To be Argued by:
CAMERON GILBERT
(Time Requested: 10 Minutes)

New York Supreme Court

Appellate Division—Second Department

Docket No.: 2009-02430

FRAGRANCENET.COM, INC.,

Plaintiff-Appellant,

– against –

FRAGRANCEX.COM, INC. and RON YAKUEL,

Defendants-Respondents.

BRIEF FOR DEFENDANTS-RESPONDENTS

DOZIER INTERNET LAW, P.C.
11520 Nuckols Road, Suite 101
Glen Allen, Virginia 23059
(804) 346-9770

– and –

ANTHONY M. CAMISA, ESQ.
323 Willis Avenue
Mineola, New York 11501
(516) 741-0005

Attorneys for Defendants-Respondents

Kings County Clerk's Index No. 00156/08

COUNSEL PRESS

460 WEST 34TH STREET, NEW YORK, NEW YORK 10001
(212) 685-9800; (716) 852-9800; (800) 4-APPEAL

(206427)

206427_tst_cob

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

PRELIMINARY STATEMENT

This appeal is yet another volley by Plaintiff-Appellant FragranceNet.com, Inc. ("FragranceNet") in a war of attrition against Defendants-Appellants FragranceX.com, Inc. ("FragranceX") and Ron Yakuel ("Mr. Yakuel") conducted by litigation. FragranceNet and FragranceX are business competitors in the online sale of fragrances and related products. Mr. Yakuel is a principal of FragranceX. While FragranceNet is the older and more established retailer, FragranceX has steadily grown and is gaining market share against FragranceNet. Unable to successfully compete against FragranceX in the marketplace, FragranceNet has resorted to a "scorched earth" litigation campaign to assail its main competitor.

This petty lawsuit was one front in that litigation campaign. FragranceNet asserted three duplicative conversion claims and an unjust enrichment claim against FragranceX for an alleged erroneous delivery of a package by the United Parcel Service ("UPS") containing merchandise allegedly belonging to FragranceNet and admittedly worth less than $4000.00. Inexplicably, FragranceNet also sued Mr. Yakuel individually though its complaint is devoid of any factual allegations that Mr. Yakuel was personally involved in the errant delivery or that the corporate veil should be pierced. Demonstrating that their true motive for this lawsuit was not to be made whole for the alleged $4000.00 injury

but instead to harass and intimidate its business competitor, FragranceNet also sought $10 million in punitive damages.

Initially, FragranceX and Mr. Yakuel unsuccessfully moved to dismiss FragranceNet's specious claims. Subsequently, after determining that the cost of litigation would far exceed the compensatory damages sought and without any admission of liability, FragranceX and Mr. Yakuel notified the trial court through counsel that they were willing to pay the amount of compensatory damages. The trial court then permitted FragranceX to move to dismiss FragranceNet's punitive damages claim and directed the parties to submit papers regarding whether the punitive damages claim should be allowed to proceed. After a plenary review, the Supreme Court determined that FragranceNet had asserted a "phantom claim for punitive damages" and dismissed its claim.

Despite having been made whole on its claim for damages, and again demonstrating that its true motive in this litigation is to harass and injure Defendants, FragranceNet has pursued a frivolous appeal of the dismissal of its punitive damages claim. Because, as detailed below, the Supreme Court properly dismissed FragranceNet's punitive damages claim, the order appealed from should be affirmed.

QUESTION PRESENTED

Under United States and New York law, a claim for punitive damages must be premised on extreme and egregious conduct by a defendant and must bear some reasonable relationship to the actual harm suffered. Here, Plaintiff has alleged that Defendants have converted less that $4000.00 worth of goods belonging to Plaintiff that were erroneously delivered to Defendants by a common carrier, but seek $10 million dollars in punitive damages. Did the Supreme Court properly dismiss Plaintiff's claim for punitive damages?

This question should be answered in the affirmative.

COUNTER-STATEMENT OF FACTS

Because FragranceNet has provided an inaccurate and misleading statement of facts in its brief, FragranceX is compelled to provide the following summary of the relevant facts:

A. Plaintiff FragranceNet And Defendant FragranceX Are Competing Online Retailers Of Perfumes And Other Products.

FragranceNet and FragranceX are direct competitors engaged in the sale of perfumes, colognes, and other beauty products. (R. 39-40, 133, 175). Mr. Yakuel is an officer of FragranceX and its sole shareholder. (R. 40).

Even though FragranceNet started doing business four years earlier than FragranceX, FragranceX has steadily gained market share on FragranceNet. (R. 39-42). Unable to successfully compete with FragranceX in the marketplace, FragranceNet instead commenced a "scorched earth" litigation campaign to take down its main competitor. (R. 39-42, 133, 145, 160-65, 175-77). In addition to the case at issue here, FragranceNet has filed a separate action in state court based upon another mis-delivery of a package to FragranceX[1], as well as a complaint seeking monetary and equitable damages for alleged copyright and trademark infringement in Federal court[2]. (R. 39-42, 133, 145, 160-65, 175-77).

