SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **IAS MOTION 56EFM**

Justice

----------X

MARK PEREZ,

Plaintiff,

- v -

LIVE NATION WORLDWIDE, INC., and LIVE NATION MARKETING, INC.,

Defendants.

INDEX NO. 158373/2013

MOTION DATE 07/01/2020

MOTION SEQ. NO. 010

DECISION AND ORDER

----------X

The following e-filed documents, listed by NYSCEF document number 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 396, 397, 398, 399, 400, 401, 402, 403, and 404(Motion 010)

were read on this motion to/for SET ASIDE VERDICT.

I. INTRODUCTION

In this action to recover damages for personal injuries arising from a workplace construction accident, the defendant Live Nation Worldwide, Inc. (Live Nation), moves pursuant to CPLR 4404(a), 4406, and 5501(c) to set aside, as excessive and contrary to the weight of the evidence, a jury verdict in favor the plaintiff, Mark Perez, and against it on the issue of damages in the sum of $101,799,768, plus stipulated damages in the sum of $315,000 for past medical expenses, for a total award of $102,114,768. Live Nation also seeks to set aside the verdict in the interest of justice, and for a new trial on the issue of damages, contending that the plaintiff's counsel made numerous improper and prejudicial comments in the course of opening and summation. It also argues that, in his closing remarks, the plaintiff's counsel improperly suggested to the jury that it award damages to the plaintiff far in excess of what could be deemed reasonable compensation, thus assuring that even a verdict in a lesser amount would be excessive, a practice known as "anchoring."

Live Nation also seeks a collateral source hearing pursuant to CPLR 4545 to determine the extent to which other sources of insurance and indemnification already have compensated, or will compensate, the plaintiff for his losses, and to set off those amounts from the total award. In addition, Live Nation requests that any judgment entered on the award, as so reduced, be structured pursuant to CPLR article 50-B, as directed by the court, unless the parties stipulate to the amount of the collateral source set-off and the form of the structured judgment.

The plaintiff opposes the motion in its entirety, contending that, under the unique circumstances of this case, including his relatively young age at the time of the accident, the extensive past and future surgical interventions needed to repair a severe skull fracture (including the removal of a portion of the skull itself), the deteriorating traumatic brain injuries that he sustained, and the loss of a potentially long career in internet marketing, the amounts awarded were supported by the evidence and justified. The plaintiff further argues that any comments made by counsel in the course of the trial, including opening statements and summation, constituted fair comment on the evidence, were not prejudicial, and do not constitute any basis for setting aside the verdict. The plaintiff also argues that, under New York law, there is no legal basis for limiting the amount of damages that a plaintiff can request a jury to award, that in the first instance, it always is up to the jury to determine what constitutes reasonable compensation, and that, by limiting the amount that can be requested, a court would unlawfully usurp the jury's function by effectively determining, as a matter of law, what the appropriate measure of damages could be. The plaintiff also notes that the defendant did not timely object to many of the issues that it raised in its present application.

Live Nation's motion is granted only to the extent that so much of the verdict as awarded compensation for future pain and suffering and future lost wages is set aside, and a new trial is directed with respect to those issues, unless the plaintiff stipulates to a reduction of the award for future pain and suffering from the sum of $75,250,000 over 43 years to the sum of $30,100,000 over 43 years, and the reduction of the award for future lost wages from the sum of

$5,154,038 over 43 years to the sum of $1,920,000 over 24 years, so that the total award is reduced from $102,114,768 to $53,705,730. Should the plaintiff so stipulate, the parties shall be given the opportunity to stipulate to the amount of the collateral source set-off and the form of the structured judgment in accordance herewith. The motion otherwise is denied. The court notes that, should the plaintiff stipulate to the reductions set forth herein, and a judgment is entered on the verdict, as so reduced, the principal sum of the judgment will bear prejudgment interest at the rate of 9% per annum from June 30, 2016, the date that the court determined that liabiility was established against Live Nation (*see* CPLR 5002; *see Rohring v City of Niagara Falls*, 84 NY2d 60, 68 [1994]; *Love v State of New York*, 78 NY2d 540, 542 [1991]; *Gyabaah v Rivlab Transp. Corp*., 170 AD3d 616, 617 [1st Dept 2019]; *Gibbs v State Farm Fire & Cas. Co*., 169 AD3d 1483, 1484-1485 [1st Dept 2019])..

II. BACKGROUND

Live Nation promotes concerts at the Jones Beach Theater in Wantagh, New York. On June 26, 2013, the plaintiff, who was then 30 years of age, fell from the structure on which he was working while engaged in the erection of signage for a booth at that location on behalf of Best Buy Stores, L.P., a sponsor of Live Nation's concert series. Specifically, while Perez stood approximately 10 feet above the ground on the first level of the booth (according to Live Nation) or 40 feet above the ground upon a truss (according to the plaintiff), a union stagehand hired by Live Nation drove a forklift into the structure, causing the plaintiff to fall to the ground below and strike his head and other parts of his body (*see Perez v Beach Concerts, Inc.*, 2018 NY Slip Op 32999[U], *3 [Sup Ct., N.Y. County, Nov. 5, 2018]; *see also Perez v Beach Concerts, Inc*., 2016 WL 3566115, *1 [Sup Ct., N.Y. County, Jul. 1, 2016], *affd* 154 AD3d 602, 602 [1st Dept 2017]). As a result, the plaintiff sustained massive brain injuries, including a subdural hematoma, skull fractures, facial fractures, multiple hemorrhages, spinal fractures, seven fractured ribs, and a

punctured and collapsed lung, and was airlifted to a nearby trauma center in East Meadow, New York.

During Perez's initial month-long hospitalization at Nassau University Medical Center, he was put into a medically induced coma, was placed on life support, and was intubated with a feeding tube, a chest tube, and tracheal tube. After emerging from the coma, he was admitted to the brain injury unit at Southside Hospital in Bay Shore, New York, where he underwent a comprehensive brain injury rehabilitation program that included physical therapy, occupational therapy, speech therapy, recreational therapy, and neuropsychology treatment. Perez underwent several additional months of therapy at St. Charles Rehabilitation Center in Smithtown, New York.

Perez was compelled to undergo four brain surgeries between June 2013 and May 2015. The first surgery, performed almost immediately after the accident to decrease the pressure in his head and save his life, consisted of an emergency right hemicraniectomy, in which a portion of his skull was removed and inserted into his abdomen to preserve it for future re-implant should that procedure become feasible. The second surgery consisted of a cranioplasty, in which the skull bone flap that previously had been implanted into his abdomen was explanted and placed back onto his skull. Perez's third surgery involved a cranioplasty with titanium mesh placement and adjacent tissue rearrangement, which was performed in two parts by two different surgeons. The fourth surgery involved a cranioplasty with removal of the titanium mesh, a procedure also performed in two parts by two different surgeons. Expert testimony adduced at trial indicated that Perez will require at least one more cranioplasty in the future to repair the large defect in his head and to protect his brain. Perez also has been diagnosed with post-traumatic epilepsy. He has frequent seizures, including numerous grand mal seizures, that are uncontrolled by medication. According to testimony adduced at trial, Perez is constantly at risk of having another seizure, and his ability to participate in daily activities is severely limited.

