23.16 Plaintiff's Memorandum of Law In Opposition to Defendant's Motion for JNOV and New Trial

[Attorneys for Plaintiff]

[PLAINTIFF], on behalf of herself and all others similarly situated, Plaintiff, v. REXALL SUNDOWN, INC., Defendant.	)	SUPERIOR COURT OF NEW JERSEY LAW DIVISION CAMDEN COUNTY DOCKET NO. Civil Action **PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR JNOV AND NEW TRIAL**

I. INTRODUCTION

Defendant argues that it is entitled to judgment notwithstanding the verdict because, pursuant to this Court's ruling on a Motion In Limine, the jury determined damages on a per purchase (rather than classwide) basis and because, Defendant contends, there was no evidence supporting the finding that Defendant's conduct with regard to the marketing of Calcium 1200 was in violation of the Consumer Fraud Act and resulted in ascertainable losses to class members. In addition, Defendant argues that a new trial is warranted on the damages assessed by the jury. Under the applicable standard, Defendant's motion must be denied in it's entirety.

More particularly, the standard for determining a motion for judgment notwithstanding the verdict under R.4:40-2 and a motion for judgment under R. 4:40-1 is the same. That is, the court must accept as true the evidence which supports Plaintiff's position, and accord Plaintiff the benefit of all legitimate inferences, and if reasonable minds could differ, the motion must be denied. *Velasquez v. Jiminez*, 336 N.J. Super. 10, 30 (App. Div. 2000)(citing *Dolson v. Anastasia*, 55 N.J. 2, 5-6 (1969); Pressler, Current N.J. Court Rules, comment on R. 4:4001 and –2 (2000)). "The trial court is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with it's existence, viewed most favorably to the party opposing the motion." *Velasquez*, 336 N.J. Super. At 30-31 (quoting *Lewis v. American Cyanamid Co*., 155 N.J. 544, 567 (1998)). *See also Blume v. Denville Twp. Board of Ed*., 334 N.J. Super. 13, 19 (App. Div. 2000).

The findings challenged by the Defendant in this motion were made by the jury after hearing testimony and considering the evidence presented during nearly a week of

trial. As set forth below, the findings were made in accordance with the instructions given and were irrefutably based upon the evidence presented. In such circumstances there is no basis for disturbing or modifying the verdict.

II. LEGAL ARGUMENT

A *The Jury's Determination of Ascertainable Losses on a Class Member Purchase Basis and Not a Classwide Basis Was Proper*

Defendant's first challenge to the verdict does not address the sufficiency of the evidence supporting the jury's findings but rather, the propriety of a finding of ascertainable losses on a per class member purchase basis as opposed to an aggregate classwide basis. This challenge appears to be based upon an assertion that in order to sustain the jury's finding that each class member who purchased Defendant's Calcium '900' and Calcium 1200 suffered ascertainable losses of $4.99 and $5.99, respectively, the jury was required to also make a finding as to aggregate classwide damages. Defendant cites no legal precedent, not a single case or authority, in support of its position. Plaintiff submits that this is because the relevant authority establishes that, in fact, the approach adopted by this court was well within in its discretion and the findings rendered in accordance with that approach are proper and sustainable. *See generally* Rule 4:32-3 (a) (in conducting class actions "the court may make appropriate orders… determining the course of the proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or arguments…").

More particularly, while reported decisions on class action trials are few, discussions of how to address damages issues in the context of a predominance and/or manageability analysis for class certification purposes confirm the propriety of the approach here, which required the jury to make a finding as to the appropriate formula to be applied to determine individual damages from which the classwide damages would be calculated. *See e.g. In Re Visa Check/Master Money Anti-Trust Litigation*, 2001 U.S. App. Lexis 22480, 35-38 (2d Cir. October 17, 2001) (collecting cases). Thus, for example, in affirming the certification of a class of merchants and trade associations in an antitrust action, over defendant's objections that damage issues precluded certification and rendered the case unmanageable, the Second Circuit recently observed:

> There are a number of management tools available to a district court to address any individualized damages issues that might arise in a class action, including: (1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class. *See e.g.* Fed.R.Civ.P. 23(c)(4) (stating that "when appropriate, (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class"); In *re Master Key Antitrust Litig., 528 F.2d 5, 12 n. 11, 14 (2d Cir. 1975).* (discussing use of