B. United Parcel Service Erroneously Delivers To Defendant FragranceX, Which Receives And Ships Hundreds Of Packages Daily, Three Packages Allegedly Containing Goods Worth Less Than $4000 Belonging To Plaintiff.

As part of its business, FragranceX ships and receives hundreds of packages daily using various shippers, including UPS. (R. 175). FragranceNet alleges that UPS erroneously delivered to FragranceX three packages containing goods

---

[1] *FragranceNet.com, Inc. v. FragranceX.com, Inc., et al.*, Suffolk County Supreme Court Index No. 08-41039. The complaint in this action made similar allegations and also sought $10 million in punitive damages and $10,588.00 in compensatory damages. In an order dated March 18, 2009 and entered March 24, 2009, the Supreme Court, Suffolk County (Gazzillo, J.) dismissed FragranceNet's claim for punitive damages. FragranceNet has not appealed that order. This Court may take judicial notice of these facts. *Allen v. Strough*, 301 A.D.2d 11, 18, 752 N.Y.S.2d 339, 345 (2d Dep't 2002).

[2] *FragranceNet.com, Inc. v. FragranceX.com, Inc.*, CV-06-2225 (JFB)(AKT).

belonging to FragranceNet on December 12, 2007. (R. 13-15). FragranceNet also alleges that FragranceX refused to return those goods to either UPS or FragranceNet despite demands that it do so. (R. 13-15). FragranceNet alleges that the value of the goods was $3902.91. (R. 13-15).

C. Plaintiff Files A Complaint Against Defendants Alleging Less Than $4000 In Actual Damages And $10 Million In Punitive Damages.

On or about January 8, 2008, FragranceNet filed a complaint in the Supreme Court, Suffolk County, against FragranceX and Mr. Yakuel. (R. 12-24). The complaint asserted three duplicative claims of conversion and one claim for unjust enrichment against FragranceX and Mr. Yakuel based upon UPS's alleged erroneous delivery of FragranceNet's goods to FragranceX. (R. 13-18). The complaint sought compensatory damages of $3902.91 and $10 million in punitive damages. (R. 17-18). Notably, despite the fact that UPS was the entity that erroneously delivered the goods at issue to FragranceX, FragranceNet did not name UPS as a defendant. (R. 12-18).

D. Defendants Move To Dismiss The Complaint, And The Court Denies The Motion.

FragranceX and Mr. Yakuel moved to dismiss FragranceNet's complaint in its entirety. (R. 9-38). The Supreme Court denied the motion, stating that the

complaint stated a cognizable cause of action and that it was premature at that time to determine whether punitive damages were warranted. (R. 8).

E. Defendants, With The Court's Permission, Move To Dismiss Plaintiff's Claim For Punitive Damages After Offering To Pay The Trivial Sum Plaintiff Sought In Actual Damages.

Subsequently, FragranceX and Mr. Yakuel determined that the costs associated with defending FragranceNet's claims against them for compensatory damages would far exceed the $3902.91 actually sought by FragranceNet. (R. 127-34). Accordingly, FragranceX and Mr. Yakuel submitted an offer to compromise FragranceNet's claims for the amount of $3902.01, and sought the Supreme Court's permission to move to dismiss FragranceNet's punitive damages claim. (R. 127-38). In doing so, they made it clear to the court that this was not in any way an admission of liability or that FragranceNet's claim had any merit. (R. 132). Rather, it was done solely because of the trivial amount of actual damages at issue. (R. 132).

The Supreme Court granted FragranceX and Mr. Yakuel permission to move to dismiss the punitive damages claim. (R. 6-7, 133, 185). FragranceX and Mr. Yakuel then moved to dismiss FragranceNet's punitive damages claim, asserting that FragranceNet could not state a claim for punitive damages as a matter of law. (R. 127-46, 185-88). FragranceNet opposed the motion. (R. 147-84).

F. The Court Finds That Plaintiff Failed To State A Claim For Punitive Damages As A Matter Of Law And Dismisses The Claim.

In an order dated February 25, 2009 and entered March 6, 2009, the Supreme Court, Suffolk County (Weber, J.) granted FragranceX's and Mr. Yakuel's motion to dismiss FragranceNet's claim for punitive damages. (R. 3-5). The Supreme Court noted that the goods that were the subject of the action were erroneously delivered to FragranceX by UPS, that the errant delivery was not caused by FragranceX or Mr. Yakuel, and that UPS was not made a defendant in this action. (R. 3). While apparently taking issue with Defendants' denial that the goods were ever received by FragranceX, the Supreme Court nevertheless determined that the conduct alleged by FragranceNet was insufficient as a matter of law to support a claim for punitive damages:

> "…the Court cannot conclude that the Defendants' conduct rises to a level mandating the imposition of exemplary damages…As a practical matter, under the circumstances, and, keeping in mind the dollar value of the property involved, it is hard to see how significant punitive damages, if any at all, would be awarded by any rational trier of fact in this case. It is even harder to see how the time of counsel and this Court should be further invested in the pursuit of a phantom claim for punitive damages. "

(R. 3-4). After striking FragranceNet's punitive damages claim, the court awarded FragranceNet the principal sum of $3902.91 with costs and interest. (R. 4). It is

undisputed that FragranceNet has been paid an agreed upon sum in full satisfaction of this award.