By Decision and Order dated June 30, 2016, and entered July 1, 2016, the Supreme Court (Lebovits, J.) awarded summary judgment to the plaintiff on the issue of liability on his Labor Law § 240(1) cause of action against Live Nation. The court concluded that Live Nation, as the licensee of the premises where the accident occurred, was an owner of premises under construction within the meaning of the law, and that the plaintiff was engaged in the alteration of a structure at the time of his accident. The court thus determined that Live Nation was statutorily liable to the plaintiff pursuant to Labor Law § 240(1) for failing to provide adequate safety equipment necessary to protect him from gravity-related dangers. The Appellate Division affirmed the Supreme Court's order (*see Perez v Beach Concerts, Inc.*, 154 AD3d at 602), and the matter proceeded to a jury trial on the issue of damages.

III. THE TRIAL ON THE ISSUE OF DAMAGES

At the jury trial on the issue of damages, conducted over 15 days in November and December 2019, the plaintiff testified on his own behalf, and adduced evidence from family members, as well as from a physician who is board certified in brain injury medicine and physical medicine and rehabilitation, a physician who is board certified in radiology and neuroradiology, a physician specializing in brain trauma, a physician who is board certified in psychiatry and neurology, a physician who is board certified in orthopedic surgery, a physician who is board certified in neurological surgery, a life care planner, and an economist. The evidence demonstrated that the plaintiff sustained severe orthopedic injuries and a skull fracture that required four separate surgeries, that he is missing a portion of his skull, that he suffered from severe traumatic brain injury, that his neuro-motor and cognitive functions had been severely compromised as a result of the trauma, that those functions had deteriorated since the date of the accident, and those functions were likely to deteriorate significantly in the future. The plaintiff also adduced expert testimony at trial supporting his contentions that he could no

longer engage in gainful employment, that his inability to work or generate income was permanent, and that he might become completely dependent on caregivers in the future.

Specifically, the evidence adduced by the plaintiff at trial demonstrated that his traumatic brain injury resulted in numerous, extensive, and ongoing symptoms, including continual head pain, post-traumatic epilepsy, left hemiparesis, light and noise sensitivity, emotional dysregulation, depression, anxiety, fatigue, post-traumatic stress disorder, clinically severe neuropsychiatric disorder, aphasia, and profound cognitive deficits, such as deficits in motor speed, attention, information-processing speed, verbal fluency, visual perception, verbal linguistic function, memory, concentration, attention, and executive functions. The evidence also supported the plaintiff's allegations that he is missing a significant amount of brain tissue, which will not regenerate, and that his brain damage and cognitive deficits are permanent and progressive.

The evidence adduced from the plaintiff's expert witnesses also supported his claims that he will require a lifetime of medical care for cognitive, emotional, and psychological impairments and post-traumatic epilepsy caused by diffuse brain injury, he will be unable to engage in remunerative employment for the remainder of his life, and he will require a lifetime of psychiatric treatment to help him deal with the extraordinary physical and psychological challenges that he faces on a daily basis. Proof was presented that the plaintiff's treatment will need to be supplemented with psychotropic medications to address his depression, anxiety, and sleep disorder, that he will likely have future seizures necessitating additional brain surgeries to address those seizures, and that his traumatic brain injury has rendered him completely and permanently disabled, necessitating full-time supervision and care. In addition, the evidence supported the plaintiff's contentions that he is required to wear a helmet to protect his brain, he will have permanent impairments arising from his orthopedic injuries and will require shoulder surgery with insertion of hardware in the future. The jurors observed the plaintiff's current appearance and were also shown photos of how his head appeared prior to the accident.

Testimony and evidence adduced at trial indicated that, after the accident, Perez's treating physicians gave him only a 10% chance of survival but, that upon his survival, he continues to endure the consequences his injuries.

The trial evidence also demonstrated that, in addition to the physical and psychiatric injuries that Perez sustained, the extent to which he lost the enjoyment of life was significant. He adduced evidence supporting his claim that, prior to the accident, he was an intelligent, active, independent, and adventurous young man with a zeal for life, enjoying snorkeling, flying small planes, and spending time with his girlfriend of eight years. He presented proof that, as a result of the accident, he became unable to engage in those pursuits, socially isolated, anxious, depressed, fearful, defeated, and dependent on his brother. He and his family members testified that he lost his girlfriend, his friends, his confidence, and his self-esteem, and that he suffered greatly while in complete isolation. Perez himself testified that he had only been on one date since the accident, and that, when his date suggested he try yoga exercises, he did, but suffered a seizure during the yoga class; he has not had success dating since that time. The plaintiff testified that, although he still goes to a gym and attempts to work out on a stationary bicycle, he had sustained a seizure on one occasion, and fell from the bicycle. He also asserted that, although he was able to drive a car for a short time after the accident, he can no longer do so because his motor and cognitive functions have deteriorated, and his physician recommended that he refrain from driving. Perez and his brother testified that, although Perez lived on his own for the first few years after the accident, he had to move back in with his parents because he could not fully care for himself.

Perez, his family members, and several experts testified that Perez is *fully and painfully aware* of his significant cognitive deficits and the social isolation they have caused, as well as the likelihood that those deficits will get progressively more severe as time goes on.

In addition, the plaintiff's brother, who worked with the plaintiff, testified that, at the time of the accident, the plaintiff had already established a track record in graphic design, and had

designed advertisements, fliers, t-shirts, sales displays, and internet marketing web sites for numerous clients, including Macy's, Bed, Bath & Beyond, J.C. Penney, Victoria Classics, Health Nutrition, Inc., the New York Islanders hockey club, conventions presented at the Nassau Coliseum, several bedding providers, local restaurants, and the nationally recognized tattoo ink and supply distributors World Famous, Inc., Koru Sumi, and World Famous Tattoo Lou's, owned by Lou Rubino. The plaintiff also submitted his tax returns and W-2 earnings statements. The plaintiff confirmed that he engaged in this work, and that he also managed his father's fashion photography business.

In addition, Perez submitted evidence that, at the time of the accident, he was negotiating with Best Buy to perform marketing and design services beyond designing and erecting the booth at Jones Beach Theater at which the subject accident occurred.

The plaintiff also adduced testimony from an economist quantifying the lost income that would be caused by his inability to advance professionally as a graphic and internet marketing designer. Specifically, that economist testified that "his pre-injury earning capacity, what he could have earned if he would not have been hurt. I established as the average earnings of a web developer in the New York City/Long Island area. That amount is $84,910 per year. That represents his earning capacity over his work life." That economist also gave his opinion on the future expenses of a life-care plan requiring rehabilitation services, counseling, and psychotherapy, as well as other likely health-care services that would be required over the course of the plaintiff's lifetime as a consequence of his injuries. Another economist who testified on behalf of the plaintiff calculated the plaintiff's total loss future of wages for a full life expectancy of 79 years at almost $5,700,000.

