. Ms. Winfrey tasted the Liège waffles prepared by Mr. Matlock and picked Burgundian's Liège waffles to be included on her 2021 Oprah's Favorite Things list.

168. Mr. Matlock used Burgundian's Liège waffle recipe to prepare the Liège waffles that were personally tasted and picked by Ms. Winfrey for her 2021 Oprah's Favorite Things list.

169. Ms. Winfrey's selection of Liège waffles for her 2021 Oprah's Favorite Things list would not have occurred but for Burgundian.

170. Ms. Winfrey's selection of Liège waffles for her 2021 Oprah's Favorite Things list would not have occurred but for Burgundian's Liège waffles.

171. Ms. Winfrey's selection of Liège waffles for her 2021 Oprah's Favorite Things list would not have occurred but for Burgundian's confidential Liège waffle recipe.

172. Ms. Winfrey's selection of Liège waffles for her 2021 Oprah's Favorite Things list would not have occurred but for Mr. Matlock preparing the Liège waffles tasted by her.

Questions

173. On August 26, 2021, Mr. Matlock emailed Mr. Deacon with questions about Eastern Standard's proposed term sheet.

174. Mr. Matlock asked Mr. Deacon about the waffle royalty and the perpetual and unrestricted scope of the license relative to the non-guaranteed and capped fee.

175. Mr. Matlock asked Mr. Deacon about Eastern Standard exclusively owning all derivative versions of the recipe and Eastern Standard's ability to unilaterally transfer and sub-license the confidential recipe.

176. Mr. Matlock asked Mr. Deacon about the non-use of the Burgundian brand on the Liège waffles to be sold by Eastern Standard and the restriction of Burgundian from promoting that its waffles were selected for Oprah's Favorite Things.

Photographs

177. On August 31, 2021, Eastern Standard requested that Mr. Matlock prepare additional Liège waffles using Burgundian's confidential Liège waffle recipe to send to Portland, Oregon to be photographed for the 2021 Oprah's Favorite Things announcement and promotion.

178. On August 31, 2021, Mr. Hinman texted Mr. Matlock, "Hi Shane! Please see text below that we just got from Bill. How quickly can you turn these around? Gents, we just had a curve ball drop in for Oprah. They need 3 total OFT boxes in Portland OR on Thursday for photography. That is 24 waffles in roughly the size and shape we intend to sell (3.5 oz). Can one of you reach out to Shane to see if he can make these? Taste isn't an issue, just for photography".

179. On August 31, 2021, Mr. Matlock personally prepared the Liège waffles to be photographed for the 2021 Oprah's Favorite Things announcement and promotion using Burgundian's Liège waffle recipe.

180. On August 31, 2021, Mr. Hinman picked up the Liège waffles prepared by Mr. Matlock at Mr. Deacon's request and then same-day shipped them to Portland, Oregon to be photographed for the 2021 Oprah's Favorite Things announcement and promotion.

181. The Liège waffles prepared by Mr. Matlock using Burgundian's Liège waffle recipe were photographed for the 2021 Oprah's Favorite Things announcement and promotion.

Prior Statements Rejected

182. On August 31, 2021, Mr. Deacon responded in a confusing and contradictory manner to Mr. Matlock's August 26, 2021 email and questions.

183. In his August 31, 2021 email, Mr. Deacon rejected many of the statements made by Eastern Standard's other corporate officers, including that its pretzel sales had plateaued and that Eastern Standard's pretzels and Burgundian's Liège waffles were similar.

184. In his August 31, 2021 email, Mr. Deacon rejected that Eastern Standard’s pretzel sales had slowed, writing “[f]or your information, we haven’t reached a ‘pretzel plateau’, as we continue to explore white space in pretzels sales on line and through brick and mortar opportunities - and we have always planned to add new items to what we offer our customers.”

185. In his August 31, 2021 email, Mr. Deacon rejected the comparison of Burgundian’s Liège waffles to Eastern Standard’s pretzels, writing “[w]hile pretzels and waffle *may* be a good comp for waffles, we won’t know until we test the market with our audience.”

Multiple Transaction Types

186. In his August 31, 2021 email, Mr. Deacon simultaneously discussed multiple transactions types concerning Burgundian’s Liège waffles including co-branding, white labeling, and recipe purchasing.

187. In his August 31, 2021 email, Mr. Deacon provided a hyperlink to co-branding licensing examples, while in the same email describing Eastern Standard and Burgundian’s proposed arrangement as “white label” and discussing Mr. Matlock “selling his recipe.”

188. In his August 31, 2021 email, Mr. Deacon wrote that “white label partnership” is “definitely a clear and distinctly different path than our initial discussions of the potential for Eastern Standard Provisions talent and infrastructure to assist you in launching and marketing your Burgundian waffle brand, which remains an option.”