FragranceNet appealed from the dismissal of its punitive damages claim. (R. 2). For the reasons stated below, the order appealed from should be affirmed.

ARGUMENT

POINT I THE SUPREME COURT PROPERLY DISMISSED FRAGRANCENET'S CLAIM FOR PUNITIVE DAMAGES BECAUSE FRAGRANCENET FAILED TO STATE A CLAIM FOR PUNITIVE DAMAGES AS A MATTER OF LAW.

The Supreme Court properly dismissed FragranceNet's claim for punitive damages because the conduct alleged by FragranceNet is insufficient as a matter of law to support an award of punitive damages and because, in any event, the damages sought bear no rational relationship to the alleged harm suffered. Under New York law, the hornbook allegations of conversion made by FragranceNet are insufficient as a matter of law to state a claim for punitive damages. Also, FragranceNet impermissibly seeks an impermissible award of punitive damages that is more than 2500 times the compensatory damages it alleges it suffered. Accordingly, the order appealed from dismissing FragranceNet's claim for punitive damages should be affirmed.

A. The Supreme Court Properly Dismissed FragranceNet's Claim For Punitive Damages Because FragranceNet Fails To Allege The Type Of Extreme Conduct Required To Support An Award Of Punitive Damages.

The Supreme Court properly dismissed FragranceNet's claim for punitive damages because it impermissibly seeks to recover punitive damages in an ordinary conversion claim. Under New York law, punitive damages are an extraordinary remedy, available only in limited circumstances that: (1) evince wanton dishonesty and an abnormal degree of moral turpitude, and (2) involve misconduct directed to the public at large. Here, all FragranceNet has alleged is that a common carrier erroneously delivered a package to a business competitor that receives hundreds of such packages a day, and that it failed to return that package to FragranceNet upon demand. Moreover, taking FragranceNet's allegations as true, the alleged conduct was directed solely at FragranceNet, and not at the public. Because FragranceNet failed to allege the type of extraordinary conduct that would support an award of punitive damages, and because FragranceNet failed to allege a pattern of conduct directed at the public at large, the Supreme Court properly dismissed its claim for punitive damages and the order appealed from should be affirmed.

1. Under New York Law, Ordinary Tortious Conduct Is Legally Insufficient To Support A Claim For Punitive Damages.

Under New York law, punitive damages are an "extraordinary remedy" available only in "limited circumstances". *Rocanova v. Equitable Life Assurance Society of the United States*, 83 N.Y.2d 603, 613, 634 N.E.2d 940, 944, 612 N.Y.S.2d 339, 343 (1994); *see also New York University v. Continental Ins. Co.*, 87 N.Y.2d 308, 315, 662 N.E.2d 763, 767, 639 N.Y.S.2d 283, 287 (1995); *Bread Chalet, Inc. v. Royal Ins. Co.*, 224 A.D.2d 650, 651, 639 N.Y.S.2d 73, 74 (2d Dep't 1996). The standard for awarded punitive damages is "a strict one". *Rocanova*, 83 N.Y.2d at 613. The purpose of punitive damages is not to remedy private wrongs, but to vindicate public rights. *Rocanova*, 83 N.Y.2d at 613; *Continental Ins. Co.*, 87 N.Y.2d at 315. When the harm alleged is purely economic in nature, it is rarely sufficiently reprehensible to justify a significant sanction beyond compensatory damages absent other extenuating circumstances. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 576, 116 S.Ct. 1589, 1592 (1996).

In order to recover punitive damages, a litigant must demonstrate two elements: (1) conduct by the defendant evincing "a high degree of moral turpitude" and demonstrating "such wanton dishonesty as to imply a criminal indifference to civil obligations"; and (2) that this conduct was aimed at the public generally. *Rocanova*, 83 N.Y.2d at 613; *Continental Ins. Co.*, 87 N.Y.2d at 315; *Walker v. Sheldon,* 10 N.Y.2d 401, 405, 179 N.E.2d 497, 499, 223 N.Y.S.2d 488, 491 (1961).

The misconduct alleged must be "exceptional", such as in cases where the defendant acted maliciously, wantonly, outrageously, oppressively, or with a recklessness demonstrating vindictiveness. *Ross v. Louise Wise Services, Inc.,* 8 N.Y.3d 478, 489, 868 N.E.2d 189, 196, 836 N.Y.S.2d 509, 516 (2007); *Walker,* 10 N.Y.2d at 403. Accordingly, not only must the party seeking punitive damages demonstrate egregious, tortious conduct by which it was aggrieved, but must also demonstrate that this conduct was part of a pattern of similar conduct directed at the public generally. *Rocanova*, 83 N.Y.2d at 613; *Steinhardt Group, Inc. v. Citicorp*, 272 A.D.2d 255, 257, 708 N.Y.S.2d 91, 93 (1st Dep't 2000) (failure to allege that egregious conduct was directed at public required dismissal of punitive damages claim); *Zimmerman v. Tarshis*, 289 A.D.2d 230, 231, 734 N.Y.S.2d 462, 463 (2d Dep't 2001) (punitive damages claim dismissed because conduct alleged did not evince wanton dishonesty and conduct alleged was not directed at the public); *Leppard v. Parisi*, 271 A.D.2d 412, 413, 707 N.Y.S.2d 835, 836 (2d Dep't 2000) (same).

