2 Civil No. B212933

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 8

Teresa D. Green,

Plaintiff and Appellant

vs.

LAIBCO, LLC dba Las Flores Convalescent Hospital

Defendant and Appellant

On Appeal From The Superior Court of Los Angeles County
Honorable Richard Fruin, Jr., Judge,
Los Angeles Superior Court Case No. BC374097

COMBINED APPELLANT'S REPLY BRIEF AND CROSS-RESPONDENTS' BRIEF

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APPELLANT'S REPLY BRIEF

INTRODUCTION

Plaintiff Teresa Green's opening brief demonstrated that the trial court purported to grant defendant's new trial motion one day after the court's power to rule on the motion expired, so the motion was denied by operation of law and the new trial order was void for want of jurisdiction. (Appellant's Opening Brief ["AOB"] 29-31.)

Defendant responds by urging this Court to interpret Code of Civil Procedure section 660 ("section 660") in a way that has been rejected by four California appellate courts during the past 78 years. (Combined Respondent's Brief and Cross-Appellant's Opening Brief ["CRB/CAOB"] 13-18.) Defendant's primary argument, which is based on language in California Supreme Court decisions that did not involve the issue presented in this case, has no merit and was squarely rejected by a California appellate court. Defendant's secondary argument, based on legislative history, fails because the plain language of section 660 obviates any need to use legislative history and because the legislative history of the statute supports the interpretation that has been in effect for 78 years.

Even if this court had to consider the new trial order's merits, plaintiff would still prevail for reasons stated in plaintiff's opening brief. Defendant does not discuss two of the three grounds for granting the order. Defendant asserts the third ground–excessive damages–was correct, but that argument is irrelevant because it ignores the trial court's rationale, which is the only basis for upholding a new trial grant based on excessive damages.

ARGUMENT

I.

THE NEW TRIAL ORDER IS VOID: DEFENDANT'S ARGUMENT TO THE CONTRARY HAS NO SUPPORT IN THE RELEVANT STATUTE'S LANGUAGE OR LEGISLATIVE HISTORY.

A. Defendant's Primary Argument Distorts and Disregards Section 660's Language and Has Been Explicitly Rejected By The Court Of Appeal.

1. The relevant language in section 660 is clear.

Section 660 states that the trial court's power to rule on a motion for new trial expires:

> 60 days from and after the mailing of notice of entry of judgment by the clerk of the court pursuant to Section 664.5 or 60 days from and after service on the moving party by any party of written notice of the entry of the judgment, whichever is earlier, or if *such notice has not theretofore been* given, then 60 days after filing of the first notice of intention to move for a new trial.

(Code Civ. Proc., § 660, 3rd para., emphasis added.)

The straightforward, grammatical way to read this language is that the clerk's mailing, or the moving party's service, of the notice of entry of judgment starts the 60 day period in which a court must rule on a new trial motion *unless* such notice is not given before the first notice of intention to

move for a new trial is filed. In that situation, service of the first notice of intention to move for a new trial starts the 60 day period. Every court of appeal that has dealt with the issue raised in this case has read section 660 in this manner. (*Iske v. Stockwell-Kling Corp.* (1932) 128 Cal.App. 192, 194 ("*Iske*"); *Rubens v. Whittemore* (1934) 2 Cal.App.2d 575, 576-577 ("*Rubens*"); *Bunton v. Arizona Pacific Tanklines* (1983) 141 Cal.App.3d 210, 216 ("*Bunton*"); *In re Marriage of Liu* (1987) 197 Cal.App.3d 143, 149-150.)

2. Defendant's misconstruction of the relevant statutory language makes no grammatical sense and would lead to an absurd result.

Defendant urges that this Court to reject the above-cited cases and interpret section 660 to permit the 60 day period to restart if notice of entry of judgment is mailed by the clerk or served by the moving party within 60 days after the first notice of intention to move for a new trial is filed. This interpretation disregards the plain language of the statute. Moreover, it would have the absurd consequence, which the Legislature could not possibly have intended, of sub silentio allowing a party to "grant" a court an extension of up to 60 days in which to decide a new trial motion.

The critical statutory language is the phrase "or if such notice has not theretofore been given, then 60 days after filing of the first notice of intention to move for a new trial." (Code Civ. Proc., § 660, 3rd para.) Defendant acknowledges (as it must) that "such notice" is the notice of entry of judgment. (CRB/CAOB 14 ["The statute says the third trigger applies 'if such notice [of the judgment] has not theretofore been given . . . .'"].)

The only sensible grammatical construction of this key statutory language is that the phrase "has not theretofore been given" refers to the notice of entry of judgment not having been given before the first notice of intention to move for a new trial is filed. Thus, if the notice of entry of judgment has not been given before the first notice of intention to move for a new trial is filed, the court has 60 days from the latter to decide the new trial motion.

Defendant nonetheless asserts that:

> The statute says the third trigger applies 'if such notice [of the judgment] has not theretofore been given, then 60 days after filing of the first notice of intention to move for a new trial.' (Code Civ. Proc., § 660, 3d par.) The phrase 'not theretofore been given' modifies the term '60 days,' and so the third trigger comes into play if no one serves notice that a judgment has been entered within 60 days (or ever) after the notice of intention is filed.

(CRB/CAOB 14.)

Defendant fails to explain the basis on which it concludes that "[t]he phrase "not theretofore been' given modifies the term '60 days'. . . ." (CRB/CAOB 14.) Defendant's contention makes no grammatical sense because the phrase "has not theretofore been given" cannot logically modify or refer to the term "60 days"; is defendant really asserting that it is the "60 days" that "has not theretofore been given?" Straightforwardly reading the sentence makes it clear that the 60 days refers to the time period in which the new trial motion must be decided after the filing of the first notice of intention to move for a new trial, when that event starts the time running because no notice of entry of judgment was theretofore given.

Not only is defendant's interpretation grammatically nonsensical, it would enable the moving party's attorney to unilaterally extend the time in

which a court could grant a new trial motion. This scenario would occur if a party files a notice of intent to move for a new trial before notice of entry of judgment is mailed by the court clerk or served by a party. If the trial court has not decided the motion 59 days later, and the court clerk has not mailed notice of entry of judgment during that time, the moving party's attorney could serve notice of entry of judgment on the 60th day. Under defendant's theory, the trial court would be given another 60 days to decide this motion.

Accepting defendant's theory would require this Court to believe that the Legislature, by enacting a statute providing for three different *60 day* periods in which a court had jurisdiction to decide a new trial motion, actually intended to permit the new trial motion to be decided within *120 days* under certain circumstances. If the Legislature intended to extend a *jurisdictional* time period, there is no reason it would not have done so explicitly. (Cf. *Selinger v. City Council* (1989) 216 Cal.App.3d 259, 267 ["if the Legislature intends for a moratorium to toll statutory deadlines, it knows how to do so explicitly"]; see generally *Leithliter v. Board of Trustees* (1970) 12 Cal.App.3d 1095, 1099 ["we presume [Education Code section 13401], means precisely what it says"]; *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1328 ["Occam's razor-avoid hypothesizing complicated explanations when a simpler one is available-applies here."].)

Defendant nonetheless contends that reading the statute as it is written "invites confusion by creating situations in which multiple triggers would apply, and no one could be sure when the 60-day period expires." (CRB/CAOB 16.) Defendant is wrong because each "trigger" covers a separate situation. The first 60 day period applies when the clerk mails notice

of entry of judgment. The second 60 day period applies when the moving party serves notice of entry of judgment. If *neither* event occurs *before* a notice of intent to move for a new trial is filed, the 60 day period in which the court must decide the new trial motion commences with the filing of the notice of intent. Four appellate courts in the past 78 years have had no trouble understanding this statute's plain language. The only "confusion" here is that which defendant attempts to create.

3. Defendant relies on Supreme Court dicta whose applicability has been rejected by the Court of Appeal because opinions are not authority for propositions not considered therein.

In attempting to convince this Court that section 660 does not mean what it says, defendant quotes language paraphrasing that statute in *Palmer v. GTE California, Inc.* (2003) 30 Cal.4th 1265, 1275 and *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 899. (CRB/CAOB 15.) Defendant claims "[t]hese passages do *not* say 'if such notice is not given *before a notice of intention is filed*,' which is Green's position here. Instead, the italicized language shows that the third trigger in section 660 applies only if no one provides notice of entry of judgment within 60 days after the notice of intention is filed." (*Ibid.*)

The Court of Appeal rejected this argument two years after *Sanchez-Corea* was decided, stating:

> Appellant suggests that language in *Sanchez-Corea v. Bank of America*, *supra*, 38 Cal.3d 892, indicates that a filing of intention to move for new trial is the operative event in

> determining the 60-day period *only* if no notice of entry of judgment is mailed by the clerk or served by the parties *at any time*. Specifically, in *Sanchez-Corea* the Supreme Court stated that the 60-day period provided by section 660 "runs from the mailing of notice of entry of judgment by the clerk or the service of notice of entry of judgment, whichever is earlier, *or if no such notice is given*, from initial notice of intent to move for new trial." (*Id*. at p. 899, italics added.) Appellant contends this language indicates that the filing of the notice of intention is the operative event *only* when other forms of notice are not provided, regardless of when the other notice is provided. We reject this argument.

