IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Joe H. Miller, IV, and Robert W. Pearce, Jr., Plaintiffs, vs. Asensio & Co., Inc., Asensio Capital Management, Inc., and John Does 1-20, Defendants.	C/A No. 2:99-1861-18 **ORDER**

This matter is before the court on several post-trial motions by plaintiffs and defendant Asensio and Co., Inc.[1]

I. Background

Plaintiffs' filed this action alleging that Manual Asensio ("Mr. Asensio"), through his brokerage company, Asensio and Co., Inc. ("Asensio"), committed securities fraud through the fraudulent manipulation and short selling of the common stock of Chromatics Color Sciences International, Inc. ("CCSI"). After a series of pre-trial motions, the court conducted a jury trial on plaintiffs' claims under § 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder.[2] Pursuant to Fed. R. Civ. P. 49(a), the court submitted to the jury separate verdict forms for each plaintiff with the following two written questions:

[1] The parties stipulated at trial to the dismissal as a matter of law of defendants Asensio Capital Management, Inc., the parent company of Asensio and Co, Inc., and twenty unnamed defendants, John Does 1-20.

[2] The scope of Rule 10b-5 is coextensive with the coverage of § 10(b); therefore, the court will refer to both the statutory provision and the Rule as § 10(b). See S.E.C. v. Zandford 535 U.S. 813, __ n.1, 122 S. Ct. 1899, 1901 n.1 (2002).

variety of post-trial motions by both parties.

II. Defendant's Renewed Motion for Judgment as a Matter of Law

Defendant has filed a renewed motion for a judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b), which provides that "[i]f, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion."[4] Under Fed. R. Civ. P. 50(b), a court may allow the jury's verdict to stand, order a new trial, or direct entry of judgment as a matter of law. "The question is whether a jury, viewing the evidence in the light most favorable to [the non-movants,] could have properly reached the conclusion reached by this jury." Dennis v. Columbia Colleton Med. Center, Inc., 290 F.3d 639, 644 (4th Cir. 2002). The court must draw all reasonable inferences in favor of the non-movants without weighing the evidence or assessing the witnesses' credibility. Id. (internal citations omitted). The movant's motion will be granted "if a reasonable jury could only rule in favor of [the movant]"; however, "if reasonable minds could differ," the motion must be denied. Id. "The movant is entitled to judgment as a matter of law if the nonmoving party failed to make a showing on an essential element of his case with respect to which he had the

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After consultation with counsel, the court responded as follows: "No. The calculation of damages is outlined in the charge on page 23. You can award whatever amount of damages you find each plaintiff has proved, from zero dollars up to the amount requested by each plaintiff."

[4] Plaintiffs do not contest that all of defendant's arguments in this motion were made in defendant's original motion for judgment as a matter of law before the case was submitted to the jury and therefore are properly made in this renewed motion under Fed. R. Civ. P. 50(b).

burden of proof." Price v. City of Charlotte, N.C., 93 F.3d 1241, 1249 (4th Cir. 1996).

A. Dr. Perry Woodside's Testimony Was Properly Admitted.

Defendant argues that it is entitled to a judgment as a matter of law because the opinion testimony of plaintiffs' expert witness, Dr. Perry Woodside, regarding causation and damages was erroneously admitted. Specifically, defendant argues that Dr. Woodside's testimony should have been stricken under the standard of Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) and its progeny, as codified in Rule 702 of the Federal Rules of Evidence. Fed. R. Evid. 702 provides that

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Under Fed. R. Evid. 702 "trial judges act as gatekeepers to 'ensure that any and all scientific testimony . . . is not only relevant, but reliable.' " Cooper v. Smith & Nephew, Inc., 259 F.3d 194, 199 (4th Cir. 2001) (quoting Daubert, 509 U.S. at 588). It is the duty of a trial judge before whom expert scientific testimony is proffered to "conduct 'a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.' " Cooper, 259 F.3d at 199 (quoting Daubert, 509 U.S. at 592-93). "The proponent of the testimony must establish its admissibility by a preponderance of proof." Cooper, 259 F.3d at 199 (internal citation omitted).