2. FragranceNet's Ordinary Conversion Claims Do Not Allege Sufficiently Egregious Conduct To Warrant An Award Of Punitive Damages.

Conversion claims, even those involving improper motives for the taking of the plaintiff's property, do not demonstrate the requisite "high degree of moral turpitude" and "wanton dishonesty" to support an award of punitive damages as a

matter of law. *Robert Plan Corp. v. Perot Systems, Corp.*, 278 A.D.2d 119, 718 N.Y.S.2d 50 (1st Dep't 2000) (intentional misappropriation of proprietary information did not demonstrate reprehensible conduct required to support award of punitive damages); *Boston Concessions Group, Inc. v. Criterion Center Corp.*, 250 A.D.2d 435, 673 N.Y.S.2d 111 (1st Dep't 1998) (refusal to return warranties and papers despite lawful demand held insufficient to establish wanton conduct required for punitive damages); *DePierro v. Bank of New York*, 308 A.D.2d 430, 764 N.Y.S.2d 208 (2d Dep't 2003) (claim for punitive damages based upon conversion dismissed where plaintiff failed to plead elements of punitive damages claim); *Scull v. Sicoli*, 247 A.D.2d 852, 668 N.Y.S.2d 827 (4th Dep't 1998) (punitive damages claim premised upon conversion of earnest money dismissed even though plaintiff was granted summary judgment on conversion claim); *Grant Street Const., Inc. v. Cortland Paving Co., Inc.*, 55 A.D.3d 1106, 865 N.Y.S.2d 762 (3d Dep't 2008) (repair facility improperly refused to release equipment to true owner liable for conversion, but conduct insufficient to support claim for punitive damages); *Seynaeve v. Hudson Moving & Storage, Inc.*, 261 A.D.2d 168, 690 N.Y.S.2d 16 (1st Dep't 1999) (defendant wrongfully refused to return plaintiff's property; held that "garden variety" conversion claim based upon a bailment was insufficient as a matter of law to support recovery of punitive damages).

Here, FragranceNet has alleged nothing more than "garden variety" conversion. FragranceNet alleges merely that UPS delivered merchandise belonging to it to FragranceX, and that an employee of FragranceX (not Mr. Yakuel) signed for that delivery. (R. 14). Notably, FragranceNet does not allege that this mis-delivery was in any way caused by or the fault of FragranceX. Rather, it is alleged that FragranceX merely passively received goods that were not intended for it. (R. 14). FragranceNet then alleges that it and UPS made demands that this merchandise, mistakenly delivered to FragranceX through no fault of its own, be returned. (R. 14-15). There is no allegation that Mr. Yakuel, individually, received the merchandise. (R. 14-15). Lastly, FragranceNet alleges that neither FragranceX nor Mr. Yakuel returned the merchandise to Plaintiff. (R. 15).

There is simply nothing "exceptional" about these allegations to warrant the imposition of punitive damages. Every conversion claim involves the wrongful withholding of property from its true owner. If the conduct alleged by FragranceNet was sufficient to sustain a punitive damages award, then every conversion claim ever asserted would warrant punitive damages. Given that punitive damages are an "extraordinary remedy" available only in "limited circumstances", *Rocanova*, 83 N.Y.2d at 613, *Continental Ins. Co.*, 87 N.Y.2d at 315, *Bread Chalet*, 224 A.D.2d at 651, the result sought by FragranceNet would distort the rule if allowed. Because FragranceNet's allegations state nothing more

than a basic, ordinary, hornbook cause of action for conversion, the Supreme Court properly dismissed its claim for punitive damages.

Moreover, FragranceNet has not alleged any conduct directed at the public at large, an essential element of any punitive damages claim. *Rocanova*, 83 N.Y.2d at 613; *Continental Ins. Co.*, 87 N.Y.2d at 315; *Walker,* 10 N.Y.2d at 405. Here, FragranceNet has alleged conduct by FragranceX directed solely at FragranceNet. (R. 14-15). This purely "private transaction" cannot form the basis of a claim for punitive damages. *Rocanova*, 83 N.Y.2d at 613; *Steinhardt*, 272 A.D.2d at 257; *Tarshis*, 289 A.D.2d at 231; *Parisi*, 271 A.D.2d at 413. Accordingly, the Supreme Court properly dismissed FragranceNet's claim for punitive damages.

