Joseph J. Joyce (Bar No. 4857)
Ryan J. Schriever (Bar No. 10816)
J. JOYCE & ASSOCIATES
10813 South River Front Parkway, Suite 460
South Jordan, Utah 84095
Telephone: (801) 302-2255
Facsimile: (801) 302-2266

Michael Y. McCormick (*pro hac vice*)
McCormick Hancock Newton
1900 West Loop South, Suite 700
Houston, TX 77027
Telephone: (713)297-0700
Facsimile: (713)297-0710

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

PROCTER & GAMBLE; THE PROCTER & GAMBLE DISTRIBUTING COMPANY, Plaintiffs, vs. RANDY L. HAUGEN, ET AL., Defendants.	**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR IMMEDIATE INQUIRY INTO POSSIBLE JURY MISCONDUCT** Civil No. 1:95_CV_94_TDS Judge Ted D. Stewart

Defendants Randy L. Haugen, Freedom Associates, Inc., Steven E. Brady, Stephen L. Bybee, Eagle Business Development, Inc., Ted Randal Walker, and Walker International Network (collectively the "Defendants"), by and through counsel, submit

this Memorandum in Support of Defendants' Motion for Immediate Inquiry into Possible Jury Misconduct.

I. INTRODUCTION

As Magistrate Boyce remarked, damages have always been the "spooky ghost" of this case.

> I think you [P&G] have a very heavy, heavy burden from my perspective in going over this with regard to your damage claims. It seems to me in some instances almost an insurmountable claim to be able to allocate causation in this matter. . . .The concern that I have is everybody is running up money on this thing, and you could probably get three ladies from Snowville to say that maybe they didn't buy a bar of soap or something and that is going to be your damage claim.

June 2, 1997 Hearing trans., pp. 20-21 (late Magistrate Judge Ronald N. Boyce). The jurors that deliberated on March 16, 2007 clearly faced the same problem as the Magistrate recognized a decade ago: P&G could not prove a single lost sale at trial. Lacking such evidence, the jury fashioned a damages remedy of its own in the form of attorney fees. Ex. A, Affidavit of Juror Bryan Tuttle, Ex. B, Affidavit of Juror Rosemarie Riedl, Ex. C, Affidavit of Tanya Platt. This remedy involved both the consideration of facts not in evidence (the amount of P&G's attorney fees) and the arrival at an impermissible "quotient verdict." Defendants now ask this court to make an inquiry to determine (1) whether the jury relied on extraneous, prejudicial information in awarding damages, and (2) whether the jury formed and executed an agreement to arrive at a verdict that was not unanimous.[1]

[1]It goes without saying that Defendants will be making other post-trial motions, including a renewed Motion for Judgment as a Matter of Law and a Motion for New Trial, each of which are bolstered by the above-referenced affidavits and the contents of this motion.

III. STATEMENT OF FACTS

This case was tried to a jury from March 6 to March 16, 2007. On March 16, 2007, the jury returned a verdict in favor of P&G for $19,250,000. Doc. 1146. After the verdict was entered, Juror Bryan Tuttle contacted Defendant Randy Haugen to discuss, among other things, the manner in which damages had been calculated. Counsel for Defendants then followed-up with Mr. Tuttle; they also contacted other jurors, seeking corroboration of Mr. Tuttle's statements and additional information. In the course of this inquiry, counsel determined that the jurors had awarded no damages to P&G other than "out-of-pocket" expenses[2], on which there was no true agreement. Ex. A, B, C. These "out-of-pocket" expenses were almost entirely comprised of attorney fees and litigation costs, projected over a twelve-year period. Ex. A, B, C. The jurors (1) were unaware that judges determine the award of attorney fees in a Lanham Act case, (2) did not know that the Lanham Act restricted an award of attorney fees to "exceptional" cases, (3) lacked any testimony or other evidence concerning the manner in which P&G's attorneys were to be compensated (whether by hourly rate, contingency fee, or hybrid agreement), (4) lacked any testimony or other evidence concerning the reasonableness, necessity, or amount of attorney fees, and (5) lacked any testimony or evidence concerning the nature of the prior proceedings, which would be required to determine whether the jury's "twelve-year" award was warranted. *See* 15 U.S.C. § 1117(a) ("The court in exceptional cases may award reasonable attorney fees to the prevailing

