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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2717-21

MATTHEW J. PLATKIN,
Attorney General of the State
of New Jersey, and CARI FAIS,[1]
Acting Director of the New Jersey
Division of Consumer Affairs,

Plaintiffs-Respondents,

v.

22MODS4ALL INC.,

Defendant-Appellant.

Submitted September 13, 2023 – Decided October 12, 2023

Before Judges Haas and Gooden Brown.

On appeal from the Superior Court of New Jersey, Chancery Division, Essex County, Docket No. C-000244-19.

Kristen Renzulli, Christopher Renzulli (Renzulli Law Firm, LLP) of the New York bar, admitted pro hac vice, and Timothy R. Rudd (Scott L. Braum & Associates,

[1] In accordance with R. 4:34-4, the caption has been revised to reflect the current Acting Director of the Division of Consumer Affairs.

LTD) of the Ohio bar, admitted pro hac vice, Scott L. Braum (Scott L. Braum & Associates, LTD) of the Ohio bar, admitted pro hac vice, attorneys for appellant (Scott L. Braum, Timothy R. Rudd, Kristen Renzulli, and Christopher Renzulli, on the briefs).

Matthew J. Platkin, Attorney General, attorney for respondents (Jason W. Rockwell and Sookie Bae-Park, Assistant Attorneys General, of counsel; Jeffrey Koziar, Deputy Attorney General, on the brief).

PER CURIAM

Defendant 22Mods4All, Inc. appeals from a March 28, 2022 Chancery Division order entering summary judgment and attorneys' fee orders as final judgments in favor of plaintiffs, the Attorney General and the Acting Director of the Division of Consumer Affairs (Division). We affirm.

By way of background, on December 19, 2019, plaintiffs filed a verified complaint and order to show cause (OTSC) against defendant alleging, among other things, violations of the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -227, based on defendant's sale in New Jersey of large capacity ammunition magazines (LCMs) exceeding the capacity permitted by N.J.S.A. 2C:39-1(y), which was then defined as "a box, drum, tube or other container which is capable of holding more than 10 rounds of ammunition to be fed continuously and

directly therefrom into a semi-automatic firearm." N.J.S.A. 2C:39-1(y).[2] Under N.J.S.A. 2C:39-3(j), with limited exceptions, "[a]ny person who knowingly has in his possession a [LCM] is guilty of a crime of the fourth degree," and, under N.J.S.A. 2C:39-9(h), "[a]ny person who . . . transports, ships, sells or disposes of a [LCM]" for other than authorized military or law enforcement purposes "is guilty of a crime of the fourth degree."

The complaint alleged that defendant, a Florida corporation that sells firearms, parts, and accessories, "engaged in the online advertisement, offer for sale, and . . . sale of LCMs to New Jersey buyers on multiple occasions, without informing buyers that [LCMs were] illegal in New Jersey." Specifically, according to the complaint, on August 2 and November 26, 2018, undercover detectives with the New Jersey Division of Criminal Justice purchased online through defendant's website a total of nine LCMs capable of holding thirty .223/5.56 rounds. Each item cost $11.99 and was shipped to an undercover address in New Jersey.

On January 7, 2019, the Attorney General issued a cease-and-desist letter, informing defendant about the undercover purchases, notifying defendant that

[2] In 2018, the Legislature amended N.J.S.A. 2C:39-1(y) to reduce the definition of LCMs from holding more than fifteen rounds to more than ten rounds. L. 2018, c. 39, § 1 (codified at N.J.S.A. 2C:39-1).

its sales of LCMs violated New Jersey law, and demanding that it stop advertising, selling, and shipping LCMs to New Jersey residents. To determine the scope of defendant's unlawful practices, the letter also demanded a list, detailing defendant's New Jersey sales of LCMs since January 1, 2014, and warned that failure to comply within fifteen days would result in legal action. Although defendant ceased selling LCMs in New Jersey, it failed to comply with the document demand. In a June 13, 2019, telephone conversation with Laura Wedgle, defendant's Vice-President, Wedgle represented that defendant did not have access to its sales records because defendant's e-commerce platform provider, Shopify, Inc., had terminated defendant's services. Wedgle agreed to sign an acknowledgement letter to that effect and to assist the Division in securing the records from Shopify but failed to do either.