The cases relied upon by FragranceNet are inapposite. In *Toomey v. Farley*, 2 N.Y.2d 71, 138 N.E.2d 221, 156 N.Y.S.2d 840 (1956), the defendants caused to be published in a newspaper false statements that the plaintiffs, opponents in a political campaign, were communists and traitors. This is a far cry from allegations that a common carrier erroneously delivered goods to a defendant. Moreover, *Toomey* was decided long ago, and to the extent that it is inconsistent with the Court of Appeals' later decisions in *Walker* and *Rocanova*, it has been overruled.

FragranceNet misrepresents *Ahrens v. Stalzer*, 4 Misc.3d 1013(A), 791 N.Y.S.2d 867, 2004 WL 1796489 (Nassau County District Court August 5, 2004), an unreported case, as a simple conversion case. In fact, that case involved substantial vandalism of the plaintiffs' home, including flooding the home with water, writing profane graffiti on the plaintiffs' wall, soiling the plaintiffs' undergarments, and defecating under the plaintiffs' mattress, along with the theft of the plaintiffs' family photos. *Id.* No such egregious conduct is alleged here. Similarly, in *Manekas v. Allied Discount Co.*, 6 Misc.2d 1079, 166 N.Y.S.2d 366 (Supreme Court, Kings County 1957), the defendant went to the plaintiff's home and stole his car, then refused to return it despite being presented with conclusive proof of the plaintiff's ownership of the vehicle and its own failure to properly document its claimed lien on the vehicle. Here, FragranceX did not affirmatively seize the goods at issue; rather, the goods were erroneously delivered to it through no fault of its own. Moreover, to the extent that these trial level cases are inconsistent with the Court of Appeals' holdings in *Walker* and *Rocanova*, they are erroneously decided and not authoritative.

FragranceNet's reliance upon *Penn-Ohio Steel Corp. v. Allis-Chalmers Mftg. Co.*, 50 Misc.2d 860, 272 N.Y.S.2d 266 (Supreme Court, New York County 1966) is misplaced because that case was reversed by the Appellate Division. *Penn-Ohio Steel Corp. v. Allis-Chalmers Mftg. Co.*, 28 A.D.2d 659, 280 N.Y.S.2d 679 (1st

Dep't 1967). The Appellate Division reversed the judgment in plaintiff's favor and dismissed the complaint, stating, *inter alia*, that there was insufficient proof that the defendant acted maliciously or with the intent to harm the plaintiff. *Id.* at 659. Moreover, the allegations in that case were that the defendant made false statements to various government agencies regarding certain agreements with plaintiffs that resulted in the plaintiffs facing criminal charges and civil claims. *Penn-Ohio Steel*, 50 Misc.2d at 861-68. Here, no such allegations are made. Rather, all that is alleged is that UPS erroneously delivered goods to FragranceX and that Defendants failed to return those goods. (R. 13-18). Similarly, *Covalito v. New York Organ Donor Network, Inc.*, 438 F.3d 214 (2d Cir. 2006) involved allegations that the defendants had improperly diverted to another recipient a kidney that had been donated by a decedent to the plaintiff. *Id.* at 217-20. Again, no such egregious allegations are present here.

FragranceNet's reliance upon *Irving Land Corp. v. A.J. Richard & Sons, Inc.*, 262 A.D.2d 286, 689 N.Y.S.2d 651 (2d Dep't 1999) is also misplaced, as that case supports the dismissal of its claim for punitive damages. This Court held in *Irving Land Corp.* that a claim for punitive damages is properly dismissed where there is no evidence of the extraordinary conduct required to support an award of punitive damages. *Id.* Here, as stated above, FragranceNet has alleged nothing

more that garden-variety conversion. Accordingly, the Supreme Court correctly dismissed FragranceNet's claim.

Lastly, FragranceNet's claim that it should be permitted discovery on its claim for punitive damages puts the proverbial cart before the horse. Before a litigant is entitled to discovery on a claim, it must first state a viable claim. Here, as demonstrated above, FragranceNet has simply failed to allege any extraordinary conduct by Defendants that would permit the imposition of punitive damages. All conversion claims involve the intentional withholding of the plaintiff's property by the defendant. To permit mundane, boilerplate allegations like those of FragranceNet here to elevate this case into the rarified strata of cases that support the imposition of punitive damages would be to make the exception the rule and require that punitive damages be imposed whenever a claim for conversion is established. This result is not supported by the law, and no amount of discovery can cure FragranceNet's fatally defective pleading. Accordingly, the Supreme Court properly dismissed FragranceNet's punitive damages claim, and the order appealed from should be affirmed.

B. The Supreme Court Properly Dismissed FragranceNet's Claim For Punitive Damages Because It Bears No Rational Relationship To The Alleged Harm Done.

Due process of law precludes a grossly excessive award of punitive damages. Under Federal and New York law, the reasonableness of a punitive

damages award is evaluated by looking at its ratio to the compensatory damages sought. Here, despite conceding that its compensatory damages are no more than $3902.91, FragranceNet seeks $10 million in punitive damages – a ratio of 2562.19 to 1. Because the amount of punitive damages sought by FragranceNet was grossly excessive as a matter of law, the Supreme Court properly dismissed its claim for punitive damages, and the order appealed from should be affirmed.

