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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

GLORIA OROZCO, Plaintiff, Cross-defendant and Appellant, v. ETHAN CONRAD et al., Defendants, Cross-complainants and Appellants; JOSE OVALLE, Cross-defendant and Appellant.	C086667 (Super. Ct. No. 34201500178749CUNPGDS)

A jury awarded plaintiff Gloria Orozco punitive damages after returning verdicts in her favor against defendants Ethan Conrad and his company Ethan Conrad Properties, Inc.[1] for conversion, intentional infliction of emotional distress, trespass to chattels, trespass to property, and forcible entry. The court reduced the jury's damages award in

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[1] For simplicity, we will refer to defendants collectively as Conrad. We will distinguish between Conrad and his company when appropriate.

multiple respects and entered judgment against Orozco and cross-defendant Jose Ovalle on Conrad's cross-claim for breach of contract, prompting Orozco and Ovalle to appeal. The court also denied the parties' requests for attorney fees and Orozco's various costs the parties now challenge.

We agree with Orozco in one respect and modify the punitive damages award to reflect seven times the total amount of compensatory damages awarded by the jury and affirmed by the trial court -- emotional distress damages ($50,000) and trespass to chattels damages ($3,000) -- for a total of $371,000 in punitive damages. We affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

A

Underlying Facts

Before 2008, Orozco contemplated becoming partners in a restaurant with Samuel and Rubicelia Sanchez, but nothing formal materialized. The Sanchezes, however, entered into a lease with the owners of a shopping center in Elk Grove for the purposes of opening a restaurant and Orozco accompanied them to the signing of the lease but did not sign herself. Rubicelia thereafter became ill and the Sanchezes asked Orozco to take over the restaurant. Orozco borrowed $150,000 from them and used the money, along with money she borrowed from family, to acquire kitchen and restaurant equipment and construct the restaurant space to fit her needs. In April 2008, after completing the space, Orozco opened her restaurant.

For the next seven years, Orozco paid only what she could afford in rent. The property manager, who was the property manager throughout Orozco's tenure in the shopping center, agreed to the arrangement. Orozco usually paid between $1,000 and $2,000 each month but skipped rent altogether twice in 2015. Orozco never signed a lease with the owners of the shopping center and the owners never told her she had hundreds of thousands of dollars of unpaid rent or tried to evict her. In March 2009,

however, Orozco and Samuel Sanchez signed a document stating she was responsible for the restaurant. She signed it to give Samuel Sanchez peace of mind and she did not think it meant she was taking over the lease to the restaurant space.

In 2014, Conrad proposed to buy the shopping center. As part of that process, he received a due diligence period to investigate the property before the final sale. During that time, Conrad investigated the shopping center's accounting including the rental income and occupancy rate. He learned the lease for Orozco's restaurant space was not signed by the current tenant, and the current tenant (Orozco) paid only what she could afford on an intermittent basis. He also learned from the property manager that Orozco could very easily be taken advantage of. As to the original lessees of the space, Conrad learned they owed nearly $730,000 in unpaid rent. Conrad knew there had been no lease assignment from the original lessees to the current tenant and assumed the restaurant and kitchen equipment inside Orozco's restaurant belonged to her.

Conrad saw an opportunity with the shopping center and with Orozco's space. As a businessman, he was in the business of buying distressed commercial properties similar to the shopping center. He owned the properties and his company, of which he was the chief executive officer and sole owner, managed the properties while his construction company (not a party to this action) flipped them to attract tenants who would pay market rent. While Conrad had 140 employees and a number of managers who handled matters without his input, he had the final say in "most things." Orozco's space provided an additional opportunity because it contained kitchen and other restaurant equipment, all of which was clean and in good condition. Conrad wanted a tenant who would pay the market rate to occupy the space.[2]

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[2] Conrad is very successful in his line of work. In the four previous years, his company had experienced double-digit growth in terms of operating income and properties acquired. While his company had a management income of over $5.5 million

Once Conrad owned the shopping center, he and his employee Moe Nayebkhel wrote a one-page lease amendment, which Conrad intended be a memorial of the Sanchezes' assignment of their lease to Orozco. The Sanchezes refused to sign the amendment, stating the lease had been discharged in their bankruptcy. The lease amendment purported to change the term of the lease from 10 years to one year with an option for the landlord to terminate the lease with 30 days' notice. Conrad testified this was a common practice when a tenant paid reduced rent because it allowed the tenant to stay in the space but also allowed the owner to market the space and potentially receive fair-market value. The amendment also required Orozco to transfer ownership of all her kitchen and restaurant equipment to Conrad's company.

Conrad instructed Nayebkhel to speak with Orozco before she signed the amendment. Conrad told him to explain to Orozco that by signing the amendment, she was transferring ownership of the kitchen and restaurant equipment to his company in exchange for forgiveness of $270,000 of delinquent rent, which Conrad calculated from the date of the Sanchezes' bankruptcy. Thereafter, Nayebkhel called Orozco and told her she owed hundreds of thousands of dollars in delinquent rent and it would all go away if she signed a document. He told her the lease was going to become a one-year lease but never said anything about a month-to-month lease. He further told her Conrad would meet with her to assess how much rent she could afford and that they would reassess the situation at the end of the year. Nayebkhel did not tell her about the transfer of her

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dollars and a rental income of nearly $40 million a year, Conrad believed the net income of the company was closer to $47,000, once maintenance and construction costs, as well as overhead was deducted. Conrad held most of the assets personally. His net worth was largely based on the value of the properties he owned, which in 2015 was $320 million and in 2016 was $440 million. As for the shopping center, its value had increased during Conrad's ownership and was worth $12 million at the time of trial, as opposed to $5 million when he bought it.

kitchen and restaurant equipment. He did require her to provide a cosigner to the lease amendment.

Nayebkhel gave the amendment to Orozco and then called her every day until she returned it. Orozco had the document for three days and read it several times but did not understand it. She did not think she owed money under the original lease. She also did not think she transferred ownership of her kitchen and restaurant equipment or entered a month-to-month lease by signing the document. She felt pressured to sign because Nayebkhel repeatedly called her and said she owed hundreds of thousands of dollars she could not afford. Orozco asked her brother-in-law, Ovalle, to become her cosigner and he agreed because Orozco said she needed the help and assured him it was going to be okay. He did not read the document.

After Orozco signed the lease amendment, Conrad began marketing and giving tours of the space. Once he found a tenant willing to pay market rent, he terminated Orozco's lease and instructed her to move out by March 30, 2015. In the termination letter, Conrad demanded the remaining rent and reminded Orozco the kitchen and restaurant equipment was to remain in the space. When Orozco received this letter, she contacted legal counsel. Counsel contacted Conrad, but he did not agree that Orozco owned the kitchen and restaurant equipment or that the lease amendment was unenforceable altogether. He maintained he was the rightful owner of the kitchen and restaurant equipment and that any attempt to take the equipment would be considered theft. Orozco did not pay the entire rent for March.

In the evening hours of March 19, 2015, Orozco began packing her belongings. The new tenant of the restaurant space saw Orozco moving and contacted Conrad out of concern Orozco was removing the kitchen and restaurant equipment promised in the lease. Conrad immediately sent multiple e-mails to employees, including the security company he contracted with, telling them Orozco did not have the right to remove anything from the restaurant space and, in the event she attempted to take anything, to

threaten her with criminal prosecution for theft and to call the police.[3] Conrad believed a crime was going to occur and wanted to stop it, he did not contemplate how his directions would impact Orozco.

The next morning, Orozco began moving her belongings out of the restaurant, including the restaurant and kitchen equipment, with several helpers and a moving truck. Conrad's construction employee, who was working at the shopping center and had been alerted by Conrad's e-mail the night before, saw Orozco and her associates moving equipment and alerted Conrad. Conrad instructed the construction employee to block Orozco's moving truck with his car. Conrad's intent was to stop Orozco from removing the property until police could arrive and resolve the situation. The construction employee did as instructed. He then got out of his car, stood in front of the moving truck and yelled at its driver that the group was stealing Conrad's property and he was going to call the police. He then went to the driver's side door and tried to force it open by kicking and banging on the door and pulling on the handle. He did the same thing to the passenger side door.[4] The driver of the truck was able to drive around the construction employee's car and drive away with pots and pans in the truck.[5]

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[3] At trial, Conrad acknowledged this was not true and Orozco had the right to remove her personal property. He admitted that this e-mail and subsequent e-mails should have been clearer on that point.

[4] The construction employee denied blocking the moving truck and attempting to gain entry by pounding and kicking the truck's doors. He acknowledged he told Conrad he blocked the moving truck and was almost hit in the process, but he contended that was a lie.