After repeated follow-up telephone calls to defendant proved futile, on July 26, 2019, the Division issued a subpoena requesting, among other things, LCM documents related to defendant's advertising, sales, and disclosures to New Jersey residents as well as defendant's sales record retention policies and Shopify services termination documents. On August 29, 2019, the Division issued a deficiency letter due to defendant's failure to comply with the subpoena. After defendant failed to respond to the subpoena or the deficiency letter,

plaintiffs filed the complaint seeking "complete compliance with the [s]ubpoena" and "monetary relief" as authorized under the CFA.

In the complaint, plaintiffs alleged defendant "engaged in unconscionable commercial practices and acts of deception" in violation of N.J.S.A. 56:8-2 by "delivering a total of nine [LCMs] to a New Jersey addressee, when the possession of such items in New Jersey is a criminal offense." Further, in accordance with N.J.S.A. 56:8-3, authorizing the Attorney General to conduct investigations to ascertain whether a person is engaging in CFA violations, including issuing subpoenas under N.J.S.A. 56:8-4, plaintiffs sought a court order pursuant to N.J.S.A. 56:8-6 to obtain compliance with the subpoena.

On February 25, 2020, Judge James R. Paganelli entered a consent order requiring defendant to, among other things, respond to the subpoena. The order also reserved plaintiffs' right to seek recovery of costs and attorneys' fees relating to defendant's noncompliance. Based on defendant's response to the subpoena, plaintiffs identified additional LCM sales in New Jersey, including a July 17, 2018, online sale of eight similar LCMs to an addressee in Hackensack.

Plaintiffs subsequently moved for summary judgment, requesting: (1) a finding that defendant's acts constituted multiple violations of the CFA and its implementing regulations; (2) issuance of permanent injunctive relief against

future violations; (3) an award of civil penalties under the CFA; and (4) reimbursement of attorneys' fees and investigative costs. In support, plaintiffs submitted a statement of material facts delineating the facts as outlined above. In its responding statement of material facts, defendant did not dispute plaintiffs' factual recitations or that its sales activities constituted CFA violations. Instead, defendant urged the court to impose nominal fees and penalties. In support, defendant asserted it was "a small, family-owned company" that "employed approximately ten people," its profits on the three New Jersey sales totaled $83.13, it was unaware of New Jersey's restrictions until receipt of the cease-and-desist letter, it changed its sales practices immediately thereafter, and it was non-compliant with the subpoena because it did not believe it was subject to New Jersey's jurisdiction.

In a May 24, 2021, order and accompanying written decision, Judge Paganelli granted summary judgment to plaintiffs, finding defendant engaged in unlawful practices in violation of N.J.S.A. 56:8-2 and N.J.A.C. 13:45A-4.1 in connection with its "July 7, August 2, and November 26, 2018, transactions."[3] N.J.S.A. 56:8-2 defined "an unlawful practice" as:

[3] Although not constituting a CFA violation per se, the judge also found defendant "failed to obey the subpoena" and permanently enjoined defendant from future violations.

> The act, use or employment by any person of any commercial practice that is unconscionable or abusive, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise . . . or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby.[4]

Under N.J.A.C. 13:45A-4.1(b),[5]

> It shall be an unconscionable practice for any person, including any business entity, to advertise or market to, or otherwise solicit the sale from, a resident of this State, a consumer product that is illegal to possess or use in this State . . . where the possession or use . . . would subject the person possessing or using the product to criminal prosecution, without clearly and conspicuously disclosing that the product is illegal to possess or use in this State . . . .

The judge determined the transactions constituted violations of the CFA by exposing "New Jersey consumers to criminal liability" and "fail[ing] to disclose the [criminal] exposure." The judge explained that "the exposure to

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[4] N.J.S.A. 56:8-2 was amended in August 2022. L. 2022, c. 96, § 1. The amendment is not pertinent to this appeal.

