73

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2019-00136

CHIME MEDIA, LLC

vs.

RICHARD KOSOWSKY

vs.

GEORGE O'CONOR, defendant-in-counterclaim

MEMORANDUM OF DECISION AND ORDER ON RICHARD KOSOWSKY'S MOTIONS FOR JUDGMENT NOTWITHSTANDING THE JURY'S VERDICT, TO AMEND OR ALTER THE JUDGMENT, FOR REMITTITUR, OR FOR A NEW TRIAL

After a trial in October 2022, a Middlesex County jury found defendant Richard Kosowsky ("Kosowsky") liable on plaintiff Chime Media, LLC's ("Chime") claims of breach of contract, breach of fiduciary duty, and business defamation.[1] The evidence at trial, from my perspective, generated two overarching impressions: first, that Chime presented very strong evidence demonstrating Kosowsky's liability, particularly with respect to his far-reaching breach of fiduciary duty; and second, that Chime's evidence on damages was speculative and ill-defined. The jury apparently shared my assessment of liability, but not damages. The jury awarded Chime damages in the amount of $24.4 million and wrote, "DFT pays plaintiff's legal fees" on the verdict form. After a prolonged briefing schedule and a hearing, now before the court are a variety of post-trial motions, including Kosowsky's motions for judgment notwithstanding the verdict or to amend or alter the judgment (Paper #59) and for remittitur or a

[1] The jury found in Kosowsky's favor on Chime's claim of tortious interference with prospective economic advantage. Additionally, in July 2020, this court (Tuttman, J.) allowed Kosowsky's motion for summary judgment on his counterclaims against Chime and its chief executive officer, George O'Conor.

new trial (Paper #60). For the following reasons, these motions are **DENIED** insofar as they seek to alter the jury's verdict on Kosowsky's liability, but **ALLOWED in part**, to the extent the motions challenge the jury's damages award.

DISCUSSION

Richard Kosowsky makes his post-judgment motions in the alternative, seeking judgment notwithstanding the verdict, alteration or amendment to the verdict, remittitur, or a new trial. See, e.g., Commonwealth v. Johnson Insulation, 425 Mass. 650, 667 (1997).

I. Judgment Notwithstanding the Verdict – Mass. R. Civ. P. 50(b)

Kosowsky unsuccessfully moved for a directed verdict under Mass. R. Civ. P. 50(a) at the close of Chime's evidence at trial. He now moves for judgment notwithstanding the verdict under Mass. R. Civ. P. 50(b).

"Because the jury are a pillar of [the] justice system, nullifying a jury verdict is a matter for the utmost judicial circumspection." Cahaly v. Benistar Prop. Exch. Tr. Co., 451 Mass. 343, 350 (2008). "'Judgment notwithstanding the verdict is to be granted cautiously and sparingly.'" Brissette v. Ryan, 88 Mass. App. Ct. 606, 610 (2015) (citation omitted). Additionally, as a motion for judgment notwithstanding the verdict "is 'technically a revised motion for a directed verdict, no grounds for the motion . . . may be raised which were not asserted in the directed verdict motion.'" Gyulakian v. Lexus of Watertown, Inc., 475 Mass. 290, 299 (2016) (citation omitted); Shafir v. Steele, 431 Mass. 365, 371 (2000) ("[A] party may not raise an issue in a motion for judgment [notwithstanding the verdict] that was not raised in a motion for directed verdict."). "This requirement 'is an important one,' as it 'allows the judge knowingly to rule on the question before him . . . , and it allows the opposing party an opportunity to rectify any deficiencies in its case . . . .'" Gyulakian, 475 Mass. at 299 (citation omitted).

"When considering a motion for judgment [notwithstanding the verdict], 'the judge's task, taking into account all the evidence in its aspect most favorable to the plaintiff [as the nonmoving party], [is] to determine whether, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, the jury reasonably could return a verdict for the plaintiff.'" Phelan v. May Dep't Stores Co., 443 Mass. 52, 55 (2004) (second alteration in original) (citations and internal quotation marks omitted). The judge "disregard[s] . . . [evidence] favorable to the moving party[,]" O'Brien v. Pearson, 449 Mass. 377, 383 (2007), and "consider[s] whether 'anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn' in favor of the nonmoving party." Id. (citations omitted). Accord Esler v. Sylvia-Reardon, 473 Mass. 775, 780 (2016). "The touchstone [of this inquiry] is reasonableness." Cahaly, 451 Mass. at 350. "To be reasonable, the inference 'must be based on probabilities rather than possibilities and cannot be the result of mere speculation and conjecture.'" Phelan, 443 Mass. at 55 (citations omitted).