[2] According to Juror Bryan Tuttle, "[W]e took all of the categories of damages set forth in the instructions and wrote them on the chalk board. Beside each category, we all agreed to the number zero with the exception of out-of-pocket expenses for which there was disagreement. I said $0." Ex. A.

party."); *United Phosphorus, Ltd. v. Midland Fumigant, Inc*., 205 F.3d 1219, 1232 (10th Cir. 2000) ("discretionary" and "exceptional").

In order to calculate the amount of attorney fees under the jury's formulation of "out-of-pocket" expenses, several of the jurors offered their own opinions concerning hourly rates at which attorneys were commonly compensated. Ex. A, B, C. Some said $300 per hour. Ex. A, B. Others ventured that it was $350 or even $600 per hour. Ex. A, B. Given the duration of the litigation and the number of attorneys at P&G's counsel table, some jurors apparently guessed that P&G had expended tens of millions of dollars in attorney fees. Ex. A, B. Others indicated that, since no evidence of attorney fees had been submitted, none could be awarded. Ex. A ("I had heard no evidence of attorneys' fees so I stuck with zero."). Ultimately, the jurors agreed to add up all their various guesses (including two "zero" verdicts) and divide by the number of jurors. Ex. A, B, C. This agreement constituted an impermissible "quotient verdict," as is more thoroughly discussed in Section V, below.

III. OUT-OF-POCKET EXPENSES

Out-of-pocket expenses, litigation costs and attorney fees are clearly separate awards under the Lanham Act. 15 U.S.C. § 1117(a); *see, e.g*., *Hartco Engg, Inc. v. Wang's Int'l, Inc*., 142 Fed. Appx. 455, 457 (Fed. Cir. 2005) (trial court "awarded $190,000 for attorney fees and $40,547 for out-of-pocket expenses" (award later vacated)). Out-of-pocket expenses are a measure of damages left to jurors, while attorney fees are an "exceptional" award left to the discretion of the court. 15 U.S.C. § 1117(a). Litigation costs are governed by Federal statute.

IV. RULE 606(b)

A. Standard

Jurors are permitted to provide evidence by affidavit concerning "extraneous prejudicial information" improperly brought to the jury's attention. Fed. R. Evid. 606(b). Prejudicial extra-record facts are not simply limited to media reports and the like; they can include personal knowledge of extraneous facts or consideration of evidence not admitted during trial. *United States ex rel. Owen v. McMann*, 435 F.2d 813, 818 n.5 (2nd Cir. 1970); *see Hard v. Burlington N. Railroad*, 812 F.2d 482, 486 (9th Cir. 1987) (extraneous information about past settlements improper); *In re Beverly Hills Fire Litigation*, 695 F.2d 207 (6th Cir. 1982), cert. denied, 461 U.S. 929) (juror conducted out-of-court experiment of wiring in his home and reported results to the jury members; court found that juror's investigation had the effect of putting him in possession of evidence not offered at trial); *Government of Virgin Islands v. Gereau*, 523 F.2d 140, 149 (3d Cir. 1975) (consideration of evidence not admitted in court potentially prejudicial). The nature of the extraneous information and "its probable effect on a hypothetical average jury" determines whether the defendant has been prejudiced. *United States v. Crosby*, 294 F.2d 928, 950 (2d Cir. 1961). For example, in *Aluminum Co. of America v. Loveday*, 273 F.2d 499, 499-500 (6th Cir. 1959):

> The principal reason for granting a new trial by the district court was based on affidavits and testimony of jurors regarding remarks of one of the jurors concerning his personal observation of cattle: that, during the trial, he had visited the critical area, viewed the cattle, and had returned to the jury room and reported to his fellow jurors, in substance, that the cattle were about the best looking he had seen in a long time. The United States District Judge expressed the opinion and made a finding that the conduct

of the juror had prejudiced the claims of the plaintiffs in the minds of some of the jurors.

B. Application

The jurors in this case lacked knowledge of how P&G's attorneys were to be paid, the reasons for the duration of the litigation, and P&G's predatory motive for bringing suit (the latter of which was excluded by motions in limine). Because of the way the jurors read their instructions, they felt compelled to fill in the blanks using personal knowledge—specifically of attorneys' hourly rates—when the record contained no such evidence. That is, the jurors considered their individual and collective opinions concerning attorney fees, then multiplied those rates by the time they presumed the attorneys had worked over a twelve-year period. Ex. A, B, C. The jurors clearly considered the following pieces of extraneous, prejudicial information:

(1) The number of lawyers at P&G's counsel table. Ex. A.

(2) The fact that some lawyers are compensated at an hourly rate, as opposed to a contingency fee or hybrid agreement. Ex. A, B.

(3) The hourly rate of compensation for lawyers, as calculated by various jurors. Ex. A, B.

As a result of the consideration of this extraneous information, Defendants were clearly prejudiced: Sums that were not (and could not have been) in evidence—including the aggregate amount of attorney fees P&G had actually paid over 12 years—were awarded as damages. Ex. A, B.

Rather than accepting Defendants' statements and the attached juror affidavits, Defendants ask that the court conduct an inquiry into the information relied on by the jury in determining the amount of damages awarded, including a review of the juror notes, and, upon the conclusion of such inquiry, determine that the jury's deliberations were tainted by extraneous information that prejudiced Defendants. *See Aluminum Co.*, 273 F.2d at 499-500.

V. "QUOTIENT" VERDICTS

A quotient verdict is "a verdict rendered in a civil action according to an agreement between the jurors to accept a mathematical average of their individual estimates of the measure of damages." KLUG, B., *1981 Ohio Supreme Court Decision Survey: Taxation*, 51 U. Cin. L. Rev. 218, 231 (1981); *see also E. L. Farmer & Co. v. Hooks*, 239 F.2d 547, 554 (10th Cir. 1956). Such verdicts are generally regarded as invalid because they are reached through a process of chance instead of "discussion, deliberation, reasoning and collective judgment." *Id*.; *see also Wright v. Illinois & Mississippi Tel. Co.*, 20 Iowa 195, 212 (Iowa 1866) (seminal state-law case permitting use of affidavits to show quotient verdict). In 1915, the U.S. Supreme Court held that public interests outweighed a litigant's private interests in admitting affidavits verifying that the jury arrived at a quotient verdict. *McDonald v. Pless*, 238 U.S. 264, 269 (1915). The precise facts of the case were as follows:

> The defendant McDonald moved to set aside the verdict on the ground that when the jury retired the Foreman suggested that each juror should write down what he thought the plaintiffs were entitled to recover, that the aggregate of these amounts should be divided by 12 and that the quotient should be the verdict to be returned to the court. To this suggestion all assented.

> The motion further averred that when the figures were read out it was found that one juror was in favor of giving plaintiffs nothing, eight named sums ranging from $ 500 to $ 4,000 and three put down $ 5,000. A part of the jury objected to using $ 5,000 as one of the factors inasmuch as the plaintiffs were only suing for $ 4,000. But the three insisted that they had as much right to name a sum above $ 4,000 as the others had to vote for an amount less than that set out in the declaration. The various amounts were then added up and divided by 12. But by reason of including the three items of $ 5,000 the quotient was so much larger than had been expected that much dissatisfaction with the result was expressed by some of the jury. Others however insisted on standing by the bargain and the protesting jurors finally yielded to the argument that they were bound by the previous agreement, and the quotient verdict was rendered accordingly.

McDonald, 238 U.S. at 265-266.

It is overwhelmingly clear that the jurors in this case entered a quotient verdict. Ex. A, B, C. In fact, two jurors awarded no damages of any kind, though this was offset by the over-sized awards of other jurors, all numbers having been offered with the knowledge that the jurors would be bound by the average. Ex. A. Because the "zero verdict" jurors were bound by an antecedent agreement to award the quotient of the collective awards, they consented to the verdict anyway. Ex. A, B, C. The question before the court is, "In light of *McDonald*'s prohibition against challenging quotient verdicts through affidavits, does it matter?"[3] Absolutely. Yes.

McDonald never limited the scope of a jury inquiry conducted at the trial judge's request. *McDonald*, 238 U.S. at 269. Likewise, Federal Rule of Evidence 606(b), the

[3]In drafting the *McDonald* opinion, Justice Lamar clearly recognized that inflexible application of the rule announced might violate the "plainest principles" of justice. *McDonald*, 238 U.S. at 269 (*quoting Mattox v. United States*, 146 U.S. 140, 148 (1892). The opinion itself concedes that the rule is not fair to defendants. *Id*. at 268 ("[T]he argument in favor of receiving such evidence is not only very strong but unanswerable—when looked at solely from the standpoint of the private party who has been wronged by such misconduct."). Perhaps because of this, *McDonald* specifically does not limit the scope of a jury inquiry conducted at the trial judge's request. *Id*. at 269.

modern rule governing inquiry into jury conduct, contains no such limitation.[4] "[T]he court . . . enjoys substantial discretion in choosing the investigative procedure" to be used in reviewing a jury verdict. *United States v. Barber*, 147 Fed. Appx. 941, 945 (11th Cir. 2005) (*citing United States v. Register*, 182 F.3d 820, 840 (11th Cir. 1999). Neither *McDonald* nor Rule 606(b) should be read to prevent a court, properly apprised of a quotient verdict, to make an inquiry into that verdict.[5] Otherwise, quotient verdicts might as well be permitted, if not endorsed.

VI. CONCLUSION & REQUEST FOR INQUIRY

Jurors are admonished to follow the instructions provided to them. They are warned that, if such instructions are not followed, another jury will be forced to do the same work over. This court is now being tested: Are we serious about the admonitions

[4] Courts and commentators have often struggled with Rule 606(b), which has been interpreted to preserve some public goods (principally, frankness among jurors and the finality of their verdicts) at the expense of others (unanimity and accuracy of verdicts). The plainest example of an injustice rendered as a result of the trial court's refusal to admit affidavit evidence came in *Tanner v. United States*, 107 S. Ct. 2739, 2755 (1987). Justice Marshall, Brennan, Stevens and Blackmun noted in their concurrence/dissent that the court had refused to hold an evidentiary hearing despite receiving an affidavit indicating that several jurors were intoxicated throughout much of the trial. *Id*. Dogmatic application of an ancient precedent in the face of evidence that justice has not been served is itself unjust. *See generally* CORTI, M., *Tanner v. United States, Did the Court go to Far in its Interpretation of Federal Rule of Evidence 606(b)*, 3 J. Legal Advoc. & Prac. 49 (2001). *See, e.g.*, RANK, T., *Federal Rule of Evidence 606(b) and the Post-Trial Reformation of Civil Jury Verdicts*, 76 Minn. L. Rev. 1421 (1992); MULLER, E., *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 Harv. L. Rev. 771 (1998) (criminal cases); LAWSKY, B., *Limitations on Attorney Post-Verdict Contact with Jurors: Protecting the Criminal Jury and its Verdict at the Expense of the Defendant*, 94 Colum. L. Rev. 1950 (1994) (criminal cases).

[5] The Tenth Circuit most recently dealt with *a* quotient verdicts in *E. L. Farmer & Co. v. Hooks*, 239 F.2d 547 (10th Cir. 1956). There, the appellate court was not persuaded by affidavits of non-jurors averring that certain papers left in the waste basket of the jury room indicated a quotient verdict had been entered. *Id*. at 553-54. As the court saw it, the affidavits of non-jurors did not demonstrate that the jurors entered into an antecedent agreement to be bound by the quotient. *Id*. at 554. Therefore, no new trial could be granted based on the quotient verdict. *Id*. Of course, the only people who could provide that critical piece of information—whether the jurors had entered into an agreement to be bound by a quotient verdict in spite of the fact that they were not unanimous—were the jurors themselves. The Tenth Circuit's discussion of the antecedent agreement requirement was either needless (because there was no way for a movant, deprived of juror statements, to meet its burden concerning antecedent agreement) or it anticipated some circumstance where antecedent agreement could be proven by juror statements. It is Defendants' understanding that the jurors themselves have independently provided such statements to the court.

made to the jurors, or not? If not, we can merely look the other way, knowing that by doing so, an obvious injustice has been done.

Defendants have difficulty imagining a case that calls out more strongly for a judicial inquiry than the one before the Court. Jurors have independently contacted the Court concerning the use of extraneous information during their deliberations. They have stated that their award of $19,250,000 million was primarily composed of attorney fees. They have indicated that, without intending to do so, they entered into an improper quotient verdict. Neither *McDonald* nor Fed. R. Evid 606(b) limit the scope of a jury inquiry conducted at the trial judge's request. Fed. R. Evid 606(b); *McDonald*, 238 U.S. at 269. Under these circumstances, it is incumbent on the court to investigate, and ultimately to correct, the errors of the jurors. For these reasons, the defendants respectfully request that the Court conduct an investigation into all matters relevant under Rule 606(b) as soon as possible. Among the steps the Court can and should take include interviews of the jurors and inspection of the juror notes made at trial.

In order to preserve the sanctity and objectivity of the inquiry, Defendants hereby request that all parties be precluded from contacting jurors pending completion of the Court's inquiry.

DATED this 26th day of March, 2007.

Respectfully Submitted,

Electronically signed by Ryan J. Schriever

_____

Joseph J. Joyce
Michael Y. McCormick
Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the26th day of March, 2007, a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR IMMEDIATE INQUIRY INTO POSSIBLE JURY MISCONDUCT** was sent using the CM/ECF system which sent notification of such filing to the following:

Tracy H. Fowler
James D. Gardner
Michael D. Zimmerman
Snell & Wilmer LLP

Stanley M. Chesley
Fay E. Stilz
Waite, Schneider, Bayless & Chesley Co., L.P.A.

Electronically signed by RJS on 03/26/07

Exhibit A

IN THE UNITED STATE DISTRICT COURT FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

THE PROCTER & GAMBLE COMPANY and THE PROCTER & GAMBLE DISTRIBUTING Plaintiffs, vs. RANDY L. HAUGEN, et al, Defendants.	)	Civil No. 1:95-CV-0094K Judge Ted D. Stewart

AFFIDAVIT OF BRYAN TUTTLE

STATE OF UTAH §
§
COUNTY OF Davis §

I, BRYAN TUTTLE, state the following:

1. I am over eighteen years old.

2. I am competent to testify about the matters set forth in this affidavit.

3. I have personal knowledge of the facts discussed in this affidavit.

4. I was a juror in the suit between Procter & Gamble and Randy Haugen and the other Amway distributors over the Satanism rumor.

5. I felt that I was required to find a violation of the Lanham Act based in part on the instruction that said that the Amvox message constituted Commercial Speech and

that the Commercial Speech issue had previously been decided by the Court. Other jurors appeared to share this opinion.

6. I felt that, based on the instructions, if I found one of the defendants was liable I had to find them all liable. Other jurors appeared to share this opinion.

7. During our deliberations, the jury discussed each of the elements of damages and found that P&G did not meet its burden on any of the potential components of damages, except out-of-pocket expenses including attorneys' fees and litigation costs.

8. In order to calculate the amount of attorneys' fees, litigation costs and other out-of-pocket expenses, we agreed to ask each juror what amount of these expenses were owing to P&G, add the numbers together, and divide by the number of jurors. We agreed to be bound by the result before asking each juror for an amount.

9. I did not think P&G had proven any damages. In fact, we took all of the categories of damages set forth in the instructions and wrote them on the chalk board. Beside each category, we all agreed to the number zero with the exception of out-of-pocket expenses for which there was disagreement. I said $0.

10. The out-of pocket expenses category was presumed to be primarily attorneys' fees and litigation costs. Some jurors discussed their personal experiences of paying $300 per hour and some discussed $600 per hour among other numbers. I had heard no evidence of attorneys' fees so I stuck with zero. After soliciting numbers from everybody and averaging them, we knew what a general ballpark figure would be. We agreed to be bound by the result of this second inquiry before asking each juror for the amount. In the end, the numbers received were between $0 and $50 million, but averaged out to be $19,250,000.

11. The figure ultimately awarded represents the sum of all the jurors' estimates of P&G's attorneys' fees, litigation costs and other out-of-pocket expenses divided by the number of jurors.

Further affiant sayeth not.

BRYAN TUTTLE

Exhibit B

IN THE UNITED STATE DISTRICT COURT FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

THE PROCTER & GAMBLE COMPANY and THE PROCTER & GAMBLE DISTRIBUTING Plaintiffs, vs. RANDY L. HAUGEN, et al, Defendants.	)	Civil No. 1:95-CV-0094K Judge Ted D. Stewart

AFFIDAVIT OF ~~ROSEMARY~~ Rosemarie RIEDL

STATE OF UTAH §
§
COUNTY OF _____ §

I, ~~ROSEMARY~~ Rosemarie RIEDL, state the following:

1. I am over eighteen years old.

2. I am competent to testify about the matters set forth in this affidavit.

3. I have personal knowledge of the facts discussed in this affidavit.

4. I was a juror in a case called Procter & Gamble vs. Stephen Brady, Stephen Bybee, Randy Haugen and Ted Randall Walker.

5. In trying to reach a verdict in this case, we determined that Procter & Gamble did not prove damages related to any of the categories in the

instructions but we knew Procter & Gamble had to have incurred expenses for the litigation, including attorneys' fees.

6. In trying to determine a fair number, I considered that I had recently hired an attorney for $300 per hour. Another juror indicated that that juror had hired a lawyer for $350 per hour. * Please see remarks below

7. We agreed that we would average what each one of us suggested as an appropriate dollar figure for out-of-pocket expenses, including attorneys' fees and litigation costs and then each person reported a number. The numbers were added up and divided by the number of jurors and that is how we came up with $19.25 million. Also, we had 11 jurors (juror #6 was excused as she was not feeling well)

Further affiant sayeth not.

Rosemarie Riedl

~~ROSEMARY~~ RIEDL
ROSEMARIE

6.) In trying to determine a fair number (no one ~~h~~ on the jury knew the exact (PER HOUR) amount) one juror said that $300. per hour is about right. I had a lawyer make a will and trust for my husband and I (about 10 yrs. ago), but I don't recall what he charged us per hour. Another juror indicated that she had recently used the service of a lawyer and she was charged $350. per hour.

Exhibit C

IN THE UNITED STATE DISTRICT COURT FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

THE PROCTER & GAMBLE COMPANY and THE PROCTER & GAMBLE DISTRIBUTING Plaintiffs, vs. RANDY L. HAUGEN, et al, Defendants.	)	Civil No. 1:95-CV-0094K Judge Ted D. Stewart

AFFIDAVIT OF TANYA PLATT

STATE OF UTAH §
§
COUNTY OF DAVIS §

I, TANYA PLATT, state the following:

1. I am over eighteen years old.

2. I am competent to testify about the matters set forth in this affidavit.

3. I have personal knowledge of the facts discussed in this affidavit.

4. I was a juror in a case called Procter & Gamble vs. Stephen Brady, Stephen Bybee, Randy Haugen and Ted Randall Walker.

5. In our deliberations, we were unable to find for Procter & Gamble on any element of damages other than out of pocket expenses like fees for attorneys and costs of litigation.

6. Because we had no dollar figures in the evidence for out of pocket expenses, we used our own experiences with attorneys and lawsuits and we agreed that whatever number was the average among all of us, we would abide by that number.

7. We each came up with a number individually, and then all the numbers were added together and divided by 11. The numbers ranged from zero by two jurors to as high as $50 million.

8. Two of the jurors did not want Procter & Gamble to get anything so they said zero even though they knew there were out of pocket expenses.

9. Attorneys' fees and expenses were the only category of damages which we considered awarding based on the Court's instructions.

Further affiant sayeth not.

Tanya Platt

TANYA PLATT