1. Under United States And New York Law, A Claim For Punitive Damages Must Be Reasonably Related To The Alleged Harm.

Under United States and New York law, due process of law precludes grossly excessive punishment of a tortfeasor. *Gore*, 517 U.S. at 562; *Correia v. Suarez*, 52 A.D.3d 641, 860 N.Y.S.2d 611 (2d Dep't 2008); *Sawtelle v. Waddell & Reed*, 304 A.D.2d 103, 108-18, 754 N.Y.S.2d 264, 270-77 (1st Dep't 2003); *Rosenberg, Minc & Armstrong v. Mallilo & Grossman*, 8 Misc.3d 394, 403-04, 798 N.Y.S.2d 322, 331 (Supreme Court, New York County 2005). Accordingly, punitive damages may not be grossly disproportionate to the severity of the offense alleged. *Gore*, 517 U.S. at 576; *Correia*, 52 A.D.3d at 641-42; *Sawtelle*, 304 A.D.2d at 108-18.

In addition, an award of punitive damages must bear some "reasonable relationship" to the compensatory damages claimed. *Gore*, 517 U.S. at 580; *Correia*, 52 A.D.3d at 641-42; *Sawtelle*, 304 A.D.2d at 108-18. The

reasonableness of the punitive damages award to the compensatory damages claimed is determined by the ratio of the former to the latter. *Gore*, 517 U.S. at 580-83; *Correia*, 52 A.D.3d at 641-42; *Sawtelle*, 304 A.D.2d at 108-18. Where that ratio substantially skewed towards the punitive damages side of the equation, judicial scrutiny is warranted. *Gore*, 517 U.S. at 583 (a ratio of 500 to 1 between punitive damages and compensatory damages "raise[s] a suspicious judicial eyebrow"); *Correia*, 52 A.D.3d at 641-42 (holding that punitive damages award of $70,000.00 was impermissibly disproportionate to compensatory damages award of $3000.00); *Sawtelle*, 304 A.D.2d at 108-18 (holding that punitive damages award of $25 million in case where compensatory damages were $1,827,499.00 was "grossly excessive"); *Rosenberg*, 8 Misc.3d at 403-04 (ratio of 10:1 is "the outside ratio" and single-digit multiples are "more likely to comport with due process").

2. FragranceNet's Patently Outrageous Claim For $10 Million In Punitive Damages Bears No Rational Relationship At All To Its Alleged Loss Of Less Than $4000.

Here, FragranceNet admits that its total compensatory damages allegedly sustained in this case are $3902.91. (R. 12-18). Despite that undisputed fact, FragranceNet seeks $10 million in punitive damages; a staggering 2562.19 to 1 ratio of punitive damages to compensatory damages. This obviously far exceeds any reasonably permissible ratio of punitive to compensatory damages, and is

clearly "grossly excessive" as a matter of law. *Gore*, 517 U.S. at 583; *Correia*, 52 A.D.3d at 641-42; *Sawtelle*, 304 A.D.2d at 108-18; *Rosenberg*, 8 Misc.3d at 403-04. The mere assertion of such a patently absurd claim for punitive damages conclusively demonstrates that FragranceNet's motive in bringing this litigation is not to recover the less than $4000.00 in damages it claims to have sustained, but instead to vex and harass FragranceX, a business competitor beating it in the marketplace, and FragranceX's principal Mr. Yakuel. Accordingly, the Supreme Court properly dismissed FragranceNet's claim for punitive damages.

C. The Doctrine Of "Law Of The Case" Does Not Preclude The Court From Dismissing FragranceNet's Punitive Damages Claim Because The Supreme Court Specifically Authorized FragranceX And Mr. Yakuel To Make The Subject Motion To Dismiss.

Under New York law, "every court retains a continuing jurisdiction generally to reconsider any prior intermediate determination it has made." *Aridas v. Caserta*, 41 N.Y.2d 1059, 1061, 364 N.E.2d 835, 836, 396 N.Y.S.2d 170, 172 (1977); *see also Paramount Communications v. Gibraltar as. Co.,* 212 A.D.2d 490, 623 N.Y.S.2d 850 (1st Dep't 1995) (court has the inherent power to alter its own prior orders for sufficient reasons and in furtherance of justice); *Halloran v. Halloran*, 161 A.D.2d 562, 564, 555 N.Y.S.2d 139, 141 (2d Dep't 1990) (same); *Stansky v. Mallon*, 133 A.D.2d 392, 519 N.Y.S.2d 387 (2d Dep't 1987) (same). In *Aridas*, the Appellate Division dismissed the defendants' first appeal for failure to

prosecute, but considered the same issue previously raised in the dismissed appeal on the defendants' second appeal. *Aridas*, 41 N.Y.2d at 1061. The Court of Appeals held that "the Appellate Division's exercise of its reserved power in this instance" was not error. *Id.*