In Executive Telecard, Ltd. Sec. Litig., 979 F. Supp. 1021 (S.D.N.Y. 1997), the court examined the question whether the methodology employed by a damages expert in a securities fraud case was sufficiently reliable to be admitted under Daubert and Fed. R. Evid. 702. The Executive Telecard court explained that in evaluating causation and damages in a securities fraud case, the expert must eliminate the portion of the price decline that is the result of forces unrelated to the allegedly fraudulent conduct. 979 F. Supp. at 1025. "Such forces can be broadly categorized into: (1) company risk – the unique risk that is peculiar to the particular stock at issue, and (2) market risk – the risk associated with market wide variations generally." Id. As the court informed the parties during the pre-trial motions, the court finds the reasoning of Executive Telecard persuasive and has adopted it as the applicable standard in this case.

With regard to "company risk," the court concluded that the expert must conduct an "event study" or other similar analysis to determine whether the company's stock price "was affected by company specific factors exclusive of the challenged fraud." Id. at 1025. Dr. Woodside testified that he performed an event study in which he looked at CCSI's public filings and media articles related to CCSI during the time period at issue and concluded that there were no other company-specific events that would have affected CCSI's stock price except the alleged fraud. (Woodside Testimony, Pls.' Mem. Opp. D's. Mot. J. Matter Law Ex. A at 8, 32-33.) Dr. Woodside testified that his methodology was to systematically look at each specific event relating to CCSI during that time period and determine whether it was new information in the market that may have affected CCSI's stock price. (Woodside Testimony, Pls.' Mem. Opp. D's. Mot. J. Matter Law Ex.

A at 8, 32-46.) Thus, Dr. Woodside met the requirement in Executive Telecard that he conduct an event study to distinguish between fraud related and non-fraud related company-specific influences. 979 F. Supp. at 1025-27.

As to "market risk," Dr. Woodside compared the actual CCSI stock price to several market indices and mutual funds during the time period at issue. (Woodside Testimony, Pls.' Mem. Opp. D's. Mot. J. Matter Law Ex. A at 8, 24-32.) In particular, Dr. Woodside compared the CCSI stock price to market indices and mutual funds containing companies similar to CCSI, including speculative companies with small-capitalizations. (Woodside Testimony, Pls.' Mem. Opp. D's. Mot. J. Matter Law Ex. A at 8, 25-39.) The Executive Telecard court specifically suggested this as a reliable method of determining the effect of market risk. 979 F. Supp. at 1027 n.3. Thus, Dr. Woodside's testimony adequately addressed "market risk." As can be seen from the jury's answer to the special interrogatory on damages, Dr. Woodside's conclusion and methodology was subjected to a vigorous and effective cross-examination. Even though the jury did not accept Dr. Woodside's opinion, it was sufficiently reliable to meet the requirements of Fed. R. Evid. 702 and therefore was properly admitted as evidence.

B. The Jury's Special Verdict on Damages was Supported by Sufficient Evidence.

Defendant also argues that even if Dr. Woodside's testimony was properly admitted, it was not a legally sufficient evidentiary basis for a jury to find that plaintiffs suffered any damages. As an initial matter, this motion is moot because the jury found that defendant's alleged fraud did not cause any damages to plaintiffs. Moreover, Dr.

Woodside's testimony provided a legally sufficient evidentiary basis on which a jury could have determined that plaintiffs suffered damages as a result of defendant's alleged fraud. The credibility of Dr. Woodside's testimony was an issue of fact and therefore was properly submitted to the jury.

C. The Jury's Finding that CCSI was Traded on an "Open and Active Market" was Supported by Sufficient Evidence.

The fraud on the market theory is based on the hypothesis that, in an open and active securities market, the price of a company's stock is determined by the available material information regarding the company and its business. Basic Inc. v. Levinson, 485 U.S. 224, 241 (1988). An "open and active market" means that there were a large number of traders, a high level of activity, and frequency of trades, which rapidly reflect new information in price. In re Bell Atl. Corp. Sec. Litig., Civ. No. 91-0514, 1997 WL 205709, at *24 (E.D. Pa. Apr. 17, 1997).[5]

Defendant argues that no reasonable jury could have concluded that the shares of CCSI were traded on an open and active market because there was no competent evidence that there were a large number of traders, a high level of activity, or a sufficient frequency of trades. Defendant contends that it presented evidence showing that "during the period in question the market for shares of CCSI was subject to manipulation by a relatively small number of shareholders owning very large positions in the stock." (D's Renewed Mot. J. Matter Law at 2.) Although Mr. Asensio offered testimony as to why he believed

[5] Courts also refer to this concept as an "open and developed" market, Basic, 485 U.S. at 241, or an "efficient" market, Longman v. Food Lion, Inc., 197 F.3d 675, 682 n.1 (4th Cir. 1999).

that CCSI stock was manipulated by insiders, Dr. Woodside testified that CCSI was actively traded on an open and active market – the NASDAQ small cap market. Moreover, both Mr. Asensio and Dr. Woodside testified that the price of CCSI stock fluctuated according to material events such as its FDA approval. Therefore, there was ample evidence to support the jury's conclusion that CCSI was traded on an open and active market.