[5] N.J.S.A. 56:8-4(a) authorized the Attorney General to promulgate rules and regulations having the force of law to accomplish the CFA's objectives.

criminal liability and the failure to disclose [were] separate and distinct [violations]." The judge reasoned that separate penalties were warranted "since the consumer [was] exposed to criminal prosecution for the possession of each LCM" as well as to "effectuate[] the legislative intent." As such, the judge found a total of twenty violations, "seventeen . . . for exposure and three . . . for failure to disclose."

According to the judge, the violations consisted of:

> July 17, 2018 — eight offenses for exposure to criminal liability and one separate offense for failure to disclose;
> August 2, 2018 — six offenses for exposure to criminal liability and one separate offense for failure to disclose[;] and
> November 26, 2018 —three offenses for exposure to criminal liability and one separate offense for failure to disclose.

The judge imposed a civil penalty totaling $150,000 pursuant to N.J.S.A. 56:8-13, which authorizes the imposition of "a penalty of not more than $10,000 for the first offense and not more than $20,000 for the second and each subsequent offense." The judge imposed the individual penalties as follows:

> [F]or the exposure offenses this court assesses a one hundred and fifteen thousand dollar ($115,000) penalty (July 8 - $45,000 ($10,000 for the first LCM plus $35,000 ($5,000 each for the 7 others)[])]; (August 2 - $40,000 ($15,000 for the first LCM plus $25,000 ($5,000 each for the 5 others)[])]; and (November 3 -

> $[30,000] ($20,000 for the first LCM plus $10,000 ($5,000 each for the 2 others)[))].
>
> . . . [F]or the disclosure offenses this court assesses a thirty-five thousand dollar ($35,000.00) penalty (July 8 - $7,500.00.00; August 2 - $10,000.00; and November 26 - $12,500.00).

In determining the appropriate penalty, the judge relied on guidance provided by our Supreme Court in Kimmelman v. Henkels & McCoy, Inc., which "determine[d] the scope and applicability of the civil remedies set forth in N.J.S.A. 56:9-10c for violations of the New Jersey Antitrust Act . . . , N.J.S.A. 56:9-1 to -19." 108 N.J. 123, 126 (1987). Like the CFA, the Antitrust Act "does not mandate that any particular penalty be imposed for a given violation. Rather, the statute merely establishes the maximum penalty permissible and allows a court considerable discretion in determining the penalty appropriate in each case." Id. at 136. In addition to any other factors deemed appropriate, the Kimmelman Court delineated the following factors for courts to consider in setting civil penalties: "(1) [t]he good or bad faith of defendant"; "(2) [d]efendant's ability to pay"; "(3) [a]mount of profits obtained from illegal activity"; "(4) [i]njury to the public"; "(5) [d]uration of the conspiracy"; "(6) [e]xistence of criminal or treble damages actions"; and "(7) [p]ast violations." Id. at 137-39 (emphasis omitted).

Judge Paganelli determined defendant's "bad faith" weighed "in favor of a substantial penalty." The judge noted the fact that defendant "ceased any further sales into New Jersey and provided the appropriate warning on its website after learning that their conduct was [a CFA violation]" constituted a mitigating factor. Nonetheless, according to the judge, defendant's "conduct was unconscionable," implying a "lack of good faith, honesty in fact and observance of fair dealing."

The judge continued:

> It is incumbent upon [defendant], doing website business and sales to New Jersey, to be cognizant of the State's laws. It is not enough to complain that its standard magazines "are legal for purchase almost everywhere in America".
>
> Moreover, any reliance on change in law, the 2018 amendment, has no meaningful relevance since that amendment merely reduced the LCM size from 15 rounds to 10 rounds and all LCMs, in the matter at bar, provided 30 rounds.