Here, the Supreme Court initially denied Defendants' motion to dismiss FragranceNet's entire case. (R. 8). The court, however, upon learning at a scheduled conference that Defendants were willing to concede liability for the compensatory damages alleged solely because the costs of litigation would vastly exceed the damages sought, granted Defendants permission to move to dismiss FragranceNet's claim for punitive damages. (R. 6-7, 131-33). The Supreme Court, after reviewing the submissions of all parties on the issue, determined that FragranceNet had failed to state a claim for punitive damages as a matter of law. (R. 3-5). Because the Supreme Court had the inherent power to reconsider its prior determination in light of the change in the parties' position, the court was not precluded by the doctrine of "law of the case" from dismissing FragranceNet's claim for punitive damages.

The cases relied upon by FragranceNet are inapposite, as they all involve situations where a party sought to re-litigate an issue already decided by the court without the court's permission to do so and where nothing substantial had changed in the case. *Baron v. Baron*, 128 A.D.2d 821, 513 N.Y.S.2d 744 (2d Dep't 1987)

(court did not grant permission to re-litigate motion, and no indication of any change in the case); *Atlas Feather Corp. v. Pine Top Ins. Co.*, 122 A.D.2d 241, 505 N.Y.S.2d 436 (2d Dep't 1986) (same); *Haibi v. Haibi*, 171 A.D.2d 842, 567 N.Y.S.2d 778 (2d Dep't 1991) (same); *Hoffman v. Landers*, 146 A.D.2d 744, 537 N.Y.S.2d 228 (2d Dep't 1989) (same). Here, unlike these cases, the Supreme Court specifically authorized Defendants to move to dismiss FragranceNet's punitive damages claim based upon the Defendants' willingness, solely because the cost of a defense would far exceed the damages sought, to pay the compensatory damages sought by FragranceNet.

FragranceNet's reliance upon *Freeze Right Refrig. & Air Conditioning Svces., Inc. v. City of New York*, 101 A.D.2d 175, 475 N.Y.S.2d 383 (1st Dep't 1984) is misplaced, because that case actually supports Defendants. In *Freeze Right*, the defendants' first motion for summary judgment was denied on the grounds that unresolved factual issues precluded summary judgment. *Freeze Right*, 101 A.D.2d at 178. The defendants made a second motion for summary judgment based upon alleged newly discovered evidence, and the trial court denied the motion, holding that the defendants could not make a second motion for summary judgment and that their purported new evidence could have been presented on the prior motion. *Id.* at 179. The Appellate Division reversed and granted the second summary judgment motion, holding, *inter alia*, that the trial

court was not precluded from addressing the second summary judgment motion on its merits, even though there was no newly discovered evidence, because "other sufficient cause" to hear the second motion existed. *Id.* at 180-81. In so holding, the Appellate Division observed that "Courts should therefore be loathe to sustain a meritless action upon purely procedural grounds." *Id.* at 181.

Here, the Supreme Court properly determined that sufficient cause – namely, Defendants' willingness to pay the compensatory damages sought by FragranceNet because the cost of a defense far outstripped the damages sought – existed to hear the motion to dismiss the punitive damages claim. It also properly declined to sustain FragranceNet's meritless claim for punitive damages solely on procedural grounds. Accordingly, the order appealed from should be affirmed.

POINT II IF THE COURT REINSTATES FRAGRANCENET'S CLAIM FOR PUNITIVE DAMAGES, IT SHOULD SEARCH THE RECORD AND DISMISS THE CLAIM AS AGAINST MR. YAKUEL BECAUSE FRAGRANCENET HAS FAILED AS A MATTER OF LAW TO STATE A CLAIM AGAINST MR. YAKUEL INDIVIDUALLY.

Assuming for the sake of argument that this Court could properly reinstate FragranceNet's claim for punitive damages, it should nevertheless search the record and dismiss all of FragranceNet's claims as against Mr. Yakuel because there is no basis to hold Mr. Yakuel personally liable on the facts alleged by FragranceNet. This court has the power to search the record and grant summary dismissal of FragranceNet's claims as against Mr. Yakuel. *Merritt Hill Vineyards*

v. Windy Hgts. Vineyard, 61 N.Y.2d 106, 110-11, 460 N.E.2d 1077, 1080, 472 N.Y.S.2d 592, 595 (1984).

Under New York law, a corporate officer is not personally liable for the alleged wrongs of the corporation. *Robbins v. Panitz*, 61 N.Y.2d 967, 969, 463 N.E.2d 615, 475 N.Y.S.2d 274 (1984); *Felder v. R&K Realty*, 295 A.D.2d 560, 561-62, 744 N.Y.S.2d 213 (2d Dep't 2002). Here, FragranceNet's complaint does not allege any grounds to pierce the corporate veil, and makes no allegations that Mr. Yakuel acted in any manner other than his corporate capacity. (R. 13-19). It is alleged that FragranceX, and not Mr. Yakuel personally, received the goods at issue. (R. 13-19). Mr. Yakuel did not personally sign for the goods. (R. 14). There is no basis alleged in FragranceNet's complaint that would permit Mr. Yakuel to be held personally liable for acts in his corporate capacity, or acts by FragranceX or its employees. (R. 13-19, 34-35, 125-26). Accordingly, at a minimum, this Court should search the record and dismiss FragranceNet's claims as against Mr. Yakuel individually.