(*In re Marriage of Liu*, *supra*, 197 Cal.App.3d at p. 150.)

In rejecting this argument, the Court of Appeal noted that *Sanchez-Corea* involved a different issue and that "[t]he Supreme Court did not address the clear intent of this statute [section 660] in *Sanchez-Corea* and, we believe, did not intend to modify the statute." (*Id.* at p. 151.) The court concluded by citing the well accepted principle that "'[l]anguage used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered.'" (*Ibid*., citing *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.)

Like *Sanchez-Corea*, *Palmer* involved an issue that is not presented here. *Palmer* held that a party's service of a file-stamped copy of a judgment started the 15 day period for filing a notice of intent to move for new trial. (*Palmer*, *supra*, 30 Cal.4th at p. 1267-1268.) The same reasoning that led the *In re Marriage of Liu* court to reject an argument relying on *Sanchez*'s paraphrase of section 660's language–"if no such notice is given," requires rejection of defendant's reliance on *Palmer*'s virtually identical paraphrase of that language–"or if such notice is not given." (*Palmer*, *supra*, 30 Cal.4th at

p. 1275.)

The California Supreme Court has made it clear that its dicta are not controlling authority. *Palmer* itself refused to apply a dictum stating that a party could start the 15 day period running "'*only* if the party submitting the order or judgment for entry serves notice of entry of judgment on all the parties, files the original notice with the court, and files a proof of service' as provided in section 664.5, subdivision (a)(2)." (*Palmer*, *supra*, 30 Cal.4th at p. 1275, citing *Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 65.) The Court found that this dictum "overstated the statutory requirements" and "was made without reference to the facts in *Van Beurden*, because there the prevailing party had made no attempt to give notice of entry of judgment to the party filing a notice of intention to move for a new trial." (*Palmer v. GTE California, Inc.* , *supra*, 30 Cal.4th at pp. 1275, 1278; see also *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1028-1029 [rejecting as "misleading" a Supreme Court dictum regarding a statute's requirements].)

If the Supreme Court in *Palmer* and *Colmenares* could reject its own dicta *interpreting* statutes, this court can and should reject Supreme Court dicta *paraphrasing* a statute. (*Ferguson v. Workers' Comp. Appeals Bd.* (1995) 33 Cal.App.4th 1613, 1624 ["We are not bound by Supreme Court dicta we do not find relevant and compelling. [Citations.] Moreover, '[i]t is axiomatic that cases are not authority for propositions not considered.'"].) Therefore, this Court should refuse defendant's invitation to replace section 660's "has not theretofore been" with "is not." Instead the Court should follow the statute's plain meaning and hold the new trial order void for want of jurisdiction.

B. Defendant's Secondary Argument, Which Is Based on Part of Section 660's Legislative History, Should Not Even Be Considered; Moreover, Section 660's Legislative History Supports Plaintiff's Interpretation of That Statute.

Defendant contends that section 660's legislative history supports defendant's interpretation of that statute. (CRB/CAOB 17-18.)

As a threshold matter, this Court should disregard that argument and deny defendant's request to take judicial notice of certain legislative history. For reasons set forth above, "section 660 unambiguously provides that the filing of the first notice of intention to move for a new trial is the operative event for determining the 60-day period where notice of entry of judgment 'has not *theretofore* been given.'" (*In re Marriage of Liu*, *supra*, 197 Cal.App.3d at p. 151.) "[I]f there is 'no ambiguity or uncertainty in the language, the Legislature is presumed to have meant what it said,' and it is not necessary to 'resort to legislative history to determine the statute's true meaning.'" (*People v. Licas* (2007) 41 Cal.4th 362, 367.) Therefore, section 660's legislative history should be disregarded. However, even if this Court were to consider that history, it would help plaintiff, not defendant.

Defendant begins its legislative history argument by contending that this Court should follow *Moore v. Strayer* (1917) 175 Cal. 171 ("Moore") , which construed a prior version of section 660, because "[c]ourts 'do not presume that the Legislature intends, when it enacts a statute, to overthrow long-established principles of law unless such intention is clearly expressed or necessarily implied.'" (CRB/CAOB 17, citing *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 199 [stating that the Legislature was

presumed to be aware of an existing statute when it enacted a related piece of legislation].)

It is obvious that this principle does not apply when the Legislature adds language to a statute that obliterates a decision's rationale, which is exactly what occurred after *Moore* was decided. The version of section 660 that *Moore* construed did not even refer to the filing of a notice of intent to move for a new trial, but stated in relevant part that "[t]he power of the court to pass on motion for new trial shall expire within three months after the verdict of the jury or service on the moving party of notice of the decision of the court." (*Moore*, *supra*, 175 Cal. at p. 172.) Not surprisingly, *Moore* held that filing of the notice of intent to move for a new trial did not start the statutory time period running because "jurisdiction of which to pass upon the motion is divested *only* by the *service* of notice of decision followed by the lapse of a period of three months." (*Ibid*., emphasis added in part.)

In 1929, the Legislature changed section 660 to read in relevant part as follows: "The power of the court to pass on motion for a new trial shall expire sixty days (60) days from and after service on the moving party of written notice of the entry of the judgment, *or if such notice has not theretofore been served*, then sixty (60) days after filing of the notice of intention to move for a new trial." (Defendant's Motion to Take Judicial Notice, Declaration of Jan Raymond, Exhibit C, p. 10, emphasis added.) Despite this change in language, defendant contends that "[n]othing in the 1929 amendment 'clearly expressed' the Legislature's intention to overrule the Supreme Court's existing interpretation of section 660, as reflected in *Moore*." (CRB/CAOB 17.)

Defendant is wrong because the Legislature rendered *Moore* irrelevant

by changing section 660 to add an alternative event for starting the applicable time period running. In 1932, the Court of Appeal recognized this fact by rejecting pre-1929 cases holding "that the time begins to run from the filing of notice of entry of judgment, and not from the notice of intention to move for a new trial." (*Iske*, *supra*, 128 Cal.App. at p. 194.) The Court stated that "[a] comparison of the section as amended and as it stood prior to the amendment leaves no doubt but that the legislature intended by the amendment that in cases where no notice of entry of judgment is served prior to the filing of notice of intention to move for a new trial, the sixty-day period begins to run from such time . . . ." (*Ibid*.) Tellingly, *Moore* has not been cited since 1928 in any decision available on Westlaw.

Defendant also cites a passage from the Legislative Counsel's digest summarizing the 1929 amendments to section 660. (CRB/CAOB 17.) However, the Legislative Counsel's summary "does not have the force of law" and cannot override "conflicting statutory language." (*R.R. v. Superior Court* (2009) 180 Cal.App.4th 185, 201; *People v. Thomas* (1996) 42 Cal.App.4th 798, 804 ["[W]e place little confidence in the observations of the legislative counsel in this regard. The summary also refers to preexisting law as authorizing fines 'for offenses related to possession,' yet the actual language of those code sections clearly authorizes the imposition of fines only when the person has committed a specified offense or has violated a specified code section."].) To the extent that the passage defendant quotes from the Legislative Counsel's summary conflicts with the statute's language, that passage must be disregarded.

Actually, the legislative history defendant supplies supports plaintiff's

interpretation of section 660. One of defendant's documents is an excerpt from the 1929 Statutes of California that contains the following note written in the margin of section 660: ""[M]otion to be passed on within 60 days." (Defendant's Motion to Take Judicial Notice, Declaration of Jan Raymond, Exhibit C, p. 10.) Margin notes are deemed part of the "official enactment" of a statute. (*People v. Sisuphan* (2010) 181 Cal.App.4th 800, 808.) As such, they indicate legislative intent and can be used to construe statutes. (*Id*. at p. 808, fn.8, citing *People v. Clark* (1992) 10 Cal.App.4th 1259, 1265-1266.) If the Legislature really intended for attorneys to be able to extend the time for consideration of a new trial motion past the 60 day period by filing a notice of entry of judgment after a notice of intent to move for new trial had been filed, that margin note would not have been made.

The subsequent history of section 660 also favors plaintiff's interpretation. The relevant amendment to the statute was passed in 1929 and the issue addressed in this case was first decided under that amendment three years later. (*Iske*, *supra*, 128 Cal.App. at p. 194.) Section 660 was amended again in 1933, but the only change was adding the words "Except as otherwise provided in section 12a of this code" at the start of the statute's third paragraph. (Code Commissioners' Note following Code Civ. Proc., § 660; www.westlaw.com.) Code of Civil Procedure Section 12a, then as now, provided for extending the time to perform an act if the end of the pertinent time period fell on a weekend or holiday. (See Law Revision Commission Comments and other notes following Code Civ. Proc., §12 a; www.westlaw.com.) Thus, the amendment had no effect on the issue resolved in *Iske* and presented again in this case.