Next, the judge stated defendant's ability to pay could not be "meaningfully weigh[ed]" because defendant's "income and financial resources" were never provided. Further, the judge's consideration of profits obtained from the illegal activity "weigh[ed] toward a lesser penalty" because the parties

agreed that defendant's profits from the three transactions amounted to a nominal $83.13.

However, the judge determined that "injury to the public" weighed "in favor of a substantial penalty." In support, the judge rejected defendant's claim that there had been "no actual harm," explaining:

> [Defendant's] conduct directly exposed New Jersey consumers to criminal liability. Moreover, the failure to disclose the liability prevented the New Jersey consumer from any meaningful reflection on the transaction. Therefore, there was harm.
>
> Moreover, by dismissing, as "amourphous [sic] and unsubstantiated" and characterizing the State's cause of action as a "bludgeon for political means", [defendant] trivializes the actual import of the New Jersey legislation.
>
> The State of New Jersey has, undoubtedly, a significant, substantial and important interest in protecting its citizens' safety. This interest clearly includes reducing the lethality of active shooter and mass shooting incidents. Ass'n of N.J. Rifle & Pistol Clubs v. AG N.J., 910 F.3D 106, 119 (3d. Cir. 2018).
>
> Therefore, [defendant]'s shipment to New Jersey consumers of the illegal magazines, not only harms those consumers but also harms the public through violation of its legislation and jeopardizes the public safety.

As to the "[d]uration of the conspiracy," the judge dismissed as "misplaced" defendant's "attempt to shift the blame to the State for not advising

it earlier of its violative behavior," and determined that "the offensive period was extensive and weigh[ed] in favor of a more substantial penalty." Additionally, the judge rejected defendant's contention that it should receive a "reduction in penalty" to offset the anticipated award of attorneys' fees and costs, reasoning that "the legislation clearly envision[ed] a penalty, in addition[] to the Attorney General's recovery of fees[] and costs."

Turning to "[p]ast violations," the judge acknowledged

> there [were] no past penalties followed by violative behavior that would warrant the imposition of more substantial penalties.
>
> However, [defendant]'s behavior did not just occur on one occasion. Instead, its conduct spanned several transactions and is indicative, therefore, that there were past violations.
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> While this factor is some[what] related to duration, this court nonetheless, determines that this factor weighs in favor of a more substantial penalty.

Finally, regarding "[o]ther [c]onsiderations," the judge declined defendant's "invitation" to consider in its analysis the possibility that "New Jersey's LCM 'ban will be deemed unconstitutional.'" The judge concluded defendant's CFA violations warranted "a substantial penalty" and granted plaintiffs leave to submit a fee application for attorneys' fees and costs incurred in the prosecution as authorized by N.J.S.A. 56:8-11 and N.J.S.A. 56:8-19.

Pursuant to N.J.S.A. 56:8-11, "the Attorney General shall be entitled to recover costs for the use of this State" in "any action or proceeding brought under the provisions of [the CFA]." Under N.J.S.A. 56:8-19, "the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit." See Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21 (2004) ("A prevailing plaintiff in an action under the [CFA] is entitled to reasonable attorneys' fees, filing fees, and costs." (citing N.J.S.A. 56:8-19)); Delta Funding Corp. v. Harris, 189 N.J. 28, 41 (2006) (noting that "[a]n award of attorney's fees and costs to prevailing plaintiffs is mandatory" in CFA actions).

Thereafter, plaintiffs submitted a fee application supported by a certification of services, listing the work of four attorneys, their hourly rates, their years of experience, and their time expended on the case over a period spanning January 1, 2020, to May 12, 2021. After applying the governing principles, the judge entered an order on September 1, 2021, awarding plaintiffs attorneys' fees totaling $26,996.40. In an August 31, 2021, written opinion supporting the award, the judge calculated the lodestar, addressed defendant's objections, and made certain reductions to the requested amount. See Furst, 182 N.J. at 21 ("The starting point in awarding attorneys' fees is the determination of the 'lodestar,' which equals the 'number of hours reasonably expended

multiplied by a reasonable hourly rate.'" (quoting Rendine v. Pantzer, 141 N.J. 292, 334-35 (1995))); R. 4:42-9(b) (stating that application for counsel fees shall be supported by affidavit addressing pertinent factors, including those in RPC 1.5(a)).[6]

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[6] RPC 1.5(a) catalogues "[t]he factors to be considered in determining the reasonableness of a fee," including:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
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> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
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> (4) the amount involved and the results obtained;
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> (5) the time limitations imposed by the client or by the circumstances;
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> (6) the nature and length of the professional relationship with the client;
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> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
>
> (8) whether the fee is fixed or contingent.