189. In his August 31, 2021 email, Mr. Deacon described Eastern Standard buying Burgundian’s recipe, writing “it’s difficult to place a value on just a recipe” and “[i]n trying to come up with a total value for a recipe, we researched what other chefs sell their recipes for and they typically range in the hundred of dollars to a few thousand dollars max.”

Net Revenue Share

190. In his August 31, 2021 email, Mr. Deacon rejected a “net revenue share” with Burgundian by asserting that it was risky for Burgundian.

191. In his August 31, 2021 email, Mr. Deacon explained that Eastern Standard had explored a net profit share with Burgundian, writing “[w]e did run a few models, including a royalty percentage based on based on net profit, but the royalty based on units produced was the cleaner and simplest.”

192. In his August 31, 2021 email, Mr. Deacon dismissed a net profit share with Burgundian because Burgundian was not “protected against unforeseen cost increases that could well eliminate net profits.”

193. On August 31, 2021, Mr. Deacon was aware that Eastern Standard’s proposed term sheet capped Burgundian’s possible payment, that Burgundian’s Liège waffles were selected for Oprah’s Favorite Things, and that Eastern Standard was projecting millions of dollars of sales and revenue from selling Liège waffles.

Mutual Benefit

194. On September 1, 2021, Mr. Matlock responded to Mr. Deacon’s email by reiterating that Eastern Standard and Burgundian “stand to benefit significantly from this deal and the growth opportunity for our respective brands; it’s important we come to an agreement within that context.”

195. In his September 1, 2021 email, Mr. Matlock wrote, “I have been acting on good faith in this process, as I want to see both of us be wildly successful with these waffles; however, it is imperative to get a deal done before any announcement or commercial use of the Burgundian Liege Waffle is allowed to move forward.”

196. In his September 1, 2021 email, Mr. Matlock explained that Eastern Standard and Burgundian “currently have an NDA which does not allow the use of [Burgundian’s] recipe or waffles in the marketplace for what is being done at this juncture, especially if it’s being done without [Burgundian’s] branding.”

197. In his September 1, 2021 email, Mr. Matlock continued that “treating this as a recipe transaction is not what I have agreed upon, nor desire to, as we move forward.”

Burgundian Discarded

198. On September 2, 2021, Mr. Deacon abruptly and angrily responded to Mr. Matlock by ending Eastern Standard and Burgundian’s relationship and threatening litigation against Burgundian.

199. In his September 2, 2021 email, Mr. Deacon wrote that “[Eastern Standard is] no longer in the position to move forward with the white label agreement [and has] decided to use the waffle recipe developed by [Eastern Standard’s] co-packer.”

200. In his September 2, 2021 email, Mr. Deacon wrote that, “the co-packer’s recipe is quite different than [Burgundian’s Liège waffle recipe], as it does not include your mandatory ingredients or crucial process steps that you list in your recipe” and is “scalable in a way that better fits [Eastern Standard’s] needs and product demand.”

201. In his September 2, 2021 email, Mr. Deacon wrote that Eastern Standard “will use all means necessary to protect our relationship with third parties, including endorsers and our co-packer [which] includes pursuing any necessary temporary restraining orders, injunctions, or claims of tortious interference with contract or business expectancy in order to protect our company and our rights.”

Resolution Attempted

202. On September 17, 2021, Burgundian sent Eastern Standard a lengthy demand and cease-and-desist letter, specifically citing G.L. c. 93A, in an (unsuccessful) attempt to find resolution without litigation and/or involving this Court.

Confidential Information Not Returned

203. In its September 17, 2021 letter, Burgundian requested that Eastern Standard meet its obligations under Section 6 of the NDA.

204. Section 6 of the NDA provided:

“The Recipient shall not make any copies of the Confidential Information without the prior written consent of the Discloser.”

205. Section 6 of the NDA further provided:

“The Recipient agrees that it will, within five (5) business days after receipt of a written request by the Discloser, return or destroy all documents and tangible materials in its possession, which contains any Confidential Information disclosed to the Recipient by the Discloser hereunder.”

206. Eastern Standard failed to reply or conform with its obligations under section 6 of the NDA within its required time frame of September 24, 2021.

207. On September 28, 2021, Mr. Deacon wrote a letter to Mr. Matlock acknowledging Eastern Standard’s obligations to Burgundian under Section 6 of the NDA.

208. Mr. Deacon wrote in his September 28, 2021 email, “we will continue to hold any Confidential Information (as defined in the Agreement) we received from Burgundian with a reasonable degree of care for the remainder of the term (5 years the effective date of the Agreement).”