C. The Jury's Finding that Asensio Acted with "Scienter" was Supported by Sufficient Evidence.

In order to show that defendant acted with the requisite scienter, plaintiffs must prove by a preponderance of the evidence that defendant acted (1) knowingly with intent to deceive, manipulate, or defraud or (2) with reckless disregard for the truth. See Phillips v. LCI Int'l, Inc., 190 F.3d 609, 620-21 (1999). Recklessness is more than mere negligence. Id. at 621. Recklessness is "an act so highly unreasonable and such an extreme departure from the standard of ordinary care as to present a danger of misleading a reasonable investor to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it." Id. (internal citations and quotation marks omitted).

Plaintiffs submitted sufficient evidence for a reasonable jury to conclude that Asensio either knew the statements were false or acted with reckless disregard for their truth. One means of showing scienter is evidence of a motive and opportunity to defraud.[6] See id. at 621. In order to demonstrate motive, plaintiffs must show "concrete

[6] Although the court in Phillips declined to resolve whether motive and opportunity, standing alone, is sufficient to plead scienter, the court's opinion indicates

benefits that could be realized by one or more of the false statements and wrongful nondisclosures alleged." Id. (internal citations and quotations marks omitted). Here, plaintiffs introduced evidence showing that Asensio established short positions in CCSI stock before making the allegedly fraudulent statements. Thus, Asensio had the motive and opportunity to defraud because a decline in the CCSI stock price as a result of these statements would result in concrete financial benefit to Asensio.

In addition, plaintiffs introduced evidence showing that Asensio's statements about CCSI's Colormate bilirubinometer were based on self-interested medical sources. For example, Asensio testified that he based his conclusions about the effectiveness of CCSI's products partially on the opinion of Dr. Judy Stone, a doctor-turned-short-seller who was a client of Asensio. Thus, the jury could have found that Asensio acted with a reckless disregard for the truth by basing these statements on a self-interested "medical" source. Therefore, by presenting evidence that Asensio both had a motive and opportunity to defraud and issued certain statements without appropriate medical support, plaintiffs presented sufficient evidence for a reasonable jury to conclude that Asensio either knew the statements were false or acted with a reckless disregard for their truth.

E. The Jury's Finding that Asensio Made One or More Demonstrably False Statements was Supported by Sufficient Evidence.

To establish a violation under §10(b), "plaintiffs must point to a factual statement or omission – that is, one that is demonstrable as being true or false." Longman, 197 F.3d at 675; see also Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1091-96 (1991)

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that motive and opportunity is one type of evidence that may used to show scienter. See id. at 620-21.

(explaining that even opinion in the proper context can be demonstrably true or false and therefore factual). During the trial, plaintiffs presented testimony from Dr. Ian Holzman and Dr. Jeffrey Maisels stating that the following statements made by Asensio were demonstrably false:

(1) The clinical testing of CCSI's bilirubinometer only compared its bilirubin measurement performance to a physician's visual assessment.

(2) Repeated bilirubin testing is not normal and testing by bilirubinometers cannot replace the blood tests for infant jaundice.

(3) CCSI's bilirubinometer can only produce estimates of total bilirubin levels, which are inadequate substitutes for indirect or direct bilirubin levels provided by blood tests.

(4) CCSI had at least eight competitors in the bilirubinometer market and its products are no better than other existing equivalents.

(5) The potential market for CCSI's products was extremely limited.

(6) CCSI's Colormate III was a very simple easily duplicated device of limited utility an imprecise bilirubin testing.

The court instructed the jury on how to distinguish fact from opinion, and the jury apparently determined that at least one of Asensio's statements was demonstrably false. The court did not require the jury to identify which of these individual statements were the basis of the jury's verdict. However, a reasonable jury could have found that one or more of these statements was a false statement of fact. For example, a reasonable jury could have concluded that Asensio's statement that the clinical testing of CCSI's

bilirubinometer only compared its bilirubin measurement performance to a physician's visual assessment was false because plaintiffs presented evidence showing that the clinical testing compared the bilirubin measurement performance to blood tests. Accordingly, plaintiffs presented ample evidence upon which a reasonable jury could conclude that Asensio made at least one false statement of fact.