Live Nation adduced the testimony of several experts, including a physician, an economist, and a life care planner. These experts opined, as relevant to their respective areas of expertise, that Perez did not fully comply with the medical and therapeutic recommendations of his health-care providers, and consequently did not obtain the optimal medical and

therapeutic outcomes he might have achieved had he fully complied, that Perez would be able to engage in a sedentary income-generating profession for the remainder of his expected work life despite his injuries, and that he would not require a significant outlay of expenses for the extensive, full-time personal care described by his own experts because his elderly parents could care for him.

Live Nation's expert physician, who was board certified in physical medicine and rehabilitation and in brain injury medicine, testified that her

> "interpretation of [his aphasia test results] is that he understands basic and fairly complex information. He has some problems -- he doesn't have problems naming anything. Spontaneous speech is impacted. He is a little hesitant at times, but he is functional. He is able to say what he wants to say. It may take him a bit longer to do so, though."

She concluded, however, that, inasmuch as Perez's scores on a recognized cognition test had decreased each time it was administered and was much lower than expected, "it suggests that he is not putting in full effort," and since he was exhibiting shakiness in the course of a physical exam, "he was not giving his full effort." She nonetheless concluded that, although she had "doubts about the extent of his injury and performance," Perez should see a neuropsychologist once per week for the remainder of his life because his injury has "changed his life . . . and has impact on his mental well-being." She also opined that "he needs to have supervision at all times," that is, "24-hour supervision," until his seizures are under control, and that "he still needs help with medication management . . . and other things like cooking, shopping and community efforts."

A board-certified neurologist who testified on Live Nation's behalf opined that Perez's scores on the cognitive function test described by the physical medicine and rehabilitation expert were inconsistent with his actual level of functioning, and that the scores would normally be correlated with someone who had end-stage Alzheimer's disease or severe dementia. He thus concluded that Perez, who did not otherwise evince signs or symptoms of dementia, was not giving his full effort in connection with those examinations. The neurologist also opined that

there was no reason that the plaintiff could not proceed to have a new cranioplasty procedure to repair the deficit in his skull, and that his delay in undergoing the procedure remains a "safety risk," particularly were he to fall again and strike his head. He further gave his opinion that the absence of a portion of the plaintiff's skull could be the cause of the plaintiff's headaches or be contributing to his seizures, and that an additional cranioplasty procedure might alleviate these symptoms. The neurologist nonetheless asserted that the plaintiff needs continually to be seen by a neurologist to optimize his pharmacological treatment and manage his seizures.

Live Nation also adduced testimony from a physician specializing in the treatment of epilepsy, who testified that he administered an electroencephalogram (EEG) test to Perez, and that, although the EEG was abnormal, with moderate right cerebral dysfunction, there was no indication that Perez showed signs of epilepsy.

Live Nation also adduced evidence that, at least during the first year or two after the accident, Perez was able to function, care for himself, and even operate a motor vehicle to visit relatives, go shopping, and appear for medical appointments.

In addition, Live Nation presented testimony from a rehabilitation nurse who was certified in life-care planning. The nurse disagreed with the plaintiff's life-care planner as to the method employed to calculate the future costs of care. She opined that Perez did not need annual physical therapy and neuropsychological evaluations, and that he did not need as much rehabilitation therapy as urged by the plaintiff's expert. She also concluded, however, that the plaintiff would need cognitive remediation for the remainder of his life. In addition, Live Nation's life-care planner concluded that the plaintiff would need neuropsychological therapy once per week for the rest of his life, but ascribed a lower annual cost for those services than did the plaintiff's expert. She also differed in her opinion as to the need for the plaintiff to treat or consult with several types of medical specialists, the frequency of such treatments or consultations, and the cost likely to be incurred in connection therewith. This expert also opined that Perez would not need 24-hour-per-day personal care, but would only need 4 hours of such

care each day, and could either take care of himself for the remaining 20 hours, or rely upon family members.

In the course of the trial, the court, by order dated November 18, 2019, denied Live Nation's motion in limine to preclude Dr. Theodore Schwartz from testifying that Perez would likely need future surgery to repair the defect in his skull. Prior to the jury's deliberation, Live Nation moved pursuant to CPLR 4401 for judgment as a matter of law dismissing Perez's claims for future medical expenses and lost wages, contending that he failed to make a prima facie showing that he would need additional surgery or medical care to treat his traumatic brain injury and skull deformity or that he would forego income from a career as a web designer as a result of his injuries. The court denied those motions from the bench. By order dated December 4, 2019, the court granted Live Nation's request to charge the jury on the issue of whether Perez failed to mitigate his damages by declining fully to comply with his health-care providers' treatment and therapy recommendations. The court also denied Live Nation's pre-emptive in limine motion seeking to prevent the plaintiff's counsel from "anchoring" his suggestion of an appropriate award of damages at a level it claimed to be excessive as a matter of law. The court advised Live Nation that it must make any such objection at the appropriate time, and reiterated that directive immediately before summations, noting that only a timely objection would enable the court to give any necessary curative instruction to the jury.

During summation, Live Nation's attorney suggested to the jury that it return an award of $10,000,000 for past and future pain and suffering, an award for total lost earnings in the range of $1,496,230 to $1,657,643, and compensation for future life-care planning in the sum of $5,857,000.

Prior to the plaintiff's summation, the court imposed certain limitations on the manner in which the plaintiff's attorney could employ demonstrative or pictorial devices during summation. During the plaintiff's summation, Live Nation only objected to a comment about its attorneys' state of mind, a comment about how "lucky" Live Nation believed that the plaintiff should be if

his lost wages were compensated at the annual rate of $33,000, and a comment that the plaintiff was "worried now about dying early, especially after this trial," all of which were sustained.

With the jury out of room, Live Nation objected to counsel's statement that the plaintiff had waited more than six years to come to trial, arguing that the statement suggested that the delay was the fault of Live Nation. The objection was overruled as untimely and because a reasonable juror would not have drawn that negative inference from the comment. Live Nation also waited until the jury left the room to raise an issue with respect to counsel's description of its suggested awards as "insulting," but the court denied as untimely any objection in this regard.

Live Nation did not object to any of the other comments or rhetorical devices employed by the plaintiff's attorney, including his comments that the defense strategy was to "sow the seeds of doubt," to "distract, distort, and confuse," to "deny" even legitimate claims, and to "deceive" the jury. Nor did it object to counsel's statements that defense counsel overused the term "reasonable" in the course of summation. Live Nation also declined to object to counsel's comments that the defense witnesses were inconclusive, uncertain, or inconsistent in their testimony or employed equivocal, deceptive, or euphemistic phrasing in rendering their opinions, that these witnesses were paid for and employed by Live Nation and that their testimony was colored by that relationship, that they were thus "talking out of two sides of their mouths," and that Live Nation's suggestion of an appropriate award constituted a false projection of generosity.

The plaintiff's attorney asked the jury to return a verdict in excess of $100 million, consisting of awards of $487,986 for past lost earnings, a range of $4,666,052.to $5,689,888 for future lost earnings, $2,752,072 for future medical expenses, $307,707 for future rehabilitation expenses, $10,083,694 for future custodial care (for a total of $13,143,473 for future out-of-pocket expenses), $35,000,000 for past pain and suffering, and $50,000,000 for future pain and

suffering over 42 years. Live Nation did not object to counsel's suggestions when they were made.