> a separate liability and damages trial in an antitrust case and, if appropriate, use of subclasses to facilitate damages determination); *Green v. Wolf Corp., 406 F.2d 291, 300-01 (2d Cir. 1968)*. (stating that "the district court may use the procedures suggested by Rule 23(b)(3) [may]. . . require the use of the sensible device of split trials") (internal quotation marks omitted); 1 Newberg & Conte, *supra*, §4.26, at 4-91 to 4-97 (collecting cases applying each of these management tools); 4 Newberg & Conte, *supra*, §166.03[3][a][I] (discussing adjudication of individualized questions in separate actions or in separate damage proceedings, allowing a class action to proceed for the purposes of litigating particular issues, or dividing the class into subclasses, and collecting cases applying those tools); *id.* at § 166.03[3][b][iv] (stating that manageability problems may be obviated by dividing the class into subclasses or confining certification to certain issues). *Id.* at *37-38. (footnotes omitted).

Id. at 36-38. *See also Lonegran v. AJ's Wrecker Service of Dallas, Inc., et al.*, 1999 U.S. Dist. LEXIS 11190, *21, *22 (N.D. Texas 1999) affirmed 200 F.3d 816 (1999). (Class certification decision in a case where "[t]he only issue that could possibly differ among class members is the exact amount of damages that each has suffered", court noted that individual calculations "could be referred to a special master. . . .").

Perhaps even more instructive is the decision of a Florida district court following trial in which the court, after rejecting the plaintiffs' proposed procedure for assessing damages on a class-wide basis following a liability judgment, ordered the use of a special master for damage determinations in a claims administration process. *Allapattah Services, Inc. v. Exxon Corporation*, 157 F.Supp. 2d 1291 (S.D. Fla. 2001). In *Allapattah* a jury had returned a special verdict in favor of a class of gasoline dealers which recognized a common damage factor to be applied to the prices charged by the defendant for gasoline for the purposes of calculating compensatory damages. The plaintiffs argued that the factor could be applied on an aggregate basis to all gasoline sold to the class to calculate a classwide damage award, to be later allocated to class members. The district court rejected this position and required instead that individual compensatory damages be calculated by application of the factor found by the jury. The district court then determined that the appointment of a Special Master to conduct a claims administration process was an appropriate mechanism for assessing individual damages, including issues of proof of amounts of gasoline purchased, applicable class period for each claim, and calculation of damages. 157 F. Supp. 2d at Sec.D.[1] Presumably, the final judgment amount, as in this case, would thereafter be calculated from the total of the individual damages assessed by the Special Master using the factor found by the jury.

In sum, as recognized by both the class action rule and case law, there is a wide variety of mechanisms available to the trial court for purposes of managing a class action. This court, by order on Motion in Limine, see Exhibit A, crafted one such approach, that is consistent with the options discussed in the relevant authority. Hence, Defendant's

[1] The court entered an order, requiring the parties' to submit recommendations as to the qualifications of the special master and nature of the claims process and providing for notice to the class. The court also certified the issues presented on the motion to fix a damage judgment for immediate appeal to the Eleventh Circuit and stayed the claims process pending a determination on whether the appeal would be accepted.

attack on the verdict because it is predicated upon a finding of per purchase damages that, once calculated, will provide the basis for the final judgment is without merit.

Also without merit is Defendant's contention that its due process rights would be violated if class members were to be informed of the verdict against Defendant and in their favor before Defendant has had an opportunity to obtain appellate review of the decision. To the contrary, it is class members who would be prejudiced if this court were to suppress the information that they have prevailed in a jury trial brought against Defendant on their behalf, and they are entitled to damages as a result, simply because Defendant believes it will prevail upon appeal. Indeed, New Jersey's class action rule specifically contemplates that "for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members …to intervene and present claims…or otherwise to come into the action. . . ." Rule 4:32-3(b). Likewise, many of the mechanisms discussed in the *In Re Visa Check* case quoted above involve notice to the class prior to the administration (or, in some cases, even the adjudication) of damages issues.