F. Materiality

A fact is "material if there is a substantial likelihood that a reasonable purchaser or seller of a security (1) would consider the fact important in deciding whether to buy or sell the security or (2) would have viewed the total mix of information made available to be significantly altered by disclosure of the fact." Longman, 197 F.3d at 683 (internal citations omitted). Defendant argues that the above statements were not material because they did not contain any new factual information. However, Dr. Woodside testified that these statements contained factual representations that were not previously available in the market. Moreover, Dr. Woodside testified that the statements in Asensio's report were material because they would be viewed as important by an average investor. This testimony is corroborated by the drastic drop in CCSI's stock price after the statements were made. Thus, plaintiffs presented evidence sufficient for a reasonable jury to conclude that the statements at issue were material.

G. "In Connection With" Requirement

Section 10(b) requires that the fraud occur "in connection with the purchase or sale of any security." Neither side objected to the following jury instruction explaining the "in connection with" requirement:

> EVEN THOUGH THE PLAINTIFFS MUST BE SELLERS OF THE SECURITIES IN QUESTION, YOU DO NOT HAVE TO FIND THAT THE DEFENDANT ACTUALLY PARTICIPATED IN THE SECURITIES TRANSACTION AT ISSUE IF THE DEFENDANT WAS ENGAGED IN FRAUDULENT CONDUCT THAT WAS "IN CONNECTION WITH" THE SALE. THE REQUIREMENT OF "IN CONNECTION WITH" IS SATISFIED IF YOU FIND THERE WAS SOME NEXUS OR RELATIONSHIP BETWEEN THE ALLEGEDLY FRAUDULENT CONDUCT AND THE SALE OF SECURITIES BY THE PLAINTIFFS. IN OTHER WORDS, FRAUDULENT CONDUCT MAY BE "IN CONNECTION WITH" THE SALE OF SECURITIES IF YOU FIND THE ALLEGED FRAUDULENT CONDUCT "TOUCHED UPON" SUCH SALE.

See U.S. v. Gruenberg, 989 F.2d 971, 975 (8th Cir. 1993).

Both plaintiffs testified that their decisions to sell their CCSI shares were a result of Asensio's fraudulent statements. Specifically, plaintiffs testified that after Asensio's statements caused a sharp drop in the value of CCSI's shares, their brokers issued a margin call that forced them to sell. Thus, although Asensio was not a party to the plaintiffs' sale of their securities, their decision to sell was a result of Asensio's alleged fraud and was therefore "in connection with" their sale of securities.

Defendant points out that neither side has presented any other reported §10(b) action in which an investor successfully sued an analyst for making statements about a third-party company. However, the situation in this case is no different than the common §10(b) scenario in which an investor sues a corporate defendant based on fraudulent statements made by the company and its insiders under the theory that the statements caused the plaintiffs to sell at a lower price. In both cases, the company's and Asensio's

statements are "in connection with" plaintiffs' sale of securities even though neither the company nor Asensio have any direct contact with the plaintiffs and are not a party to the sale. Thus, plaintiffs have presented sufficient evidence for a reasonable jury to conclude that defendant's fraud was "in connection with" their sale of CCSI securities.

H. Truth on the Market

Under the "truth on the market" defense, if the defendant can show that corrective information "credibly entered the market and dissipated the effects of the misstatements, those who traded [the] shares after the corrective statements would have no direct or indirect connection with the fraud." Basic, 485 U.S. at 248-249. Defendant argues that CCSI rebuttal statements dissipated the effects of Asensio's fraud. The court addressed this issue in its Second Summary Judgment Order filed on December 13, 2001. In that Order, this court concluded that it was a factual issue for the jury whether credible, truthful information entered the market and completely dissipated the effects of Asensio's statements. Specifically, the court held that a reasonable trier of fact could conclude that plaintiffs sold their shares of CCSI stock at an artificially low price as a result of the fraud because CCSI's rebuttal statements did not overwhelm the market with information contradicting Asensio's statements and a "conflicting mix of information" existed in the market when the plaintiffs sold their shares. Defendant did not present any new evidence at trial to change the court's finding at the summary judgment stage. Therefore, the court concludes that a reasonable jury could have found that defendant did not establish the truth on the market defense.