The jury awarded the plaintiff the sums of $10,500,000 for past pain and suffering over 6.46 years, $75,250,000 for future pain and suffering over 43 years, $163,000 for past lost wages over 6.46 years, $5,154,038 for future lost wages over 43 years, $315,000 for past medical expenses, as stipulated by the parties, $3,656,804 for future medical expenses over 43 years, $307,707 for future rehabilitation expenses, and $6,768,150 for future custodial care over 41.54 years, for a total award of $102,114,768.

IV. DISCUSSION

A. PAIN AND SUFFERING

Generally, "[t]he amount of damages to be awarded for personal injuries is primarily a question for the jury, and the jury's determination is entitled to great deference" (*Coker v Bakkal Foods, Inc.*, 52 AD3d 765, 766 [2d Dept 2008]). Thus, a jury's determination with respect to awards for past and future pain and suffering will not be set aside unless the awards deviate materially from what would be reasonable compensation (*see* CPLR 5501[c]; *Harvey v Mazal Am. Partners*, 79 NY2d 218, 225 [1992]; *Garcia v CPS 1 Realty, L.P.*, 164 AD3d 656, 659 [2d Dept 2018]; *Quijano v American Tr. Ins. Co*., 155 AD3d 981, 983 [2d Dept 2017]; *Harrision v New York City Tr. Auth*., 113 AD3d 472, 476 [1st Dept 2014]). "The 'reasonableness' of compensation must be measured against relevant precedent of comparable cases" (*Kayes v Liberati*, 104 AD3d 739, 741 [2d Dept 2013]; *see Urbina v 26 Ct. St. Assoc., LLC*, 46 AD3d 268, 275 [1st Dept 2007]; *Reed v City of New York*, 304 AD2d 1, 7 [1st Dept 2003]; *Halsey v New York City Tr. Auth.*, 114 AD3d 726, 727 [2d Dept 2014]). "Although prior damage awards in cases involving similar injuries are not binding upon the courts, they guide and enlighten them with respect to determining whether a verdict in a given case constitutes reasonable compensation" (*Miller v Weisel*, 15 AD3d 458, 459 [2d Dept 2005]; *see Garcia v CPS 1 Realty,*

L.P., 164 AD3d at 659 [2d Dept 2018]; *Vainer v DiSalvo*, 107 AD3d 697, 698-699 [2d Dept 2013]; *Reed v City of New York*, 304 AD2d at 7). Crucially, the amount constituting "reasonable compensation" must be assessed with due regard to the "circumstances presented" (*Luna v New York City Tr. Auth*., 116 AD3d 438, 438 [1st Dept 2014]).

> "While CPLR 5501 (c) review has of course been used as a control on 'runaway juries,' the vast bulk of decisions have involved fractional reductions as a by-product of greater scrutiny in a legislatively mandated attempt to keep compensation reasonable and uniform . . . CPLR 5501 (c) requires us to develop standards for material deviation as a by-product of our review of appealed verdicts. If, for example, case comparison demonstrates that individuals with similar injuries but without the ability to return to work have received smaller awards, the appealed award deviates materially. Other factors which may affect the reasonableness of an award include the need for future surgery as well as the nature and severity of subjective pain"

(*Donlon v City of New York*, 284 AD2d 13, 18-19 [1st Dept 2001]). Nonetheless, what constitutes reasonable compensation in one era might be insufficient in a later era . Thus, what might have passed for reasonable compensation in 1980 would not be considered reasonable in 2000, and what was reasonable in 2000 might not be considered reasonable in 2020, owing to increased costs of living, medical care, and personal care, and the better medical and scientific understanding of the severity of certain injuries. The plaintiff has provided illustrative examples of the appropriateness of a court's change in the magnitude of damages evaluations over time, in which the Appellate Division, First Department, determined that a ten-fold to twenty-fold increase in awards from 1999 to 2019 for pain and suffering for almost identical injuries was reasonable (*compare Rydell v Pan Am Equities, Inc*., 262 AD2d 213 [1st Dept 1999] and *So v Wing Tat Realty, Inc*., 259 AD2d 373 [1st Dept 1999] with *Kromah v.2265 Davidson Realty LLC*, 169 AD3d 539 [1st Dept 2019]).

There are numerous reported appellate decisions in which an appellate court provided some indication of what was reasonable compensation for pain and suffering for a plaintiff who sustained a fractured skull and/or traumatic brain injury (*see Popolizio v County of Schenectady*, 62 AD3d 1181 [3d Dept 2009] [where plaintiff suffered a traumatic brain injury which severely

limited his cognitive functions, award of $350,000 for past pain and suffering and $1.75 million for future pain and suffering]; *Hernandez v Vavra*, 62 AD3d 616 [1st Dept 2009] [where plaintiff suffered traumatic brain injuries including a subarachnoid hemorrhage, award of $1 million for past pain and suffering and $1.75 million for future pain and suffering]; *Sadhwani v New York City Tr. Auth*., 66 AD3d 405 [1st Dept 2009] [where plaintiff suffered extensive brain injury, award of $1.9 million for past and future pain and suffering]; *Nunez v City of New York*, 85 AD3d 885 [2d Dept 2011][where plaintiff suffered a traumatic brain injury including a fractured skull and a two-month coma, award would be set aside unless plaintiff stipulated to reduce the award for past pain and suffering to $1.75 million and future pain and suffering to $3.75 million]; *Belt v Girgis*, 82 AD3d 1028 [2d Dept 2011][where plaintiff suffered traumatic brain injuries, including a cerebral concussion and temporal bone fracture, intracranial hemorrhage, and permanent memory loss, award of $2 million for past pain and suffering and $3 million for future pain and suffering]; *Cintron v New York City Tr. Auth.*, 50 AD3d 466 [1st Dept 2008][where plaintiff suffered traumatic brain injuries including multiple skull fractures requiring surgery and was left with cognitive impairments, award of $4.75 million]; *Chelli v Banle Assoc, LLC* [where plaintiff suffered traumatic brain injuries including compound depressed skull fractures requiring a craniotomy, award of $3.5 million for past and future pain and suffering]; *Reed v City of New York,* 304 AD2d 1 [1st Dept 2003] [where plaintiff suffered multiple skull fractures, a subdural hematoma and occipital contusions an award of $2.5 million for past pain and suffering and $2.5 million for future pain and suffering]; *Rahman v City of New York*, 2012 NY Misc LEXIS 4453 [Sup Ct, Queens County, Sep. 5, 2012] [evidence supported an award of $1.5 million for past pain and suffering and $1.5 million for future pain and suffering where plaintiff had a 2.5” hole in his skull, remained for one month and 13 days in a hospital, was in a coma for approximately three weeks, required significant rehabilitation services, and sustained seizures and memory loss]).