209. Mr. Deacon wrote in his September 28, 2021 email, “we have not received any physical copies of any Burgundian Confidential Information that requires return to Burgundian.”

210. Mr. Deacon wrote in his September 28, 2021 email, “any electronic Burgundian Confidential Information will be destroyed in accordance with our normal retention, archival, and erasure processes and policies.”

211. Eastern Standard possesses and holds electronic copies of Burgundian’s Confidential Information.

212. Section 6 of the NDA is not limited to the return or destruction of “physical copies of any Burgundian Confidential Information.”

213. Burgundian requested that Eastern Standard identify what “electronic Burgundian Confidential Information” it possessed, and that Eastern Standard provide Burgundian with a copy of its “retention, archival, and erasure processes and policies.”

214. Eastern Standard refused to identify what “electronic Burgundian Confidential Information” it possessed and refused to provide Burgundian with a copy of its “retention, archival, and erasure processes and policies.”

Contract Withheld

215. On September 30, 2021, Burgundian sent Eastern Standard a letter seeking Eastern Standard’s contract concerning Oprah’s Favorite Things and the Liège waffles.

216. Eastern Standard did not produce, and refused to produce, to Burgundian Eastern Standard’s contract concerning Oprah’s Favorite Things and the Liège waffles.

Burgundian Replaced

217. Eastern Standard ended its relationship with Burgundian.

218. Eastern Standard did not have its own Liège waffle product or Liège waffle recipe when it ended its relationship with Burgundian.

219. Eastern Standard needed to secure a Liège waffle product to meet the demand expected from the selection of the Liège waffles for the 2021 Oprah’s Favorite Things list.

220. Eastern Standard did not move forward with Ardalin Foods.

221. Ardalin Foods’ Liège waffle product and/or Liège waffle recipe are based on Burgundian’s Liège waffle recipe and derivative of Burgundian’s Liège waffle recipe.

222. After ending its relationship with Burgundian, Eastern Standard solicited Liège waffle companies to work with it to make and/or produce Liège waffles.

223. Eastern Standards efforts to contract with Liège waffle companies were known and discussed in the Liège waffle business community and discussed on social media.

224. As of September 17, 2021 (i.e., the same day that Burgundian sent its letter to Eastern Standard), Eastern Standard was contacting Liège waffle companies other than Burgundian about manufacturing and/or co-packing Liège waffles.

225. On September 17, 2021, Eastern Standard contacted Ilene Feldman of Send Me Waffles about manufacturing and/or co-packing Liège waffles for Eastern Standard.

226. On September 17, 2021, Eastern Standard inquired with Ms. Feldman about Send Me Waffles manufacturing and/or co-packing 300,000 Liège waffles for November 2021.

227. On September 17, 2021, Ms. Feldman posted in the Facebook group “League of Liège Wafflers” asking if another Liège waffle company could meet Eastern Standard’s request because Send Me Waffles could not.

228. “League of Liège Wafflers” is a private Facebook group co-founded by Mr. Matlock for small Liege Waffles businesses.

229. On September 17, 2021, Ms. Feldman posted in the Facebook group “League of Liege Wafflers” asking, ‘Do any of you have the capabilities to co-pack large order of . . . Belgian Liege Waffles (yeast dough)?’”

230. Upon information and belief, Eastern Standard contracted with a Liège waffle company other than Burgundian.

231. Eastern Standard moved forward with Ms. Winfrey’s selection of the Liège waffles for Oprah’s Favorite Things without Burgundian.

Inconsistency

232. Ms. Winfrey tasted and picked Liège waffles made with Burgundian’s confidential Liège waffle recipe for her 2021 Oprah’s Favorite Things list.

233. Eastern Standard asserts that the Liège waffles it is advertising and selling are different from Burgundian’s Liège waffles.

234. Eastern Standard asserts that the Liège waffles it is advertising and selling are made with a new and/or different recipe from Burgundian’s Liège waffle recipe.

235. Eastern Standard assert that the Liège waffles it is advertising and selling were selected by Ms. Winfrey for the 2021 Oprah’s Favorite Things list.

Oprah Winfrey Mislead

236. Eastern Standard submitted Burgundian’s Liège waffles for Oprah’s Favorite Things under Eastern Standard’s name and brand only.

237. Eastern Standard submitted Liège waffles for Oprah’s Favorite Things as its own product without any mention of Burgundian.

238. Eastern Standard represented that the Liège waffle it submitted to Oprah’s Favorite Things belonged to Eastern Standard.

239. Eastern Standard did not disclose to Ms. Winfrey and/or Oprah's Favorite Things that Burgundian prepared the Liège waffles submitted for Oprah's Favorite Things.

240. Eastern Standard did not disclose to Ms. Winfrey or Oprah's Favorite Things that the Liège waffles tasted by Ms. Winfrey were made using Burgundian's Liège waffle recipe.

241. Eastern Standard did not disclose to Ms. Winfrey or Oprah's Favorite Things that Eastern Standard does not have an agreement with Burgundian to sell Burgundian's Liège waffles.

242. Eastern Standard did not disclose to Ms. Winfrey or Oprah's Favorite Things that Eastern Standard signed an NDA with Burgundian prohibiting Eastern Standard from using Burgundian's Liège waffle recipe or other confidential and proprietary information.

243. Eastern Standard did not disclose to Ms. Winfrey or Oprah's Favorite Things that Eastern Standard would be selling Liège waffles made by different company than the company that made the Liège waffles tasted by Ms. Winfrey for Oprah's Favorite Things.

Consumers Mislead

244. Eastern Standard states on its website that, "Our Gourmet Liège Belgian Waffle Gift Box has been selected for Oprah's Favorite Things 2021!"

245. Eastern Standard describes its "Eastern Standard Provision Gourmet Liège Belgian Waffle Gift Box" as "SELECTED AS ONE OF OPRAH'S FAVORITE THINGS: Chosen as one of Oprah's Favorite Things in 2021, this selection of Liège Belgian Waffles, artfully blended sugars and toppers and delectable sauces are the perfect gourmet treat."

246. Ms. Winfrey did not taste the Liège waffles that Eastern Standard is advertising and selling as picked for the 2021 Oprah's Favorite Things list.

247. Ms. Winfrey did not pick the Liège waffles that Eastern Standard is advertising and selling as picked for the 2021 Oprah’s Favorite Things list.

248. The Liège waffles pictured on OprahDaily.com under Eastern Standard’s branding for Ms. Winfrey’s 2021 Oprah’s Favorite Things list are different from the Liège waffles being advertised and sold by Eastern Standard on its website and elsewhere.

249. Using Burgundian’s confidential Liège waffle recipe, Mr. Matlock made the Liège waffles depicted on OprahDaily.com under Eastern Standard’s branding for Ms. Winfrey’s 2021 Oprah’s Favorite Things list.

250. The Liège waffles pictured in the 2021 Winter issue of *O Quarterly* under Eastern Standard’s branding for Ms. Winfrey’s 2021 Oprah’s Favorite Things list are different from the Liège waffles being advertised and sold by Eastern Standard on its website and elsewhere.

251. Using Burgundian’s confidential Liège waffle recipe, Mr. Matlock made the Liège waffles depicted in the 2021 Winter issue of *O Quarterly* under Eastern Standard’s branding for Ms. Winfrey’s 2021 Oprah’s Favorite Things list.

252. Eastern Standard is misrepresenting to consumers that the Liège waffles it is advertising and selling on its website and elsewhere were endorsed by Ms. Winfrey for her 2021 Oprah’s Favorite Things list.

Confidential Information Misuse

253. Eastern Standard is competing against Burgundian.

254. Eastern Standard is competing against Burgundian in the Liège waffles marketplace by selling Liège waffles.

255. Eastern Standard is hosting “pop-up events” to sell Liège waffles in areas including but not limited to Massachusetts.

256. Eastern Standard is selling Liège waffles at breweries including but not limited to Mighty Squirrel Brewing Co. in Waltham, Massachusetts.

257. Eastern Standard used confidential information it learned from Burgundian under the NDA to select, acquired, and/or develop the Liège waffles it is advertising and selling.

258. Eastern Standard reviewed and evaluated the Liège waffles it is advertising and selling on its website and elsewhere.

259. Eastern Standard used confidential information it learned from Burgundian under the NDA when it selected, acquired, and/or developed the Liège waffle it is advertising and selling on its website and elsewhere.

260. Eastern Standard reviewed and evaluated the Liège waffle recipe for the Liège waffles it is advertising and selling on its website and elsewhere.

261. Eastern Standard used confidential information it learned from Burgundian under the NDA when it reviewed and/or evaluated the Liège waffle recipe for the Liège waffle it is advertising and selling on its website and elsewhere.

262. Eastern Standard is using confidential information and knowledge it learned from Burgundian under the NDA to market Liège waffles and compete against Burgundian.

263. For example, without limitation, Mr. Dimond texted Mr. Matlock on August 27, 2021, “Broad marketing question for you that crossed my mind...should we market this strictly as a ‘Liege’ waffle? Will people recognize that term? Do we need to explain what liege means? Any other way you think it should be described to a large national audience?”

264. On August 27, 2021, Mr. Matlock responded to Mr. Dimond that “Great question and definitely needs some thought around it. I just sent you an email with some names being

used in the market currently” and “Along with a touch of history. I’m always all about giving fun information to the consumer.”

265. On August 27, 2021, Mr. Matlock emailed Mr. Dimond that “I am of course partial to the actual name in conjunction with engaging information. A Belgian Liège Waffle hails from the town of Liège.”

266. Eastern Standard is advertising and selling “Liège Belgian Waffles” on its website and elsewhere.

267. Eastern Standard is advertising and selling a “Eastern Standard Provision Gourmet Liège Belgian Waffle Gift Box” on its website and elsewhere.

268. Upon information and belief, Eastern Standard has benefited from the “Oprah Effect” for the Liège Waffles it is advertising and selling on its website and elsewhere.

269. The Liège Waffles being sold by Eastern Standard have been featured and promoted by and/or on the Internet, national and local media, e-commerce websites, social media, print media, and television including without limitation on the TODAY Show, OprahDaily.com, *O Quarterly*, and Amazon.

270. Upon information and belief, Eastern Standard has realized a significant revenue increase and/or other financial benefits from the sale of Liège Waffles.

271. Upon information and belief, Eastern Standard has realized a significant revenue increase and/or other financial benefits from Ms. Winfrey’s endorsement of the Liège Waffles.

CLAIMS

Count I **(Breach of Contract)**

272. Burgundian re-alleges and fully incorporates herein by reference each and every allegation contained in all prior paragraphs and/or set forth above.

273. The NDA is valid and enforceable contractual agreement between Eastern Standard and Burgundian.

274. Burgundian has fulfilled its obligations under the NDA and has at all times complied with the NDA.

275. Eastern Standard has engaged in, and continues to engage in, acts or inactions which constitute breach of contract, and which breached the NDA, including but not limited to:

- a. Using, and/or misusing, Burgundian's confidential information to exclusively and solely benefit Eastern Standard, and not in furtherance of the business relationship between the parties, including but not limited to:
 - i. Submitting Burgundian's Liège waffles under the Eastern Standard brand only for Oprah's Favorite Things.
 - ii. Securing a selection of the Liège waffles for Oprah's Favorite Things under the Eastern Standard brand only and to Burgundian's exclusion.
 - iii. Realizing, exclusively and solely, the financial, business, and branding benefits arising from a selection of Burgundian's Liège waffles for Oprah's Favorite Things and/or the selection for Oprah's Favorite Things.
 - iv. Obtaining an undue economic and competitive advantage in the Liège waffle marketplace and against Burgundian.
 - v. Identifying and promoting the Liège waffle that Eastern Standard is advertising and selling as having been endorsed by Ms. Winfrey instead of Burgundian's Liège waffles.

- vi. Selecting, acquiring, evaluating, and/or developing a Liège waffle and/or Liège waffle recipe to replace Burgundian's Liège waffles and/or Burgundian's Liège waffle recipe.
 - vii. Bringing a Liège waffle product to market and to advertise and sell on its website and elsewhere, exclusive of Burgundian, in a period of months.
 - viii. Positioning itself as a leader in the Liège waffle marketplace and more effectively and successfully advertising, promoting, and marketing its Liège waffle product and offering.
- b. Failing to return and/or destroy Burgundian's confidential information to Burgundian, timely or at all.
 - c. Failing to require its directors, officers, employees, representatives, consultants, and agents to comply with the terms of the NDA.

276. Eastern Standard's breaches of the NDA, individually and collectively, are knowing, intentional, willful, and malicious.

277. Burgundian has suffered damages, injuries, and harms as a direct and proximate result of Eastern Standard's breach of contract.

Count II
(Breach of the Implied Covenant of Good Faith and Fair Dealing)

278. Burgundian re-alleges and fully incorporates herein by reference each and every allegation contained in all prior paragraphs and/or set forth above.

279. The covenant of good faith and fair dealing is implicit and inherent to every contract in Massachusetts.

280. Eastern Standard has engaged in, and continues to engage in, acts or inaction which constitute bad faith and breach of the implied covenant of good faith and fair dealing, including but not limited to:

- a. Signing, executing, and agreeing to the NDA with Burgundian under false pretenses and/or misleading Burgundian about its intentions and interests in a relationship with Burgundian and/or its Liège waffles.
- b. Utilizing and leveraging the NDA to secure an undue economic and competitive advantage through the submission and selection of Burgundian's Liège waffles under the Eastern Standard brand only for Oprah's Favorite Things.
- c. Utilizing and leveraging of the NDA to be positioned and able to exclusively and solely realize the financial, business, and branding benefits arising from a selection of Burgundian's Liège waffles for Oprah's Favorite Things and/or a selection for Oprah's Favorite Things.
- d. Utilizing and leveraging of the NDA to secure an undue economic and competitive advantage in the Liège waffle marketplace and against Burgundian by way of co-opting, learning, and misappropriating Burgundian's confidential and proprietary information concerning Liège waffles and otherwise.

281. Eastern Standard's breaches of the implied covenant of good faith and fair dealing, individually and collectively, are knowing, intentional, willful, and malicious.

282. Burgundian has suffered damages, injuries, and harms as a direct and proximate result of Eastern Standard's breach of the covenant of good faith and fair dealing.

Count III
(Violation of the Massachusetts Trade Secrets Act)

283. Burgundian re-alleges and fully incorporates herein by reference each and every allegation contained in all prior paragraphs and/or set forth above

284. Burgundian possesses valuable trade secrets including without limitation its Liège waffle recipe, market knowledge, market relationships, culinary techniques, special training, unique cooking processes and methods, and baking experience which provided, and continue to provide, Burgundian with economic advantage from being neither generally known nor readily ascertainable by proper means.

285. Burgundian expended significant time and resources to develop its trade secrets, including without limitation its Liège waffle recipe, and Burgundian's success in the highly competitive food and/or restaurant market as a small business is derived from (a) identifying and filling a gap in that market for authentic Liège waffles and (b) its unique and laboriously developed Liège waffle recipe.

286. Burgundian closely safeguards its trade secrets, including without limitation its Liège waffle recipe, beyond reasonable measures by disclosing it only to necessary employees and by requiring all people to whom its trade secrets are disclosed to sign a non-disclosure agreement, among other measures.

287. Burgundian and Eastern Standard executed the NDA so that Burgundian could safely, securely, and confidentially disclose its trade secrets, including without limitation its Liège waffle recipe, to Eastern Standard for the parties' mutual benefit only and not exclusively for Eastern Standard's benefit.

288. Eastern Standard knowingly executed and agreed to the NDA.

289. Eastern Standard acquired and/or used Burgundian's trade secrets, including without limitation its Liège waffle recipe, through improper means including but not limited to:

- a. Breaching the NDA.
- b. Breaching the implied covenant of good faith and fair dealing.
- c. Signing, executing, and agreeing to the NDA with Burgundian under false pretenses and/or misleading Burgundian about its intentions and interest in a relationship with Burgundian and/or its Liège waffles.
- d. Passing off Burgundian's Liège waffles as exclusively belonging to and made by Eastern Standard to Mr. Winfrey and/or Oprah's Favorite Things.
- e. Passing off its Liège waffles as selected for Oprah's Favorite Things list when the Liège waffles selected by Ms. Winfrey were actually Burgundian's Liège waffles.
- f. Acquiring and/or developing a Liège waffle recipe and/or product using the trade secret information improperly obtained from Burgundian.

290. Eastern Standard has engaged in, and continues to engage in, acts or inactions which constitute trade secret misappropriation and/or violate G.L. c. 93 §§ 42-42G.

291. Eastern Standard has received, and continues to receive, benefits from the misappropriation and unauthorized use of Burgundian's trade secrets, including without limitation its Liège waffle recipe.

292. Eastern Standard's misappropriation and unauthorized use of Burgundian's trade secrets, including without limitation its Liège waffle recipe, have resulted in Burgundian losing revenue and profits and not realizing or benefiting from the "Oprah Effect."

293. Eastern Standard's violations of the Massachusetts Trade Secret Act, individually and collectively, are knowing, intentional, willful, and malicious.

294. Burgundian has suffered damages, injuries, and harms as a direct and proximate result of Eastern Standard's trade secret misappropriation.

295. Eastern Standard has been unjustly enriched as a direct and proximate result of its trade secret misappropriation.

Count IV
(Passing Off)

296. Burgundian re-alleges and fully incorporates herein by reference each and every allegation contained in all prior paragraphs and/or set forth above.

297. Eastern Standard has engaged in, and continues to engage in, acts or inactions which constitute passing off including without limitation:

- a. Presenting Burgundian's Liège waffles to Oprah's Favorite Things and/or Ms. Winfrey as belonging to and made by Eastern Standard instead of Burgundian and without any mention or inclusion of Burgundian or its brand.
- b. Misrepresenting publicly and misleading the public that the Liège waffles Eastern Standard is advertising and selling on its website and elsewhere were endorsed by Ms. Winfrey for her 2021 Oprah's Favorite Things list instead of Burgundian's Liège waffles.
- c. Excluding any mention of Burgundian or its brand when promoting, advertising, and marketing the selection of the Liège waffles for Oprah's Favorite Things.
- d. Advertising and selling a different Liège waffle from the Liège waffle made by Burgundian that was tasted and selected by Ms. Winfrey for Oprah's Favorite Things and without any qualification and/or without any explanation publicly.
- e. Advertising or promoting and/or allowing or enabling to be advertised or promoted that the Liège waffles featured in *O Magazine* and on Oprahdaily.com

in association with Oprah's Favorite Things belong were and are made by Eastern Standard instead of Burgundian.

298. Eastern Standard's acts of passing off have caused harm and injury to Burgundian and its commercial interests by excluding Burgundian from the financial and sales benefits arising from a selection of Burgundian's Liège waffles for Oprah's Favorite Things.

299. Eastern Standard's acts of passing off have caused harm and injury to Burgundian and its business reputation by excluding Burgundian from the branding and marketing benefits arising from a selection of Burgundian's Liège waffles for Oprah's Favorite Things.

300. Eastern Standard's acts of passing off have caused harm and injury to Burgundian by diverting consumers to purchase Eastern Standard's Liège waffles instead of Burgundian's Liège waffles.

301. Eastern Standard's acts of passing off, individually and collectively, are knowing, intentional, willful, and malicious.

302. Burgundian has suffered damages, injuries, and harms as a direct and proximate result of the Eastern Standard's passing off.

Count V
(False Advertising/Deceptive Statements)

303. Burgundian re-alleges and fully incorporates herein by reference each and every allegation contained in all prior paragraphs and/or set forth above.

304. Eastern Standard has engaged in, and continues to engage in, acts or inactions which constitute false advertising, and which are false and misleading, including without limitation:

- a. Misrepresenting publicly and misleading the public that the Liège waffles it is advertising and selling on its website and elsewhere were endorsed by Ms. Winfrey for her 2021 Oprah's Favorite Things list.
- b. Excluding any mention of Burgundian or its brand when promoting, advertising, and marketing the selection of Burgundian's Liège waffles by Ms. Winfrey for her 2021 Oprah's Favorite Things list.
- c. Advertising and selling a different Liège waffle from the Liège waffle tasted and selected by Ms. Winfrey for her 2021 Oprah's Favorite Things list without any qualification and/or without any explanation publicly.
- d. Advertising or promoting and/or allowing or enabling to be advertised or promoted that the Liège waffles featured in *O Magazine* and on Oprahdaily.com in association with Oprah's Favorite Things belong were and are made by Eastern Standard and not Burgundian.

305. Eastern Standard's acts and practices concerning the advertising, promotion, and marketing of Liège waffles mislead the reasonable public and others.

306. Eastern Standard's misrepresentations, misleading statements and/or acts of false advertising have caused harm and injury to Burgundian and its commercial interests by excluding Burgundian from the financial and sales benefits arising from a selection of Burgundian's Liège waffles for Oprah's Favorite Things.

307. Eastern Standard's misrepresentations and misleading statements and/or acts of false advertising have caused harm and injury to Burgundian and its business reputation by excluding Burgundian from the branding and marketing benefits arising from a selection of Burgundian's Liège waffles for Oprah's Favorite Things.

308. Eastern Standard's acts of passing off have caused harm and injury to Burgundian by diverting consumers to purchase Eastern Standard's Liège waffles instead of Burgundian's Liège waffles.

309. Eastern Standard's acts of false advertising, individually and collectively, are knowing, intentional, willful, and malicious.

310. Burgundian has suffered damages, injuries, and harms as a direct and proximate result of Eastern Standard's false advertising.

Count VI
(Violation of G.L. c. 93A)

311. Burgundian re-alleges and fully incorporates herein by reference each and every allegation contained in all prior paragraphs and/or set forth above.

312. Eastern Standard is engaged in trade or commerce with Burgundian in Massachusetts, and within the meaning set forth by G.L. c. 93A at all times relevant hereto.

313. Eastern Standard has engaged in, and continues to engage in, acts or inactions which constitute unfair and deceptive trade practices and/or which violate G.L. c. 93A, § 11 including without limitation:

- a. Breaching the NDA.
- b. Breaching the covenant of good faith and fair dealing.
- c. Engaging in passing off.
- d. Violating the Massachusetts's Trade Secret Act.
- e. Engaging in false advertising.
- f. Executing the NDA under false pretense and using Burgundian, its confidential information, and the NDA to obtain Ms. Winfrey's endorsement.