III. Plaintiffs' Motion for New Trial on Issue of Damages

Plaintiff has filed a motion for a new trial on the issue of damages pursuant to Fed. R. Civ. P. 59. "In considering a motion for a new trial, a trial judge may weigh the evidence and consider the credibility of the witnesses, and if he finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, he must set aside the verdict, even if supported by substantial evidence, and grant a new trial." Chesapeake Paper Prod. Co. v. Stone & Webster Eng'g Corp., 51 F.3d 1229, 1237 (4th Cir. 1995) (internal citations and quotation marks omitted).

A. The Jury Instruction on Damages Not Erroneous

First, plaintiffs argue that the court's jury instruction on the calculation of damages was erroneous. On page 23 of the jury instructions, the court instructed the jury as follows:

> INTRODUCTION TO DAMAGES
>
> IF YOU FIND THAT PLAINTIFFS PROVED THAT DEFENDANT VIOLATED SECTION 10(b) AND RULE 10(b)(5), THEN YOU SHOULD CONSIDER DAMAGES.
>
> CALCULATION OF DAMAGES
>
> THE APPROPRIATE MEASURE OF DAMAGES IN THIS CASE IS THE "OUT-OF-POCKET" RULE, WHICH IS THE AMOUNT EACH PLAINTIFF WAS ACTUALLY DAMAGED AS A RESULT OF THE DEFENDANT'S ALLEGED FRAUD. DAMAGES UNDER THE OUT-OF-POCKET RULE IS THE DIFFERENCE BETWEEN (1) THE "TRUE" VALUE OF THE CCSI STOCK IN THE ABSENCE OF THE

DEFENDANT'S ALLEGEDLY FALSE MISSTATEMENTS; AND (2) THE PRICE EACH PLAINTIFF RECEIVED EACH TIME HE SOLD THE SECURITIES. EACH PLAINTIFF SOLD HIS SHARES OF CCSI STOCK ON SEVERAL DIFFERENT DATES, SO YOU MUST DETERMINE, BASED ON THE EVIDENCE PRESENTED, WHAT THE STOCK PRICE WOULD HAVE BEEN AT THE TIME OF EACH SALE IN THE ABSENCE OF DEFENDANT'S ALLEGEDLY FALSE STATEMENTS AND COMPARE THAT FIGURE WITH THE AMOUNT EACH PLAINTIFF ACTUALLY RECEIVED.

YOU MAY NOT CONSIDER OR AWARD DAMAGES FOR ANY SALES THAT OCCURRED AFTER JUNE 10, 1999.

Plaintiffs argue that the proper measure of damages was the difference between (1) the fair market value of CCSI stock in the absence of Asensio's fraud measured at the time of plaintiff's initial sale of CCSI stock in June 1998 and (2) the actual compensation plaintiffs received each time they sold their respective shares of CCSI.

Plaintiffs base this argument on isolated language in the Fifth Circuit's opinion in Huddleston v. Herman & MacLean, 640 F.2d 534 (5th Cir. 1981), rev'd in part on other grounds, 459 U.S. 375 (1983). In Huddleston, the court explained that damages under the out-of-pocket rule are calculated as "the difference between the price paid and the 'real' value of the security, i.e., the fair market value absent the misrepresentations, at the time of the initial purchase by the defrauded buyer." 640 F.2d at 556.[7] Although the court

[7] In Huddleston, the plaintiffs alleged that they purchased stock at an inflated price after fraud had occurred; here, the plaintiffs allege that they sold the stock at a deflated price after fraud had occurred. Therefore, the measure of damages in Huddleston was the purchase price less the true price whereas in this case the measure is the true price less the selling price.

uses the word "initial," the facts of the Huddleston case did not involve a situation where the plaintiffs purchased stock in increments on multiple occasions. However, the case did involve multiple plaintiffs who purchased their shares on various dates. The court explained that:

> The use of the out-of-pocket rule will require that a "true" or "real" value, i.e., the value the security would have had absent the misrepresentation, be established for each date on which members of the class purchased during the ninety-day class period. Once those values are obtained, possibly with the help of expert witnesses or a special master, then the determination of each individual plaintiff's recovery becomes a simple matter of subtraction of the "true" value of the security on the date of the plaintiff's purchase from the purchase price paid by the plaintiff on that date. The issue of damages is thus an individual matter to be determined separately for each member of the plaintiff class.

Thus, although the Huddleston case involve facts distinguishable from this case, its reasoning actually supports the court's instruction that when there are multiple sales by a single plaintiff, the true value of the stock must be calculated on the date of each sale.