Nonetheless, the award of damages for pain and suffering is unique to each case. Moreover, the cited determinations were rendered 8 to 17 years ago, and what might have been reasonable in 2003 or 2012 is insufficient now. Thus, although the "guidance" provided by prior awards approved by appellate courts is relevant, it is limited, as none of the cases cited by Live Nation or noted by this court involves the *profound* injuries that Perez sustained, the extent and number of past and future surgical interventions Perez has undergone and will undergo, or the progressive deterioration of his cognitive and physical functions. Nor do other cases necessarily take account of the obvious fact that Perez is *painfully and profoundly aware* of the course that his life has taken and is likely to take (*see McDougald v Garber*, 73 NY2d 246 [1989]), including the loss of his girlfriend, the loss of his ability to engage in interesting and gainful work, and his increasing inability to take care of his own needs, not to mention the loss of his enjoyment of recreational activities. Nor do those cases describe the additional orthopedic and internal injuries that the plaintiff sustained here.

Hence, the comparison of cases involving other traumatic brain injuries to the injuries sustained by Perez is of value, but only to the extent that the court recognizes that those cases involve the evaluation of similar, but not identical injuries, and that they were decided many years ago.

Moreover, the law of damages for noneconomic does not remain static, as it historically has taken account of inflation, the current and future costs of medical care and other economic loss (*see Torres v State Farm Mut. Auto. Ins. Co*., 120 AD2d 728, 729 [2d Dept 1986] [proof of non-recoverable economic loss may be relevant to determining noneconomic loss]), equipment, and services, and the general recognition that the value of the dollar and concomitant value of pain-and-suffering awards have evolved over time. Moreover, given the unique circumstances of the instant matter, in which the plaintiff has a profound awareness of the loss of his enjoyment of life, as reflected in his psychological and psychiatric profile, requires a higher award to the plaintiff here.

In light of the foregoing, the court concludes that the jury's award of $10,500,000 for past pain and suffering over 6.46 years constitutes reasonable compensation. Conversely, the award of $75,250,000 for future pain and suffering over the 43 years that the plaintiff is likely to live is excessive. Nonetheless, the court concludes that an award of $30,100,000 for future pain and suffering over 43 years constitutes reasonable compensation for future pain and suffering under the unique circumstances of this case. While the court recognizes that even this reduced amount constitutes a significant sum of money, the court notes that both it and the jury had the opportunity to observe the plaintiff over the 15 days of trial. The court and the jury also heard his testimony and observe his demeanor on the stand, which revealed the inescapable fact that the plaintiff was and is keenly aware of how the quality of his life is deteriorating daily. It also reflected that the plaintiff not only will have to live with the consequences of both the intense physical and emotional suffering which he sustained and will continue to sustain, but the additional suffering that his knowledge of those conditions will impose upon his daily perceptions and activities until the end of his life.

B. PAST AND FUTURE LOST WAGES

Live Nation contends that the plaintiff's submission of proof of his history of work as a commercial graphic designer and internet web designer was insufficient to support his claim to enhanced past or future lost income at the rate of compensation expected in those professions, and that jury's verdict in this regard was contrary to the weight of the evidence in any event. Although the jury's determination to make an award for such losses was based on legally sufficient evidence and was not contrary to the weight of the evidence, the amount of the award for future lost wages or income is both contrary to the weight of the evidence and excessive. The court thus reduces that award accordingly.

As explained by the Court of Appeals,

> "For a court to conclude as a matter of law that a jury verdict is not supported by sufficient evidence, however, requires a harsher and more basic assessment of the jury verdict. It is necessary to first conclude that there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial. The criteria to be applied in making this assessment are essentially those required of a Trial Judge asked to direct a verdict. It is a basic principle of our law that 'it cannot be correctly said in any case where the right of trial by jury exists and the evidence presents an actual issue of fact, that the court may properly direct a verdict'"

(*Cohen v Hallmark Cards, Inc*., 45 NY2d 493, 499 [1978], quoting *McDonald v Metropolitan St. Ry*., 167 NY 66, 69-70 [1901]).

The standard for making a determination as to whether a jury's verdict is contrary to the weight of the evidence is whether "'the evidence so preponderate[d] in favor of the [movant] that [the verdict] could not have been reached on any fair interpretation of the evidence'" (*Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995], quoting *Moffatt v Moffatt,* 86 AD2d 864, 864 [2d Dept 1982, *affd* 62 NY2d 875 [1984]; *see Killon v Parrotta*, 28 NY3d 101, 107 [2016]; *McDermott v Coffee Beanery, Ltd*., 9 AD3d 195, 205 [1st Dept 2004]; *Goldstein v Snyder*, 3 AD3d 332, 333-334 [1st Dept 2004]; *Kennedy v New York City Health & Hosps. Corp*., 300 AD2d 146, 147 [1st Dept 2002]).

> "Whether a particular factual determination is against the weight of the evidence is itself a factual question. . . . Thus, the question whether a verdict is against the weight of the evidence involves what is in large part a discretionary balancing of many factors"

(*Cohen v Hallmark Cards, Inc*., 45 NY2d at, 498-499; *McDermott v Coffee Beanery, Ltd*., 9 AD3d at 205). These factors include "'an application of that professional judgment gleaned from the Judge's background and experience as a student, practitioner and Judge'" (*Annunziata v City of New York*, 175 AD3d 438, 441 [2d Dept 2019], quoting *Nicastro v Park*, 113 AD2d 129, 135 [2d Dept 1985]) and "interest of justice" factors (*Jordan v Bates Adv. Holdings, Inc.,* 11 Misc 3d 764, 774-775 [Sup Ct, N.Y. County 2006] [Acosta, J.]). "A preeminent principle of jurisprudence in this area is that the discretionary power to set aside a jury verdict and order a new trial must be exercised with considerable caution, for in the absence of indications that

substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict" (*Nicastro v Park*, 113 AD2d at 133).

"Recovery for lost earning capacity is not limited to a plaintiff's actual earnings before the accident . . . and the assessment of damages may instead be based upon future probabilities" (*Kirschhoffer v Van Dyke*, 173 AD2d 7, 10 [3d Dept 1991]). The loss, however, must be more than speculative. Hence, a plaintiff who was never employed in the position upon which he or she bases lost earnings, or never obtained the training or credentials necessary to secure such employment, may not seek lost earnings because the proof will be deemed speculative (*see Naveja v Hillcrest General Hosp*., 148 AD2d 429, 430 [2d Dept 1989]). Where, however, the nature of a plaintiff's employment possibilities subsequent to an accident is reasonably certain, he or she satisfies the burden of establishing the right to recover lost earnings even where he or she has not actually commenced that employment. In *Keefe v E & D Specialty Stands, Inc.* (272 AD2d 949 [4th Dept 2000]), the plaintiff had not yet begun his apprenticeship with an ironworkers' union at the time of his accident. He had nonetheless "completed all written and physical tests and had been notified that he would be accepted into the apprenticeship program" (*id*. at 949). In rejecting the defendant's contention that the Supreme Court erred in admitting evidence regarding the wage rates and fringe benefits of union ironworkers, the Appellate Division concluded that "the loss of earnings was established with reasonable certainty" (*id.*).

Similarly, in *Savillo v Greenpoint Landing Assoc, LLC* (2011 NY Slip Op 31950[U] [Sup Ct, N.Y. County, Jun. 13, 2011]), the jury, in awarding the plaintiff lost union wages and benefits, was permitted to rely on videotaped deposition testimony of a prospective employer and one of its workers that the plaintiff "was to become a union member. No testimony from a union representative was necessary regarding the process and the time-frame for entering the union because" the owner "testified competently on both subjects" (*id*. at *8).