In short, Defendant's dislike of the jury's findings against it and its desire to overturn those findings on appeal do not provide a basis for entering a judgment notwithstanding the verdict. Nor do they create due process impediments to advising class members about the verdict and providing class members the opportunity to participate in further proceedings, if they so desire. At most, Defendant's concerns suggest additional information that may be appropriately included in the notice of the verdict to which Plaintiff class members are entitled.[2]

B. *Judgment Notwithstanding the Verdict Should Not Be Entered With Respect to Plaintiff's Claims As To Calcium 1200*

Contrary to Defendant's contention, there is ample evidence to support the jury's finding with regard to Calcium 1200. This evidence included testimony by Defendant's representative Nicholas Palin that both Calcium '900' and Calcium 1200 were marketed using the same scheme; the evidence that Calcium '900' and Calcium 1200 were labeled differently than all of the other Calcium products marketed by Defendant; letters from consumers, including those from New Jersey, putting Defendant on notice that consumers viewed the Calcium '900' and Calcium 1200 products confusing for the same reasons; testimony by the Plaintiff supporting the conclusion that the marketing and labeling tactic used for both products was misleading; evidence of confusion of Defendant's own employees' and the labels themselves. All of this evidence supports the jury's determination that Defendant's conduct with regard to the marketing and labeling of Calcium 1200 violated the Consumer Fraud Act.

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[2] For example, it may be appropriate to advise class members that final judgment will be entered after the claims process is completed and that Defendant intends to appeal the final judgment, in which event further notice would be provided to claimants as to the effect of the appeal and the ultimate resolution as well as any impact of same upon the timing of payment on claims. A similar approach was used in *Robinson* v. *Thorn Americas*, CAM-L-3470-98, when, following summary judgment in favor of the class, an appeal was filed. *See* notice attached as Ex. B. *See also* Notice of Pendancy in *Smith* v. *Precision Chevrolet*, ATL-L-315696, advising class members of the case and the liability judgment in their favor. Ex. C.

The evidence likewise supports the jury's determination of the ascertainable losses suffered by each class member who purchased Calcium 1200 for the reasons set forth in the following section.

C. *There Was No Miscarriage of Justice Justifying An Order For A New Trial As To Damages, Or To Remit Damages*

In its third point, Defendant argues that the Court should order a new trial as to damages, or alternatively, remit damages, on the grounds that the jury's assessment of $4.99 per bottle for Calcium '900' and $5.99 per bottle for Calcium 1200 was "based upon speculation and conjecture and not upon the evidence that was presented at trial." Db5. Defendant's argument must be rejected for two reasons. First and foremost, the appropriate mechanism where the complaint pertains only to the quantum of damages is remittitur – not a new trial as to damages. Second, even assuming arguendo that the jury assessed damages in the amount of $4.99 and $5.99 respectively based upon the testimony of Kelly Michols, that assessment was well within their province, did not result in an excessive verdict, and certainly did not constitute a miscarriage of justice. Thus, the Court should deny Defendant's motion for a new trial and should not remit damages.

More particularly, *R*. 4:49-1 provides, in relevant part:

> A new trial may be granted … if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law.

A new trial is warranted only in instances where the trial court determines that a "manifest denial of justice" has occurred. *Fertile v. St. Michael's Medical Center*, 169 N.J. 481, 490 (2001); *Baxter v. Fairmont Food*, 74 N.J. 588, 597–98 (1977). "The scope of the new trial depends on the nature of the injustice." *Fertile*, 169 N.J. at 490. Where the alleged error pertains to liability, a motion for new trial is proper. However, where the quantum of damages is the sole source of complaint that a denial of justice has taken place, such as that alleged here, remittitur is the better remedy. *Baxter*, 74 N.J. at 595.

"Remittitur 'describes the power of a court upon a motion for new trial due to excessive damages rendered by a jury to require the plaintiff to consent to a decrease in the award to a specified amount as a condition for denial of the motion.'" *Fertile*, 169 N.J. at 491 (quoting *Henker v. Prebylowski*, 216 N.J. Super. 513, 516 (App. Div. 1987)). Remittitur avoids the unnecessary expense and delay of a new trial, and thus, when confronted with an excessive verdict, courts should resort to remittitur. *Caldwell v. Haynes*, 136 N.J. 422, 443 (1994).

> [A] 'trial judge should not interfere with the quantum of damages assessed by a jury unless it is so disproportionate to the injuries and resulting disabilities shown as to shock the conscience and to convince him that to sustain the award would be manifestly unjust.'

Iacano v. St. Peter's Medical Center, 334 N.J. Super. 547, 555 (App. Div. 2000) (quoting *Taweel v. Starn's Shoprite Supermarket*, 58 N.J. 227, 236 (1971)). Only in the clearest of cases should jury verdicts by found excessive and therefore reduced. *Iacano*, 334 N.J.Super. at 554-555.