There can be no question that the evidence, construed in Chime's favor, justifies the liability verdict against Kosowsky. See O'Brien, 449 Mass. at 383 ("'[T]he standard to be employed is whether the evidence, construed against the moving party, justif[ies] a verdict against him.'" (second alteration in original) (citations and internal quotation marks omitted)); see also Esler, 473 Mass. at 780; Phelan, 443 Mass. at 55. Kosowsky was an officer of Chime and owed the LLC a fiduciary duty of loyalty and care. Although he played an integral role in Chime's efforts to develop relationships with financial institution sponsors and potential issuers of Chime's financial product known as TRBO's (or "Turbo's"), at some point in August 2018 and for reasons not well-explained at trial, Kosowsky soured on Chime's founder, George

O'Conor ("O'Conor"). Instead of confronting O'Conor or working as an officer to change matters with which he disagreed, or breaking from the company, Kosowsky, while still an officer of Chime, launched a campaign to defame O'Conor and Chime. He undertook to interrupt the numerous relationships he had helped to cultivate, and criticized O'Conor and Chime to investors, financial institutions and potential TRBO issuers, with a goal of undermining Chime's prospects. The evidence of Kosowsky's campaign to hurt Chime and O'Conor's reputation and prospects, was compelling and broad in scope. The evidence at trial plainly demonstrated that Kosowsky violated his fiduciary duty to Chime, defamed Chime, and breached his contract with Chime. Kosowsky's motion for judgment notwithstanding the verdict thus lacks merit.

That Kosowsky's liability was firmly established does not insulate from challenge the jury's award of $24.4 million in damages. However, a motion for judgment notwithstanding the verdict is not the appropriate vehicle to challenge excessive or inadequate damages. See Shafir, 431 Mass. at 371. Rather, "'[q]uestions concerning inadequate or excessive damages are initially within the discretion of the trial judge and should ordinarily be raised by bringing a motion for a new trial . . . .'" Id. (alteration in original) (citations omitted).

Kosowsky's motion for judgment notwithstanding the verdict is accordingly **DENIED**.

II. **Amendment to or Alteration of the Judgment – Mass. R. Civ. P. 59(e)**

Kosowsky has also moved to amend or alter the judgment under Mass. R. Civ. P. 59(e). "Rule 59(e) 'is designed for precisely such situations' where the judgment is incorrect because it lacks both legal and factual justification." Shawmut Cmty. Bank, N.A. v. Zagami, 419 Mass. 220, 223 (1994), quoting Page v. New England Tel. & Tel. Co., 383 Mass. 250, 252 (1981). "In such circumstances, 'the judge [is] not called upon to find different facts from the evidence, but merely to correct the judgment by striking out that portion which [is] erroneous because it lack[s]

both legal and factual justification.'" Quarterman v. Springfield, 91 Mass. App. Ct. 254, 260 (2017) (alterations in original) (further citation and internal quotation marks omitted), quoting Page, 383 Mass. at 252. "A motion under rule 59(e) . . . [is] addressed to the judge's discretion . . . ." R.W. Granger & Sons, Inc. v. J & S Insulation, Inc., 435 Mass. 66, 79 (2001).

Although the court concludes that the amount of damages the jury awarded to Chime is excessive, a determination as to the appropriate amount of damages due to Chime would not be a mere correction but would require the court to find facts from the evidence. See Quarterman, 91 Mass. App. Ct. at 260. Contra Spring v. Geriatric Auth. of Holyoke, 394 Mass. 274, 290-291 (1985) ("conclud[ing] that the jury award was not compensatory in nature because no actual damages were proved at trial" and that, "[t]herefore, the judge correctly altered the jury's verdict to reflect the nominal damages due the plaintiff as a result of the [defendant's] breach of contract"); Page, 383 Mass. at 251-252 (affirming trial judge's amendment of jury's finding of $10,000 in damages to $1.00 where, after jury wrote on verdict form that plaintiff was entitled to nominal damages without providing dollar amount, "the jury were sent out again for a very limited purpose. They were instructed to 'put a figure after it, whatever that nominal damage is'" and "[t]hey obviously did not follow that instruction").

Kosowsky's motion to alter or amend the judgment is **DENIED**.

III. **Remittitur and New Trial – Mass. R. Civ. P. 59(a)**

Kosowsky also has moved for remittitur or a new trial under Mass. R. Civ. P. 59(a). As concluded above, the only issue is the jury's award of damages because Kosowsky is not entitled to post-judgment relief as to the jury's findings regarding his liability.