Initially, the judge accepted the hourly rates as reasonable and uncontested by defendant. However, as to the hours expended, the judge reduced the amount requested where it was unsupported by proper descriptions or necessary information. The judge noted that although his "review of the billing records" did not reveal any "abusive" "in-house collaboration," plaintiffs had already "unilaterally reduced its fee request" to omit "supervis[ory] and duplicative work" and "th[e] court has further winnowed out unsupported, and, therefore unreasonable fee requests."

In addressing defendant's arguments, the judge rejected defendant's contention that plaintiffs' efforts were "minimal." The judge also rejected defendant's "proposition that attorneys' fees must be limited to 'litigation-specific costs' or that courts are constrained from awarding substantial sums." The judge explained:

> To the extent attorney fees were incurred or costed for the attorneys' work necessary to carry out its function under the CFA, this court determines that those costs are recoverable. This court would not extend recovery to non-attorney work or . . . "administrative and duplicative tasks", but this court does not find that that is what [p]laintiff[s have] attempted to do here.
>
> Furthermore, [d]efendant's position seemingly ignores its: (a) failure to produce any documents or information[] demanded by [p]laintiff[s] in January 7,

> 2019; (b) failure to sign the June 2019 acknowledgment letter; (c) failure to respond to multiple phone calls . . . ; (d) failure to respond to the July 26, 2019 subpoena; and [(e)] failure to respond to the August 29, 2019 deficiency letter.
>
> In fact, [d]efendant seems to take no responsibility for its actions in ignoring [p]laintiff[s] and inspiring the resultant lawsuit.

Thus, the judge concluded plaintiffs were "entitled to attorneys' fees for the attorney work conducted pre-litigation."

In dismissing defendant's assertion that plaintiffs "should be refused attorneys' fees for voluntary mediation," the judge pointed out that "[d]efendant fail[ed] to quantify or cull out the objectionable charges attributable to the mediation session." Because plaintiffs did not specify "hours spent on mediation," the judge found "no basis" to "judicially impose such . . . [an] exclusion." Finally, the judge denied defendant's request for a plenary hearing, finding "no necessity" for one. See Furst, 182 N.J. at 24 (discouraging the use of a plenary hearing to adjudicate an attorney-fee application and holding "that a plenary hearing should be conducted only when the certifications of counsel raise material factual disputes that can be resolved solely by the taking of testimony").

On March 28, 2022, Judge Paganelli entered a consent order stipulating that the May 24, 2021, summary judgment order and the September 1, 2021, attorneys' fee award were final judgments and orders. In this ensuing appeal, defendant does not dispute that it violated the CFA. Instead, defendant argues that the penalty for the CFA violations and the attorneys' fee award were "unreasonable," "excessive," "not justified," "unsupported by the law," and constituted an abuse of judicial discretion. In that regard, defendant renews the arguments rejected by the judge, asserting the judge erred in his calculation of the number of CFA violations and the amount of the penalty given the fact that there were only three transactions, none of which "caused injury to the public"; defendant "is a small, family-owned company"; defendant's sales yielded "less than a $90 profit" and resulted in the imposition of other sanctions; defendant "was selling standard AR-15 magazines that were legal for purchase almost everywhere in America"; defendant "ceased further sales to New Jersey" as soon as it learned of the ban; and defendant had no "prior violations." Additionally, defendant challenges the judge's application of the factors governing attorney fee awards and asserts the judge should not have included "voluntary mediation," pre-litigation "investigative costs," or pre-suit enforcement fees "pre-dating the preparation of the complaint and the actual prosecution of

[p]laintiffs' claim." Also, defendant asserts the judge should have conducted a plenary hearing before awarding attorneys' fees.