> "Although [the employer] was not a union member, he employed union members, and the jury was entitled to credit his testimony that the process for Plaintiff's union admission had already been started by the time [the plaintiff] was injured,

> and that in the absence of the injury, he would have become a member of the union in the typical time frame to accomplish membership. [The employee] gave similar testimony. The union benefits were not hypothetical because there was sufficient evidence to support, with a reasonable certainly (and no contrary evidence), that [the plaintiff] would have joined the union. . . . The jury was entitled to determine a reasonable date of union membership"

(*id*.) (citation omitted).

Where, as here, a plaintiff has adduced testimony and provided documentation that he has begun a career in a certain trade or profession, the claim for lost future income cannot be deemed speculative.

The plaintiff bears the burden at trial of establishing damages for past lost earnings with "reasonable certainty," such as by submitting tax returns or other relevant documentation (*Jeffries v 3520 Broadway Mgt. Co*., 36 AD3d 421, 423 [1st Dept 2007]; *see Martinez v Metropolitan Transp. Auth*., 159 AD3d 584 [1st Dept 2018]; *Man-Kit Lei v City Univ. of N.Y*., 33 AD3d 467, 469 [1st Dept 2006]; *Bielich v Winters*, 95 AD2d 750 [1st Dept 1983]; *see also Tassone v Mid-Valley Oil Co., Inc*., 5 AD3d 931, 932 [3d Dept 2004]; *O'Connor v Rosenblatt*, 276 AD2d 610 [2d Dept 2000]), adducing testimony from his or her employer (*see Ordway v Columbia County Agricultural Socy*., 273 AD2d 635, 637 [3d Dept 2000]), or adducing documentary evidence or corroborative testimony. In the First Department, a plaintiff seeking to prove any past lost wages must do so through corroborating documentary evidence and/or through an employer's testimony; an employee may not rely solely on his or her own testimony, unless the defendant had supporting documentary evidence in its possession and expressly declined to employ it to challenge the plaintiff's trial testimony (*see Kane v Coundorous*, 11 AD3d 304, 305 [1st Dept 2004]; *Grinnell v City of New York*, 244 AD2d 171 [1st Dept 1997]; *cf. Shubbuck v Connors*, 72 AD3d 1554 [4th Dept 2010] [Fourth Department permits plaintiff to establish lost earnings based solely on his or her own testimony]).

Recovery for lost earnings, however, is not limited to actual earnings before the accident, and a plaintiff may introduce expert testimony assessing damages based upon future

probabilities, provided that the expert's ultimate assertions are not speculative and are supported by an evidentiary foundation (*see Tassone v Mid-Valley Oil Co., Inc.*, 5 AD3d at 931; *Kirchhoffer v Van Dyke*, 173 AD2d 7 [3d Dept 1991]). As the First Department explained in a personal injury action in which the plaintiff claimed lost income from a potential career as an opera singer:

> "it is undisputed that a person tortiously injured is entitled to recover for impairment of future earning capacity, without limitation to the actual earnings which preceded the accident. In death actions, and in the cases of injuries, involving very young people whose vocational potentialities have not yet been developed, the courts have allowed assessment of damages based on future, and not presently realized, earning capacity.
>
> "The courts have also allowed juries to assess damages on future earning capacities based in turn upon probable promotions.
>
> "In the case of young people engaged in the study for occupations or professions requiring a great deal of preliminary or formal training the courts have also permitted the assessment of damages based on future earning potential after the training period would have been completed. And even in the case of singers, and presumably, therefore, in the case of other musical artists, some courts in other jurisdictions have had occasion to permit juries to assess damages based on future earning potential although at the time of the accident the would-be artist's career is inchoate.
>
> "On this analysis the jury in this case was very properly permitted to assess the damages with respect to plaintiff's inchoate operatic career."

(*Grayson v Irvmar*, 7 AD2d 436, 439 [1st Dept 1959]; *see Man-Kit Lei v City Univ. of N.Y.*, 33 AD3d at 469 [evidence concerning future lost wages in a particular occupation or profession must "focus on claimant's interests or aptitudes"]; *Zainovich v American Airlines*, 26 AD2d 155 [1st Dept 1966]).

Indeed, PJI 2:291 sets forth the appropriate jury charge where a plaintiff adduces sufficient evidence to demonstrate that he or she was prevented by an injury from pursuing an occupation or profession. That instruction directs the jury to consider whether the plaintiff offered evidence that he or she was pursuing a course of training in a particular occupation and whether the claimed injuries interfered with or prevented the plaintiff from pursuing that course and attaining the earning capacity of that occupation. It further directs the jury to consider the

plaintiff's talent, training received, opportunities and recognition already obtained, future opportunities that the plaintiff is likely to have, and the likelihood, risks, and contingencies in achieving success in that occupation.

The court concludes that the plaintiff's testimony, the testimony of his brother, and the emails exchanged between Best Buy and the plaintiff sufficiently established that the plaintiff had the talent, aptitude, skills, and training to pursue a career as a graphic designer and internet web site designer, that he already had established a track record in this regard, and that he had a burgeoning client list of recognized commercial entities. This testimony was not only legally sufficient, but any contrary evidence noted by Live Nation did not so preponderate in Live Nation's favor that the verdict recognizing the plaintiff's right to recover future lost wages as a designer could not have been reached on any fair interpretation of the evidence.

Nonetheless, the award of $5,154,038 over 43 years, or almost $120,000 per year until the likely date of the plaintiff's death, was both excessive and contrary to the weight of the evidence. There was no testimony that the plaintiff intended to work until his death had he not been injured. Rather, the only matter that the jury considered in this regard was the court's instruction informing it that, based on the PJI's actuarial tables, the plaintiff had a likely work-life expectancy of 24 years. Moreover, although the plaintiff's economist based the relevant calculation of total future lost income on an anticipated annual income of approximately $89,000, discounted to net present value, the sum appears to be slightly inflated given the fact that the plaintiff was only beginning his career and could not reasonably expect his income in the early portion of his career to reach that amount. Hence, the court concludes that an award for future lost income in the sum of $1,920,000 over 24 years, or $80,000 per year, without discounting to net present value, constitutes reasonable compensation for someone in the plaintiff's position.

C. FUTURE MEDICAL AND PERSONAL CARE EXPENSES

The court also concludes that there was legally sufficient evidence supporting the plaintiff's claims for future medical expenses, including the cost of future surgeries, physical therapy, rehabilitation therapy, occupational therapy, neurology consultation and treatment, psychiatric treatment or psychotherapy, medical and pharmacological management services, and full-time, 24-hour-per-day personal care services. The jury's determination to make awards for those future costs was not contrary to the weight of the evidence, and the amounts awarded were supported by the testimony and documentation admitted into evidence at trial.

D. INTEREST OF JUSTICE

A motion pursuant to CPLR 4404(a) to set aside the verdict in the interest of justice "encompasses errors in the trial court's rulings on the admissibility of evidence, mistakes in the charge, misconduct, newly discovered evidence, and surprise" (*Russo v Levat*, 143 AD3d 966, 968, 41 N.Y.S.3d 230 [2d Dept 2016]; *Van Dusen v McMaster*, 28 AD3d 1057, 1058 [4th Dept 2006]).