In *Taweel*, the New Jersey Supreme Court explained the use of remittitur in these terms:

> The trial court's views necessitate a restatement of the true function of a remittitur. When there is adequate support for the jury's finding on liability and it appears only that the damages awarded were excessive, the remittitur device may be used and its use is encouraged to avoid a new trial. *Fritsche v. Westinghouse Electric Corp.*, 55 N.J. 322, 330–331 (1970). The term is used to describe an order denying defendant's application for a new trial on condition that the plaintiff consent to a specified reduction in the jury's award. *Fisch v. Manger*, 24 N.J. 66, 72 (1957). It may be employed only in cases where, if the plaintiff declines the reduction, the separate issue of liability having been clearly and properly decided, he must submit to a new trial as to damages. If however, the award of damages is so grossly excessive as to demonstrate prejudice, partiality or passion and thus to generate the feelings that the entire verdict was tainted, a remittitur is improper. The correct procedure in such a case is an order for a new trial on all issues.

Taweel, 58 N.J. at 231.

Case law makes clear that remittitur is only appropriate in situations where the verdict is excessive and shocks the judicial conscience. *See, e.g. Fertile*, 169 N.J. at 489 (damages of $15 million reduced to $5 million where plaintiff suffered severe arm injury and loss of use of that arm, but was otherwise healthy and could fully function); *Iacano*, 334 N.J.Super. at 554–550 (reduction of $1.5 million to $500,000 where plaintiff suffered permanent and painful injury to her hand); *but see*, *Fritsche v. Westinghouse Electric Corp*., 55 N.J. 322 (1970) (Defendant's motion for new trial properly denied where jury awarded injured motorist $80,000 for person injuries sustained in a minor car accident which involved property damage of only $52.50 and in which no other passengers were injured). In *Baxter v. Fairmont Food Co.*, 74 N.J. 588 (1977), the Supreme Court set forth the standards to be applied in post-verdict applications for relief from excessive verdicts. The Court made clear that "a trial judge should not interfere with the quantum of damages assessed … unless it is so disproportionate to the injury … as to shock his conscience…."

> To us all of this means that a trial judge, before acting in derogation of the jury's fixing of damages, must be convinced, and that very clearly, of something like this: "This verdict is terribly wrong – having canvassed the record I reach this conclusion because of substantive factors in the totality of the evidence [e.g., the incredible testimony offered by a party, the overwhelming weight of the evidence with respect to a certain fact, the

> failure of a party to produce any countervailing medical or other expert testimony, etc.] – and I must therefore determine that it is so much against the weight of the evidence as to be, manifestly, a miscarriage of justice."

Baxter, 74 N.J. at 598-599.

In *Jackson v. Consolidated Rail Corp.*, 223 N.J.Super. 467 (App. Div. 1988), plaintiff employee filed suit against his employer for racial discrimination. The jury returned a verdict in plaintiff's favor and awarded him $600,000 in compensatory damages, and $1,000,000 in punitive damages. Defendant subsequently filed a motion for new trial as to damages, which the trial granted finding that defendant's actual damages were only $16,500. The Appellate Division affirmed:

> Given the economic loss, the trial judge concluded that the jury must have awarded over $500,000 for emotional distress. However, he concluded that, notwithstanding that the emotional distress, especially during the period of discharge, 'was real and painful and there are some resulting emotional scars …, the severity of the distress from the testimony of the plaintiff himself was not of such a degree to warrant the judgment of over half a million dollars.'

Jackson, 223 N.J.Super. at 478.

Here, the damages were not excessive but rather in accord with the evidence presented at trial including the testimony of Defendant's own witness. More particularly, Kelly Michols, testified that he believed the price of Calcium '900' to be $4.99 and the price of Calcium 1200 to be $5.99. Plaintiff's expert, Professor Wachter provided average and median prices for the products during the class period that included prices that were close to these same numbers. Given these facts, and regardless of whether the jury's assessment of ascertainable losses was based solely on the testimony of Mr. Michols, or on a combination of all of the testimony and evidence presented, it is not for the court, in the face of a motion for new trial, to speculate as to how the jury reached its determination. The jury, having had the opportunity to view the evidence, hear the testimony and weigh the credibility of the witnesses, possessed great latitude to assess damages consistent with that evidence. So long as the verdict does not shock the judicial conscience, does not constitute a miscarriage of justice, and is not excessive, the verdict must stand. Since the verdict here was based upon the evidence, including credible testimony concerning the price of Calcium '900' and Calcium 1200, it should not be remitted as suggested by the defense.

III. CONCLUSION

For all of the forgoing reasons, Defendant's Motion should be denied in its entirety.

Respectfully submitted,

[Attorneys for Plaintiff]