- g. Committing a “bait and switch” with Burgundian’s Liège waffles and inferior Liège waffles from a different company.
- h. Acting to exclusively and solely realize financial, business, and branding benefits that would not exist but for Burgundian, Burgundian’s Liège waffles, and/or Burgundian’s Liège waffle recipe.
- i. Publicly claiming that Ms. Winfrey endorsed the Liège waffles it is selling, while privately claiming that the same Liège waffles use a “new recipe and process” from Burgundian’s Liège waffles that Ms. Winfrey actually tasted and picked for her 2021 Oprah’s Favorite Things list.

314. Eastern Standard’s unfair and deceptive trade practices occurred primarily and substantially within Massachusetts.

315. Eastern Standard’s unfair and deceptive trade practices, individually and collectively, are knowing, intentional, willful, and malicious.

316. Burgundian has suffered damages, injuries, and harms as a direct and proximate result of Eastern Standard’s violations of G.L. c. 93A, § 11.

Count VII
(Unjust Enrichment)

317. Burgundian re-alleges and fully incorporates herein by reference each and every allegation contained in all prior paragraphs and/or set forth above.

318. Burgundian conferred a benefit upon Eastern Standard by disclosing its confidential and proprietary Liège waffle recipe and other confidential and proprietary information under the NDA.

319. Eastern Standard appreciated and knew that a benefit had been conferred upon it via Burgundian disclosing its confidential and proprietary Liège waffle recipe and other confidential and proprietary information to Eastern Standard under the NDA.

320. Eastern Standard's acceptance and retention of the benefit conferred upon it by Burgundian would be inequitable under the circumstances because:

- a. Eastern Standard is exclusively and solely realizing without Burgundian the financial, business, and branding benefits arising from a selection of Burgundian's Liège waffles for Oprah's Favorite Things.
- b. Burgundian's reasonable expectation was that Eastern Standard would not use Burgundian's Liège waffles, Liège waffle recipe, and associated information provided under the NDA to benefit Eastern Standard alone to the detriment of Burgundian.
- c. But for Burgundian, Burgundian's Liège waffles, and/or Burgundian's Liège waffle recipe, the selection for Oprah's Favorite Things from which Eastern Standard is exclusively and solely benefiting would not exist.
- d. But for Burgundian, Burgundian's Liège waffles, and/or Burgundian's Liège waffle recipe, the financial, business, and branding benefits that Eastern Standard is exclusively and solely realizing would not exist.
- e. But for Eastern Standard's unjust and inequitable conduct Burgundian would have realized and experienced the financial, business, and/or branding benefits from having its Liege waffles endorsed by Ms. Winfrey for her Oprah's Favorite Things list including the "Oprah Effect."

321. Equity requires restitution from Eastern Standard to Burgundian.

322. Burgundian has suffered damages, injuries, and harms as a direct and proximate result of Eastern Standard's conduct.

Count VIII
(Promissory Estoppel)

323. Burgundian re-alleges and fully incorporates herein by reference each and every allegation contained in all prior paragraphs and/or set forth above.

324. Burgundian to its detriment reasonably relied upon Eastern Standard's promises and/or representations that it would, among other things:

- a. Honor and comply with the terms and provisions of the NDA.
- b. Include and feature Burgundian's branding when it submitted Burgundian's Liège waffles for Oprah's Favorite Things.
- c. Equitably share the financial, business, and branding benefits arising from a selection of Burgundian's Liège waffles for Oprah's Favorite Things.

325. Eastern Standard broke its promises to Burgundian and used Burgundian's Liège waffles, Liège waffle recipe, and associated confidential information to Eastern Standard's sole benefit and to the detriment of Burgundian.

326. Burgundian has suffered damages, injuries, and harms as a direct and proximate result of Eastern Standard's conduct.

RELIEF

WHEREFORE, upon all allegations and counts alleged herein, Burgundian respectfully requests that this Court:

- a. ENTER judgment against the Defendant on each count alleged herein;
- b. ORDER the Defendant to comply with the NDA it executed with Burgundian;

- c. ENJOIN the Defendant from using or accessing Burgundian's confidential information and trade secrets;
- d. ENJOIN the Defendant from advertising, promoting, marketing, or otherwise stating or implying that its Liège waffles were endorsed by Oprah Winfrey and/or picked for Oprah's Favorite Things;
- e. AWARD Burgundian its damages of all types and forms including without limitation the Defendant's profits and revenues and reasonable royalties;
- f. AWARD Burgundian multiple damages pursuant to G.L. c. 93A;
- g. AWARD Burgundian its attorney's fees and costs under the laws of the Commonwealth of Massachusetts and G.L. c. 93A; and
- h. GRANT such other and further relief as this Court deems just and proper.

**BURGUNDIAN HEREBY DEMANDS
A JURY TRIAL ON ALL ISSUES SO TRIABLE**

The Plaintiff,
The Burgundian LLC.
By its Attorneys,

DATE: February 3, 2021

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