[5] The construction employee testified he was peacefully waiting in the parking lot after calling the police to report Orozco and her associates when one of Orozco's associates drove out of a parking spot and nearly hit him. He thought it was intentional and reported it to the security guard when he arrived.

Another tenant of the shopping center was "disturbed" and "shocked," and asked her husband to call the police. Orozco was hysterical and crying and could not be calmed down. She called her attorney, who then spoke with another of Conrad's employees who was at the scene. That employee told Orozco's attorney Conrad was friends with the mayor and chief of police and that "[w]e're going to have these guys arrested." The employee did not engage in a meaningful conversation with Orozco's attorney but instead threatened to "hunt [Orozco] to the ends of the earth" for the property she took.

By the time police arrived, the driver of the moving truck had also returned. An officer briefly detained the driver after Conrad's security guard pointed to him as the man who attempted to hit the construction employee. When questioned about the equipment, Orozco asserted it belonged to her and provided receipts to the officer. Conrad's employees and security guard explained the equipment had been transferred to their employer as part of the lease amendment. The officer believed the matter was a civil matter to be resolved in court and not by arrest. He allowed Orozco to continue removing the equipment from the restaurant space.[6]

Conrad was frustrated with this result. He e-mailed the mayor multiple times complaining about Orozco "stealing" kitchen and restaurant equipment. The mayor put Conrad in contact with the chief of police, who he also e-mailed multiple times demanding criminal action. Conrad disagreed with the initial officer's assessment the matter was not criminal and Conrad thought treating it as such would ensure return of his

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6 The evidence is conflicting on this point. Orozco and another tenant of the shopping center testified the officer permitted her to continue removing the equipment. The security officer testified Orozco was prohibited from doing so, while the construction employee testified he could not recall, however, he said during a deposition that Orozco was allowed to remove the equipment. Further, while the second officer at the scene testified it was his understanding Orozco was instructed not to remove the equipment, he could not attribute that knowledge to any source and the information was missing from the initial officer's report and his recollection.

property. The police chief, however, also believed the matter to be civil and instead assigned the matter to a lieutenant who assigned it to a sergeant. Conrad was upset about the police chief's determination and threatened to tell the press about Orozco's conduct and the lack of response from the police. The chief assured Conrad his complaint would be given to the district attorney, which it was, for possible prosecution, which the district attorney declined to pursue.[7]

Conrad also contacted the managing partner at the law firm where the attorneys representing Orozco worked. He began his e-mail by informing the partner that his "company is the fast[est] growing commercial real estate landlord in the Greater Sacramento Area. We own approximately 4.4 million square feet of commercial space in over 150 buildings with over 650 tenants." He accused Orozco's attorneys of giving her bad and unethical advice that would result in criminal charges and a civil suit. E-mails between Conrad and Orozco's attorneys were included in the message to the managing partner. In the most recent e-mail Conrad had sent a few hours prior, he told Orozco's attorneys he had a "great relationship" with the mayor and police chief and they were "**both aware of this matter now and will be pursuing full criminal charges against your clients**."

Meanwhile, after contacting the police chief, mayor, and Orozco's law firm, Conrad instructed his construction crew to go to Orozco's restaurant space. Ten to 20

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[7] Conrad pursued criminal prosecution of Orozco for about a week following her move out by communicating with the mayor, a councilmember, and the chief of police. He did not pursue this prosecution because he was upset; he pursued this because he wanted his property returned. He thought a criminal prosecution was "a good way to help motivate [Orozco] to return the items." When communicating with these city officials, Conrad expressed his surprise at the city's response considering a well regarded district attorney friend of his assured him it was a criminal matter and because the Folsom Police Department and the Sacramento County Sheriff's Department had treated similar matters he was involved in as criminal.

men arrived in a steady progression, some with dollies. They barricaded the entrance so Orozco could not remove any property. The men then went into the restaurant and removed Orozco's kitchen and restaurant equipment, placing it into a vacant retail space in the shopping center. The men yelled at Orozco, calling her a thief and a liar, and accused her of stealing Conrad's property. They threatened to call the police and also taunted her.[8] Other tenants of the shopping center came out of their businesses to see about the commotion. Orozco was still hysterical, she was also shaking and crying.

The sergeant assigned to the matter arrived at the shopping center. He believed the standing order was to leave the disputed property in the restaurant and ordered the parties to do so. A locksmith came to the restaurant and changed the locks on the front and back doors.[9] At one point, Orozco and some of her associates were locked inside of the restaurant. Once they left the restaurant, however, they were no longer allowed to go inside. Left inside the restaurant were several of Orozco's personal items, including decorative plates and plants. Conrad's employees later disposed of these items, along with some of Orozco's kitchen and restaurant equipment the new tenant did not want.

Conrad believed Orozco had already made off with hundreds of thousands of dollars in kitchen and restaurant equipment. Because he wanted his property returned, he ordered his security guard to follow Orozco. Specifically, he told the security guard and

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8 Conrad's construction employee and security guard denied this happened and testified Conrad's construction workers were peaceful and professional. The officers who responded to the shopping center testified the scene was relatively peaceful and, while the atmosphere was tense, there was no yelling or arguing.

9 It is unclear who called for a locksmith. Conrad testified he told his employees to change the locks at police direction; however, no officer testified to such. The security guard testified the sergeant allowed Conrad's employees to proceed with a lock out after he ordered Orozco to return property to the restaurant; however, it is unclear whether the sergeant initiated the lock out. In an e-mail to his construction employee, Conrad instructed him to change the locks so Orozco could not take more property. There was no mention of an officer directing Conrad to initiate such a process.

his team that "all they need to do [wa]s go to Gloria's house and follow her or her boyfriend to the new restaurant space that they've rented and/or find the moving van with [the equipment] in it parked at or near their house and notify us promptly." Orozco was under surveillance for a few days. Once Conrad inspected the shopping center property, he realized he needed $15,000 worth of equipment to fulfill the lease with the new tenant.

At trial, Orozco estimated Conrad had taken $112,372.62 of her property. The kitchen and restaurant equipment made up the majority of this total. Orozco based her value estimation of the equipment on its purchase price in 2007 or 2008. She testified the equipment was expensive and custom-made for her restaurant. She had recently made calls about similar equipment and learned the price had increased. She, however, did not know how much her equipment was worth at the time of testimony.

After Orozco was locked out of the restaurant, she could not be calmed down and would not stop crying. She was shaking and complained of a headache and chest pains. The next day, Orozco felt worse and she began vomiting and feeling dizzy. She went to the hospital and remained there for three days. She felt stressed, scared, and afraid because she did not know what Conrad and his employees were going to do to her. She thought she was going to die. Since then, Orozco feels as if she lives in prison. She does not feel safe and believes Conrad has sent people to get her. She also sees a cardiologist because of chronically high-blood pressure and rapid heart rate. Her treating physician believed these conditions were caused by stress and anxiety. Left unchanged, Orozco suffered from an increased risk of heart attack and stroke. Orozco also suffered from slight hyperthyroidism, which was correlative to anxiety and high-blood pressure.

Orozco sued. Conrad thereafter filed a cross-complaint against Orozco and Ovalle alleging conversion and breach of contract.

B

Relevant Trial And Posttrial Proceedings

At trial, Orozco limited her claims to extortion, trespass to real property, trespass to chattels, conversion, intentional infliction of emotional distress, and forcible entry. Following the close of evidence, Conrad moved for a directed verdict on Orozco's extortion claim. The court granted the motion finding no evidence "supports the cause of action for extortion. And to the extent there is any evidence arguably before the jury that may support such a claim, the Court finds that the defendants acted -- or actions in reporting what they thought were crimes or threatening to seek prosecution or making communication with elected officials to police officials in the vicinity or in the community were privileged activities."

The parties later agreed to submit to the jury three verdict forms: "plaintiff special verdict form" (Orozco's verdict form), "cross-complainant's special verdict form" (Conrad's verdict form), and the "Court's special verdict form" (court's verdict form). The court's verdict form contained questions meant to constitute factual findings separate from Conrad's and Orozco's special verdict forms. The questions were taken from a joint verdict form proposed by the parties, and queried whether the parties agreed to the terms of the contract, whether Orozco signed under duress or gave her consent through fraud, and whether the contract was unconscionable. Before excusing the jurors for deliberations, the court described the questions in the court's verdict form as advisory.

The jury found in favor of Orozco's claim for conversion and awarded her $122,372.62 split evenly between Conrad and his company. It also found in favor of Orozco's intentional infliction of emotional distress claim and awarded her $50,000 split evenly between Conrad and his company. Finally, it found in favor of Orozco's trespass to chattels claim and awarded her $3,000, again split evenly between Conrad and his company. While the jury found for Orozco on her trespass and forcible entry claims, it

did not award her damages in that regard. However, the jury did find Orozco was entitled to punitive damages.