"It is a well-established principle of statutory construction that when the Legislature amends a statute without altering portions of the provision that have previously been judicially construed, the Legislature is presumed to have been aware of and to have acquiesced in the previous judicial construction. Accordingly, reenacted portions of the statute are given the same construction they received before the amendment." (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 734.) By amending section 660 in 1933 without altering the language to change the result in *Iske*, which was decided in 1932, the Legislature clearly signaled its acceptance of *Iske*.

In 1934, the Court of Appeal, citing *Iske*, again held that the 60 day period that begins with the filing of a notice of intent to move for a new trial does not restart when a notice of entry of judgment is subsequently served. (*Rubens*, *supra*, 2 Cal.App.2d at pp. 576-577.) Section 660 was further amended in 1959, 1969 and 1970. (Historical and Statutory Notes following Code Civ. Proc., § 660; www.westlaw.com.) The 1959 amendment added the last three sentences to the third paragraph of section 660. (*Ibid*.) The 1969 amendment changed the first sentence of the third paragraph by substituting "rule" for "pass"; inserting "the mailing of notice of entry of judgment by the clerk of the court pursuant to Section 664.5 or 60 days from and after", "by any party" and "whichever is earlier"; and substituted "given" for "served." (*Ibid.*) The 1970 amendment inserted "first" preceding "notice of intention". (*Ibid.*)

None of these changes altered the key language relied on in *Iske* and *Rubens*. (*Bunton*, *supra*, 141 Cal.App.3d at p. 215 ["We conclude that the later amendments to section 660 have not altered its basic structure and, therefore, the analyses in both *Iske* and *Rubens* remain undisturbed and

applicable to the case before us."].) Not surprisingly, *Bunton* (decided in 1983) and the 1987 case of *In re Marriage of Liu*, *supra*, interpreted the relevant language in section 660 exactly as did *Iske* and *Rubens*. The Legislature has not subsequently amended the statute. (See generally *Beeman v. Burling* (1990) 216 Cal.App.3d 1586, 1603, fn. 12 ["[T]he Legislature's silence on the issue in the face of the many cases . . . suggests the Legislature is satisfied with the existing rule."].)

As stated above, the language of section 660 is clear, so this Court should not judicially notice or construe the statute's legislative history. However, if that history is considered, it bolsters plaintiff's argument. For all of the reasons discussed above, the order granting defendant a new trial was void for want of jurisdiction and must be reversed.

II.

EVEN IF THE NEW TRIAL COURT ORDER HAD NOT BEEN VOID, IT WOULD HAVE TO BE REVERSED ON THE MERITS.

A. Defendant Has Not Even Addressed Two of the Three Grounds on Which the Court Granted a New Trial.

The court granted a new trial because one of plaintiff's causes of action was supposedly not supported by sufficient evidence on a particular theory, a court-formulated jury instruction was purportedly incorrect, and prejudicial evidence had allegedly misled and inflamed the jury, purportedly leading to a lack of deliberation and excessive damages. (Appellant's Appendix ["AA"]

197-199.) Plaintiff demonstrated that all three of these grounds were incorrect. (AOB 31-53.)

Defendant has not even addressed the first two grounds. (CRB/CAOB 18-24.) This fact speaks volumes, rendering it unnecessary for plaintiff to further argue these points.

B. Defendant's Argument On the Third Ground--Excessive Damages–Must Be Disregarded Because It Is Not Based On The Trial Court's Rationale.

The trial court found "plaintiff's evidence of her complaints about patient care and safety" to be prejudicial and concluded that it caused excessive damages. (AA 198.) The court set forth this purportedly prejudicial evidence at length. (AA 201-207.) Plaintiff demonstrated why this evidence was not prejudicial. (AOB 43-53.) Defendant cites none of the purportedly prejudicial evidence and does not contend that it resulted in excessive damages, but supplies its own reasons why damages were purportedly excessive. (CRB/CAOB 18-24.) This, defendant cannot do.

"[O]n appeal from an order granting a new trial . . . upon the ground of excessive or inadequate damages, it shall be conclusively presumed that said order as to such ground was made only for the reasons specified in said order or said specification of reasons, and such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons." (Code Civ. Proc., § 657.) Thus, a new trial order based on excessive damages can be upheld only if the trial court's rationale was correct. (*Meiner v. Ford Motor Co.* (1971) 17 Cal.App.3d 127, 143 [when trial court's reason

for holding damages excessive could not support a new trial on that ground, then new order trial could not be sustained on that ground].) Because the trial court's rationale is incorrect for reasons discussed in plaintiff's opening brief, its excessive damages finding cannot stand.

Defendant contends that there were three additional purported bases for the court's finding that damages were excessive: (1) insufficient evidence to support the compensatory damages award; (2) jury anger; and (3) lack of deliberation. (CRB/CAOB 19, 21-22, 24.) Defendant is wrong. These were not bases for the excessive damages finding, they were merely (in the trial court's view) *effects* of admitting the patient care and safety evidence that the court deemed prejudicial. (AA 198.)

The new trial order stated that "The court finds that plaintiff's evidence of her complaints about patient care and safety, although not sufficient itself to support a jury verdict, prejudiced the jury in its deliberations on plaintiff's other claims. Such evidence had, in the court's view, *these prejudicial effects* . . . ." (AA 198, emphasis added.) The "prejudicial effects" to which the court referred were the very things defendant relies on: insufficient evidence to support the compensatory damages award, jury anger and lack of deliberation. (AA 198.) By challenging these effects' purported *cause*–the allegedly improper evidence regarding plaintiffs complaints about care and safety–plaintiff a fortiori challenged the "effects." Thus, defendant is incorrect in contending that plaintiff "waived" the right to challenge these effects. (CRB/CAOB 24.)

Moreover, plaintiff expressly challenged the only one of these effects that could even conceivably be deemed independent of the allegedly

prejudicial evidence: plaintiff's purported failure to "provide sufficient evidence to support her $1,237,086 compensatory damage award." (AA 198.) Contrary to defendant's contention (CRB/CAOB 19), plaintiff's opening brief contested this conclusory assertion, stating that "[p]laintiff suffered over $200,000 in past and future economic damages, her life was effectively destroyed for 10 months, she suffers from the excruciating disease of shingles, she is frightened by her lack of health insurance and worried she will lose her home, and a jury could find that she will never be the same person she once was." (AOB 52.)

Defendant ignores these facts in asserting that the trial court could have found that plaintiff's compensatory damages were excessive. (CRB/CAOB 19-20.) The trial court also ignored these facts, apparently because it was convinced that plaintiff's evidence of her complaints about patient care and safety was so prejudicial that the jury's deliberations were irrevocably tainted. Because this evidence was not prejudicial, the court was wrong and the new trial order would have to be reversed on the merits were it not jurisdictionally void.

CROSS-RESPONDENT'S BRIEF

INTRODUCTION

Like Sherlock Holmes' dog that didn't bark in the night, the most significant thing about defendant's cross appeal is what's missing: any challenge to the jury's verdict on plaintiff's theories that her termination violated public policy because it resulted from her complaints about patient care and safety and her refusal to provide false information to the Department of Health Services ("DHS"). Plaintiff's compensatory damages stemmed from her termination and were not divided based on the theory of recovery. (AA 55.) Therefore, she will be entitled to those damages even if defendant prevails on its cross-appeal because, as explained in the Appellant's Reply Brief, the new trial order must be reversed.

Defendant raises two issues, contending first that it should have been granted a "partial JNOV on Green's claim for punitive damages." (CRB/CAOB 25.) Defendant next contends that plaintiff is not entitled to attorney fee claims because her Fair Employment and Housing Act ("FEHA") claims purportedly were not supported by substantial evidence. (CRB/CAOB 25.) Neither contention is correct.

Defendant asserts that the jury's punitive damage award was not supported by sufficient evidence of defendant's financial condition because the amount of defendant's net worth was not introduced into evidence. This argument fails for two reasons. First, it is defendant's financial condition, not net worth, that is crucial and plaintiff demonstrated that defendant had a positive net worth, $677,343 in net income for the previous year and a

substantial future earning capability. Second, defendant caused any deficiency in evidence of its financial condition by stonewalling plaintiff's discovery requests and producing, at the start of the punitive damages phase, 29 pages of data so unintelligible that defendant's CEO professed to be unable to locate a net worth figure.

Defendant also contends that the jury's verdict on plaintiff's FEHA claim was unsupported by sufficient evidence because too much time allegedly elapsed between plaintiff's reporting sexual harassment and her termination to permit finding causation. This argument fails because a barrage of retaliatory actions began after plaintiff engaged in a protected action and continued during her employment. When plaintiff engages in a protected activity and retaliation commences thereafter and is ongoing, a time gap between the plaintiff's protected activity and the final adverse action does not preclude plaintiff from showing causation.

STATEMENT OF THE CASE

A. Summary of Facts Pertaining to Defendant's Contention That Punitive Damages Cannot Be Assessed Because Plaintiff Failed to Adduce Sufficient Evidence of Defendant's Financial Condition.

The facts set forth below pertain to defendant's obdurate resistance to disclosing relevant financial information and to the evidence that plaintiff was nevertheless able to adduce.

1. Pre-trial events: defendant opposes plaintiff's discovery requests and trial subpoenas directed at obtaining evidence of its financial condition.

On March 4, 2008, plaintiff's counsel deposed Laib Greenspoon. (Appellant's Reply Appendix ["ARA"] 8.) Ten days later, plaintiff's counsel served a first set of special interrogatories consisting of 16 questions, each asking for an address and telephone number of a person or entity Greenspoon identified in his deposition. (ARA 11-13.) These people included Schlomo Rechnitz and Steve Stroll. (ARA 12-13.) Rechnitz is "the primary shareholder of Brius Management, a Laibco Partner" and Stroll is "Laibco's accountant." (ARA 51.)

Defendant responded by refusing to provide the requested names and addresses. (ARA 9, 16-24.) Plaintiff's counsel e-mailed defendant's counsel explaining that several of these interrogatories were intended to enable plaintiff to subpoena trial witnesses, including Rechnitz and Stroll,

knowledgeable about Las Flores' financial condition and/or to serve "s.d.t.'s" (subpoenas duces tecum) on these witnesses. (ARA 27.)[1]

Defendants' counsel responded in a letter dated May 8, 2008, stating in relevant part that:

> You claim in your e-mail that the addresses and telephone numbers of the foregoing are needed to find out about Las Flores's 'financial condition, and its management and control.' As you know, a defendant's financial condition is not a subject for discovery and is not admissible at trial until after a jury makes a finding of 'oppression, fraud or malice.' Cal Civ. Code §§ 3294, 3295. In addition, most of the foregoing businessmen, if anything, would obviously know far less about Laibco's financial condition than Mr. Greenspoon, who is the administrator of the facility.

(ARA 29.)

Plaintiff subsequently filed her motion to compel responses to the interrogatories. (ARA 1.) In plaintiff's accompanying separate statement, she stated that:

> Stroll is the person who has to be subpoenaed and ordered to produce himself and all relevant writings for the punitive damages phase applicable to LAIBCO dba LAS FLORES' financial condition, and the extent to which the other third parties Sam Menlo, Century Quality Management, Schlomo Rechnitz, Steven Rechnitz, and Brius Management are liable for LAIBCO/LAS FLORES' debts.

(ARA 41.)

Defendant opposed the motion to compel. (ARA 47.) Plaintiff filed a reply, in which she asked:

[1/] Plaintiff 's e-mail does not identify Stroll and Rechnitz by name, but refers to interrogatories 6-13. (ARA 27.) The interrogatories directed towards Rechnitz and Stroll were numbers 8 and 12. (ARA 12-13.)

> Can LAS FLORES claim *privacy* to cover up the identity of the entities, persons, and with [*sic*] which LAS FLORES does business to prevent her from getting the data at trial to prove punitive damages and impeach GREENSPOON, the man who told her to lie to the DHS and who fired her for not doing so? No. Is Plaintiff supposed to be stuck with the uncontroverted testimony of GREENSPOON about his questionable claims of LAS FLORES' financial status (i.e. alleged impoverishment) because his counsel claims GREENSPOON is the most knowing and knowledgeable administrator? (Opposition: 8:11-19) No.

(ARA 67.)

On June 12, 2008, the court denied plaintiff's motion to compel, but ordered counsel for defendant to "provide to the Court a current financial statement on the day of trial." (ARA 72.)

On July 11, 2008, plaintiff served a Notice to Appear and to Produce Evidence at Trial. (ARA 80, 84.) Although most of the evidence sought related to the extent of monies that Laib Greenspoon and others derived from LAIBCO, plaintiff also requested that defendant produce:

> All writings that evidence its financial condition and financial net worth for the purposes of assessing punitive damages pursuant to *California Civil Code* sections 3294 and 3295. Said writings are to include but are not limited to tax returns, bank statements, profit and loss statements, bank statements, stocks and bonds, deeds of trust, income and expense reports, balance sheets, and asset statements.

(ARA 81-82.)

Defendant objected to this particular request on the following grounds: "overbroad," "irrelevant," "privacy," and "prejudicial, confusing and misleading." (ARA 87.) Defendant failed to explain why or how these grounds purportedly applied to plaintiff's request, choosing instead to cite statutes and case law embodying general principles. (ARA 87.) Plaintiff's

counsel described these objections as "boilerplate." (ARA 73.)

On July 25, 2008, plaintiff filed and served a motion to compel defendant's production of the evidence requested in the Notice of July 11, 2008. (ARA 73, 95.) This motion appears to have been denied by the trial court in connection with its denial of plaintiff's motion to amend her complaint to allege alter ego liability against Laib Greenspoon. (2 Reporter's Transcript ["RT"] A-2 – A-9.)

2. Trial events: defendant discloses nearly 30 pages of financial gibberish at the start of the punitive damages phase and Greenspoon testifies that he cannot ascertain defendant's net worth from the gobbledygook.

Trial commenced on August 12, 2008. On August 18, 2008, the jury unanimously held defendant liable, awarded plaintiff $1,237,086 in compensatory damages and found by clear and convincing evidence that Las Flores Convalescent Hospital ("Las Flores") acted with malice, oppression or fraud. (7 RT 1267-1272.) The jury was excused and the court asked defense counsel if he had his "paper describing the financial condition of the defendant." (7 RT 1273.) Defense counsel replied "I do, your honor." (7 RT 1273.) The court then asked "[w]hat exactly is it that you have." (7 RT 1273.) Defense counsel replied: "It's a financial statement with the balance sheet and property and loss statement, most current one being, I think, of June '08." (7 RT 1273.)

The court asked plaintiff's counsel if she wanted "to stipulate to that

amount and [the court would] read it to the jury." (7 RT 1273.) Plaintiff's counsel declined to do so, as she had not seen the document in question. (7 RT 1273.) Defense counsel agreed to provide the document and the court suggested that plaintiff's counsel review it while the court prepared the jury verdict form. (7 RT 1274.)

That document was a printout consisting of page after page of closely spaced figures interspersed with text in confusingly spaced columns. (AA 132-159.) Below is a PDF copy of part of the first page of the "financial statement," which includes references to such items as "bingo petty cash." (AA 132.) (The first 10 pages of this almost 30 page document are attached as Attachment 1 to this brief pursuant to California Rule of Court 8.204(d).)

06_08.TXT

REPORT RUN DATE 7/29/08
FYLECO
CONVALESCENT

BALANCE SHEET
FAC.093 LAS FLORES

6/30/08

PRIOR YEAR YTD	VARIANCE	ACCOUNT	BUDGET	CURRENT YTD	PRIOR MONTH YTD	VARIANCE
1000		CASH-CONCENTRATION		191683.61	158983.97	32699.64
377020.84	185337.23-		.00			
1050		CASH-HOLIDAY SHARE FUND		100.00-	100.00-	.00
.00	100.00-		.00			
1052		BINGO PETTY CASH		52.37	52.37	.00
52.37	.00		.00			
1090		PETTY CASH		3250.00	3250.00	.00
1750.00	1500.00		.00			
1092		PETTY CASH-PATIENT TRUST FUND		1000.00	1000.00	.00
1000.00	.00		.00			
		CASH		195885.98	163186.34	32699.64
379823.21	183937.23-		.00			
1128		INTERCOMPANY REC/PAY-CVSC		.00	.00	.00
.00	.00		.00			
		INTERCOMPANY		.00	.00	.00
.00	.00		.00			

After a "pause in the proceedings" that lasted no longer than it took the trial court to formulate the two questions used in the punitive damages special verdict form, the court asked both counsel if they were ready to proceed. (7 RT 1274.) Plaintiff's counsel replied:

> Your honor, you might recall that in connection with a motion to compel that was filed earlier in this case, I requested the address and whereabouts of Las Flores's accountant, a gentleman named Steve Stroll.
>
> You asked the purpose for which I requested that information in special interrogatories, and I told you it was for the punitive damages phase of this case. At that point, you suggested that counsel lodge with the court on the first day of trial a current financial statement in lieu of my receiving a response under oath as to the accountant's whereabouts.
>
> Your honor, I respectfully submit to you that this bare bones compilation, that doesn't even have totals that are comprehensible, puts us at a significant disadvantage to begin now.

(7 RT 1275.)

The court then asked what the document showed as the "net worth" and plaintiff's counsel replied that she was not readily able to ascertain this. (7 RT 1275.) The court then said to plaintiff's counsel: "I'm not sure exactly where you're going with this. We're going to continue this trial today. You can call Mr. Greenspoon if you want and ask him to explain the financial statement. [¶.] I take it that you don't read financial statements yourself." (7 RT 1275.)

Plaintiff's counsel replied "I have read financial statements, but this one is not condensed, compiled, nor summarized. And I submit that that puts us at severe prejudice in this phase of this case." (7 RT 1275-1276.)

The following colloquy then ensued:

> **The Court**: What does it show as the net worth of the company?
>
> **Ms. Solo**: I do not know.
>
> **The Court**: Why not?
>
> **Ms. Solo**: It's 24 pages, your honor, and I don't exactly see a bottom line total.
>
> **The Court**: Well, is this both a profit and loss statement and a balance sheet?
>
> **Mr. Strapp**: Yes, your honor.
>
> **The Court**: So it's not 24 pages of one document. It's two documents.
>
> **Ms. Solo**: That doesn't help. Perhaps Mr. Strapp can tell us what he contends is his client's net worth.
>
> **The Court**: Mr. Strapp, I do need to know whether it's a positive net worth or not.
>
> **Mr. Strapp**: It is, your honor.
>
> **The Court**: Do you want to shed any more information than that?

(7 RT 1276.)

Defendant's counsel did not reply. There was a pause in the proceedings, following which the court said: "Mr. Strapp, the only question is whether there's a positive net worth, and I don't know if there's anything more that needs to be put into evidence beyond that." (7 RT 1276-1277.) Defendant's counsel did not address the trial court's assertion and did not provide defendant's net worth, but instead discussed jury instructions. (7 RT 1277.)

After a fifteen minute recess, during which counsel and the court engaged in on and off the record discussion, the jury returned, the court read the punitive damages instructions and plaintiff's counsel called Greenspoon to the stand. (7 RT 1280-1288.) Greenspoon was defendant's CEO, had previously been self-employed as a stock trader for "a couple" of years and

"pride[s] [him]self on being a good business person." (3 RT 34, 37; 6 RT 1047.) Greenspoon had a copy of the document his counsel provided. (7 RT 1288.) When asked what defendant's net assets were, he said "I don't know the balance sheet myself that well." (7 RT 1288-1289.) When asked the question again, he said "I don't know how to answer the question." (7 RT 1289.) When asked if he had "a clue what the total assets of Laibco are," Greenspoon replied "No." (7 RT 1289.) He gave the same answer when asked if he had an estimate of the total liabilities. (7 RT 1290.)

Greenspoon knew that Laibco was "in the black," but did not know the net worth. (7 RT 1290.) When asked if it was "a million," he said that he didn't know. (7 RT 1290.) When asked if it was "2 million," he said that he didn't know. (7 RT 1290-1291.) When asked if it was "3 million," he replied: "I don't think I understand the question." (7 RT 1291.) When asked to identify where in the "financial statement" the net worth figure was located, Greenspoon said "[a]gain, I can't give you net worth." (7 RT 1292.) Greenspoon did testify that the net income for Laibco, doing business as Las Flores, was $677,343 for the 12 months ending June 2008. (7 RT 1292.)

After closing argument, plaintiff's counsel requested that the jury be given the balance sheet. (7 RT 1299.) The court refused, stating:

> You didn't offer it into evidence during your case. You got into evidence the important issue, which is that $677,000 was the net profit of the company for the 12 months ended June 2008. If you can't understand the financial statement and Mr. Greenspoon can't understand the financial statement, I'm not going to ask the jury to understand the financial statement.

(7 RT 1299.)

The jury awarded plaintiff $1,237,086 in punitive damages, the same

amount it had awarded in compensatory damages. (7 RT 1267, 1301.)

3. Post-trial events: defendant moves for judgment notwithstanding the verdict and plaintiff's opposition papers include an expert's declaration explaining why the document defendant disclosed was not a financial statement.

Defendant contended that "[t]he punitive damages award in this case is fatally defective because Plaintiff failed to present evidence of Defendant's financial condition. (AA 86.) Defendant acknowledged that plaintiff had shown that defendant's net income for the past 12 months was $677,343. (AA 86.) However, defendant contended that such evidence was insufficient and that "[p]laintiff failed to present *any* evidence of Defendant's financial condition or net worth, including its assets and liabilities." (AA 86.)

Plaintiff opposed the JNOV motion, contending first that defendant failed to respond satisfactorily to her discovery request for "'all writings that evidence its financial condition and financial net worth for the purposes of assessing punitive damages . . . .'" (AA 121.) Plaintiff asserted that, despite a court order issued on June 12, 2008, defendant produced only "an utterly worthless partial year's **non**-financial statement . . . ." (*Ibid*.) Plaintiff attached a copy of this statement as Exhibit A to Gail Solo's declaration filed contemporaneously with the JNOV opposition. (AA 131-159.)

Plaintiff then noted that Laib Greenspoon had testified that he could not understand the document filed and he did not know LAIBCO's net worth. (AA 121-122.) Plaintiff submitted a declaration from Joseph Lipnicki, a

certified public accountant with 36 years of experience, stating that Las Flores "current equity" was "buried" within the document. (AA 126.) Lipnicki made it clear that the document could not be considered a financial statement:

> Financial statements are intended to be a concise, understandable order of information taken from the books and records of the business concern for the benefit of the reader. It is the custom and practice that most multi-billion dollar Fortune 500 companies attach complete audited financial statements in connection with their annual reports to stockholders that are extremely concise, simple, and straightforward, of only a few pages length, (excluding the appurtenant notes to the financial statements).
>
> The alleged financial statements of LAS FLORES CONVALESCENT do not qualify as a valid financial statement. Rather it is a lengthy listing of the accounts in the books and records. This may serve management's needs, but does not serves [*sic*] the needs of a reader of the financial statements outside of the management group. The software that produced all of the numbers in this report appears very sophisticated, and I am confident that appropriate financial statements could have been obtained in another area of the software. The documentation submitted does not articulate a balance sheet, statement of income and members' equity, (statement of cash flows omitted).
>
> At most, the documentation constitutes an internal report . . . .

(AA 126.)

Defendant objected to the Lipnicki and Solo declarations. (AA 187-189.) The court never ruled on these objections.

On November 19, 2008, the court issued its ruling purporting to grant defendant's new trial motion. (AA 195.) The court stated that the "grant of defendant's new trial motion automatically grants a new trial also on the issue of punitive damages." (AA 195.) In its ruling, the court noted that it would

have granted defendant's JNOV motion if it had been unaccompanied by a new trial motion. (AA 199.)

B. Summary of Facts Pertaining to Defendant's Contention That the Jury's Verdict on Plaintiff's FEHA Claim Was Not Supported by Substantial Evidence.

To the extent that the facts pertaining to this issue were contested, all disputes are resolved in plaintiff's favor. (*Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, 369 ["In reviewing the sufficiency of the evidence, we must consider all of the evidence in the light most favorable to the prevailing party."].)

Roxana Marroquin was an assistant in the Activities Department, which plaintiff headed. (4 RT 315, 377.) Marroquin was a "happily married woman." (4 RT 323.) In approximately March 2006, Las Flores maintenance worker Javier Castellanos began following Marroquin around and asking her out. (4 RT 323, 448-449; 5 RT 647.) Marroquin knew that Castellanos and Las Flores dietary supervisor Desiree Buchanan "were boyfriend and girlfriend" and was surprised by Castellanos' actions. (4 RT 323, 332.)

Plaintiff saw Castellanos "frequently in the areas where [Marroquin] was at, and she was visibly uncomfortable. He would stare at her inappropriately and make comments and things." (4 RT 450.) Other staffers, including housekeepers and plaintiff's assistant Cynthia Wicker, told plaintiff that "they were seeing [Castellanos] making gestures and various things." (4 RT 450.)

Marroquin told plaintiff that Castellanos was harassing her. (4 RT

448.) Castellanos' actions made Marroquin "very uncomfortable" and "incredibly upset," and she threatened "to quit if something wasn't done." (4 RT 449.) Las Flores policy required plaintiff to report sexual harassment. (4 RT 449.) Sometime in the spring of 2006, plaintiff and Marroquin met with Greenspoon, who did not appear particularly interested, but "said he'd look into it." (4 RT 450-451; 5 RT 648.) Greenspoon did not take notes or say an investigation would occur. (4 RT 451.) Nor did he assure plaintiff that there would be no retaliation for reporting the harassment. (4 RT 451.)

After this, "all hell kind of broke loose." (4 RT 451.) Marroquin and Buchanan previously had been friends, and Buchanan had been very nice to plaintiff and the Activities Department. (4 RT 323-324.) Buchanan is friendly with Renita Morgan, the director of nursing at Los Flores. (4 RT 451; 6 RT 949, 964, 972.) Morgan is "management" and is in charge of Los Flores when Greenspoon is not around. (6 RT 964.) After plaintiff and Marroquin reported the sexual harassment, the activities department had "difficulty getting assistance in many areas – dietary, nursing." (4 RT 451.) "Problems were increasing." (4 RT 451.) Getting refreshments from the kitchen became so difficult plaintiff would go out and purchase them. (4 RT 452.) Sherry Parker, the director of staff development, who is friendly with Morgan and has socialized with her and Buchanan, would place one resident who could "just really get disruptive" into activities programs with 20 or 30 people. (4 RT 452; 5 RT 728-729, 750.) The resident would create a disruption, be wheeled out and then returned to the activities room by Parker or someone she assigned. (4 RT 452.)

Plaintiff told management that she felt she was being retaliated against

for reporting sexual harassment. (4 RT 453.) "Management," to plaintiff was Morgan, Greenspoon and Parker. (5 RT 644.) She told "whoever was available" and "Renita Morgan in particular" that "we were not getting the staff support we need to provide the services we need . . . ." (4 RT 453.) Morgan replied "'Well, why did you – why did you report that? You hurt Desiree. You made her cry. Doesn't Roxana know how to handle herself?'" (4 RT 453.) Plaintiff also told Greenspoon that nursing was refusing to assist the activities department with bringing patients in and out of the activities room. (3 RT 45.) After Schlank's accident, plaintiff attempted to tell Greenspoon that she was having difficulty obtaining help from nursing in monitoring smoking, but he brushed her off. (4 RT 472.)

Plaintiff believed that the retaliation adversely affected her pay. (4 RT 453.) After plaintiff reported the harassment, she requested a raise for Marroquin and later requested a raise for herself. (4 RT 453-454.) Plaintiff had "been at the same wage for a couple of years." (4 RT 454.) Greenspoon said he "would look into it." (4 RT 454.) He also said "'well, how is it that you can manage with one person on some days and that you would need three on other days.' He didn't seem to want to provide assistance." (4 RT 454.) Marroquin later received a raise–after plaintiff was fired. (4 RT 315-316.)

The retaliation for "standing up for Ms. Marroquin" continued until plaintiff was fired. (5 RT 671.)

ARGUMENT

I.

PLAINTIFF INTRODUCED SUFFICIENT EVIDENCE OF DEFENDANT'S FINANCIAL CONDITION TO JUSTIFY THE PUNITIVE DAMAGES AWARD, AND ANY DEFICIENCY IN PLAINTIFF'S EVIDENCE RESULTED FROM THE PERSISTENT OBSTRUCTIVENESS OF DEFENDANT, WHICH SHOULD NOT BENEFIT FROM ITS OWN MISCONDUCT.

A. Plaintiff Introduced Sufficient Evidence of Defendant's Financial Condition To Justify the Punitive Damages Award.

Defendant contends that the jury's punitive damage award should be overturned because plaintiff's purported failure to introduce evidence of defendant's net worth "left the jury unable to determine Las Flores' financial condition." (CRB/CAOB 29.) As will be explained in section B.1. below, any such "failure" would have been due to defendant's complete refusal to provide *any* financial information until the punitive damages phase of the trial began, at which point it provided a virtually unintelligible printout in which any information pertaining to net worth was buried so deeply that *Greenspoon* testified he could not find it. In reality, however, plaintiff succeeded in

introducing evidence sufficient to justify the jury's punitive damages award.

Plaintiff is required to adduce evidence of defendant's *financial condition*. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 109-110.) *Adams* explicitly refused to equate "financial condition" with "net worth," stating that "[w]e cannot conclude on the record before us that any particular measure of ability to pay is superior to all others or that a single standard is appropriate in all cases." (*Id*. at p. 116, fn. 7.) "As the court in *Adams* recognized, the key question before the reviewing court is not 'what is the defendant's net worth?' Rather, the question is 'whether the amount of damages 'exceeds the level necessary to properly punish and deter.'" (*Cummings Medical Corp. v. Occupational Medical Corp.* (1992) 10 Cal.App.4th 1291, 1299 [internal quotation marks omitted in part].)

In addition to not being synonymous with "financial condition," "'[n]et worth' is subject to easy manipulation and . . . should not be the only permissible standard. Indeed, it is likely that blind adherence to any one standard could sometimes result in awards which neither deter nor punish or which deter or punish too much." (*Lara v. Cadag* (1993) 13 Cal.App.4th 1061, 1065, fn.3 ("*Lara*"); *Kelly v. Haag* (2006) 145 Cal.App.4th 910, 915 [citing *Lara*]; *Zaxis Wireless Communications, Inc. v. Motor Sound Corp.* (2001) 89 Cal.App.4th 577, 582-583 [citing *Lara*].)

Courts have therefore relied on other measures, sometimes in combination with net worth, sometimes in the absence of net worth and sometimes to override net worth. (See, e.g., *Burnett v. National Enquirer, Inc.* (1983) 144 Cal.App.3d 991, 1012 [reviewing punitive damage award in light of net worth and net income for the relevant period]; *Cummings Medical Corp.*

v. Occupational Medical Corp., *supra*, 10 Cal.App.4th at pp. 1298-1301 [punitive damages allowed in the amount of fraudulently gained profits when no net worth figure was introduced]; *Zaxis Wireless Communications, Inc. v. Motor Sound Corp.*, *supra*, 89 Cal.App.4th at p. 583 [cash on hand, checking account balance and line of credit outweighed a negative net worth].)

Moreover, net worth is not restricted to the present balance of assets and liabilities, but can also include future earning power. (*Uhrich v. State Farm Fire & Cas. Co.* (2003) 109 Cal.App.4th 598, 607 [net worth figure included "present value earning capacity"].) In O.J. Simpson's civil case, the Court of Appeal upheld punitive damages that were considerably higher than *plaintiff's* estimate of Simpson's net worth, in part because of his future earning capacity. (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 625 ["Simpson is a wealthy man, with prospects to gain more wealth in the future"].)

As in *Uhrich* and *Rufo*, the evidence before the jury in the present case demonstrated that defendant here had considerable future earning power as well as present resources. Greenspoon testified that defendant was "in the black" and had a net income of $677,343 for the 12 months ending June 2008. (7 RT 1289-1290, 1292.) This amounted to an average profit of more than *$55,000 per month*. The jury knew that when defendant began operating Las Flores in approximately January 2006, the 99 bed facility had approximately 40-50 residents and that Greenspoon rapidly increased that number. (3 RT 34, 36; 5 RT 730.) The facility has been "at capacity" during Greenspoon's tenure. (5 RT 704.) As Greenspoon admitted, Las Flores has been a good investment. (6 RT 1047.)

It is common knowledge that our population is aging and demand for

elder care services is increasing. (See, e.g., *Foradori ex rel. Foradori v. Captain D's, LLC* (N.D. Miss. 2005) 2005 WL 3307102, *11, fn. 8. ["The court does not deem it improper to take judicial notice of the fact that this nation has a rapidly aging population which will place great demands upon the very same home care and nursing services which plaintiff will require for the rest of his life."].)[2] Given Las Flores' track record, the jury could conclude Las Flores would continue to generate substantial future earnings.

Defendant asserts that "'[E]vidence of the defendant's annual income, standing alone, is not meaningful evidence.'" (CRB/CAOB 27, citing *Robert L. Cloud & Associates, Inc. v. Mikesell* (1999) 69 Cal.App.4th 1141, 1152.) (Internal quotation marks partially omitted.) This assertion is irrelevant because plaintiff also introduced evidence of defendant's present positive net worth and future earning capacity.

In contrast, plaintiffs in the cases defendant cites failed to introduce *any* evidence regarding the defendants' liabilities. (CRB/CAOB 27-28, citing *Robert L. Cloud & Associates, Inc. v. Mikesell*, supra, 69 Cal.App.4th at p. 1152 [evidence of income, as well as expenses pertaining to certain transactions, but no evidence of partnership assets or liabilities or individual defendant's financial condition]; *Baxter v. Peterson* (2007) 150 Cal.App.4th 673, 681 ["although the record shows that Peterson owns substantial assets, it is silent with respect to her liabilities"]; *Kelly v. Haag*, *supra*, 145 Cal.App.4th at p. 917 [no evidence that defendant still owned certain property and, if so,

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[2/] Pursuant to California Rule of Court 8.1115(c), plaintiff has attached a copy of *Foradori ex rel. Foradori v. Captain D's, LLC* as Attachment 2 to this brief.

whether it was encumbered].)

By showing that defendant had a positive net worth, plaintiff obviated any question regarding defendant's present liabilities. Taken in conjunction with defendant's hefty net income for the year ending June 2008 and its participation in a growing sector of the economy, the jury's punitive damages award was based on sufficient evidence of defendant's financial condition.

B. Any Deficiency In Plaintiff's Evidence Resulted From the Persistent Obstructiveness of Defendant, Which Should Not Benefit From Its Own Misconduct.

Despite plaintiff's discovery requests, and the court's ordering defendant to produce financial information on the first day of trial, defendant produced no such information until the punitive damages phase began. At that time, defendant produced a 29 page printout so confusing that plaintiff's expert, Joseph Lipnicki, subsequently explained in detail why the document did "not qualify as a valid financial statement," but was merely "a lengthy listing of the accounts in the books and records." (AA 126.) Lipnicki also noted that defendant's current equity was "buried within" the document. (AA 126.)[3] *Tellingly, Greenspoon testified he could not locate a net worth figure*.

