IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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| F'REAL FOODS, LLC and RICH PRODUCTS CORPORATION,<br><br>Plaintiff,<br><br>v.<br><br>HAMILTON BEACH BRANDS, INC. and HERSHEY CREAMERY COMPANY,<br><br>Defendant. | Civil Action No. 16-41-CFC |

Rodger D. Smith II, Michael J. Flynn, and Taylor Haga, MORRIS, NICHOLS, ARSHT & TUNNELL LLP, Wilmington, Delaware; Guy W. Chambers and Peter Colosi, SIDEMAN & BANCROFT LLP, San Francisco, California

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*Counsel for Defendant*

**MEMORANDUM OPINION**

June 9, 2020
Wilmington, Delaware

COLM F. CONNOLLY
UNITED STATES DISTRICT JUDGE

The Court held a four-day jury trial in this patent infringement case filed by Plaintiffs f'real Foods LLC and Rich Products Corporation against Defendants Hamilton Beach Brands, Inc. (Hamilton Beach) and Hershey Creamery Company (Hershey). The jury awarded Plaintiffs $2,988,869.00 in lost profits. D.I. 264, Question 7(b). Pending before me is Defendants' Renewed Motion for Judgment as a Matter of Law of No Lost Profits or, in the Alternative, Motion for a New Trial on or Remittitur of Lost Profits. D.I. 296.

## I. BACKGROUND

Plaintiffs' only evidence of lost profits concerned the MIC2000 blenders used in Hershey's Shake Shop Express program. *See* Trial Tr. at 599:8–16. Plaintiffs hired a damages expert, Dr. Akemann, to model the profits Plaintiffs lost due to the Shake Shop Express Program. When Dr. Akemann calculated lost profits, he divided the time period of Hershey's infringement into when Hershey profited by renting its machines to retailers and when Hershey let retailers use its machines for free and profited by adding an upcharge to the cups used in its blenders. Trial Tr. at 607:8–16. He then modelled f'real's lost profits on Hershey's business model at the relevant time: part of the model was based on

adding an upcharge to cups and part of the model was based on renting machines. *Id.*

When determining Plaintiffs' market share, Dr. Akemann relied on an email written by f'real's COO Jens Voges (the "Voges Email") in which Voges summarized information from external sources regarding f'real's competitors. Trial Tr. 656:2–657:2.

When modeling Plaintiffs' lost profits due to lost sales on upcharged cups, Dr. Akemann looked to f'real's history of using an upcharge model at certain high-volume places. Trial Tr. at 387:21–388:2; Trial Tr. at 607:18–25. Dr. Akemann also looked to a "business document that f'real generated in the 2013 time period," which was when infringement from the Shake Shop Express program began. Trial Tr. at 608:5–7. In that document, f'real "focused on 70 cents as the appropriate upcharge." Trial Tr. at 608:14–15. Dr. Akemann testified that he relied on the 70-cents upcharge suggested in that document because the infringing blenders in the Shake Shop Express program had been located in a similar business context. Trial Tr. at 608:1–20.

When modeling Plaintiff's lost profits due to lost rentals, Dr. Akemann "assume[d] that [Plaintiffs] would have matched whatever rental fees [Hershey] charged." Trial Tr. at 664:5–6. Hershey charged customers roughly $150.00 per month. Trial Tr. at 664:1–12. When Defendants confronted Dr. Akemann with a

f'real document that showed f'real rented its machines for a $500.00 down payment and $350.00 per month, Dr. Akemann explained that he used Hershey's pricing to "control for the differences in pricing to do my analysis." Trial Tr. at 666:3–4.

Dr. Akemann calculated upcharge lost profits as $3,015,367.00; lost rental profits as $897,028.00; and total lost profits as $3,912,395.00. Trial Tr. at 615:4–5. The jury found the Defendants liable for $2,988,869.00 in lost profits. D.I. 264, Question 7(b).

## II. LEGAL STANDARDS FOR NEW TRIAL OR REMITTITUR

The law of the regional circuit governs the standard for ordering a new trial or remittitur in a patent case. *SynQor, Inc. v. Artesyn Techs., Inc.*, 709 F.3d 1365, 1383 (Fed. Cir. 2013) (new trial); *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 711 F.3d 1348, 1356 (Fed. Cir. 2013) (remittitur). A district court has the discretion to order a new trial when the verdict is contrary to the evidence, a miscarriage of justice would result if the jury's verdict were left to stand, or the court believes the verdict resulted from confusion. *Cf. Blancha v. Raymark Indus.*, 972 F.2d 507, 512 (3d Cir. 1992) ("Where a new trial has been granted on the basis that the jury's verdict was tainted by confusion or that a new trial is required to prevent injustice, [the Court of Appeals] reviews [the district court's ruling] for abuse of discretion"). "A remittitur is in order when a trial

judge concludes that a jury verdict is clearly unsupported by the evidence and exceeds the amount needed to make the plaintiff whole . . . ." *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1100 (3d Cir. 1995) (quotation marks and citation omitted).

## III. ANALYSIS

While this motion was pending, I granted Defendants' Renewed Motion for Judgment as a Matter of Law of Noninfringement of Claim 21 of the '662 Patent. D.I. 355. Where, as here, a judge makes a posttrial ruling of noninfringement of a patent claim as a matter of law and "the jury rendered a single verdict on damages, without breaking down the damages attributable to each patent, the normal rule would require a new trial as to damages." *Verizon Servs. Corp. v. Vonage Holdings Corp.*, 503 F.3d 1295, 1310 (Fed. Cir. 2007). But the Federal Circuit has also directed courts to "apply a harmlessness analysis" before ordering a new trial and has said that a new trial is not "automatically required" if a reasonable jury would have found the same damages award even without the error. *WesternGeco L.L.C. v. ION Geophysical Corp.*, 913 F.3d 1067, 1074 (Fed. Cir. 2019).

In addition to the jury's finding that the MIC2000 infringed claim 21 of the #662 Patent, the jury found that the MIC2000 infringed claims 20 and 22 of U.S. Patent No. 7,144,150 and claims 1 and 5 of U.S. Patent No. 7,520,658. *See* D.I.

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