On Conrad's cross-complaint, the jury found Orozco and Ovalle entered into and breached a contract with him. The jury awarded Conrad $1,800 from Orozco and $600 from Ovalle. It found Orozco had not committed conversion.

As to the findings contained in the court's verdict form, the jury found Conrad and Orozco agreed to the terms of the contract, but that Orozco's signature was achieved through duress and her consent through fraud. It also found the contract unconscionable and therefore unenforceable.

After the punitive damages phase of the trial, the jury awarded Orozco $1.8 million from Conrad and $324,000 from his company.

The parties filed a variety of posttrial motions having to do with the jury's verdicts. Among them was Orozco's and Ovalle's motion to vacate the breach of contract judgment in favor of Conrad; or alternatively, to enter a judgment notwithstanding the verdict in Orozco's and Ovalle's favor. They argued that because the jury's factual findings did not support a breach of contract conclusion, Conrad should not have prevailed on that claim. Conrad moved for a new trial on the punitive and conversion damages awards arguing the former was excessive and the latter was not supported by the evidence. Conrad further requested a new trial in the event the court did not disregard the jury's factual findings on the breach of contract claim.

The court denied Orozco's and Ovalle's motions to vacate the judgment or to enter judgment notwithstanding the verdict as it pertains to Conrad's breach of contract cross-claim. It reasoned substantial evidence supported the jury's verdict of breach of contract and that evidence of the affirmative defenses was controverted. Further, because the judgment was consistent with the verdict finding in favor of Conrad, Orozco and Ovalle were merely attempting to attack the consistency of the verdict, which was improper through the chosen procedures.

The court granted Conrad's motion for a new trial as to conversion damages and conditionally granted it as to punitive damages. As to conversion damages, the court found there was insufficient evidence presented at trial regarding the fair-market value of the property Conrad took. As to punitive damages, the court found them excessive and thought in its independent judgment that an award of $250,000 was appropriate.

Orozco also moved for prejudgment interest. The court denied the motion as untimely and on the merits, reasoning Orozco's damages were uncertain pending trial. The court also awarded Orozco costs but at a reduced amount.

The parties all appealed. Thereafter, the parties moved for attorney fees pointing to the original lease as justification. The court determined there was no contractual relationship between the parties that provided for attorney fees; and to the extent there was, neither party prevailed under the contract. The court denied both motions. The parties appealed this order as well.

DISCUSSION

I

The Court Properly Directed Verdict In Conrad's Favor On Orozco's Extortion Claim

Orozco contends the trial court erred by finding no evidence supported her claim of extortion and directing verdict in Conrad's favor. She also takes issue with the court's finding that Conrad's conduct was protected by the litigation privilege. We agree evidence did not support Orozco's claim, and thus we do not address whether the litigation privilege applies to Conrad's conduct.

" 'A nonsuit in a jury case or a directed verdict may be granted only when disregarding conflicting evidence, giving to the plaintiffs' evidence all the value to which it is legally entitled, and indulging every legitimate inference which may be drawn from the evidence in plaintiffs' favor, it can be said that there is no evidence to support a jury verdict in their favor. [Citations.]' [Citation.] Nonsuit is appropriate where the

plaintiff's proof raises nothing more than speculation, suspicion or conjecture." (*Hernandez v. Amcord, Inc*. (2013) 215 Cal.App.4th 659, 669.) We review the trial court's nonsuit ruling de novo, resolving all presumptions, inferences and doubts in favor of plaintiff. (*Ibid.*)

" ' "Extortion is the obtaining of property from another, with his consent . . . induced by a wrongful use of force or fear . . . ." (Pen. Code, § 518.) Fear, for purposes of extortion "may be induced by a threat, either: [¶] . . . [¶] 2. To accuse the individual threatened . . . of any crime; or, [¶] 3. To expose, or impute to him . . . any deformity, disgrace or crime[.]" (Pen. Code, § 519.)' " (*Mendoza v. Hamzeh* (2013) 215 Cal.App.4th 799, 805, quoting *Flatley v. Mauro* (2006) 39 Cal.4th 299, 326.) "The threat to report a crime may constitute extortion even if the victim did in fact commit a crime. The threat to report a crime may in and of itself be legal. But when the threat to report a crime is coupled with a demand for money, the threat becomes illegal, regardless of whether the victim in fact owed the money demanded. [Citation.] ' "The law does not contemplate the use of criminal process as a means of collecting a debt." ' " (*Mendoza*, at p. 805.)

Conrad told his employees to threaten Orozco with criminal prosecution and arrest to prevent her from taking the kitchen and restaurant equipment. Indeed, not only did Conrad threaten criminal prosecution, but he actively sought it by instructing his employees to call the police and by contacting the police chief and submitting a report to the district attorney. Conrad, however, made these threats of prosecution and arrest during the perceived theft; and, while his demand was for property, the property was the subject of the perceived crime. Conrad was not extorting Orozco, as much as he was demanding she immediately stop committing what he subjectively thought was a crime. By way of analogy, a person is permitted to demand another to stop committing a battery under threat of prosecution. That person is not permitted to condition the prosecution on payment of money or property. Conrad did the former, not the latter.

These facts set Orozco's case apart from the cases upon which she relies. In *Mendoza*, an employer sent a demand letter to a former employee demanding $75,000 he allegedly stole or the employer would report the employee to a variety of local, state, and federal prosecuting agencies, as well as business associates. (*Mendoza v. Hamzeh*, *supra*, 215 Cal.App.4th at p. 802.) Similarly, in *Stenehjem*, an employee sued his employer for defamation and threatened to report the employer to several prosecuting agencies unless the employer settled the lawsuit favorably to the employee. (*Stenehjem v. Sareen* (2014) 226 Cal.App.4th 1405, 1409-1410.)

In both cases, the threat of prosecution was made after the crimes allegedly occurred and money was demanded in exchange for the silence. Notably too, the employee in *Stenehjem* threatened to report a crime unrelated to the lawsuit with his employer. (*Stenehjem v. Sareen*, *supra*, 226 Cal.App.4th at p. 1423.) Conrad did not do this here. He believed he was entitled to the property, it was currently being taken, and his demands were limited to the subject of the perceived crime. Consequently, Orozco presented no evidence showing Conrad did anything more than attempt to stop a crime from occurring. Thus, we agree with the trial court's assessment the evidence did not support a claim for extortion.

II

The Court Properly Entered Judgment In Conrad's Favor On The Breach Of Contract Claim

Orozco contends the trial court deprived her of a jury trial on her affirmative defenses by entering judgment in favor of Conrad on the breach of contract claim, thus ignoring the jury's findings of duress and fraud, as well as its advisory finding of unconscionability. Orozco argues the court was bound by the jury's findings and should have entered judgment in her favor. We disagree.

When, like here, a special verdict is used, "the jury find[s] the facts only, leaving the judgment to the Court. The special verdict must present the conclusions of fact as

established by the evidence . . . and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law." (Code Civ. Proc.,[10] § 624.) " 'The requirement that the jury must resolve every controverted issue is one of the recognized pitfalls of special verdicts. "[T]he possibility of a defective or incomplete special verdict, or possibly no verdict at all, is much greater than with a general verdict . . . ." ' " (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960.)

The court must take the verdict form at face value when entering judgment on that verdict. For example, in *Myers*, the court considered a challenge to an award of punitive damages because the special verdict form included findings only for plaintiff's cause of action for breach of contract. (*Myers Building Industries, Ltd. v. Interface Technology Inc.*, *supra*, 13 Cal.App.4th at p. 958.) "No special verdict findings were submitted to the jury on any cause of action except breach of contract, even though [plaintiff] had pleaded [a] cause of action against [defendant] for breach of fiduciary duty and fraud. The special verdict read, on its face, as a net award of compensatory damages for breach of contract with a special finding that [defendant] had acted with 'oppression, fraud, or malice' towards [the plaintiff]." (*Ibid*.) Because "the jury was neither requested to nor did it make the necessary factual findings for a fraud or other tort cause of action," the special verdict was fatally defective with regard to the award of punitive damages. (*Id*. at p. 960.)

In *Saxena*, the family of the decedent was awarded damages from the decedent's physician following a jury trial on causes of action for wrongful death, negligence, and battery. (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 320.) Since the claim for battery required the family to prove that the physician had acted without the decedent's

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[10] Further section references are to the Code of Civil Procedure unless otherwise indicated.

consent, the special verdict was fatally defective for failing to require such a finding; "it 'is like a puzzle with pieces missing; the picture is not complete.' " (*Id.* at p. 326.) On that basis, the order denying the physician's motion for judgment notwithstanding the verdict was reversed with directions that the trial court enter judgment in favor of the physician on the battery claim. (*Id.* at pp. 335-336.)