Not only is plaintiffs' proposed measure of damages based on a misunderstanding of Huddleston, but it is an inaccurate measurement of plaintiffs' out-of-pocket losses that could result in a windfall for plaintiffs. It is undisputed that the baseline for measuring the damages is the true value of the CCSI stock. However, plaintiffs argue that this value should be measured as the price of CCSI at the time of plaintiffs'initial sale in June 1998. However, this is not an accurate measurement of CCSI's true value. First, the CCSI stock value likely declined between the time of Asensio's first statement and the time of plaintiffs' initial sale. Second, in the time period after the plaintiffs' initial sale, the price

of CCSI continued to fall. The true value of the stock must therefore reflect any portion of this decline in value that was not the result of Asensio's fraud.

Plaintiffs' argument that the court's instruction was duplicative with its instruction on loss causation further emphasizes this point. As plaintiffs point out, the loss causation instruction states:

> WHEN A PORTION OF EACH PLAINTIFF'S LOSS IS DUE TO AN INDEPENDENT INTERVENING CAUSE, SUCH AS A FLUCTUATION IN THE OVERALL STOCK MARKET, THE CHAIN OF CAUSATION HAS BEEN BROKEN, AND THE DEFENDANT CANNOT BE HELD LIABLE FOR THAT PORTION OF EACH PLAINTIFF'S LOSS THAT WAS NOT CAUSED BY THE ALLEGED MISREPRESENTATION OR OMISSION. THE DEFENDANT CAN ONLY BE HELD LIABLE FOR THAT PORTION OF EACH PLAINTIFF'S LOSS THAT WAS CAUSED BY THE ALLEGED MISREPRESENTATION OR OMISSION.

Therefore, it would be inconsistent with this instruction to calculate the damages by reference to the price at the time of plaintiffs' initial sale rather than at the time of each sale because it would ignore any decline that was a result of other factors. Thus, the court's jury instructions on the calculation of damages was correct and is not grounds for a new trial.

B. The Jury's Finding on Damages Was Not Against the Weight of the Evidence

Plaintiffs also argue that the jury's finding of $0.00 damages was against the weight of the evidence. Specifically, plaintiffs argue that even though Asensio introduced several factors other than the alleged fraud that may have contributed to the decline in value of CCSI shares, it cannot be argued that these other factors were the sole cause of

the decline in the stock price.

However, there was sufficient evidence to support the jury's finding that plaintiffs did not suffer any damages as a result of Asensio's fraud. Specifically, defendant offered evidence that would enable a reasonable jury to determine that at the time plaintiffs sold their shares, the true value of the CCSI stock did not exceed the amount each plaintiff received when they sold their shares. In other words, the jury could have discounted Dr. Woodside's testimony and determined that none of the decline in value at the time plaintiffs sold their shares was a result of the fraud and therefore plaintiffs did not suffer any damages.[8] This was an issue of fact for the jury, and there was ample evidence to support the jury's finding that the price at the time of the sales was not affected by the fraud.

Second, the jury could have found that even if Asensio's fraud forced plaintiffs to sell at a lower price than the true value, it actually prevented further losses by causing them to sell before the CCSI shares declined further in value. This theory is supported by the decline in value of the CCSI stock to far below the price at which plaintiffs sold.

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[8] This finding of $0.00 damages arguably would have allowed the jury to return a special verdict of "no" to the first question on the verdict form because it suggests that plaintiffs failed to meet the proximate cause element. However, the first question on the verdict form asked whether "the defendant's conduct was a proximate cause of the *injury* to the plaintiffs." (emphasis added.) Although the defendants may have caused injury to the plaintiffs in a number of ways, the only injury that is compensable under the securities laws was explained in the court's instruction of the law on damages on page 23 of the jury instructions. Therefore, the jury's finding that plaintiffs did not suffer any damages is not only consistent with the court's instruction of the law on damages, but it is consistent with their answer to the first question on the verdict form. Atlas Food Sys. and Servs., Inc. v. Crane Nat. Vendors, Inc., 99 F.3d 587, 599 (4th Cir. 1996) (explaining that a court should "harmonize seemingly inconsistent verdicts if there is any reasonable way to do so").

Thus, the jury's verdict on damages was not contrary to the weight of the evidence and is not grounds for a new trial.

C. Evidence Regarding the Performance of CCSI after October 1999 was Properly Admitted

Second, plaintiffs argue that the court improperly admitted evidence regarding the performance of CCSI following October 1999, the date on which plaintiffs sold their last shares of CCSI. Defendant introduced evidence showing that the stock value of CCSI declined to less than 10 cents per share and was eventually delisted from the NASDAQ. Plaintiffs argue that the performance of CCSI stock after they sold their stock is irrelevant and unduly prejudicial.