1. Evidentiary and Trial Rulings

To the extent that the instant motion is premised on the ground that this court made errors in its evidentiary rulings and jury charges, the interest of justice does not warrant setting aside the verdict here. Contrary to Live Nation's contention, the court discerns no errors in its ruling on the admissibility or admission of evidence. Nor does it discern any error in permitting the plaintiff to adduce the opinion testimony of his expert physician, Dr. Theodore Schwartz, in connection with the plaintiff's likely need for future surgery, or of his expert economist, Edmond Provder, in connection with the likely opportunities that the plaintiff would have had for earning a living as an internet web marketing designer had he not been injured. In addition, the court concludes that it did not err in permitting the plaintiff to adduce expert and lay testimony that he will not be able to work in the future due to his injuries and deteriorating cognitive and physical

conditions (*see generally Saginor v. OSIB-BCRE 50th St. Holdings, LLC*, 2019 NY Misc LEXIS 6190, 2019 NY Slip Op 33425[U)] [Sup Ct, NY County, Nov 18, 2019] [Kelley, J.]).

2. Comments By the Plaintiff's Counsel

In the first instance, the court notes that, in connection with almost all of the contentions that Live Nation makes on this motion concerning the impropriety of plaintiff's counsel's comments, it failed timely to object during the summation, when curative instructions could have been given to the jury, if warranted. Only where an attorney engages in "a seemingly continual and deliberate effort to divert the jurors' and the court's attention from the issues to be determined" will the failure to object be excused in connection with a CPLR 4404(a) motion in the interest of justice (*Stewart v Olean Med. Group, P.C.,* 17 AD3d 1094, 1097 [4th Dept 2005]). That situation clearly does not obtain here.

In any event, the court rejects Live Nation's contention that comments made by the plaintiff's counsel during the trial or the manner in which the plaintiff's legal team employed demonstrative aids during opening and summation were prejudicial or deprived Live Nation of a fair trial. The court sustained several objections to the plaintiff's presentations, and limited him to employing power point and other visual aids to images that described the evidence or repeated general themes of the case that the plaintiff wished to impart to the jury concerning how the parties would, or did, interpret the evidence in the course of the trial. The challenged statements made by the plaintiff's counsel, when considered individually or cumulatively, constituted fair comment on the evidence (*see Kleiber v Fichtel*, 172 AD3d 1048, 1051 [2d Dept 2019]; *Huang v. New York City Tr. Auth*., 49 A.D3d 308, 310 [1st Dept 2008]). The "selective presentation by the defendant[ ] of isolated instances of rhetorical hyperbole during counsel's lengthy summation does not properly reflect the over-all tenor of the summation, when viewed in perspective" (*Schechtman v Lappin*, 161 AD2d 118, 121 [1st Dept 1990]).

3. "Anchoring"

In addition, the court declines Live Nation's request to set aside the verdict on the ground that the plaintiff's counsel requested the jury to award damages so in excess of what would be reasonable compensation that it improperly swayed the jury to award an excessive amount even had it awarded less than the sum requested. The appropriateness of prohibiting a plaintiff's attempt at "anchoring"---that is, requesting a jury to award an amount so excessive that it constitutes an improper "anchor" or starting point from which even a downward deviation may be excessive ---is a policy issue that must be left to the legislature or to an appellate court. Jurors are presumed to be able to evaluate damages awards in a fair and impartial manner, and must be given the opportunity, at least in the first instance, to make an award that they believe to represent fair and reasonable compensation. It is unremarkable that a plaintiff's attorney might ask a jury to award more than might be anticipated or that a defendant's attorney might ask a jury to award less than might be anticipated. As this court made clear in its rulings from the bench, if it were to set a cap on the amount that counsel might ask a jury to award, it would essentially be usurping the jury's function, and pre-determining, as a matter of law, what would constitute reasonable compensation.

Live Nation has cited, and research has revealed, no New York precedent that applies this concept to a jury trial in a personal injury action. Rather, the established jurisprudence in New York recognizes that an advocate has extensive leeway in requesting that a jury award a specific dollar amount as damages for noneconomic loss. In the seminal case of *Braun v Ahmed* (127 AD2d 418, 422 [2d Dept 1987] [citations and internal quotation marks omitted]), the court concluded that, even though the CPLR at the time prohibited a plaintiff in a medical malpractice action from demanding a specific dollar amount in a complaint's ad damnum clause, an attorney could request during summation that the jury award a specific dollar amount. As the Court explained:

> "Regarding the role of counsel, as a general principle there exists a right of fair comment on the evidence, described as follows: It is the privilege of counsel in addressing a jury to comment upon every pertinent matter of fact bearing upon the questions which the jury have to decide. This privilege it is most important to preserve and it ought not to be narrowed by any close construction, but should be interpreted in the largest sense . . .The jury system would fail much more frequently than it now does if freedom of advocacy should be unduly hampered and counsel should be prevented from exercising within the four corners of the evidence the widest latitude by way of comment, denunciation or appeal in advocating his cause. Although broad in scope, counsel's liberty of discussion must remain within the issues and the evidence.
>
> "Distinct from the right of fair comment is counsel's right to place the contentions of the parties, as stated in the pleadings, before the jury. The [statements], admissions and allegations in pleadings are always in evidence for all the purposes of the trial of the action. They are made for the purpose of the trial, and are before the court and jury, and may be used for any legitimate purpose Counsel's right to use the pleadings before the jury is limited by the adversary's right to have the jury instructed that the complaint is not evidence and that the jurors should reach their determination only from the evidence
>
> "Narrowing our focus to counsel's right to argue a specific monetary amount, New York has long permitted mention of the figure stated in the ad damnum clause However, a recent determination permits mention of a lesser lump-sum figure, apparently based upon the evidence, as it clearly does not come from the pleadings. Of course, counsel still may not ask for damages in an amount exceeding the sum demanded in the ad damnum clause."

After reviewing the jurisprudence in other states, the Court in *Braun* determined to adopt the majority rule that attorneys could specifically request a jury for a specific dollar amount almost without limitation, except that the attorney could not suggest that the jury consider how much the plaintiff should be awarded on a "per diem" or "per time unit" basis (*see Lee v Bank of N.Y.*, 144 AD2d 543, 543 [2d Dept 1988]; *De Cicco v Methodist Hosp.*, 74 AD2d 593, 594 [2d Dept 1980]). None of the other states following the majority rule limited the size of the award that could be requested.