Similarly, in *Behr*, the court concluded the verdict there reflected "the absence of a factual finding necessary to support a cause of action" for fraud by misrepresentation because the verdict form did not call for a finding as to whether the defendant made an affirmative misrepresentation. (*Behr v. Redmond* (2011) 193 Cal.App.4th 517, 531.) Thus, that cause of action was unsupported by the jury's verdict, and judgment on that claim was reversed. (*Id.* at p. 538.)

Conrad's verdict form did not include Orozco's affirmative defenses; it contained only the findings necessary to establish a breach of contract claim, which the jury found true. Based on that verdict form, the judgment is supported irrespective of the jury's findings regarding Orozco's affirmative defenses. In other words, all the puzzle pieces are present, and the breach of contract picture is complete.

Indeed, Orozco does not argue Conrad's verdict form was missing an element for a breach of contract claim or that there was a lack of evidence supporting that verdict as reflected in the special verdict form; she argues only that ample evidence supported her defenses. She also does not take issue with the trial court's conclusions regarding the validity of the verdict form and supporting evidence when denying her motions to vacate and for judgment notwithstanding the verdict.[11] Instead, she argues the findings of fraud

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[11] To the extent Orozco argues the verdict forms were faulty, that argument is forfeited by Orozco's failure to object at trial. "A party who fails to object to a special verdict form ordinarily waives any objection to the form." (*Behr v. Redmond, supra,* 193 Cal.App.4th at p. 530.) "When the issue is whether a question was omitted from a special

and duress were binding and can be harmonized with the jury's other findings to reflect the jury's belief she breached an unenforceable contract. Given this harmonized interpretation of the verdicts, Orozco argues she is entitled to a favorable judgment on Conrad's breach of contract claim. Again, we disagree and conclude that, assuming the jury's findings of fraud and duress were binding on the court, those findings were inconsistent with the findings made regarding Conrad's breach of contract claim. Consequently, Orozco has not shown she was entitled to judgment in her favor; and instead, was required to move for a new trial.[12]

"A special verdict is inconsistent if there is no possibility of reconciling its findings with each other." (*Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 357.) In making that decision, we review the answers in the special verdict form in the context of the record, including the pleadings, the evidence, the instructions, and the arguments of counsel. (*Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 718-720 [evidence, instructions, and argument]; *Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1092 [pleading, evidence, and instructions].) " 'Where there is an inconsistency between or among answers within a special verdict, both or all the questions are equally against the law.' [Citations.] 'The appellate court is not permitted to choose between inconsistent answers.' " (*Zagami, Inc.*, at p. 1092.) Inconsistent verdicts are considered " ' "against law" ' " (§ 657, cause 6) and thus, are grounds for a new trial (*Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1344).

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verdict form, the issue must be raised before the jury is discharged." (*American Modern Home Insurance Co. v. Fahmian* (2011) 194 Cal.App.4th 162, 170, fn. 1.)

12 Because we assume the court was bound by the jury's findings, we need not address whether Orozco waived her jury trial right by failing to object to questions regarding her affirmative defenses being included in the court's special verdict form, which the court described as advisory both during and after trial.

The jury found Orozco entered into and breached a contract with Conrad owing damages. As it pertains to the court's verdict form, the jury found Orozco agreed to the terms of the contract, entered the contract under duress, and her consent was gained by fraud.[13] Orozco argues these findings can be harmonized because Conrad's verdict form dealt exclusively with contract breach, while her defenses dealt exclusively with contract formation. Thus, the jury found Orozco's breach was excused because Conrad procured the contract by fraud and duress.

Orozco ignores the jury's finding that she entered into a contract and agreed to the terms of the contract, affirmative findings of formation that are inconsistent with her defenses. These findings expressly appear on the court's verdict form and on Conrad's verdict form, wherein the jury found Orozco entered into a contract with Conrad, a necessary element of which is agreeing to the terms of that contract as the jury instruction provides. (See CACI No. 302.) Regarding breach, the jury instructions require a finding the parties "entered into a contract." (See CACI No. 303.) Conversely, the instruction regarding duress provides that if the jury finds duress, "then no contract was created." (See CACI No. 332.)[14] Orozco's counsel made this same argument regarding fraud and further argued, under the facts of this case, the fraud amounted to lack of consideration.

Considering the jury's findings in light of the instructions it was given, the jury found both that a contract existed between the parties and that it did not. To that point, Orozco's theory the jury thought her breach was excused is refuted by the jury's award of damages due to the breach. Indeed, if the breach was excused, then there would be no

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[13] The jury also found the contract unconscionable; however, Orozco does not argue the court was bound by this finding.

[14] It does not appear the jury was instructed on fraud as it relates to Conrad's breach of contract claim. Fraud was defined in the instruction regarding punitive damages; however, that instruction does not provide how a finding of fraud effects a contract. (See CACI No. 3948.)

damages resulting from that breach. Consequently, the jury believed both that there was a contract and there was not a contract, thus the verdicts cannot be reconciled. (See *Shaw v. Hughes Aircraft Co., supra,* 83 Cal.App.4th at pp. 1344-1345 [inconsistent verdicts when the jury found no contract to support a breach of contract claim but a breach of the implied covenant of good faith and fair dealing that presupposed a contract].)

Orozco attempts to avoid rejection of her appellate claim by arguing Conrad waived the argument the trial court should have granted a new trial because he has failed to appeal the court's denial of his own new trial motion. However, Conrad is not arguing the court should have granted his new trial motion but that the court did not err in denying Orozco's motions to vacate and for judgment notwithstanding the verdict. On those points, we agree.

"A motion to vacate under section 663 is a remedy to be used when a trial court draws incorrect conclusions of law or renders an erroneous judgment on the basis of uncontroverted evidence." (*Simac Design, Inc. v. Alciati* (1979) 92 Cal.App.3d 146, 153.) Similarly, "[a] motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support." (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.) "If the evidence is conflicting or if several reasonable inferences may be drawn, the motion for judgment notwithstanding the verdict should be denied." (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 110.) As we have discussed, Orozco failed to meet her burden because Conrad's verdict form supported the judgment in favor of Conrad's breach of contract claim, as did substantial evidence presented at trial.

Orozco also argues Conrad waived his inconsistent verdict argument by failing to request clarification from the jury regarding its verdict. Not so. Conrad's argument of inconsistency is a direct rebuttal to Orozco's argument the jury's findings are consistent and the findings of fraud and duress negate the findings on the breach of contract claim.

Finally, citing *Hoopes*, Orozco argues the court should have adopted the jury's advisory finding of unconscionability because it was based on the same evidence and the same operative facts as were the verdicts. (*Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 160.) We disagree. *Hoopes* involved legal and equitable claims and defenses between two commercial tenants claiming exclusive rights to the same parking spaces. (*Id*. at pp. 151-153.) In a special verdict, the jury "expressly found" the plaintiff had the right to exclude the defendants and their customers from the parking spaces. (*Id*. at pp. 150, 154, 158.) Later, the trial court "rejected the jury's factual findings and made its own independent evaluation of the evidence," and "found, contrary to the jury's special verdict, that the" plaintiff did not have the right to exclude the defendants and their customers from the parking spaces. (*Id*. at pp. 154-155.) The appellate court held the "trial court erred in disregarding the jury's verdict when ruling on equitable remedies that relied on common issues of fact previously adjudicated by the jury." (*Id*. at p. 158, italics omitted.)

When the jury advised the court the contract was unconscionable, it found " 'an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.' " While the absence of a meaningful choice is supported by the jury's factual finding of duress or fraud, the unreasonably favorable contract terms is not supported by any of the jury's legal findings. Thus, the court was not bound by the jury's finding of unconscionability and Orozco's reliance on *Hoopes* is misplaced. Accordingly, the court did not err by denying Orozco's motions to vacate and for judgment notwithstanding the verdict.

III

New Trial Motions

Orozco contends the trial court erred by granting Conrad's motion for a new trial on the issue of conversion damages because sufficient evidence supported the jury's award. She contends the trial court similarly erred when conditionally granting Conrad's

motion for a new trial on punitive damages and reducing the jury's award to $250,000. We disagree with the amount of the court's punitive damages reduction but otherwise agree with its findings.

We begin by noting that "courts have no inherent power to grant a new trial: '[t]he right to a new trial is purely statutory . . . .' [Citation.] Because the right to a new trial 'finds both its source and its limitations in the statutes . . . , the procedural steps prescribed by law . . . are *mandatory* and must be strictly followed.' " (*In re Marriage of Herr* (2009) 174 Cal.App.4th 1463, 1471.) Section 657 allows the court to grant a new trial on all or part of the issues "for any of the following causes, materially affecting the substantial rights of such party: [¶] . . . [¶] 6. Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law."