The post-October 1999 performance of CCSI was relevant for two reasons. First, it was relevant on the issue of liability because it tended to show that Mr. Asensio's statements about the value of CCSI's stock and its products were true and therefore not fraudulent. Even if plaintiffs are correct that the price decline was entirely a result of Mr. Anensio's false statements, the fact that the stock did not rebound after several years is probative evidence that Mr. Asensio's statements were accurate.[9]

Second, the post-October 1999 performance of CCSI stock is relevant evidence on the issue of damages. As explained above, the measure of damages is the true value of the CCSI stock less the price at which plaintiffs sold their shares. The fact that the CCSI stock continued to decline and was trading at pennies on the dollar at the time of the trial

[9] Moreover, plaintiffs cannot complain of any error as to the relevance of this evidence to the issue of liability because they prevailed on this issue and therefore did not suffer any prejudice.

tends to show that plaintiffs may have minimized their loss by selling when they did.

Finally, this evidence is not more prejudicial than probative under Fed. R. Evid. 403. Although evidence that CCSI's stock continued to drastically fall and was delisted from the NASDAQ is damaging to plaintiffs' theories on liability and damages, it is not confusing or misleading. Therefore, the evidence of the CCSI stock performance after October 1999 is relevant as to both liability and damages and is not unfairly prejudicial or confusing under Fed. R. Evid. 403.

D. The Letter of Acceptance, Waiver, and Consent was Properly Excluded

Plaintiffs argue that they should have been allowed to introduce (1) the National Association of Securities Dealers, Inc. Letter of Acceptance, Waiver and Consent No. CAF000044 (November 18, 2000), in which Asensio settled allegations by the NASD that he had committed certain rule violations, and (2) Asensio's sworn affidavit on February 13, 2002, in which he stated:

> Neither I nor any employee of Asensio has ever received a single customer complaint of any kind. Asensio has never been accused or charged by any industry, local, state or federal authority with any illegal act concerning any matter including any allegations of short selling or any other illegal securities trading activities conducted either in its own or its customers' accounts.

Plaintiffs claim that they should have been allowed to introduce both of these allegedly contradictory documents to impeach Mr. Asensio's credibility. Although these statements may be relevant to Mr. Asensio's credibility, their probative value is far outweighed by the prejudicial effect of the Letter of Acceptance, Waiver and Consent.

Fed. R. Evid. 403. The jury may have been confused as to the meaning of this settlement and may have improperly concluded that it tended to show that Asensio was guilty of the charges at issue in this case. Mr. Asensio's credibility was impeached during the trial through the admission of several contradictory statements from his deposition as well as his demeanor as a witness. Any value from this additional contradictory evidence is cumulative. Therefore, the court properly excluded the introduction of the Letter of Acceptance, Waiver and Consent and Mr. Asensio's Feb. 13, 2002 affidavit.

E. Portions of the Videotaped Deposition Were Properly Excluded

Plaintiffs also argue that the court erred by not allowing them to introduce portions of Mr. Asensio's videotaped deposition. Plaintiff is correct that under Fed. R. Civ. P. 32, this deposition could be used at trial. However, the testimony in the deposition must also meet the requirements of the Federal Rules of Evidence. In this case, plaintiffs argued that the deposition testimony was relevant under Fed. R. Evid. 401 as to the issue of credibility because Mr. Asensio gave contradictory answers at the deposition, engaged in temper tantrums, and refused to answer certain questions. Although this behavior could be relevant as to Mr. Asensio's credibility, its probative value on this issue was substantially outweighed by its prejudicial impact in that it was merely cumulative to Mr. Asensio's antics on the witness stand at trial. Fed. R. Evid. 403. As explained above, the jury had ample opportunity to judge Mr. Asensio's credibility. Therefore, the court properly excluded the portions of Mr. Asensio's taped video deposition that plaintiffs sought to introduce.

IV. Cross-Motions to Amend the Judgment

After the trial, the court entered a judgment pursuant to Fed. R. Civ. P. 58 providing that "the Plaintiffs Joe H. Miller, IV and Robert W. Pierce, Jr., recover of the Defendant Asensio & Company, Inc. $0.00 (Zero Dollars) damages and their costs of action." Both parties have moved to amend the judgment pursuant to Fed. R. Civ. P. 59(e).