A. Standard of Review

"A new trial shall not be granted solely on the ground that the damages are excessive until the prevailing party has first been given an opportunity to remit so much thereof as the court adjudges is excessive." Mass. R. Civ. P. 59(a). This rule "'does not require the judge to give the plaintiff the opportunity to remit only so much of the amount of the verdict as exceeds the maximum amount which the jury warrantably might have allowed.'" Hlatky v. Steward Health Care Sys., LLC, 484 Mass. 566, 589 (2020) (citation omitted). In other words, "[i]n ordering an additur or remittitur, the judge is not obliged to make the smallest modification possible . . . ." Baudanza v. Comcast of Mass. I, Inc., 454 Mass. 622, 630 (2009). Rather, "[t]he trial judge has the 'discretion to fix the amount of remittitur to bring the verdict anywhere within the range of verdicts supported by the evidence.'" Hlatky, 484 Mass. at 589; see Baudanza, 454 Mass. at 630 ("'[T]he allowance of a motion for a new trial based upon an inadequate or excessive award of damages, and the direction of an addition or remittitur, rests in the sound discretion of the judge.'" (citations omitted)); Clifton v. Massachusetts Bay Transp. Auth., 445 Mass. 611, 623 (2005) ("A judge acting on a motion for remittitur has broad discretion.").

"[A] judge may reduce a verdict where the damages awarded were 'greatly disproportionate to the injury proven,' represent a 'miscarriage of justice,' or were so large 'that it may be reasonably presumed that the jury, in assessing them, did not exercise a sound discretion, but were influenced by passion, partiality, prejudice or corruption.'" Dubuque v. Cumberland Farms, Inc., 93 Mass. App. Ct. 332, 350 (2018), quoting Reckis v. Johnson & Johnson, 471 Mass. 272, 299 (2015); see Walsh v. Chestnut Hill Bank & Trust Co., 414 Mass. 283, 292 (1993) ("[M]otions for a new trial on the theory that the damages were inadequate or excessive 'ought not to be granted unless on a survey of the whole case it appears to the judicial conscience and judgment that otherwise a miscarriage of justice will result.'" (citations

omitted)). "When a judge proposes a remittitur it does not constitute an offer, the acceptance of which binds" the parties. Franchi v. Stella, 42 Mass. App. Ct. 251, 258 (1997). But see Baudanza, 454 Mass. at 627-628 (holding that party accepting remittitur order "may not appeal from that order once judgment has entered" because "[i]t would defeat that purpose to allow a party to accept a modification of the damage award, and nevertheless continue litigation on the issue of damages").

B. Analysis

As here, remittitur "only comes into play when the issue in dispute is damages, not an issue relating to liability." Pelletier v. Somerset, 458 Mass. 504, 522 (2010); see, e.g., Clifton, 445 Mass. at 622 (concluding new trial in entirety not necessary where "[t]he jury's finding of liability remains unassailable").[2] While "[t]he judge is empowered to remit 'so much' of the damages award 'as the court adjudges is excessive[,]' . . . . the judge must provide a 'reasoned basis' for the amount of the remittitur." Charles v. Leo, 96 Mass. App. Ct. 326, 343 (2019). In making this reasoned determination as to the remittitur amount, the court must be "guided by the evidence in this case, not by awards issued in other cases on different facts." Dubuque, 93 Mass. App. Ct. at 353-354.

After careful review of the evidence at trial and consideration of the parties' arguments, a new trial limited to the issue of damages is required, unless Chime accepts a reduced damages

[2] Referring to additur rather than remittitur, the Supreme Judicial Court has held that "the trial judge is to use the additur process only when he concludes that the verdict is sound except for inadequacy of the amount and the inadequacy is such as to descend to the level of unreasonableness. An *unduly slim verdict*, however, may signal the existence of other defects in the work of the jury, or mistakes by the judge. In such a case additur would not be appropriate, and a simple new trial would be called for." Freeman v. Wood, 379 Mass. 777, 785-786 (1980) (emphasis added). Logic dictates that the same reasoning applies with respect to remittitur such that an unduly *excessive* verdict may arise from other trial errors requiring a new trial rather than a remittitur. See id. Having reviewed the entirety of the trial, however, the court concludes that the $24.4 million award signifies only that the jury erred in assessing damages.

amount discussed below. I reach this conclusion because, notwithstanding the strength of Chime's case for Kosowsky's liability, no reasonable view of the evidence can support the jury's award of $24 million in damages.