POINT III FRAGRANCENET SHOULD BE SANCTIONED BY THIS COURT FOR PURSUING A FRIVOLOUS APPEAL.

FragranceNet's persistent pursuit of a patently frivolous claim for punitive damages that is unsupportable under any reading of the applicable law constitutes frivolous conduct that should be sanctioned. Under New York law, conduct is

frivolous if it is completely without merit in law and cannot be supported by reasonable argument for the extension, modification, or reversal of the existing law, if it is undertaken primarily to delay the resolution of litigation, or if it is undertaken primarily to harass or maliciously injure another. 22 NYCRR § 130-1.1(c). The continued assertion of patently meritless arguments on appeal constitutes frivolous conduct that should be sanctioned. *Caplan v. Tofel*, ___ A.D.3d ___, ___, ___ N.Y.S.2d ___, ___, 2009 WL 3048453 (2d Dep't September 22, 2009); *Good Old Days Tavern, Inc, v. Zwirn*, 271 A.D.2d 270, 713 N.Y.S.2d 678 (1st Dep't 2000). Here, FragranceNet has not only asserted an outrageous claim for punitive damages, but has persisted in advancing that patently meritless claim on appeal, despite have been made whole by Defendants. Accordingly, FragranceNet and its counsel should be sanctioned.

As demonstrated above, FragranceNet's claim for punitive damages is precluded by New York law. Moreover, even ignoring the fact that FragranceNet's allegations are legally insufficient to sustain a claim for punitive damages under any rational reading of the law, FragranceNet sought an amount of punitive damages that could not be sustained if it had been awarded because it would be grossly excessive as a matter of law. The Supreme Court recognized the lack of merit in FragranceNet's claim, calling it a "phantom claim for punitive damages" and stating that its pursuit would be a waste of everyone's time and

scarce judicial resources. (R. 4). It is also undisputed that FragranceNet was made whole on its claim for compensatory damages. (R. 4-5).

Despite the fact that it has been made whole and the Supreme Court's determination that FragranceNet's pursuit of such a claim would be wasteful and spiteful, FragranceNet has persisted in this appeal. In doing so, it has asserted arguments completely without merit in law and that cannot be supported by reasonable argument for the extension, modification, or reversal of the existing law. It is also patently obvious that FragranceNet's pursuit of this appeal was undertaken primarily to delay the resolution of this litigation because FragranceNet has been made whole on its claim for compensatory damages and has no legal basis to seek punitive damages. FragranceNet's continued assertion of its frivolous claim for punitive damages is also clearly undertaken primarily to harass or maliciously injure Defendants, its business competitors, by diverting their resources from their work and costing them unnecessary and unwarranted legal expenses to fend off a meritless appeal. This motive is demonstrated by FragranceNet's conspicuous failure to sue UPS, the party who caused its alleged injury by erroneously delivering the merchandise in the first place.

No fair-minded person would assert a claim for $10 million based upon the errant delivery of less than $4000.00 of merchandise to a business competitor, much less continue to pursue that claim after a court has instructed it that the claim

has no merit and constitutes a waste of the court's and the parties' time and resources. This Court has the power to award FragranceX and Mr. Yakuel their actual expenses and reasonable attorneys' fees on this appeal as a sanction for FragranceNet's frivolous conduct. 22 NYCRR § 130-1.1(a). It is submitted that it should do so for the reasons stated above. In the alternative, the Court should fashion an appropriate financial sanction against FragranceNet and its counsel for pursuing this frivolous appeal.

CONCLUSION

For the forgoing reasons, it is respectfully submitted that the order appealed from should be affirmed, with costs, and that this Court should impose an appropriate sanction upon Plaintiff-Appellant FragranceNet for filing and pursuing an frivolous appeal, together with such other and further relief to Defendants-Respondents FragranceX and Mr. Yakuel as this Court deems just and proper.

Dated: Glen Allen, Virginia
October 8, 2009

DOZIER INTERNET LAW, P.C.

By: _____

Cameron Gilbert, Esq.
Eric S. Crusius, Esq.
Co-Counsel for Defendants-Respondents
11520 Nuckols Road, Suite 101
Glen Allen, VA 23059
(804) 346-9770

Anthony M. Camisa, Esq.
Co-Counsel for Defendants-Respondents
323 Willis Avenue
Mineola, NY 11501
(516) 741-0005

CERTIFICATE OF COMPLIANCE PURSUANT TO 22 NYCRR § 670.10.3(f)

The forgoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of Typeface:	Times New Roman
Point Size:	14
Line Spacing:	Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 5900.