A. Defendant's Motion to Amend Judgment

Defendant requests that the court amend the judgment to provide for the entry of judgment in favor of defendant. Defendant contends that damages are an element of liability in a §10(b) action and therefore plaintiffs failed to meet all the elements of their claim. Defendant is correct that the jury's special verdict that plaintiffs suffered $0.00 damages as a result of the defendant's fraud is actually a judgment in favor of the defendant. Cf. Exxon Corp. v. Amoco Oil Co., 875 F.2d 1085, 1090-1091 (4th Cir. 1989) (remanding to district court for an entry of j.n.o.v. in a negligence case where the jury found negligence but no damages).

Defendant argues that because the judgment was in its favor, it should be awarded costs as the prevailing party. Rule 54(d)(1) provides that "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party *unless the court otherwise directs*." (emphasis added). In general, the "prevailing party" must achieve some "material alteration of the legal relationship of the parties." Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources, 532

U.S. 598, 604 (2001).[10] In this classic "dogfall," neither side was the prevailing party; therefore the court directs that costs be awarded to neither party. Accordingly, the judgment is amended to read as follows:

> **IT IS ORDERED AND ADJUDGED** that the Plaintiffs Joe H. Miller, IV and Robert W. Pierce, Jr., recover of the Defendant Asensio & Company, Inc. $0.00 (Zero Dollars) damages.[11]

B. Plaintiffs Motion to Amend Judgment

Plaintiffs request that the court amend the judgment to explicitly state that Asensio committed securities fraud and that damages will be re-tried. First, for the reasons explained above, a new trial on damages is not warranted. Second, the jury's special verdict of $0.00 damages precludes a judgment in favor of plaintiffs because the element of damages was not met. Moreover, the form of the judgment is subject to court approval and need not reflect every special verdict of the jury. See Fed. R. Civ. P. 58. Therefore, plaintiffs' motion to amend the judgment is denied.

IV. Conclusion

It is therefore,

ORDERED, for the foregoing reasons that defendant's renewed motion for judgment as a matter of law be **DENIED.**

IT IS FURTHER ORDERED that plaintiffs' motion for a new trial on damages

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[10] Although Buckhannon was in the context of awarding statutory attorneys' fees, its interpretation of "prevailing party" also applies to the award of costs under Fed. R. Civ. P. 54(e).

[11] In order to most precisely reflect the jury's special verdicts, the court declines to enter a judgment that simply states that judgment be entered in favor of defendant.

be **DENIED.**

IT IS FURTHER ORDERED that plaintiffs' motion to amend the judgment be **DENIED.**

IT IS FURTHER ORDERED that defendant's motion to amend the judgment be **GRANTED** to the extent that neither side is awarded costs as the prevailing party.

Accordingly, the judgment should be amended to read as follows:

> **IT IS ORDERED AND ADJUDGED** that the Plaintiffs Joe H. Miller, IV and Robert W. Pierce, Jr., recover of the Defendant Asensio & Company, Inc. $0.00 (Zero Dollars) damages.
>
> **AND IT IS SO ORDERED.**

David C. Norton
United States District Judge

Charleston, South Carolina
January 16, 2003

(1) Did plaintiff . . . prove, by a preponderance of the evidence, each of the following elements:

First, that defendant, in connection with the sale of securities, made an untrue statement of a material fact or omitted to state a material fact that was necessary to make the statements that were made not misleading under the circusmstances;

Second, that the plaintiff justifiably relied on the defendant's alleged misrepresentation or omission;

Third, that the defendant acted with "scienter," which means knowingly with intent to defraud or with reckless disregard for the truth;

Fourth, that the defendant's conduct was a proximate cause of the injury to the plaintiffs.

If the jury answered "yes" to this first question, it was instructed to answer the second question:

(2) Using the out-of-pocket rule, what is the total amount that plaintiff . . . was actually damaged as a result of defendant's fraud?

The jury returned the verdict forms answering "yes" to the first question, but awarding damages of "0^{00} ZERO DOLLARS."[3] This Cadmean victory for plaintiffs spawned a

[3] Before they returned their verdict, the jury submitted the following written question to the court:

CAN YOU PLEASE CLARIFY THE PHRASE IN THE JURY INSTRUCTIONS ON PAGE 23, INTRODUCTION TO DAMAGES, "THEN YOU SHOULD CONSIDER DAMAGES.

IS THIS A MANDATE TO AWARD A VALUE GREATER THAN $0.00 GIVEN A YES RESPONSE TO QUESTION ONE?