Any deficiency in the evidence of defendant's financial condition is therefore due solely to defendant's refusal to timely produce *understandable*

[3/] Although defendant objected to plaintiff's expert's declaration (AA 188), the court never ruled on this objection. Therefore, the objection was not preserved for appeal. (*Charisma R. v. Kristina S.* (2009) 175 Cal.App.4th 361, 369 ["Where a party fails to obtain a ruling from the trial court, the objections generally are not preserved on appeal."].)

information despite plaintiff's repeated requests and the trial court's order. Defendants engaging in such misconduct cannot weasel out of paying punitive damages by contending plaintiff did not adduce sufficient financial condition evidence. (*Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 608-609 ("*Mike Davidov Co.*"); *StreetScenes v. ITC Entertainment Group, Inc*. (2002) 103 Cal.App.4th 233, 243-244; *Caira v. Offner* (2005) 126 Cal.App.4th 12, 41.)

The facts detailed in section A.1. of the Statement of the Case reveal the full extent of defendant's stonewalling, which began months before trial and continued through Greenspoon's punitive damages phase testimony. Plaintiff attempted to discover defendant's financial condition through interrogatories, and subsequently demanded that defendant bring financial condition evidence to the trial. Defendant objected to both demands and opposed plaintiff's motions to compel. The trial court denied these motions, but ordered defendant to provide the Court with a current financial statement on the day of trial.

Defendant did not turn over its financial data until the start of the punitive damages phase. (7 RT 1273.) That data was comprised of page after page of closely spaced figures interspersed with text in confusingly spaced columns. (AA 132-159.) The only opportunity plaintiff's counsel had to review this data dump was during a brief pause in the proceedings taken so the court could formulate two special verdict questions. (7 RT 1274.)

The document was incomprehensible to plaintiff's counsel, despite her experience in reading balance sheets. (7 RT 1275.) After reviewing the document, plaintiff's counsel protested that she could not understand it and the

court told her to call Greenspoon to explain it. (7 RT 1275.) The court required defendant's counsel to disclose whether defendant's net worth was positive and offered him an opportunity to disclose the amount, but defendant's counsel did not do so. (7 RT 1276.) Defendant's counsel also remained silent when the trial court opined that "the only question is whether there's a positive net worth, and I don't know if there's anything more that needs to be put into evidence beyond that." (7 RT 1277.)

Greenspoon testified that he was unable to locate a net worth figure in the document defendant had provided. (7 RT 1292.) Greenspoon also testified that he did not know what defendant's total assets or liabilities were, or what its net worth was, though he knew defendant was "in the black." (7 RT 1289-1290.) The court refused to give the defendant's document to the jury because plaintiff had not offered it into evidence during her case and because the court believed that the jury should not be asked to understand what neither Greenspoon (purportedly) nor plaintiff's counsel could comprehend. (7 RT 1299.)[4]

In short, defendant refused to disclose any relevant financial condition information in response to plaintiff's discovery requests, and opposed plaintiff's efforts to compel defendant to provide such information. (Cf. *Adams v. Murakami*, *supra*, 54 Cal.3d at p. 122 [citing availability of discovery procedures as a justification for holding that plaintiff has the burden

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[4/] Despite the trial court's rationale, defendant peculiarly asserts that plaintiff's counsel should have sought leave to enter the document into evidence *after* the trial court refused to send the document to the jury. (CRB/CAOB 28, citing 7 RT 1299.) "The law neither does nor requires idle acts." (Civ. Code, § 3532.)

to adduce evidence of defendant's financial condition].) Although ordered to provide a financial statement to the court on the first day of trial, defendant did not produce any financial information until the punitive damages phase started. The information defendant provided was incomprehensible to plaintiff's attorney and to Greenspoon as well, unless he was committing perjury. Defendant's counsel did not disclose defendant's net worth despite the trial's court's inquiry, and failed to dispute the trial court's view that a positive net worth was all that was required for punitive damages.

Having made a mockery of the process by which financial condition is supposed to be brought to the jury's attention, defendant has had the unmitigated gall to complain in its JNOV motion and on appeal that the jury's punitive damages award should be reversed for lack of evidence regarding net worth. California courts have made short shrift of similar arguments in cases where defendants have played "hide the ball," even when plaintiffs were not as diligent in seeking financial condition information as the plaintiff in this case.

In *Mike Davidov Co.*, the trial court ordered defendant to produce his financial records for the punitive damages phase of trial despite plaintiff's failure to request these records in discovery or subpoena them for trial. (*Mike Davidov Co.*, *supra*, 78 Cal.App.4th at p. 603.) Defendant failed to produce them and the trial court awarded punitive damages without receiving evidence of defendant's net worth, awarding over four times plaintiff's compensatory damages. (*Id.* at p. 604.)

The Court of Appeal held that "by failing to bring in any records which would reflect his financial condition, despite being ordered to do so, and by

failing to challenge that ruling on appeal, defendant has waived any right to complain of the lack of such evidence." (*Id.* at pp. 608-609; see also *StreetScenes v. ITC Entertainment Group, supra*, 103 Cal.App.4th at pp. 243-244 [citing *Mike Davidov Co.* in rejecting the defendant's claim that there was no admissible evidence of net worth because the documents provided to plaintiff pursuant to court order were purportedly not authenticated; *Caira v. Offner*, *supra*, 126 Cal.App.4th at p. 41 [citing *Mike Davidoff Co.* in holding that when defendant produced a financial statement pursuant to court order, any insufficiency in the record as to defendant's financial condition "would be attributable solely to [defendant's] failure to comply with a court order"].)

Like the defendant in *Mike Davidov Co.*, defendant here did not challenge the court's order requiring financial information to be disclosed and does not question that order on appeal. The only distinction between the two defendants is that, instead of completely defying the court's order like the defendant in *Mike Davidov Co.*, defendant here provided (at the last possible moment) nearly 30 pages of gibberish that included a net worth figure its own CEO purportedly could not find.

This distinction truly does not make a difference because providing information that could not be comprehended within the time constraints imposed on plaintiff was the same as providing the information in an undeciphered ancient language or providing no information at all. Had defendant provided this information when plaintiff requested it, there would have been sufficient time for plaintiff's counsel, perhaps with the aid of plaintiff's expert, to decipher it. Had defendant even provided the information to the trial court on the first day of trial, as had been ordered, the trial court

might have reviewed it and ordered defendant to substitute data that could be quickly and easily understood.

By disclosing the information at literally the last minute in a format that required plaintiff's counsel, and defendant's CEO, to wade through a massive amount of virtually unintelligible data in order to find relevant information, defendant effectively defied the trial court's order and completely hamstrung plaintiff. As *Mike Davidov Co.* and the other cases make clear, a defendant who plays these kind of games waives the right to require a plaintiff to adduce admissible evidence of financial condition. Therefore, even if sufficient evidence of defendant's financial condition was not adduced, the failure is solely attributable to defendant, and the punitive damages award should stand.

C. If this Court Reverses the Punitive Damages Award, the Case Should Be Remanded for a New Trial on Punitive Damages Only.

For reasons stated above, the punitive damages award against defendant was amply merited and should be affirmed. However, if this Court reverses the punitive damages award, it should remand for a new trial on punitive damages because plaintiff did not have a fair chance to adduce evidence of defendant's financial condition.

This Court has the power to reverse and remand for a new trial on punitive damages issue alone. (*Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 782.) Several courts have ordered such remands after reversing a punitive damages award due to insufficient evidence of defendant's financial condition. (*Storage Services v. Oosterbaan* (1989) 214

Cal.App.3d 498, 516-517; *Barragan v. Banco BCH* (1986) 188 Cal.App.3d 283, 302; *Alhino v. Starr* (1980) 112 Cal.App.3d 158, 179; *Dumas v. Stocker* (1989) 213 Cal.App.3d 1262, 1267, 1271.)

Defendant nonetheless contends that a remand to determine punitive damages would be improper if the punitive damages were reversed for lack of sufficient evidence. (CRB/CAOB 28, citing *Kelly v. Haag*, *supra*, 145 Cal.App.4th at pp. 919-920; *Baxter v. Peterson*, *supra*, 150 Cal.App.4th at p. 681.) However, in both those actions, the plaintiff "had a full and fair opportunity to present his case for punitive damages, and he d[id] not contend otherwise." (*Kelly v. Haag*, *supra*, 145 Cal.App.4th at p. 919; *Baxter v. Peterson*, *supra*, 150 Cal.App.4th at p. 681, citing *Kelly*.)

Unlike the plaintiffs in *Kelly* and *Baxter*, plaintiff here was not accorded a full and fair opportunity to present evidence of defendant's financial condition. Although *Baxter* discusses the evidence the Court of Appeal deemed insufficient, that opinion says nothing specific about the scope of the opportunity plaintiff was afforded to adduce additional information. However, *Kelly* does, and its facts strongly contrast with those here.

The plaintiff in *Kelly* failed to subpoena documents or witnesses to be available at trial to establish the defendant's financial condition. (*Kelly v. Haag*, *supra*, 145 Cal.App.4th at p. 919.) The *Kelly* trial court, "concerned about the lack of evidence of net worth" plaintiff had adduced, asked if he would like "'to come back tomorrow'" to obtain the defendant's testimony, but the plaintiff declined. (*Id*. at p. 920.) The Court of Appeal concluded that "[t]hese facts, of course, do not merit a retrial." (*Ibid*.)

Unlike the plaintiff in *Kelly*, the plaintiff here attempted to subpoena

documents and witnesses for trial. Also unlike the plaintiff in *Kelly*, plaintiff here did not decline an opportunity for additional time to present her punitive damages case; in fact, the trial court made it very clear that no such time would be given despite plaintiff's counsel's protests that her client was severely prejudiced by the fact that the financial data was not comprehensible. (7 RT 1275-1276.) Unlike the facts in *Kelly*, those here *would* merit a retrial if the punitive damages award needed to be recalculated.

For these reasons, the court should order a new trial on punitive damages if it deems the jury's verdict awarding punitive damages was not supported by sufficient evidence.[5]

[5/] Defendant asserts in the introductory section of its "Cross-Appellant's Opening Brief" that if the new trial order were to be upheld, "punitive damages should not be available to [plaintiff] in the second trial." (CRB/CAOB 25.) Because the new trial order must be reversed, this contention is moot. However, if the new trial order were to be affirmed, punitive damages would have to be retried for two reasons. First, the trial court's order states that the "grant of defendant's new trial motion automatically grants a new trial also on the issue of punitive damages." (AA 199.) Second, as discussed above, plaintiff did not have a full and fair opportunity to introduce evidence pertaining to defendant's financial condition.

II.

PLAINTIFF INTRODUCED SUBSTANTIAL EVIDENCE THAT SHE WAS DISCHARGED IN RETALIATION FOR REPORTING SEXUAL HARASSMENT, SO THE JURY'S VERDICT ON PLAINTIFF'S FEHA CLAIM MUST BE UPHELD.

Defendant contends that no substantial evidence supports the jury's FEHA harassment finding. (CRB/CAOB 31.) Defendant is wrong. The critical flaw in defendant's argument stems from its mistaken contention that "Green introduced no evidence that Las Flores was motivated to terminate her employment because she supported Marroquin's charge. . . . This means that Green's proof of causation must have rested entirely on an inference arising from the temporal proximity between her support for Marroquin and her eventual termination." (CRB/CAOB 31-32.)

This assertion is incorrect because plaintiff did not rely on temporal proximity to show causation. Instead, plaintiff adduced evidence of an ongoing course of retaliation by Las Flores management which began as soon as plaintiff reported Marroquin had been sexually harassed and which ended with plaintiff's firing. This evidence was sufficient to permit the jury to conclude that plaintiff's reporting of sexual harassment was a "motivating reason" for her termination, as required by the relevant instruction, which was requested by both counsel, modified by the trial court and accepted by both counsel as satisfactory. (Respondent's Appendix 3; 7 RT 1201-1202.)

In determining whether the jury's verdict should be upheld, the "required standard of review is simply to determine whether the jury had before it substantial evidence from which it reasonably could conclude the challenged employment actions were motivated in substantial part by reasons of [retaliation]." (*Hosford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 375.) Although analytical frameworks involving burden shifting presumptions are useful at earlier stages of an action, "[o]nce the case is submitted to the jury-and, therefore, for substantial-evidence review on appeal-these frameworks drop from the picture and traditional substantial evidence review takes their place in the analysis." (*Ibid.*) Because this appeal concerns a judgment following trial, defendant's reliance on cases concerning review of summary judgments and the shifting standards applicable to them is misguided. The only issue here is whether, when viewed in the light most favorable to the jury's verdict, substantial evidence exists to support it.

Because the evidence must be reviewed in the light most favorable to the verdict, the court should disregard defendant's assertion that "both Marroquin and Greenspoon denied ever meeting with Green to discuss Marroquin's complaint of sexual harassment." (CRB/CAOB 31.) Plaintiff testified that she met with Greenspoon and Marroquin (4 RT 450-451) and it is this testimony which is binding on appeal. (*Thompson Pacific Const., Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 541-542 ["Since the issue before us concerns the sufficiency of the evidence, 'we must consider all of the evidence in the light most favorable to the prevailing party . . . . '"]; *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 420.

["We presume there is evidence to support every finding unless the appellant demonstrates otherwise and . . . draw all reasonable inferences from the record to support the judgment."].)

Plaintiff's meeting with Greenspoon and Marroquin produced no positive results. (4 RT 450-451.) After that meeting, "all hell kind of broke loose," the activities department had "difficulty getting assistance in many areas – dietary, nursing" and "[p]roblems were increasing." (4 RT 451.) Getting refreshments from the kitchen became so difficult plaintiff would go out and purchase them. (4 RT 452.) Sherry Parker, the director of staff development, repeatedly placed a disruptive resident into activities programs. (4 RT 452.)

When plaintiff, who had been at the same wage for "couple of years," requested raises for Marroquin and herself, Greenspoon said he'd "look into it," then made a disparaging comment about the activities department's staffing needs. (4 RT 453-454.) Marroquin later received a raise–after Greenspoon fired plaintiff. (RT 315-316.) After Schlank's accident, plaintiff attempted to tell Greenspoon that she was having difficulty obtaining help from nursing in monitoring smoking, but he brushed her off. (4 RT 472.)

Plaintiff told management–Morgan, Greenspoon and Parker–that she felt she was being retaliated against for reporting sexual harassment. (3 RT 45; 4 RT 453.) Plaintiff complained to Morgan, the nursing department head who is in charge of Los Flores when Greenspoon is not around, that the activities department was not getting the staff support necessary to provide services. (4 RT 453; 6 RT 949, 964.) Morgan's reply was telling: *she asked why plaintiff had reported the sexual harassment and told plaintiff she had*

hurt Buchanan. (4 RT 453.) Buchanan, Morgan and Parker were all department heads who were friendly and socialized with one another. (4 RT 344, 451; 5 RT 732; 6 RT 949, 964, 972.) The retaliation for "standing up for Ms. Marroquin" continued until plaintiff was fired. (5 RT 671.)

This evidence was clearly sufficient to enable a jury to conclude that plaintiff's notifying Greenspoon of Marroquin's harassment became known to Morgan and resulted in a cascade of continued retaliation by Las Flores management that included a refusal to assist the activities department, a refusal to give plaintiff or her staffer Marroquin a wage increase, and plaintiff's termination. When retaliation is continuing, a plaintiff need not show temporal proximity to prove causation. (*Porter v. California Dept. of Corrections* (9th Cir. 2005) 419 F.3d 885, 895 ["Although a lack of temporal proximity may make it more difficult to show causation, circumstantial evidence of a pattern of antagonism following the protected conduct can also give rise to the inference."]) (Internal quotation marks omitted.)

Wysinger v. Automobile Club of Southern California, *supra*, 157 Cal.App.4th 413 illustrates how a continuing course of retaliation can satisfy the causation requirement. In *Wysinger*, defendant asserted that a gap of more than three years between plaintiff's protected activity and the denial of a transfer/promotion he had requested was too long to permit a jury to conclude that plaintiff was retaliated against. (*Id*. at p. 421.) The Court of Appeal rejected this argument because retaliatory activity had taken place between the two events, stating:

> A long period between an employer's adverse employment action and the employee's earlier protected activity may lead to the inference that the two events are not causally

> connected. [Citations.] But if between these events the employer engages in a pattern of conduct consistent with a retaliatory intent, there may be a causal connection. [Citations.] Here Wysinger was not invited to serve on management committees or to apply for management positions and was treated with 'coldness.' ¶ [Defendant] ignored Wysinger's repeated requests to discuss his health and commute problems.

(*Id*. at 421-422.)

In *Wysinger*, as in the present case, different employees engaged in acts that amounted to a campaign of retaliation after plaintiff complained about discriminatory conduct. Upper management did not respond to Wysinger's letters concerning the difficulties engendered by his health conditions, the human resources department ignored his requests for accommodation, Wysinger was treated coldly and ignored at management meetings, and a vice-president of district office operations and a senior vice president denied him a transfer/promotion in favor of a less qualified employee. (*Wysinger v. Automobile Club of Southern California*, *supra*, (2007) 157 Cal.App.4th at pp. 418-419, 421-422.)

As in *Wysinger*, the jury here had sufficient evidence to conclude that a concerted campaign of retaliation began after plaintiff engaged in a protected action and culminated in the adverse employment action about which plaintiff complains. Therefore, the jury's verdict on plaintiff's FEHA cause of action was proper.

CONCLUSION

For the reasons stated above, plaintiff respectfully requests this Court to reverse the order granting a new trial and remand this action with direction

to the trial court to enter a judgment based on the jury's verdict and to award plaintiff attorney fees and costs.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c) of the California Rules of Court, I certify that the attached Appellant's Opening Brief contains 12,784 words excluding the tables of contents and authorities, and this certificate. The pertinent WordPerfect program counted 12,640 of these words. I hand counted the 144 words in the PDF material on page 24 of the brief.

DATED: April 13, 2010

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