When the court grants a new trial, section 657 requires that the court specify not only the grounds upon which the motion is granted, but also the reasons for granting a new trial upon each ground stated. Section 657 prohibits the court from granting a new trial on the ground of insufficient evidence, "unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision."

Generally, an appellate court must affirm the new trial order "if it should have been granted upon any ground stated in the motion, whether or not specified in the order or specification of reasons." (§ 657.) However, an appellate court may not affirm a new trial order on the ground of insufficient evidence, unless such ground is stated in the order granting the motion. (*Ibid*.) Where a new trial is granted on the ground of insufficient evidence, "it shall be conclusively presumed" on appeal "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." (*Ibid*.)

A

The Record Supports The New Trial Order On Conversion Damages

The trial court granted Conrad a new trial on conversion damages because no evidence was presented regarding the fair-market value of the kitchen and restaurant equipment at the time of the conversion. The court pointed to Orozco's testimony she paid $112,372 for the equipment many years prior to the conversion and that she thought the equipment was worth the same price at the time defendants took the equipment. It also took into consideration she testified she did not know what the value of the property was at the time of her testimony. This led to the conclusion Orozco's estimate did not take into account depreciation, and thus could not be accepted as the fair-market value of the equipment but was its replacement value.[15]

Orozco argues the trial court's conclusion is infirm because it ignored Orozco's opinion regarding the value of the property and the jury instructions that permit a party to establish the value of his or her property. Not so. The court expressly noted Orozco's valuation of her own property and that she thought that valuation amounted to the fair-market value. The court, however, concluded Orozco's assessment of fair-market value, which was nothing more than what she paid for the equipment, was insufficient because it failed to account for depreciation.

On that point, Orozco argues the evidence, instructions, and verdict rebut the court's conclusion the jury failed to account for depreciation. Again, we disagree. The instructions required the jury to assess the fair-market value of the converted property as it was on the day of the conversion -- March 20, 2015. When assessing that fair-market value, the jury was permitted to take into consideration Orozco's purchase price. But

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[15] In a similar vein, the court found these damages uncertain and capable only of being determined by a jury verdict. Thus, it denied Orozco's motion for prejudgment interest.

ultimately the jury was to determine the highest price a willing seller would pay a willing buyer, assuming neither was pressured and both knew the property was reasonably capable of being used.

The jury awarded $112,372.62 in damages, which was the exact amount Orozco estimated her converted property was worth but with only its purchase price informing that calculation. To justify it, Orozco points to her testimony her kitchen equipment was well maintained and custom-made, and that the price for such equipment had since increased. She points to Conrad's testimony verifying the condition of the kitchen equipment as well maintained and costing between $154,000 and $100,000, as well as Conrad's verified cross-complaint that valued some of the property Orozco claimed converted at the same price valued by Orozco. She also argues her admission she did not know the value of the equipment at the time of trial is irrelevant because the jury was not supposed to determine the fair-market value of the property at the time of trial.

What is apparent across all the evidence purported to support Orozco's fair-market valuation, is that it contemplates only the purchase price of new kitchen and restaurant equipment. Such evidence cannot support a fair-market value determination at the time Orozco's property was converted, which is the measure of damages applicable. (Civ. Code, § 3336; *Murphy v. Wilson & Co*. (1957) 153 Cal.App.2d 132, 136 [value generally means fair-market value].) " '[T]estimony as to cost of goods is a circumstance tending to show value.' [Citation.] Such evidence may be taken into consideration, along with other circumstances such as the extent of the use of the property and its condition and depreciation, in order to determine the subsequent value of the property and establish the loss sustained as the result of an unlawful co[n]version." (*Wade v. Markwell & Co.* (1953) 118 Cal.App.2d 410, 431-432; see *Stroman v. Lynch* (1949) 91 Cal.App.2d 406, 408 [in action for conversion, owner's testimony as to cost of goods is a circumstance tending to show value, but evidence of cost is not necessarily evidence of market value,

and generally when property has been used, evidence of cost of replacing it with new provides no measure of value].)

Orozco's fair-market valuation was her purchase price of the kitchen equipment when it was new. Her claim she had called around and learned the prices had since increased appears to also be based on the price of new kitchen equipment, not equipment of similar age and condition as her own at the time it was converted.

Similarly, Conrad's testimony was based on the purchase price of new kitchen equipment. He agreed $154,000 was a fair estimation of Orozco's purchase costs of the equipment and $100,000 was his expected cost to purchase new equipment to fulfill the lease he entered with the tenant taking over Orozco's restaurant space. Further, Conrad's valuation in the cross-complaint is the purchase price of the kitchen equipment provided by Orozco, and is not the fair-market value of the kitchen equipment at the time of the conversion. Moreover, that valuation does not include many items on the extensive list Orozco provided of her converted property.

Lastly, Orozco's admission she did not know the fair-market value of the kitchen equipment at the time of trial is not necessarily relevant as to the value of the property at the time of the conversion, as much as it is relevant to Orozco's expertise concerning the value of used kitchen equipment. Orozco was able to testify only to the purchase price of her equipment several years prior to the conversion and to the purchase price of new equipment. When asked about depreciation and other effects time had on the value of Orozco's property, she did not know the answer. Thus, the jury was given no evidence of the fair-market value of the kitchen equipment at the time of the conversion except for the purchase price of that equipment several years prior. Because the jury awarded the exact price requested, which was the purchase price of the equipment, it is clear the jury did not award Orozco the fair-market value of the equipment converted. Accordingly,

substantial evidence supports the court's granting of Conrad's new trial motion on the issue of conversion damages.[16]

B

Punitive Damages

Orozco contends the trial court erred by conditionally granting Conrad's motion for a new trial on the punitive damages award. Specifically, she asserts the court's statement of reasons was lacking because it failed to adequately specify aspects of the proceedings leading to the jury's improper inflation of the award and because it failed to include consideration of Conrad's financial condition as required by California law. Additionally, she argues the court's conclusion the award was excessive is not supported by the record. We disagree.

" 'The due process clause of the Fourteenth Amendment to the United States Constitution places constraints on state court awards of punitive damages.' " (*Bankhead v. ArvinMeritor, Inc*. (2012) 205 Cal.App.4th 68, 84; see *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 416-418 [155 L.Ed.2d 585, 600-601].) " 'The imposition of "grossly excessive or arbitrary" awards is constitutionally prohibited, for due process entitles a tortfeasor to " 'fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.' " ' " (*Bankhead*, at p. 84; see *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1171 (*Simon*).) The United States Supreme Court in *State Farm* articulated " 'three guideposts' for courts reviewing punitive damages: '(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by plaintiff and the punitive damages award; and (3) the

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16 Because we have concluded the trial court properly granted Conrad's motion for a new trial as to conversion damages, we need not determine whether Orozco was entitled to prejudgment interest on those damages.

difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.' " (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 712 (*Roby*).)

1

The Order

Orozco was awarded a total of $2,124,000 in punitive damages -- $1.8 million to be paid by Conrad and $324,000 by his company. The parties differed on how to calculate the ratio of compensatory to punitive damages awarded, but all agreed the ratio was more than 10 to one. Citing *State Farm* and *Simon*, the court acknowledged such a ratio was suspect and then found under the "particular facts and evidence in this case, . . . the ratio exceeding single-digits conveyed by the jury's award of punitive damages is constitutionally infirm, and constitutes a violation of Defendants' constitutional rights of due process."

The court began with Conrad's reprehensibility and found it rose to a "low level." "The evidence indicates [Orozco]'s harm was not physical and her emotional distress was not sufficient to cause her 'physical' harm. There is no evidence that Mr. Conrad acted with a reckless disregard for the health and safety of others. However, making all reasonable inferences in favor of [Orozco], there was evidence whereby the jury could have reasonabl[y] found potentially repeated wrongdoing, that [Orozco] was financially vulnerable, and that the harm was caused by intentional malice. However, in reviewing the entire record, the Court finds the conduct by [Conrad] did not rise to the level of 'extreme' misconduct that would warrant a punitive damages award exceeding $2 million."

The court next addressed "the relationship between the actual damages and punitive damages award." It reasoned "the verdict awarded a significant amount of economic damages and the conduct was not especially egregious. Accordingly, the Court finds that the jury's award of over $2 million in punitive damages excessive."

The court then, "in its independent judgment, and in consideration of the entire record, has determined that reducing the punitive damages award to $250,000 (a ratio of 1:5 -- $50,000 in emotional distress damages x 5 (conversion damages subject to new trial)) would be fair and reasonable based on the evidence at trial. The reduction in punitive damages to $250,000 shall be apportioned between Ethan Conrad and Ethan Conrad Properties, Inc. as follows: $205,000 against Ethan Conrad and $45,000 against Ethan Conrad Properties, Inc."

2

The Order Meets The Procedural Requirements Of Section 657

We conclude the trial court stated reasons sufficient to comply with section 657. We can ascertain from the order why the trial court believed defendants' reprehensibility was at the low end of the spectrum. The trial court then determined that, considering the low reprehensibility determination and the significant amount of compensatory damages awarded, a one-to-five ratio was appropriate. The court's statement of reasons provides for meaningful appellate review.

Citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 932, Orozco argues the trial court's order was deficient because it did not "specify 'those aspects of the trial proceedings which, in the trial court's view, improperly led the jury to inflate its award.' " Orozco's reliance on *Neal* is misplaced. There, the trial court conditionally granted a new trial on a punitive damages award under California law because the jury was influenced by passion or prejudice. (*Id.* at pp. 927-928, 930, 932.) The appellate court concluded the reasons supporting this ground were sufficient because the trial court pointed to multiple instances "which, in the trial court's view, improperly led the jury to inflate the award." (*Id.* at p. 932.) It made that determination in light of the general principle that it is " 'sufficient if the judge who grants a new trial furnishes a concise but clear statement of the reasons why he finds one or more of the grounds of the motion applicable to the case before him. No hard and fast rule can be laid down as to the

content of such a specification, and it will necessarily vary according to the facts and circumstances of each case.' " (*Id.* at pp. 931-932.)

Here, the court did not conditionally grant a new trial based on passion or prejudice, but based on the guideposts articulated in *State Farm* regarding federal due process limitations to punitive damages. The reasons stated for that ground provide for meaningful appellate review.

Orozco also argues the court's order was deficient because the trial court failed to consider Conrad's financial condition when finding the award unconstitutional. Again, we disagree. "Because a court reviewing the jury's award for due process compliance may consider what level of punishment is necessary to vindicate the state's legitimate interests in deterring conduct harmful to state residents, the defendant's financial condition remains a legitimate consideration in setting punitive damages. [Citation.] The *State Farm* court, however, also emphasized that wealthy defendants are equally entitled to due process and that '[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.' " (*Simon*, *supra*, 35 Cal.4th at pp. 1185-1186.)

Given the trial court's findings Conrad acted with a low degree of reprehensibility and there was a disparity between the jury's compensatory damages award and the punitive damages award, consideration of Conrad's financial condition was irrelevant. Indeed, the court could not justify the punitive damages award it just determined unconstitutional simply by pointing to Conrad's wealth. The order does reflect the court's consideration of Conrad's financial condition when assessing a new punitive damages award. The court said it considered the entire record, a substantial portion of which included testimony about defendants' financial condition. Accordingly, the order meets the procedural requirements of section 657.

3

The Punitive Damages Were Unconstitutionally Excessive

The constitutional excessiveness of a punitive damages award presents a legal issue we review independently. (*Simon, supra*, 35 Cal.4th at p. 1187.) In determining whether the punitive damages award is constitutionally excessive, "we are to review the award de novo, making an independent assessment of the reprehensibility of the defendant's conduct, the relationship between the award and the harm done to the plaintiff, and the relationship between the award and civil penalties authorized for comparable conduct." (*Id.* at p. 1172.)

a

Degree Of Reprehensibility

"[T]he most important [guidepost in evaluating the constitutionality of a punitive damages award] is the degree of reprehensibility of the defendant's conduct." (*Roby, supra,* 47 Cal.4th at p. 713.) "On this question, [we] consider whether '[1] the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or was an isolated incident; and [5] the harm was the result of intentional malice, trickery, or deceit, or mere accident.' " (*Ibid.*) "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." (*State Farm Mutual Automobile Insurance Co. v. Campbell, supra,* 538 U.S. at p. 419 [155 L.Ed.2d at p. 602].)

i

Physical Harm

The evidence supports a finding Orozco was physically harmed. Indeed, Orozco testified she was distraught the day of the move out, hyperventilating, crying, and experiencing headaches. A fellow tenant of the building testified to the same. The evening of the move out, Orozco experienced a headache and chest pains. The next day, she began vomiting and was dizzy, ultimately going to the hospital where she stayed for three days. Orozco believed she was going to die from the stress of the situation. She was afraid because she did not know what Conrad would do to her and thought he sent people to get her. She did not feel safe and felt like she was hiding from Conrad -- like she was in a prison. Additionally, Orozco experienced chronic high-blood pressure related to stress, putting her at higher risk of heart attack and stroke.

Evidence of this physical harm is tempered by other considerations. Orozco testified she was in extraordinary debt to the Sanchezes and family members, as well as behind on her mortgage. While that caused her stress, her family did not demand repayment and she leased her houses to make ends meet. Orozco also suffered from slight hyperthyroidism, which is correlative to anxiety, high-blood pressure, and weight loss. Taken together, however, the record supports a finding "the harm to [Orozco] was 'physical' in the sense that it affected her emotional and mental health, rather than being a purely economic harm." (*Roby, supra,* 47 Cal.4th at p. 713.)

ii

Indifference To Or Reckless Disregard For The Health Or Safety Of Others

To show Conrad's reckless disregard for health and safety, Orozco points to Conrad's direction to multiple employees to prevent her from taking the kitchen and restaurant equipment; once, by instructing an employee to block the moving truck with his car. Conrad explains his conduct as an innocent attempt to get what he thought was

his property returned, and the actions of his employees and Orozco's associates as outside of his control.

While we are cognizant Conrad did not orchestrate every interaction between his employees and Orozco's associates, the evidence reflects he was indifferent to the potential safety hazards of the interactions he ordered. This is especially true considering Conrad instructed his construction employee to use his car to impede the physical movement of Orozco and her associates. Similarly, when Conrad did not get a favorable result from the initial police officer, he instructed an entire construction crew to go to the restaurant to prevent the removal of restaurant equipment. While the evidence was conflicting about what the initial officer ordered the parties to do, the evidence supported the conclusion the officer permitted Orozco to remove the kitchen and restaurant equipment and that Conrad knew of that fact. With that understanding, Conrad's direction to his construction crew can be taken only as an effort to intimidate Orozco and her associates. The same can be said for Conrad's efforts to have Orozco followed. Such motivation without proper clarification and oversight, which Conrad admitted was lacking, evidenced a disregard for the safety of others.

iii

Financial Vulnerability

Both parties acknowledge Orozco was in a vulnerable financial position even though, as Conrad points out, she was represented by counsel in negotiations regarding her kitchen and restaurant equipment. We note that Orozco's financial vulnerability was pivotal to Conrad's ability to take advantage of her. Conrad was told by the property manager of the shopping complex that Orozco could easily be taken advantage of. He then did just that by fraudulently and by duress leveraging Orozco's financial vulnerability (i.e., her inability to pay market rent for multiple prior years) against her in an effort to get her to transfer ownership of expensive kitchen and restaurant equipment to him, so that he may then lease the property at a higher rate than she was paying. After

Orozco contacted attorneys and attempted to remove the kitchen equipment, he flouted his wealth and political connections in an effort to get his way. He contacted Orozco's attorneys' supervisor, as well as the mayor, a councilmember, and the chief of police for assistance in getting the property returned. Although the police officers and chief of police testified Conrad received no special treatment, from the jury's perspective, that was not necessarily the case.

As explained, the evidence showed the initial officer allowed Orozco to remove her kitchen and restaurant equipment and Conrad knew of that fact. Instead of complying with that order, Conrad contacted the mayor and a councilmember, who then put him in contact with the chief of police. Conrad's matter, although already determined to be a civil matter, was assigned a more senior officer than the officer who had initially responded to the scene. That officer then accomplished what Conrad had always wanted and ordered Orozco and her associates to leave the kitchen and restaurant equipment in the restaurant. This apparent reversal in course appears to be attributed to Conrad's connections and his insistence this issue be resolved favorably to him. At the very least, it showed Conrad's willingness to take advantage of his connections to exploit this vulnerable plaintiff.

iv

Isolated Incident Versus Repeated Actions

Orozco takes no issue with the trial court's finding "there was evidence whereby the jury could have reasonabl[y] found potentially repeated wrongdoing." Conrad, on the other hand, argues the evidence did not support such a finding. Reprehensibility is "influenced by the frequency and profitability of the defendant's prior or contemporaneous similar conduct." (*Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, 1207.) We agree with defendants there was no evidence demonstrating he had treated other tenants in a similar fashion to Orozco.

v

Harm Was The Result Of Intentional Malice/Accident

This factor is of little value in assessing a California punitive damages award because "accidentally harmful conduct cannot provide the basis for punitive damages under our law." (*Simon, supra,* 35 Cal.4th at p. 1181.)

Summary. Considering all five reprehensibility factors, we conclude Conrad's conduct was at a moderate level of reprehensibility. (Compare *Izell v. Union Carbide Corporation* (2014) 231 Cal.App.4th 962, 986 [high reprehensibility when asbestos supplier knew for decade of cancer risk from low exposure but misled customers in favor of profits] to *Roby, supra*, 47 Cal.4th at pp. 713-719 [low reprehensibility when corporate defendant once adopted a discriminatory attendance policy and subjected employee to harassment resulting in economic injury and physical harm].) Orozco's injury was economic in nature and, while defendants did not physically injure her causing death, they caused emotional and mental anguish resulting in physical symptoms and potential long-term medical harm. It is clear Conrad did not intend to physically or mentally harm Orozco; however, he disregarded the health and safety implications of his actions and failed to give thought to Orozco's well-being. Further, Conrad took advantage of Orozco's financial vulnerability, even though there is no evidence he did so with other tenants. Given these concerns, the reprehensibility of Conrad's conduct can fairly be described as moderate.

b

Disparity Between Actual Harm And Punitive Damages

The second guidepost is " 'the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award.' " (*Roby, supra,* 47 Cal.4th at p. 718.) The parties disagree on the ratio of punitive to compensatory damages. The damages remaining after our affirmance of the trial court's new trial order on the conversion damages are $50,000 for Orozco's intentional infliction of emotional distress

claim and $3,000 for her trespass to chattels claim. Given the punitive damages award of $2,124,000 and the compensatory award of $53,000, the ratio of punitive damages to compensatory damages is a ratio of 40 to one.[17]

Orozco acknowledges our Supreme Court requires "special justification (by, for example, extreme reprehensibility or unusually small, hard-to-detect or hard-to-measure compensatory damages)" when the punitive damage award is "significantly greater than 9 or 10 to 1." (*Simon, supra*, 35 Cal.4th at p. 1182.) Orozco contends that because the record demonstrates Conrad acted with a high level of reprehensibility and the jury awarded insignificant compensatory damages, the punitive damages award was constitutional.

We rejected Orozco's argument Conrad acted with a high degree of reprehensibility in the preceding section, and similarly reject her claim as to the amount of her compensatory damages. As part of the damages award, Orozco received $50,000 for emotional distress damages. This amount "may have reflected the jury's indignation at [Conrad's] conduct, thus including a punitive component. Pertinent here is this statement from [the] decision in *Simon* . . . : '[D]ue process permits a higher ratio between punitive damages and a small compensatory award for purely economic damages containing no punitive element than [it does] between punitive damages and a substantial compensatory award for emotional distress; the latter may be based in part on

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[17] We do not consider Orozco's conversion damages but do consider her damages for trespass to chattels. (See *Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 532 ["an award of compensatory damages in some amount is a prerequisite to a punitive damage award, whether in the form of nominal damages [citation], restitution [citation], an offset [citation], or damages presumed by law [citation]"].) We also do not calculate the ratio separately for Conrad and his company. (See *Bardis v. Oates* (2004) 119 Cal.App.4th 1, 21, fn. 8 [no reason to maintain strict culpability lines between defendant and his company when defendant was owner and manager of the company].)

indignation at the defendant's act and may be so large as to serve, itself, as a deterrent.' " (*Roby, supra,* 47 Cal.4th at p. 718.)

Orozco disputes this conclusion, relying on *Bullock*. In *Bullock*, the appellate court concluded $100,000 for the pain and suffering of a lung cancer patient, out of a $850,000 compensatory damages award, did not reflect the plaintiff's outrage or humiliation or the jury's indignation at defendant's conduct. (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 566-567.) Importantly, *Bullock*, a personal injury case, distinguished itself from *Roby* and *State Farm*, cases where emotional distress damages arose "from economic harm with no physical injury." (*Bullock*, at p. 566.)

Orozco sued Conrad for economic harm and not personal injury as was the case in *Bullock*. Thus, the $50,000 awarded for Orozco's emotional distress carries with it an inference of the jury's indignation at Conrad's conduct and intent the award carry with it a punitive component. Because of this punitive component, we do not believe the compensatory damage award insignificant as Orozco suggests. Because the compensatory award carries a punitive component, there is necessarily a disparity between the two awards. Here, that disparity is great at a ratio of 40 to one; a ratio that cannot be justified by the moderate reprehensibility of Conrad's conduct.

c

Civil Penalties Authorized In Comparable Cases

"Finally, we consider 'the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases,' the last of the three guideposts the high court set forth in *State Farm* . . . to assess the constitutionality of punitive damages awards." (*Roby, supra,* 47 Cal.4th at p. 718.) We note cases involving " 'common law tort duties . . . do not [easily] lend themselves to a comparison with statutory penalties' "; however, we are cognizant of defendants' argument that landlord/tenant disputes and fraudulent and bad faith conduct typically call for treble damages. (*Bardis v. Oates, supra,* 119 Cal.App.4th at p. 24.)

d

Conclusion

Although Conrad acted with a moderate level of reprehensibility, the 40-to-one ratio of punitive to compensatory damages is great and includes a punitive component on the compensatory side. Thus, the jury's punitive damages award is unconstitutionally excessive regardless of Conrad's wealth. (See *Simon, supra,* 35 Cal.4th at pp. 1185-1186 [" '[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award' "].) However, considering Conrad's wealth and the deterrent effect punitive damages are meant to carry (*Roby, supra,* 47 Cal.4th at p. 719), in addition to the considerations above, we conclude a seven-to-one ratio the constitutional maximum.

" '[I]n the usual case, i.e., a case in which the compensatory damages are neither exceptionally high nor low, and in which the defendant's conduct is neither exceptionally extreme nor trivial, the outer constitutional limit on the amount of punitive damages is approximately four times the amount of compensatory damages.' " (*Bardis v. Oates, supra,* 119 Cal.App.4th at p. 26.) As discussed, we believe Conrad's conduct was more than trivial, and we do not believe a four-to-one ratio is appropriate. Neither is a nine-to-one ratio appropriate considering the compensatory damages awarded are substantially punitive. Considering Conrad's substantial wealth, along with the above considerations, we conclude a seven-to-one ratio the constitutional maximum.

"Once a maximum constitutional award has been determined . . . a new trial on punitive damages would be futile." (*Simon, supra,* 35 Cal.4th at p. 1188.) We thus order the judgment on the punitive damages award to be $371,000 -- a seven-to-one ratio to the $50,000 in intentional infliction of emotional distress damages and $3,000 in trespass to chattels damages. This sum will be divided between Conrad and his company -- $314,406.78 to be paid by Conrad and $56,593.22 to be paid by his company.

IV

The Court Properly Denied Orozco's Challenged Costs

Orozco contends the trial court erred by striking the costs she incurred for: "(a) Models, Blowups, and Photocopies of Exhibits ($6,876.57); (b) Trial Tech costs ($26,813.64); and (c) Messenger Fees costs (3,329.40); for a cumulative total of $37,019.61." We disagree.

It is well settled that a prevailing party is generally entitled to an award of costs. (§ 1032.) Section 1033.5, subdivision (c)(2) through (4) further provides that "[a]llowable costs shall be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation. [¶] . . . [and] shall be reasonable in amount. [¶] Items not mentioned in this section and items assessed upon application may be allowed or denied in the court's discretion."

As for Orozco's claim for $6,876.57 for costs of photocopies of exhibits and enlarged images, the court found Orozco failed to show the costs were for exhibits used at trial or otherwise helpful to the trier of fact. Orozco argues these costs were reasonable because "[a]s any prudent counsel would do, Orozco's counsel prepared exhibits and demonstratives intended to help the jury." Orozco does not strike at the core of the trial court's complaint. Orozco submitted invoices of her printing costs, which reflected counsel made several trial binders -- one for each witness, the court, each counsel, opposing counsel, and the clerk. These charges included those beyond copies of the exhibits such as the binders themselves, tabs, folders, and color images. Orozco failed to show which of these costs were helpful to the jury versus simply duplicative and the product of organization style. Similarly, Orozco spends no time discussing the substance or relevance of the enlarged image other than stating it was a helpful demonstrative to the jury. Thus, Orozco's argument lacks merit.

The court denied Orozco's trial technology costs because the amount requested for the use of a technician was not justified by the complexity of the trial "particularly when

more than one attorney is seated at the conference table." Orozco says this was error because "[t]his was a two-week trial where the jury had to decide complex issues . . . [requiring] 'an operator who could quickly pull up exhibits, highlight relevant sections of documents, assist with PowerPoint presentation (which had to be quickly adjusted to accommodate court rulings), display of videotaped depositions, and other tasks.' " Again Orozco fails to address the core of the court's reasoning and provides no justification why her case was especially complex that cocounsel could not perform the technological tasks she employed a technician to perform. Thus, again, Orozco's argument lacks merit.