The story of damages presented at trial was that Chime had developed an exciting new financial product—the revenue backed security or TRBO—and was working hard to partner with financial firms to provide the market infrastructure for the products as well as corporations, sports teams, or entertainment ventures to issue the securities. Chime had filed a patent application, had investors, had promising partners in the pipeline, but in Chime's ten-year existence, it had not issued or licensed a TRBO. It therefore had generated no fees and generated no income or profits. Several financial professionals testified as to the promise of the TRBO, and O'Conor testified that he expected each issuance of a TRBO to generate million of dollars in fees, but neither Chime nor TRBO's had any track record for reference. When Chime witnesses explained what Chime lost because of Kosowsky's misconduct, the unmistakable focus of Chime's evidence was that Chime was on the verge of several multi-million dollar investments which, O'Conor testified, would likely allow Chime, at last, to market and sell TRBO's, leading to lucrative fees for Chime. Namely, Chime presented evidence that until Kosowsky's misconduct, Chime anticipated an investment from Putnam of $20 million, and hoped to land $15 to $20 million from an investor group in Dallas.

The inescapable conclusion is that the basis for the jury's damages award was that Kosowsky's misconduct caused Chime to lose these anticipated investments. The problem posed by this conclusion is that a lost *investment* in a nascent enterprise does not equate to *damages*. Instead, to translate a lost investment into damages, the jury would have to determine what those investments, had they been received by Chime, would have allowed Chime to

achieve, for instance, what type of net profit Chime would have achieved had those investments allowed Chime to market its new financial products. There is no basis to conclude that the jury conducted that type of analysis; it is exceedingly likely that the damages award simply reflected the investments that were lost due to Kosowsky's misconduct. But even if I were to credit that the jury evaluated the business success Chime would achieve if it received those investments, there was no evidentiary basis from which the jury could determine Chime's lost profits that resulted from the investments of which Kosowsky deprived Chime. Without a track record, and without concrete evidence of expected revenue and expenses if Chime successfully launched a TRBO, the jury could only speculate about anticipated earnings and profits had the investments been received. In sum, evidence of lost investments is not the same as evidence of damages, and the jury had no non-speculative basis to determine what damages, lost profits or otherwise, would flow from those lost investments.

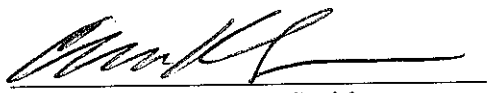
The mostly speculative nature of the evidence gauging harm to a start-up business (with no track record) attributable to Kosowsky's actions, makes difficult the task of identifying damages that are supported by evidence, for purposes of remittitur. But viewing the evidence in a light most favorable to Chime, there is one avenue to damages that is not improperly speculative, and which was supported by trial evidence. With respect to the harm caused by Kosowsky contacting numerous potential investors and partners and urging them to stay away from Chime and O'Conor, O'Conor testified that Chime's efforts to launch the TRBO was set back three to four years due to Kosowsky's misconduct. Crediting that estimate of harm, Chime's profit and loss statement (Trial Ex. 34) shows that Chime's expenses were $240,365.11 in 2015 and $266,113.00 in 2016. Expenses were greater in 2014 ($793,431.13), when Chime still had significant payroll expenses related to development of its product, as distinct from the

marketing focus of later years. Although Exhibit 34 did not cover 2017 and 2018, the 2015 and 2016 data provide a basis to estimate annual expenses through Kosowsky's misconduct in the summer of 2018. Relying upon O'Conor's testimony that Kosowsky's actionable misconduct caused Chime to lose the value of the preceding four years of its efforts to market TRBO's, I determine damages, supported by trial evidence, to be **$1,282,683.68** (one-half of 2014 expenses ($396,715.57), 2015 expenses of $240,355.11, 2016 expenses of $266,113.00, 2017 estimated expenses of $253,000, and one-half of 2018 estimated expenses ($126,500)).

Accordingly, Kosowsky's motion for remittitur is **ALLOWED**, and the court reduces the damages award from $24.4 million to $1,282,683.68, the highest amount that the trial evidence supports. If Chime does not agree to remit the difference, Kosowsky's motion for a new trial shall be **ALLOWED** solely with respect to damages. See Mass. R. Civ. P. 59(a). Chime must inform the court in writing which option it chooses within thirty (30) days of entry of this decision on the docket.

ORDER

For the foregoing reasons, Kosowsky's motion for judgment notwithstanding the verdict or to amend or alter the judgment (Paper #59) is **DENIED**; and Kosowsky's motion for a remittitur or a new trial (Paper #60) is **DENIED** as to liability and **ALLOWED** insofar as the damages award is reduced to $1,282,683.68. The court further **ORDERS** that, within thirty (30) days of entry of this decision on the docket, Chime must inform the court in writing whether it accepts or rejects the reduced award. If Chime accepts the reduced award, judgment shall enter reflecting the reduction. If Chime does not accept the reduced award, Kosowsky's motion for a new trial on damages is **ALLOWED**, and a new trial on that limited issue shall be scheduled. Other pending motions following trial will be addressed separately.



Christopher K. Barry-Smith
Justice of the Superior Court

DATED: September 21, 2023