The *Braun* Court criticized those states that did not permit an attorney to suggest a dollar amount, particularly where such a restrictive approach was based on the notion that awards for pain and suffering were "not capable of proof in dollars and cents" (*Braun v Ahmed*, 127 AD2d at 424, quoting *Botta v Bruner*, 26 NJ 82, 95 [1958]). As the Court explained:

> "The inherent weakness in this analysis is that it posits the jurors' duty as having to do the impossible, i.e., from evidence which is "not capable of proof in dollars and cents" they must fix dollars and cents damages, and, under the New Jersey rule, must do so without guidance.
>
> "On the other hand, the following arguments are offered in support of guidance: 'Authorities approving such arguments give numerous reasons: (1) that it is necessary that the jury be guided by some reasonable and practical considerations; (2) that a trier of the facts should not be required to determine the matter in the abstract, and relegated to a blind guess; (3) that the very absence of a yardstick makes the contention that counsel's suggestions of amounts mislead the jury a questionable one; (4) the argument that the evidence fails to provide a foundation for per diem suggestion is unconvincing, because the jury must, by that or some other reasoning process, estimate and allow an amount appropriately tailored to the particular evidence in that case as to the pain and suffering or other such element of damages; (5) that a suggestion by counsel that the evidence as to pain and suffering justifies allowance of a certain amount, in total or by per diem figures, does no more than present one method of reasoning which the trier of the facts may employ to aid him in making a reasonable and sane estimate; (6) that such per diem arguments are not evidence, and are used only as illustration and suggestion; (7) that the claimed danger of such suggestion being mistaken for evidence is an exaggeration, and such danger, if present, can be dispelled by the court's charges; and (8) that when counsel for one side has made such argument the opposing counsel is equally free to suggest his own amounts as inferred by him from the evidence relating to the condition for which the damages are sought'"

(*Braun v Ahmed*, 127 AD2d at 424-425, quoting *Franco v Fujimoto*, 47 Haw. 408 416-417 [1964]).

Since the time that *Braun* was decided, the CPLR was amended to prohibit the assertion of a specific dollar amount in the ad damnum clause of complaints not only in medical malpractice actions, but in all personal injury actions (*see* CPLR 3017[c]). Hence, the *Braun* decision, including its description of the broad and inclusive right of an attorney to request whatever dollar amount he or she believes is justified, remains instructive. In fact, the *Braun* decision was codified at CPLR 4016(b) (*see* L 2003, ch 694, §), which provides, in relevant part, that "[i]n any action to recover damages for personal injuries or wrongful death, the attorney for a party shall be permitted to make reference, during closing statement, to a specific dollar amount *that the attorney believes to be appropriate compensation for any element of damage that is sought to be recovered in the action"* (emphasis added).

As long as the attorney and the court make clear to the jury, as they did here, that the determination of the amount of a personal injury award remains within its province, and that the attorney's statement of the value of the claim is not evidence, it is proper to permit the attorney to request the jury to award any specific dollar amount (*see* CPLR 4016[b][1], [2], [3]; *Bechard v Eisinger*, 105 AD2d 939, 941 [3d Dept 1984]). The court recognizes that the amount requested by a plaintiff's attorney may vary greatly from what the jury considers reasonable compensation, a sum which, in turn, might be vary greatly from what the court deems to be reasonable (*see McSherry v City of New York*, 77 AD2d 540, 541 [1st Dept 1980] [jury awarded only one third of the amount suggested by the plaintiff's attorney; on post-verdict motion, the court set aside jury verdict as "grossly inadequate"]). Consequently, the court discerns no legal basis for setting aside the verdict on the ground that the plaintiff's attorney, as a matter of law, requested the jury to award an amount that might have turned out to be excessive under the circumstances.

This court is wary of creating a new trial rule of law based solely on theoretical arguments, particularly where the parties concede that the court retains authority to reduce a verdict in each particular action, based on the specific facts of the case; indeed, the court is exercising its authority in this very manner in this action, thus obviating the need to create a new rule of law in any event. Further, were the court to adopt Live Nation's argument, and set a damages threshold as a matter of law, it would virtually guarantee that every case would be appealed to determine whether the trial judge properly exercised his or her discretion. Under those circumstances, the Appellate Division would not be able simply to reinstate a verdict if it determined to reverse or modify the award, but the action would have to be retried, thus straining the limits of judicial economy. Moreover, each request to fix a cap would, by virtue of the language of CPLR 4016(b), necessarily involve a judicial inquiry into what the plaintiff's counsel believes to be reasonable compensation in every case, and a determination as to whether the attorney had a reasoned, good faith belief that the valuation of the particular injury was evolving or static. This is not an inquiry envisioned by our historical jury practice.

V. CONCLUSION

The defendant's remaining contentions as to the propriety of the verdict are without merit.

Where, as here, a court determines that certain jury awards in a personal injury action are excessive, the proper procedure is to set aside those portions of the verdict and direct a new trial thereon, unless the plaintiff stipulates to the reduced amount (*see* CPLR 4404[a]; *Reilly v St. Charles Hosp. & Rehabilitation Ctr*., 143 AD3d 692, 694 [2d Dept 2016]; *Walsh v Brown*, 72 AD3d 806, 807-808 [2d Dept 2010]). The court will thus provide the plaintiff with an opportunity to so stipulate; should he agree to the reduced awards, the court will give the parties a reasonable opportunity to further stipulate as to the appropriate collateral source reductions in the total award, if any, and to agree upon the form of a structured judgment pursuant to CPLR article 50-B, inasmuch as the award for future damages is in excess of $250,000 (*see* CPLR 5041).

Any requested relief not expressly addressed in this order is denied.

Accordingly, it is

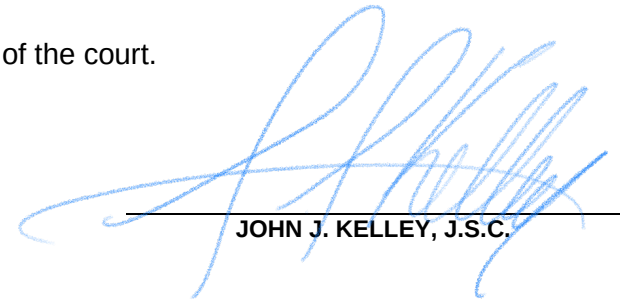
ORDERED that the motion of the defendant Live Nation Worldwide, Inc., to set aside the verdict and for a new trial is granted only to the extent that the awards for future pain and suffering and future lost wages are set aside, and a new trial on those issues is directed, unless the plaintiff files with the court, within 45 days of the entry of this order, a stipulation agreeing to the reduction of the award for future pain and suffering from the sum of $75,250,000 over 43 years to the sum of $30,100,000 over 43 years, and the reduction of the award for future lost wages from the sum of $5,154,038 over 43 years to the sum of $1,920,000 over 24 years, so that the total award is reduced from $102,114,768 to $53,705,730; and it is further,

ORDERED that, should the plaintiff so stipulate to the above reductions, the parties shall confer and, within 45 days of the filing of the stipulation with the court, should they be so

advised, submit a stipulation as to any collateral source set-offs from the award and the form of the structured judgment to be entered, which judgment shall bear interest on the principal award at the statutory rate of 9% per annum from June 30, 2016 to the date of entry of the judgment, provided that the stipulation as to the form of the judgment by the defendant Live Nation Worldwide, Inc., shall not be deemed to constitute the waiver of any right of appeal of the substance or the amounts set forth in the judgment or the right to seek reconsideration of this order; and it is further,

ORDERED that, if the parties do not stipulate to the amount of any collateral source set-offs as set forth herein, the court shall schedule a collateral source hearing pursuant to CPLR 4545.

This constitutes the Decision and Order of the court.



7/24/2020
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[ ] **DENIED**	[X]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**