The court denied Orozco's request for $3,329.40 for messenger fees, noting the request did not appear proper or reasonable on its face. It found Orozco had not met her burden of showing the two and one-half years of courier fees were incurred for purposes of trial preparation and were reasonably necessary. Orozco argues this was wrong because counsel's declaration asserting the costs were for the filing of court documents and service of process and subpoenas was sufficient, as was his assertion the use of a courier was achieved at the lowest cost by having the documents delivered locally, instead of from counsel's San Francisco office. What counsel fails to justify is why a courier was necessary in the first place instead of some other means at lower costs. It appears Orozco used a courier as a general matter throughout the litigation process, likely for convenience, instead of necessity. Accordingly, the trial court did not abuse its discretion by denying the requested courier costs.

V

The Trial Court Did Not Abuse Its Discretion

By Denying The Parties Attorney Fees

Both parties argue they are entitled to their attorney fees under the original lease. We disagree and instead agree with the court there was no contractual basis for an attorney fee award.

California follows the " 'American rule,' " under which each party to a lawsuit must pay its own attorney fees unless a contract or statute or other law authorizes a fee award. (§§ 1021, 1033.5, subd. (a)(10); *Musaelian v. Adams* (2009) 45 Cal.4th 512, 516.) Civil Code "[s]ection 1717 is the applicable statute when determining whether and how attorney's fees should be awarded under a contract." (*Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1157.) Under Civil Code section 1717, subdivision (b)(1), as a general rule, "the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract."

Notably, however, "Civil Code section 1717 has a limited application. It covers *only* contract actions, where the theory of the case is breach of contract, and where the contract sued upon itself specifically provides for an award of attorney fees incurred to enforce *that* contract." (*Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1342.) " ' "California courts 'liberally construe "on a contract" to extend to any action "[a]s long as an action 'involves' a contract and one of the parties would be entitled to recover attorney fees under the contract if that party prevails in its lawsuit." ' " ' " (*In re Tobacco Cases I* (2011) 193 Cal.App.4th 1591, 1601.) "An action (or cause of action) is 'on a contract' for purposes of [Civil Code] section 1717 if (1) the action (or cause of action) 'involves' an agreement, in the sense that the action (or cause of action) arises out of, is based upon, or relates to an agreement by seeking to define or interpret its terms or to determine or enforce a party's rights or duties under the agreement, and (2) the agreement contains an attorney fees clause." (*Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc*. (2012) 211 Cal.App.4th 230, 241-242.)

" ' "On review of an award of attorney fees after trial, the normal standard of review is abuse of discretion. However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a

question of law." ' " (*Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 751.)

The trial court found no contractual basis for an attorney fee award because the original lease, which was the only document containing an attorney fee provision, required the Sanchezes to sign the document assigning the lease to a third party. Because none of the documents purported to assign the lease to Orozco, including the lease amendment, contained the Sanchezes' signatures, the lease was not assigned and the attorney fee provision did not apply. The court noted its conclusion did not make other portions of the lease amendment, such as rent, unenforceable.

Orozco and Ovalle argue the court's ruling was error because the entire litigation centered around whether the lease amendment assigned the lease. Not so. The jury was queried generally whether the parties entered into a contract, whether Orozco and Ovalle breached the contract, whether Conrad was harmed by the breach, and the amount of damages to which he was entitled. The jury was not asked, nor did it find, whether the original lease was part of that contract. In fact, very little time was spent on the terms of the original lease, whether that be at trial or when the lease amendment was signed. The crux of the litigation was the terms contained in the lease amendment, such as the parties' right to the kitchen and restaurant equipment and the rent obligation. This contract (the lease amendment) did not include an attorney fee provision. Thus, while the lease amendment purported to operate as an assignment of the original lease, the parties' claims did not rest on the validity of that term or the terms of the original lease. Accordingly, we disagree with Orozco's and Ovalle's argument the litigation concerned the rights and duties of the parties under the original lease without some showing the original lease was validly assigned or assumed before it was amended with the terms at issue in this litigation.

Conrad attempts to make this showing by arguing Orozco expressly assumed the original lease, and because the lease amendment amended that assumed lease, there is a contractual basis to impose fees. We disagree.

An express assumption of a real property lease requires specific affirmation by the assignee to bind itself to the lease obligations either orally or in writing. (*BRE DDR BR Whittwood CA LLC v. Farmers & Merchants Bank of Long Beach* (2017) 14 Cal.App.5th 992, 1001; *Kelly v. Tri-Cities Broadcasting, Inc*. (1983) 147 Cal.App.3d 666, 673.) "In *Bank of America etc. Assn. v. Moore* (1937) 18 Cal.App.2d 522, [64 P.2d 460] (*Moore*), the court found the defendant assumed the obligations of a lease by stating so in a written assignment agreement. The document was signed by the defendant, as assignee, and the assignor. The document concluded, ' "It being understood that said Assignee . . . is to accept, assume and agree to perform all of the terms, conditions and limitations contained in said lease." [¶] "The undersigned, [defendant], hereby accepts, assumes and agrees to perform all of the terms, conditions and limitations contained in the aforementioned lease to be kept and performed by said lessee." ' [Citation.] This language established 'privity of contract.' [Citation.] The court stated, 'we have not a naked assignment creating privity of estate only, ceasing with cessation of possession, but one clothed with the express assumption by the assignee of the obligations of the lessee . . . . [T]he agreement of the defendant, in harmony with the requirement of the lease, may be interpreted as a contract directly with the lessor.' " (*BRE DDR BR*, at p. 1001.)

Conrad contends Orozco's conduct reached this standard when she signed the lease estoppel certificate, which provided the lease was in full force and effect and the lessee had an outstanding balance because of paying partial rent. Orozco, however, did not sign the document in the space provided for the lessee and instead signed in the lower margin, where she also informed the landowner she was not the lessee and paid only what she could because business was bad. Nothing in Orozco's signature or statement shows

an intent to bind herself to the terms of the lease as written in the lease estoppel certificate, let alone the lease as originally drafted.

Conrad also contends Orozco's signature on the confirmation of lease document in 2008, which provides "*Tenant hereby ratifies and confirms its obligations under the lease*" constituted an express assumption of the original lease. This tenant's obligation under the lease, however, was nothing because she was not a signatory. Nothing in this statement evidences Orozco's intent to assume the obligations of the original lease so that it places her in privity of contract with the original owners of the shopping center.

Finally, Conrad points to Orozco's agreement with the Sanchezes that she would take over the restaurant and that their partnership had ended, which was sent to the original owners of the shopping center. Again, there is nothing in this writing purporting to assign the lease or signifying Orozco's intent to assume the obligations of the lease. The document described by Conrad does not specify upon what terms Orozco took over the restaurant and its space or whether that included the terms of the original lease. Further, all three of these documents are missing the lessor's agreement Orozco be bound by the lease, defeating defendants' argument the parties were in privity of contract.

This case is like *Tri-Cities*. There, a lease between the landowner and lessee required any assignee to assume the lease obligations. (*Kelly v. Tri-Cities Broadcasting, Inc.*, *supra*, 147 Cal.App.3d at p. 671.) The defendant purchased the lessee's business, including the lease. (*Id*. at p. 670.) The purchase agreement " ' "acknowledged the [existence] of a land lease covering the real property,' " and attached an exhibit that states, ' "Land Lease covering real property on which broadcasting transmitter is located." ' [Citation.] The bill of sale also lists the 'Land Lease covering real property on which broadcasting transmitter is located.' [Citation.] As part of plaintiffs' petition to compel arbitration, it argued that the purchase agreement, lease, and possession of property by Tri-Cities was proof of an assumption of the lease. [Citation.] The trial court agreed, but the appellate court did not.

"The Tri-Cities court noted that '[i]n every case examined where there has been an express assumption, the assignee has stated specifically either orally or in writing that he agrees to be bound by the terms of the lease.' [Citation.] After considering the evidence at issue, the court concluded 'as a matter of law no evidence was presented to the trial court . . . to substantiate the conclusion Tri-Cities had assumed the lease.' " (*BRE DDR BR Whittwood CA LLC v. Farmers & Merchants Bank of Long Beach*, *supra*, 14 Cal.App.5th at pp. 1002-1003.) The same is true here.

Because the original lease was never assigned to, nor assumed by Orozco, the parties' dispute did not arise out of a contract containing an attorney fee provision. Thus, the court was correct to deny the parties attorney fees.

DISPOSITION

The judgment is modified to award Orozco a total of $371,000 in punitive damages -- $314,406.78 against Conrad and $56,593.22 against his company. The judgment is affirmed as modified. The parties shall bear their own costs. (Cal. Rule of Court, rule 8.278(a)(5).)

/s/
Robie Acting P. J.

We concur:

/s/
Krause, J.

/s/
Butz, J.*

* Retired Associate Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.