A trial court has "considerable discretion in determining the penalty appropriate in each case." Kimmelman, 108 N.J. at 136. In considering the Kimmelman factors, "[t]he [c]ourt should assess how egregious defendant's conduct was and whether defendant could have reasonably believed his conduct was legal. In addition, the court should consider defendant's conduct when it learned that its prior actions might be illegal." Id. at 137 (footnote omitted). "The greater a defendant's income and financial resources, the larger a penalty will have to be in order to deter unlawful behavior" and "[t]he greater the profits a defendant is likely to obtain from illegal conduct, the greater the penalty must be if penalties are to be a deterrent." Id. at 137-38.

"While injury to the public may sometimes be equivalent to the profits obtained by the defendant through its illegal conduct, the court should be free to consider less tangible forms of harm." Id. at 138 (citation omitted) (citing United States v. Papercraft Corp., 540 F.2d 131, 141 (3rd Cir. 1976)). If "penalties mount the longer a conspiracy remains in effect, a violator will have a greater incentive to end it." Id. at 139. Although "[a] large civil penalty may be unduly punitive if other sanctions have been imposed for the same violation,"

if "past penalties have been insufficient to deter . . . illegal activity, this factor weighs strongly in favor of greater penalties." Ibid. "The weight to be given to each . . . factor[] by a trial court . . . will depend on the facts of each case." Ibid.

Our review of the amount of a statutorily authorized civil penalty imposed by a trial court is limited to determining whether "the court abused its discretion." Id. at 136. A trial court abuses its discretion "when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (quoting Achacoso-Sanchez v. I.N.S., 779 F.2d 1260, 1265 (7th Cir. 1985)). "When examining a trial court's exercise of discretionary authority, we reverse only when the exercise of discretion was 'manifestly unjust' under the circumstances." Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 174 (App. Div. 2011) (quoting Union Cnty. Improvement Auth. v. Artaki, LLC, 392 N.J. Super. 141, 149 (App. Div. 2007)).

Likewise, trial courts are vested with broad discretion in resolving attorney-fee applications and we will not disturb either the fee award or "the decision to deny a plenary hearing unless there is a 'clear abuse of discretion.'" Furst, 182 N.J. at 25 (quoting Rendine, 141 N.J. at 317). In Furst, the Court

outlined the factors that must inform the trial court's calculation of the reasonableness of a fee award:

> In setting the lodestar, a trial court first must determine the reasonableness of the rates proposed by prevailing counsel in support of the fee application. In that regard, the court should evaluate the rate of the prevailing attorney in comparison to rates "'for similar services by lawyers of reasonably comparable skill, experience, and reputation'" in the community. Second, a trial court must determine whether the time expended in pursuit of the "interests to be vindicated," the "underlying statutory objectives," and recoverable damages is equivalent to the time "competent counsel reasonably would have expended to achieve a comparable result. . . ." The court must not include excessive and unnecessary hours spent on the case in calculating the lodestar. Whether the hours the prevailing attorney devoted to any part of a case are excessive ultimately requires a consideration of what is reasonable under the circumstances.
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> Third, a trial court should decrease the lodestar if the prevailing party achieved limited success in relation to the relief he had sought. However, there need not be proportionality between the damages recovered and the attorney-fee award itself. Fourth, when the prevailing attorney has entered into a contingent-fee arrangement, a trial court should decide whether that attorney is entitled to a fee enhancement.
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> [Furst, 182 N.J. at 22-23 (alteration in original) (citations omitted) (quoting Rendine, 141 N.J. at 336-37).]

Applying these principles, we reject each of defendant's contentions and conclude that the CFA penalty and attorneys' fee award imposed by the judge did not constitute an abuse of discretion. We affirm substantially for the reasons stated in Judge Paganelli's comprehensive and thoughtful written opinions.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION