Winning Post Trial Motions

By: Darci E. Burrell

Motions for New Trial

- Right to a new trial is purely statutory. Courts have no inherent authority to grant a new trial.
- Procedural requirements are mandatory and jurisdictional. "As the motion for 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." *Mercer v. Perez*, 68 Cal. 2d 104, 118 (1968).
- A motion for new trial can be used to ask the trial court to reexamine any issue of fact or law.

Important Deadlines for New Trial Motions

- Time limits for new trial motions are jurisdictional and cannot be extended by stipulation or court order. Cal. Civ. Proc. Code § 659.
- *Notice of intent* to file motion for new trial must be filed within 15 days of service of notice of entry of judgment.
- No relief under Code of Civil Procedure section 473(b).
- No extension of time for service by mail or by electronic means.

Important Deadlines for New Trial Motions

- Memorandum of points and authorities must be filed within 10 days after the notice of intent is filed and served.
  - Failure to file a memorandum of points and authorities is not jurisdictional.
  - Deadline to file MPA in support may be extended up to 10 additional days by stipulation or court order.
- Opposition briefs are due within **10** days after service of moving party's brief, which can be extended by up to 10 additional days by stipulation or court order.
- Moving party has **5** days after service of opposition papers to file a reply, which can be extended up to an additional 5 days by stipulation or court order.

Important Deadlines for New Trial Motions

- Trial court loses power to rule on the motion 60 days after notice of entry of judgment.
- Court may deny the motion either by issuing an order to that effect or by failing to act within the 60 days before it loses jurisdiction.
- Order granting new trial must state the ground or grounds relied upon by the court. Court must state reasons for granting new trial within the 60 day period but may provide separate statement of the reasons within 10 days after filing of the new trial order.

Grounds for New Trial

- Irregularity in the proceedings of the court, jury or adverse party
- Jury misconduct
- Accident or surprise
- Newly-discovered evidence
- Excessive or inadequate damages
- Insufficient evidence
- Verdict or decision against law
- Error of law during trial

Excessive or Inadequate Damages

- Court has the power and responsibility to reweigh the evidence.
- A "new trial shall not be granted upon the ground of . . . excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefore, that the court or jury clearly should have reached a different verdict or decision." Cal. Civ. Proc. Code § 657.
- "The judge is not permitted to substitute his judgment for that of the jury on the question of damages unless it appears from the record that the jury verdict was improper." *Bigboy v. County of San Diego*, 154 Cal. App. 3d 397, 406 (1984).
- The jury is entrusted with vast discretion to award damages which should be disturbed only upon a showing that the award is grossly disproportionate to any reasonable view of the evidence concerning plaintiff's damages. *Bertero v. National General Corp.*, 13 Cal. 3d 43, 64 n.12 (1974).

Insufficient Evidence

- Trial court has the broadest power under this standard – allows the court to act as the "13th juror."
- Trial court is not bound by factual resolutions or credibility determinations made by the jury and may grant a new trial even though there is sufficient evidence to sustain the jury's verdict.
- *But* "a new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision . . . unless . . . the court or jury clearly should have reached a different verdict or decision." Cal. Civ. Proc. Code § 657.
- The law anticipates that when the evidence is nearly balanced or when different minds could naturally and fairly come to different conclusions, the judge will not disturb the verdict. "In other words, the finding of the jury is to be upheld by him as against any mere doubts of its correctness." *Perry v. Fowler*, 102 Cal. App. 2d 808, 811 (1951) [citations omitted].

Conditional Order Granting or Denying New Trial

- Order granting or denying new trial may be conditional, such as requiring a party to agree to consent to a modification of the judgment or perform some other act to avoid or obtain a new trial.
- The order should state the time limit for performing the conditions.
- Time for performing conditions may extend past the 60 day period.
- Party consenting to a conditionally ordered addition or reduction must file and serve an acceptance on all parties. Cal. Civ. Proc. Code § 662.5(c).
- A party filing and serving an acceptance must concurrently serve an amended judgment reflecting the modified judgment. Cal. Civ. Proc. Code § 662.5(c).

Motion for JNOV

- Motion for judgment notwithstanding the verdict or "JNOV," challenges the legal sufficiency of the opposing party's evidence.
- Court must consider all evidence in the light most favorable to the judgment, giving the benefit of every reasonable inference, and resolving all conflicts in support of the judgment.
- Court cannot weight the evidence or judge the credibility of witnesses.
- The court's authority "begins and ends with a determination as to whether . . . there is *any* substantial evidence, contradicted or uncontradicted, in support of judgment." *Hauter v. Zogarts*, 14 Cal. 3d 104, 110 (1975).
- If there is a conflict in the evidence or if more than one inference can be drawn from the evidence, the motion for JNOV must be denied.

Procedural Issues for JNOV Motions

- A JNOV motion by be made by either party against whom the verdict was rendered or by the court on its own motion.
- JNOV motions are generally governed by the same time limits as new trial motions.
- Where court acts on its own motion, only five days' notice to the parties is required.
- Papers supporting motion for JNOV must be filed at the time the notice of motion is filed.
- Opposing and reply papers must be filed and served within the same time limits required by new trial motions.
- As with new trial motions, the court loses jurisdiction if it does not act within 60 days of filing and service of notice of entry of judgment.

Motions for Attorneys' Fees

- When authorized by contract, statute or law, reasonable attorneys' fees are allowable coasts.
- Sources for attorneys' fees in employment cases include:
  - FEHA, Government Code section 12965(b)
  - Code of Civil Procedure section 1021.5
  - Labor Code section 2699(g)(1)
  - Labor Code section 218.5
  - Labor Code section 1194
  - Labor Code section 226(e)
  - Labor Code section 2802(c)

Procedure for Motion for Attorneys' Fees

- Requires a noticed motion whenever the court is required to determine entitlement to fees – e.g., when court needs to determine "prevailing party" status or to fix the amount of fees.
- A notice of motion claiming fees must be served and filed within the time for filing notice of appeal – normally 60 days after notice of entry of judgment or 180 days after the date of entry, whichever is earliest.
- Parties may stipulate to extend the deadline for filing a motion for attorneys' fees for an additional 60 days for an unlimited civil case and 30 days for a limited civil case.

Principles Generally Applicable to Fee Motions

- Court has broad discretion with respect to the amount of the fee award.
  - *But* in a FEHA case, the discretion to deny a few award to a prevailing plaintiff is narrow and must be guided by the underlying purposes of the FEHA, i.e., discretion must be exercised "in a manner that, in the judgment of the court, will best effectuate the purposes of FEHA . . . ." *Horsford v. Bd. of Trustees*, 132 Cal. App. 4th 359, 394 (2005), quoting Gov. Code § 12965(b).
- Prevailing party
  - Normally the prevailing party is the one in whose favor a new judgment is entered. *Smith v. Rae-Venter Law Group*, 29 Cal. 4th 345, 365 (2002).
  - Court should analyze which party prevailed on a "practical" level.

Principles Generally Applicable to Fee Motions

- Calculating Award
  - Lodestar methodology: Under this method the court determines the number of hours reasonably spent by counsel and a reasonably hourly rate to be applied to those hours.
    - Reasonableness of hours
      - Hours are reasonably spent if, at the time the work was performed, counsel's efforts were reasonable; whether, in hindsight, counsel could have spent fewer hours is irrelevant.
      - In determining the reasonableness of counsel's hours, the court can consider "the entire course of the litigation, including pre-trial matters, settlement negotiations, discovery, litigation tactics, and the trial itself." *Vo V. Las Virgenes Muni. Water* Dist., 79 Cal. App. 4th 440, 447 (2000).
      - Attorney time records are prima facie evidence of reasonableness.
      - An award of fees may include, not only time spent litigating the action, but also fees incurred to establish and defend a fee claim.

Principles Generally Applicable to Fee Motions

- Reasonably hourly rate
  - Attorneys are entitled to compensation at hourly rates that reflect the reasonable market value of their services in the community.
  - Reasonable rates are those charged by private attorneys of comparable skill, reputation, and experience for similar litigation, as measured by the prevailing rates charged by corporate attorneys of equal caliber.
- Enhancement to the lodestar
  - To determine a fee that truly reflects the marketplace, factors in addition to hours and rates may be considered.
  - "[T]he unadorned lodestar reflects the general local hourly rate for a fee-bearing case; it does not include any compensation for contingent risk, extraordinary skill, or any other factors a trial court may consider . . . ." *Ketchum v. Moses*, 24 Cal. 4th 1122, 1138 (2001).
  - Other factors courts consider include the results obtained, preclusion of other employment, and public service.

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Panel Presentation

WINNING PRE- AND POST-TRIAL MOTIONS: OPPOSING NEW TRIAL AND JNOV MOTIONS AND WINNING MOTIONS FOR ATTORNEYS' FEES

Darci E. Burrell
Levy Vinick Burrell Hyams LLP
180 Grand Avenue, Suite 1300
Oakland, CA 94612
(510) 318-7700
darci@levyvinick.com

I. Motions for New Trial

A. Procedural Issues

1. Right to a new trial is purely statutory. Courts have no inherent authority to grant a new trial. *Marriage of Herr*, 174 Cal. App. 4th 1463, 1465 (2009).

2. Procedural requirements are mandatory and jurisdictional. "As the motion for 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." *Mercer v. Perez*, 68 Cal. 2d 104, 118 (1968); *Pacific Trends Lamp & Lighting Products, Inc. v. J. White, Inc.*, 65 Cal. App. 4th 1131, 1135 (1998).

3. A motion for new trial can be used to ask the trial court to reexamine any issue of fact or law.

4. Time for filing:

a) *Notice of intent* to file a motion for new trial must be filed within 15 days of mailing notice for entry of judgment or within 180 days after entry of judgment, whichever is earliest.

b) Time limits are jurisdictional and cannot be extended by stipulation or court order. Cal. Civ. Proc. Code § 659.

c) No relief under Cal. Civ. Proc. Code section 473(b).

d) No extension for service by mail or by electronic means.

e) Memorandum of points and authorities in support of motion for new trial must be filed within 10 days after the notice of intent is served and filed.

f) Deadline for filing memorandum of points and authorities may be extended up to 10 additional days by stipulation or court order.

g) Failure to file memorandum of points and authorities is not jurisdictional. The court may consider the motion even if no memorandum of points and authorities is filed.

h) Opposition briefs are due within 10 days after service and filing of moving party's brief but can be extended up to 10 additional days by stipulation or court order.

i) Moving party has 5 days after service and filing of the opposition papers to file a reply, which may also be extended for up to 5 additional days by stipulation or court order.

5. Court consideration of motion:

a) Court must hold a hearing – i.e., call the attorneys together at a designated time and place – on the motion for new trial before issuing an order related to the motion. *Avery v. Associated Seed Growers, Inc.*, 211 Cal. App. 2d 613, 627 (1963). The court, however, can decline to hear oral argument. *See* Cal. Civ. Proc. Code § 661.

b) Trial court loses power to rule on the motion 60 days after notice of entry of judgment. This time limit is not extended for service by mail or electronic means. *Westrec Marina Mgmt., Inc. v. Jardine Ins. Brokers Orange County, Inc.*, 85 Cal App. 4th 1042, 1049 (2000).

c) Court is supposed to set the time for hearing after the deadline for filing a memorandum of points and authorities and other supporting papers has passed. Cal. Civ. Proc. Code § 661.

d) Court may deny a motion for new trial either by issuing an order to that effect or by failing to act within the 60 days before it loses jurisdiction. *See* Cal. Civ. Proc. Code § 660. Court is not required to provide any reasons for denial.

e) An order granting new trial motion must state the ground or grounds relied upon by the court, as well as a specification of reasons. Cal. Civ. Proc. Code § 657. Must be in writing. *La Manna v. Stewart*, 13 Cal. 3d 413, 417 (1975).

f) Court must state reasons for granting motion for new trial within the 60 day period. Any order made after the 60 day period is void. *Van Beurden Ins. Services Inc. v. Customized Worldwide Weather Ins. Agency, Inc.*, 15 Cal. 4th 51, 64 (1997).

g) Although court must state grounds for granting motion for new trial before expiration of 60 day period, it may provide a separate statement of the reasons within 10 days after filing the new trial order. Cal. Civ. Proc. Code § 657. The limit for providing specification of reasons may extend past the 60 day period. *Fortenberry v. Weber*, 18 Cal. App. 3d 213, 221 (1971); *Resort Video, Lt. v. Laser Video, Inc.*, 35 Cal. App. 4th 1679, 1694 (1995).

h) Order may be conditional, such as requiring a party to consent to a modification of the judgment or perform some other act to avoid or obtain a new trial. Cal. Civ. Proc. Code § 662.5.

(1) The order should state the time limit for performing the conditions.

(2) Time for performing conditions may extend past the 60 days. So long as the order is issued within 60 days, the court may make the order conditional on matters occurring within a reasonable time thereafter. *Schelbauer v. Butler Mfg. Co.*, 35 Cal. 3d 442, 454 (1984).

(3) The court may extend the time of performance of the condition, but such order must be made within the 60 day period for ruling on the new trial motion.

(4) Procedure for acceptance:

(a) Party consenting to a conditionally ordered addition or reduction must file and serve an acceptance on all parties. Cal. Civ. Proc. Code § 662.5(c).

(b) A party filing and serving an acceptance must concurrently serve an amended judgment reflecting the modified judgment. Cal. Civ. Proc.

Code § 662.5(c).

(5) If plaintiff consents to remittitur and defendant then files an appeal, the plaintiff can cross-appeal. *Barker v. Pratt*, 176 Cal. App. 3d 370, 385 (1986).

i) Trial court generally does not have jurisdiction to reconsider its new trial order. *People v. Taylor*, 19 Cal. App. 4th 836, 840-42 (1993).

j) Court has the authority to order partial new trial but only where issues are severable. Cal. Civ. Proc. Code §§ 657, 662; *Liodas V. Sahadi*, 19 Cal. 3d 278, 285-86 (1977).

B. Grounds for New Trial Established by California Code of Civil Procedure Section 657

1. Irregularity in the proceedings of the court, jury or adverse party or any order of the court or abuse of discretion by which either party was prevented from having a fair trial. Includes:

a) Personal misconduct by the judge or other irregularity in the proceedings that materially affects the substantial rights of a party;

b) Erroneous and prejudicial evidentiary rulings, including erroneous exclusion of expert testimony;

c) Erroneous and prejudicial jury instructions, i.e., failure to instruct on a theory of the case supported by substantial evidence;

d) Irregularity in the proceedings of the jury;

e) Irregularity in the proceedings of the adverse party or counsel.

2. Jury misconduct

a) The trial court is required to undertake a three-step inquiry when ruling on a motion for new trial based on juror misconduct:

(1) Whether affidavits supporting the motion are admissible;

(2) If admissible, whether the facts establish misconduct; and

(3) If there is misconduct, whether it was prejudicial.

Whitlock v. Foster Wheeler, LLC, 160 Cal. App. 4th 149, 160 (2008).

3. Accident or surprise

a) A new trial can be granted on the ground of accident or surprise "which ordinary prudence could not have guarded against." Cal. Civ. Proc. Code § 657(3).

b) Requires the showing of three conditions:

(1) An accident or surprise occurring during the trial.

(2) The accident or surprise had a material adverse effect on the moving party's case.

(3) The accident or surprise is one that could not have been guarded against or prevented through reasonable diligence by the moving party.

c) Mistake or inadvertence not sufficient. A mistake of fact or law is not an accident; nor is negligence of trial counsel.

d) Relief from accident should be sought during trial or risk a finding that right to new trial on this ground has been waived. *See, e.g., Garcia v. County of Los Angeles*, 177 Cal. App. 3d 633, 637 (1986).

4. Newly-discovered evidence – material for the party making the application that he or she could not, with reasonable diligence, have discovered and produced at the trial.

a) The evidence must be newly-discovered – i.e., evidence that was not known and could not reasonably have been known at the time of trial.

b) The evidence must be material – i.e., likely to bring about a different result.

c) The moving party must show he or she exercised reasonable diligence to discover and produce the evidence at trial. A general averment of diligence is insufficient. The moving party must state the particular acts or circumstances that establish diligence.

5. Excessive or inadequate damages:

a) When reviewing a motion for new trial on the ground of excessive

damages, the trial court has the power and responsibility to reweigh the evidence.

b) However, "a new trial shall not be granted upon the ground of . . . excessive or inadequate damages, 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." Cal. Civ. Proc. Code § 657.

c) "The judge is not permitted to substitute his judgment for that of the jury on the question of damages unless it appears from the record that the jury verdict was improper." *Bigboy v. County of San Diego*, 154 Cal. App. 3d 397, 406 (1984).

d) The jury is entrusted with vast discretion to award damages which should be disturbed only upon a showing that the award is grossly disproportionate to any reasonable view of the evidence concerning plaintiff's damages. *See Bertero v. National General Corp.*, 13 Cal. 3d 43, 64 n.12 (1974).

6. Insufficient evidence: Insufficiency of the evidence to justify the verdict or other decision.

a) Trial court has the broadest power under this standard – acts as the "13th juror."

b) Trial court is not bound by factual resolutions made by the jury and may grant a new trial even though there is sufficient evidence to sustain the jury's verdict.

c) Trial court has the power to reweigh the evidence, including the power to consider the credibility of witnesses and to draw reasonable inferences contrary to those drawn by the jury.

d) *But* a "new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision . . . 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." Cal. Civ. Proc. Code § 657.

e) The law anticipates that when the evidence is nearly balanced or when different minds could naturally and fairly come to different conclusions, the judge will not disturb the verdict. *Perry v. Fowler*,

102 Cal. App. 2d 808, 811 (1951) [citations omitted]. "In other words, the finding of the jury is to be upheld by him as against any mere doubts of its correctness." *Id.* [citations omitted].

7. Verdict or decision is against law.

a) Differs from "insufficiency of the evidence" in that the trial court is not permitted to reweigh the evidence or assess witness credibility. This ground applies only when there is no material conflict in the evidence and the evidence is insufficient as a matter of law.

b) Examples include:

(1) A verdict unsupported by evidence.

(2) A verdict contrary to instructions.

(3) Verdict or findings hopelessly uncertain or inconsistent.

(4) Incomplete statement of decision (judge trial).

c) May raise a theory not raised during trial.

8. Error of law during trial.

a) Error must be prejudicial.

b) Error must have been timely raised during trial.

C. Effect of granting new trial: An order granting a new trial begins the trial process anew. A new trial automatically restarts the time limitations on discovery. Cutoff dates are measured from the date set for retrial. *Fairmont Ins. Co. v. Superior Court*, 22 Cal. 4th 245, 253-54 (2000).

II. <u>Motion for Judgment Notwithstanding the Verdict</u>

A. Standards for JNOV

1. Motion for judgment notwithstanding the verdict or "JNOV," challenges the legal sufficiency of the opposing party's evidence. *See Hauter v. Zogarts*, 14 Cal. 3d 104, 110 (1975).). The trial court's ability to grant a motion for judgment notwithstanding the verdict is the same as its power to grant a directed verdict. *Id.*

2. The Court must consider all evidence in the light most favorable to the judgment, giving the benefit of every reasonable inference, and resolving

all conflicts in support of the judgment. *Howard v. Owens* Corning, 72 Cal. App. 4th 621, 630 (1999).

3. The court cannot weigh the evidence or judge the credibility of witnesses. *Hauter*, 14 Cal. 3d at 110. Rather, the Court's authority "begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment." *Howard*, 72. Cal. App. 4th at 630-31.

4. If there is a conflict in the evidence or if more than one inference can be drawn from the evidence, the motion for judgment notwithstanding the verdict must be denied. *Hauter*, 14 Cal. 3d at 110.

5. "A motion for judgment notwithstanding the verdict of a jury may properly 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 to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied." *Hauter, 14 Cal. 3d at 110.* (quoting *Brandenburg v. Pacific Gas & Elec. Co.*, 28 Cal. 2d 282, 284 (1946).

6. Evidence that is "substantial" is evidence that is of "ponderable legal significance," "reasonable in nature, credible, and of solid value." *Howard*, 72 Cal. App. 4th at 631.

7. Even evidence improperly admitted constitutes "substantial evidence" on a JNOV motion. The proper method for reviewing erroneous evidentiary rulings is a motion for new trial or appeal. *Donahue v. Ziv Television Programs, Inc.*, 245 Cal. App. 2d 593, 609 (1966).

8. Inconsistencies in witness testimony do not constitute insufficient evidence because it is up to the jury to determine the weight to be given to internally inconsistent testimony. *Clemmer v. Hartford Ins. Co.*, 22 Cal. 3d 865, 878 (1978). The controlling factor is whether there was evidence from which the jury could have inferred facts supporting the verdict. *Hale v. Farmers Ins. Exch.*, 42 Cal. App. 3d 681, 692 (1974).

9. A party's testimony at trial may be disregarded if it contradicts his other own unequivocal pretrial admissions. *See Mikialian v. Los Angeles*, 79 Cal. App. 3d 150 (1978) and *Roddenberry v Roddenberry*, 44 Cal. App. 4th 634 (1996).

B. Procedural Issues

1. A court may grant JNOV as to some, but not all of the issues. *See Beavers v. Allstate Ins. Co.*, 225 Cal. App. 3d 310, 323-24 (1990).

2. A JNOV motion may be made by either party against whom the verdict was rendered or by the court on its own motion. Cal. Civ. Proc. Code § 629(a).

3. JNOV motions are generally governed by the same time limits as new trial motions.

a) A notice of motion is required but hearing date is set by the court, not by motion.

b) Where court acts on its own motion, only five days' notice to the parties is required. Cal. Civ. Proc. Code § 629(a).

c) A party's motion for JNOV must be filed and served within the time allowed under Section 659 for service and filing of a notice of intent to move for a new trial.

d) Papers supporting motion for JNOV must be filed at the time the notice of motion is filed.

e) Opposing and reply papers must be filed and served within the same time limits required by new trial motions.

f) As with motions for new trial, the court loses jurisdiction if it does not act within 60 days of filing and service of notice and entry of judgment. If the court fails to grant a JNOV within the 60 day period, the motion is automatically denied.

III. Motion for Attorneys' Fees

A. When authorized by contract, statute or law, reasonable attorneys' fees are allowable costs. Cal. Civ. Proc. Code § 1033.5(a)(10)(A), (B), & (C); *Santisas v. Goodwin*, 17 Cal. 4th 599, 606 (1998).

B. Sources for attorneys' fees in employment cases include:

1. California Fair Employment and Housing Act, Government Code section 12965(b) (discretionary fees for being prevailing plaintiff in lawsuit under the Act);

2. Code of Civil Procedure section 1021.5 (attorneys' fees for enforcing important rights affecting the public interest);

3. Labor Code section 2699(g)(1) (attorneys' fees under the Private Attorney General Act, California Labor Code section 2699 et seq.);

4. Labor Code section 218.5 (attorneys' fees for being prevailing plaintiff in lawsuit seeking nonpayment of wages, fringe benefits and health and welfare or pension benefits);

5. Labor Code section 1194 (attorneys' fees for action to recover unpaid minimum wage and overtime compensation);

6. Labor Code section 226(e) (attorneys' fees in lawsuit regarding failure to provide timely and accurate itemized wage statements or failure to timely provide copies of or access to personnel documents);

7. Labor Code section 2802(c) (attorneys' fees for enforcing right to indemnification by employer).

C. Procedure

1. A noticed motion is required whenever the court is required to determine entitlement to fees – e.g., "prevailing party" status – or to fix the amount of fees. California Rules of Court, Rule 3.1702; *612 South LLC v. Laconic Ltd. Partnership*, 184 Cal. App. 4th 1270, 1284 (2010).

2. Except as provided by statute, the time for filing a motion for recovery of statutory fees is the same as for motions to recover contractual fees. California Rules of Court, Rule 3.1702(a).

a) A notice of motion claiming fees must be served and filed within the time for filing a notice of appeal. California Rules of Court, Rule 8.104, 8.108)

b) The normal time limit for filing a notice of appeal is 60 days after notice of entry of judgment or 180 days after the date of entry, whichever is the earliest. California Rules of Court, Rule 8.104(a).

c) The parties may stipulate to extend the deadline for filing a motion for attorneys' fees for an additional 60 days in an unlimited civil case or 30 days after that time in a limited civil case.

d) The court can extend the deadline for good cause.

e) Competent evidence, generally in the form of supporting declarations, as to the nature and value of the services rendered must be presented. *Martino v. Denevi*, 182 Cal. App. 3d 553, 559

(1986).

D. Generally Applicable Principles

1. Court has broad discretion with respect to the amount of the fee award. *PLCM Group, Inc. v. Drexler*, 22 Cal. 4th 1084, 1095 (2000).

a) In a FEHA case, the discretion to deny a fee award to a prevailing plaintiff is narrow. "[I]n the context of the grant of discretion in Government Code section 12965, subdivision (b), it means something akin to the italicized portion of the following: "the court, [*in a manner that, in the judgment of the court, will best effectuate the purposes of FEHA*], may award to the prevailing party reasonable attorney's fees and costs." *Horsford v. Bd. of Trustees*, 132 Cal. App. 4th 359, 394 (2005).

2. Joinder with non-fee bearing or unsuccessful causes of action:

a) If successful claims for which statutory or other fees are available are joined either with unsuccessful claims or claims for which no fees are available, the court may need to apportion fees so the losing party is only required to pay for fees incurred prosecuting those causes of action for which fees are available. *Akins v. Enterprise Rent-A-Car Co. of San Francisco*, 79 Cal. App. 4th 1127, 1133 (2000).

b) However, "Attorneys' fees need not be apportioned between distinct causes of action where plaintiff's various claims involve a common core of facts or are based on related legal theories." *Harman v. City & Cty. of San Francisco*, 158 Cal. App. 4th 407, 417 (2007).

(1) "Thus, the test is whether the relief sought on the unsuccessful claim is intended to remedy a course of conduct entirely distinct and separate from the course of conduct that gave rise to the injury upon which the relief granted is premised." *Odima v. Westin Tucson* Hotel, 53 F.3d 1484, 1499 (9th Cir. 1995).

(2) If successful and unsuccessful claims are found to be related, the Court must evaluate the overall success in relation to the hours reasonably expended in the litigation. *Harman*, 158 Cal. App. 4th at 417. "'[T]he most critical factor is the degree of success obtained.'" *Id.* at 418 [citations omitted].

3. Prevailing party

a) Normally, the prevailing party is the one in whose favor a net judgment is entered. *Smith v. Rae-Venter Law Group*, 29 Cal. 4th 345, 365 (2002).

b) Court should analyze which party prevailed on a "practical" level. *Heather Farms Homeowners Ass'n, Inc. v. Robinson*, 21 Cal. App. 4th 1568, 1574 (1994).

4. Calculating award:

a) Lodestar methodology: Under this method, the court first determines the number of hours reasonably spent by counsel on the case and a reasonable hourly rate to be applied to those hours. The product of this calculation produces a figure known as the "lodestar" or "touchstone." *Serrano v. Priest*, 20 Cal. 3d 25, 48-49 (1977) ("*Serrano III*").

(1) Hours reasonably spent:

(a) Hours are reasonably spent if, at the time the work was performed, counsel's efforts were reasonable; whether, in hindsight, counsel could have spent fewer hours is irrelevant. *See Wooldridge v. Marlene Industries Corp.*, 898 F.2d 1169, 1177 (6th Cir. 1990) *abrogated on other grounds by Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Resources*, 532 U.S. 598 (2001).

(b) In determining the reasonableness of counsel's hours, the Court can consider "the entire course of the litigation, including pre-trial matters, settlement negotiations, discovery, litigation tactics, and the trial itself." *Vo. v. Las Virgenes Muni. Water Dist.*, 79 Cal. App. 4th 440, 447 (2000).

(c) Attorney time records are prima facie evidence of reasonableness. *See Hadley v. Krepel*, 167 Cal. App. 3d 677, 682 (1985); *see also Perkins v. Mobile Housing Ed.*, 847 F.2d 735, 738 (11th Cir. 1988) ("Sworn testimony that, in fact, it took the time claimed is evidence of considerable weight on the

issue of the time required in the usual case . . .").

(d) An award of fees may include, not only the time spent litigating the action, but also fees incurred to establish and defend a fee claim. *Serrano v. Priest*, 32 Cal. 3d 621, 639 (1982) ("*Serrano IV*").

(2) Reasonable hourly rate:

(a) Attorneys are entitled to compensation at hourly rates that reflect the reasonable market value of their services in the community. *Serrano IV*, 32 Cal. 3d at 643, and n. 38.

(b) Reasonable rates are those charged by private attorneys of comparable skill, reputation, and experience for similar litigation, as measured by the prevailing rates charged by corporate attorneys of equal caliber. *See Horsford*, 132 Cal. App. 4th at 394.

b) Enhancement to the lodestar

(1) To determine a fee that truly reflects that marketplace, factors in addition to hours and rates must be considered: "[T]he unadorned lodestar reflects the general local hourly rate for a fee-bearing case; it does not include any compensation for contingent risk, extraordinary skill, or any other factors a trial court may consider. . . ." *Ketchum v. Moses*, 24 Cal. 4th 1122, 1138 (2001).

(2) The "other factors" that the courts have considered in determining the entitlement to an upwards adjustment are: the results obtained, preclusion of other employment, and public service.

(a) Risk enhancements are "intended to approximate market-level compensation for . . . services, which typically includes a premium for the risk of nonpayment or delay in payment." *Ketchum*, 24 Cal. 4th at 1138.

(i) A fee award that compensates contingent fee counsel only for the fee that they would have received from a fee-paying client, win

or lose, is simply not a reasonable attorney's fee by market standards: "A contingent fee must be higher than the fee for the same legal services as they are performed." Id. at 1132.

(b) A reasonable attorney's fee also should reflect the results obtained. *See Wallace v. Consumers Cooperative of Berkeley, Inc.*, 170 Cal. App. 3d 836, 849-50 (1985).

(c) An upward enhancement is appropriately granted where the attorneys have been precluded from other employment by the time required to litigate the case. *Serrano III*, 20 Cal. 3d at 49; *Ketchum*, 24 Cal. App. 4th at 1132.

(d) Enhancements encourage the private enforcement necessary to vindicate these civil rights. *State of California v. Meyer*, 174 Cal. App. 3d 1061, 1073 (1985)

LESLIE F. LEVY, ESQ., State Bar No. 104634
DARCI E. BURRELL, ESQ., State Bar No. 180467
KATHERINE L. SMITH, ESQ., State Bar No. 295726
LEVY VINICK BURRELL HYAMS LLP
180 Grand Avenue, Suite 1300
Oakland, CA 94612
Tel.: (510) 318-7700
Fax: (510) 318-7701
E-Mail: leslie@levyvinick.com
darci@levyvinick.com
katherine@levyvinick.com

Attorneys for Plaintiff Patricia Metzner

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

UNLIMITED JURISDICTION

PATRICIA METZNER, Plaintiff, v. THE PERMANENTE MEDICAL GROUP and DOES 1-10, inclusive, Defendants.	Case No. RG 13702356 **RESERVATION NO.: R-1691687** ASSIGNED FOR ALL PURPOSES TO JUDGE VICTORIA S. KOLAKOWSKI DEPARTMENT 23 **PLAINTIFF PATRICIA METZNER'S OPPOSITION TO DEFENDANT THE PERMANENTE MEDICAL GROUP'S MOTION FOR NEW TRIAL** Date: January 19, 2016 Time: 4:00 p.m. Complaint Filed: November 7, 2013 Trial Date: October 9, 2015 Judgment Date: November 24, 2015

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I. INTRODUCTION

After four weeks of testimony, a jury of 12 individuals deliberated over five days for more than 20 hours, to reach a verdict in Plaintiff Patricia Metzner's favor. The jury worked diligently, repeatedly demonstrating its serious consideration of the matter before it. Nonetheless, in an effort to escape the judgment of the jury and responsibility for its conduct, Defendant The Permanente Medical Group ("TPMG") asks this Court to undo the hard work of the jury and grant it a new trial of Metzner's claims. The Court should firmly rebuff this effort.

The Court's discretion in this matter must be guided by three central principles. First, a motion for new trial is not an opportunity for the Court to substitute its own judgment for that of the jury. Rather the Court can only grant TPMG's motion if it appears from the entire record that the jury *clearly should* have reached a different verdict or decision. Cal. Const. Art. VI, § 13; Cal. Civ. Proc. Code § 657. Second, under the applicable standard of proof, in order to prevail, Metzner was only required to prove her case by a preponderance of the evidence, in other words, to tilt the scales only slightly in her favor. *See In re Angelita P.*, 28 Cal. 3d 908, 918 (1981). Third, Metzner was only required to establish that retaliation was *a* substantial motivating reason for her termination – meaning more than negligible or theoretical – not that retaliation was the only reason. *See Bockrath v. Aldrich Chemical Co., Inc.*, 21 Cal. 4th 71, 79 (1999); *Harris v. City of Santa Monica*, 56 Cal. 4th 203, 229 (2013).

Applying these standards, TPMG's motion for new trial cannot be granted. The evidence introduced at trial, much of it consisting of testimony from TPMG's own witnesses, contemporaneous documentation, and uncontradicted testimony from Metzner, established that it was more likely than not that retaliation was a substantial motivating reason for her termination. Further, a thorough examination of the evidence demonstrates that neither the testimony of TPMG's witnesses nor TPMG's characterization of documentary evidence is supported by the documents themselves. Under these circumstances, this Court cannot conclude that the jury *should* have reached a contrary result, and TPMG's motion must be denied.[1]

[1] TPMG's motion should, in fact, be stricken, as in defiance of the Court's order that TPMG's new trial motion should be limited to 25 pages, TPMG apparently compressed the spacing

II. FACTS ESTABLISHED AT TRIAL

Metzner had a long, successful career at Kaiser Permanente ("Kaiser") before coming to work in the Broadway Medical Office Building Special Procedure Suite ("BMOB"). Trial Exhibits ("Exh") 507, 508, 512, 513, 514; Trial Record ("TR") 10/29/15, 166 4-6, 167:10-11, 170:24-171:1, 173:5-7; 11/03/15 39:2-6. For approximately 18 years, Metzner always at least met and often exceeded her supervisor's expectations. *Id*.; Exh 1; TR 10/29/15 154:18-24. In January 2010, Shirley Steinback offered Metzner a position as the head of the yet to open BMOB. TR 10/21/15 25:18-26:2. Steinback offered Metzner the position based on the qualifications and skills Metzner had developed over her long career. TR 10/21/15 26:12-27:16; 28:19-23.

According to BMOB Planning Workgroup meeting recaps written by Sandra Schmit, prior to opening, things were on track for operations in the BMOB to begin in April 2010. Exhs 36, 38, 45. According to Schmit, things also went well the first day. Exh 53. There were some initial concerns about staffing, but by May 2010, Schmit reported that staffing was stable. Exh 93. There were also some concerns with supplies, but documents and others' testimony corroborate Metzner's testimony regarding on-going difficulties with Materials Management, despite escalation. Exh 60, 777; TR 10/22/15 72:21-73:21; 11/03/15 79:14-24, 81:16-82:24. Metzner also provided detailed, uncontradicted testimony regarding the efforts she made to deal with and work around Materials Management issues. TR 11/3/15 79:14-83:10.

Although some concerns were expressed in the initial months of the BMOB's operations about matters in the fledgling department and about Metzner's management in particular, in June 2010, Steinback and Schmit began to discuss also designating Metzner as manager of Oakland's Peri-Operative Medicine unit ("POM"). Exh 1551; TR 10/21/15 58:22-25; 10/22/15 62:10-13. In August 2010, Metzner officially became the Director of Oakland POM, a unit described by

between letters to give it more text than would be permitted if it utilized normal letter spacing. Plaintiff's counsel compared TPMG's moving papers on both its motion for new trial and motion for judgment notwithstanding the verdict to other papers filed by TPMG in this action and observed a substantial difference in the text. *See* Declaration of Katherine Smith in Support of Plaintiff's Opposition to Defendant's Motion for New Trial ¶ 27. This practice violates both the spirit and the letter, of California Rules of Court 2.104-2.105 and is prejudicial to Plaintiff.

Schmit as a "complex" unit, with a "big huge initiative in the works." TR 11/3/15 159:18-160:7, 161:11-12; Exh 170.

Internal surveys during the early months of the BMOB's existence found some operational concerns in the unit, but by July or August 2010, the Joint Commission conducted a survey, which the BMOB passed with no findings. TR 10/21/15 42:22-43:7; 11/3/15 176:18-177:7. After the Joint Commission survey through the time of Metzner's termination, there were no additional findings in the BMOB related to Metzner's management of the unit.[2] TR 10/22/15 65:2-22; Exhs 72, 1543, 231. Further, any documented concerns raised regarding Metzner's performance lessened significantly after the Joint Commission's visit.[3]

In September 2010, Metzner received a bonus related to the BMOB's performance during The Joint Commission survey. Exh 565; TR 11/3/15 176:24-177:3; 10/26/15 31:21-32:12. On November 6, 2010, Schmit recommended Metzner for another bonus. Exh 170; TR 10/26/15 34:5-35:3.[4] Schmit preferred awarding bonuses "across the board," but if required to distinguish particular managers to receive bonuses, she would select Metzner, among others. Exh 170. Schmit also recognized that awarding low performers with bonuses had "legal implications." *Id.* On November 18, 2010, Schmit described the BMOB as "a model of efficiency." Exh 772; TR 10/26/15 37:5-16.

By the beginning of 2011, operations in the BMOB had begun to stabilize. TR 11/4/15 10:25-11:10. During a January 2011 BMOB staff meeting, Haugen and Metzner reported that the BMOB was "getting lots of good press from patients and the administration." Exh 793, TR

[2] After the Joint Commission survey in 2010 there were two more Continuous Performance Assessments which surveyed the BMOB, in July 2011 and November 2012. The CPA in 2011 had findings related to physician performance. Exh 776, TR 11/2/15 40:21-41:11; 65:3-67:2; 10/21/15 19:8-11. Although TPMG attempted to blame Metzner for findings in July 2011, those findings were directed to and obligations of the medical staff (physicians). Exhs 231, 776. In the November 2012 survey a nervous nurse was unable to find information in a chart but the information was later located and no finding was issued. TR 11/4/15 81:24-83:7.

[3] After August and the successful Joint Commission survey, there were only 2 emails for the remainder of 2010 -- both from Dr. Gardner in late September to October -- that raised concerns about Metzner's performance. *See* Section III *infra*.

[4] Steinback approved this bonus. TR 10/21/15 60:10-14; 11/04/15 10:8-15.

11/4/15 12:6-18; 11/13/15, 138:19-139:2. Outside groups began to visit the BMOB to observe its operations, including from outside the state. TR 11/4/15 12:6-18.

On March 22, 2011, Schmit provided Metzner with an evaluation of her performance for 2010. Metzner received an overall rating of "Excellent Performance" and was rated as having either "Excellent" or "Exceptional" performance in every category. Exh 205. In particular, Schmit stated,

> Trish consistently demonstrates her commitment to achieving results. She seeks out opportunities for improvement, develops solutions in collaboration and implements them efficiently. She reassesses and adjusts as necessary. She maintains vigilance around metrics for organizational success and ensures action plans are in place to achieve them. . . . Trish demonstrates a clear understanding of the behaviors and skills essential for success in her role. She embraces her responsibilities, even in the face of change. She is results driven and accountable for department performance.

Exh 205. There was not a single negative comment from Schmit in the entire evaluation. TR 10/26/15 131:10-132:9.

In April 2011, the outgoing Director of the Richmond POM asked Metzner to provide some support for Richmond POM until an interim director could be hired. Ultimately, however, Steinback, Physician Director Dr. John Loftus, and Dr. Todd Foster asked Metzner to visit Richmond on a daily basis.[5]

By May 2011, the epidurals Metzner had been receiving to deal with pain related to a back injury had ceased being effective, and Metzner's primary physician referred her for spine surgery. TR 11/4/15 15:13-21, 17:3-18:10. In late May or early June, Metzner discussed the possibility of surgery with Schmit. TR 11/4/15 18:11-19:8, 10/26/15 46:25-47:14.

Very shortly after Schmit learned about the surgery, Schmit raised to Steinback the idea of placing Metzner on a Performance Improvement Plan ("PIP"). TR 10/21/15 72:6-18, 75:12-76:2; 10/26/15 49:16-19; 136:15-137:7; 10/27/15 176:6-16; *Plaintiff's Record of Video Excerpts*

[5] TPMG witnesses bent over backwards to suggest that Metzner was chosen for this role only because no one else was available. Foster, in particular, suggested that Metzner was only better than having no one at all. TR 11/10/15 26:2-24, 43:17-44:8. Yet at the same time that TPMG would have the trier of fact believe that finding coverage for a few months was so difficult they had no choice but to use Metzner, they also argued that finding coverage for Metzner's longer leave for the larger Oakland POM was no hardship. TR 11/9/15 153:21-23; 11/10/15 27:1-16.

Played at Trial 268:11-269:21. This was less than two and a half months after Schmit rated Metzner's performance as "excellent," a fact not shared with Steinback. TR 10/21/15 80:21-81:1.

Steinback and Schmit decided that Schmit should talk to Metzner, rather than placing her on a PIP. TR 10/21/15 72:23-73:3; 10/27/15 160:17-25. Schmit met with Metzner on June 13, 2011. TR 10/26/15 49:2-12; 11/4/15 22:25-23:2. Schmit's note regarding the June 13 meeting is the first documentation of any discussion between Metzner and Schmit regarding concerns about Metzner's performance. TR 10/26/15 135:1-11; Exh 1949. It is also the first note written by Schmit documenting concerns she allegedly had about Metzner's performance. TR 10/26/15 135:8-11. Schmit does not deny that she never warned Metzner that she was in danger of being placed on a PIP. TR 11/4/15 25:12-17; 10/26/15 139:11-140:20; 10/27/15 171:3-7.

Later in June 2011, Metzner learned that she could have surgery in July instead of September. TR 10/28/15 7:20-8:8; 11/4/15 25:23-26:11. When Metzner approached Schmit about the opportunity to have the surgery early. Schmit's response, simply, was that she did not think she could spare Metzner then, despite Ms. Metzner's uncontradicted testimony that, during this conversation, she was in obvious pain, leaving over a bar because it was painful to stand up straight. TR 11/4/15 26:19-27:15.

In July 2011, Schmit began seeking coverage for Metzner during her leave. Exhs 248, 249, 252, 255; TR 10/26/15 58:19-59:19. Schmit suggested Lori Salemi for coverage of the BMOB, and proposed covering POM, in part, by designating another manager, Nenette Ebalo, to oversee things. Exh 255; TR 11/4/15 38:10-20. Steinback rejected Schmit's plan for POM. Exhs 255, 259. In particular, Steinback questioned why Schmit had so many people covering Metzner's role and informed Schmit that she was responsible for covering for her managers on leave. Exh 255. Schmit attempted to convince Steinback to reconsider her decision, stating that there were "compelling reasons to have additional interim coverage for POM," but Steinback did not relent. Exhs 255, 259. When Schmit reported Steinback's decision to Metzner, and Metzner stated that this was not fair to Schmit, Schmit agreed and said "but that's Brunhilda for you." TR 11/4/15 38:25-39:10.

In the meantime, in August, approximately two months after suggesting that Metzner be placed on a PIP, Schmit wrote the chiefs of the Interventional Radiology department and requested their support for Salemi, to provide interim coverage in the BMOB. Schmit argued that there would be a lot of value to Salemi in covering the BMOB because it "runs VERY efficiently" and "the unit runs pretty seamlessly." Exh 252; TR 10/26/15 57:12-58:17.

Metzner's leave officially began on September 6, 2011. TR 10/21/15 76:3-7, Exh 254. During an October 27, 2011 BMOB staff meeting, Haugen reported that the BMOB was being looked at as a center of excellence. Exh 795 TR 11/13/15 141:12-143:18. Metzner returned from leave in early January 2012. Schmit began to reconsider placing Metzner on a PIP not long after she returned. TR 10/28/15 79:14-25. At the end of Metzner's first week back from leave, Schmit met with Metzner and raised issues Schmit claimed she had discovered while Metzner was out and told Metzner that Haugen and Gardner had "fallen in love" with Lori Salemi. Exh 1949; 310 TR 10/26/15 137:9-22; 11/4/15 42:19-43:6.

After her return from leave, Schmit, Haugen, and Gardner treated Metzner differently than they had prior to her leave. TR 11/4/15 39:13-40:13. By the end of March 2012, Schmit had presented Metzner with a performance evaluation that was diametrically opposed to the one she had received the year before. Exhs 205, 341. Specifically, Schmit rated Metzner as "Performance Improvement Needed" in nearly every category. Exh 341. This was the first time in Metzner's nearly 20-year career with Kaiser that she was rated as anything less than meets expectations. TR 10/29/15 154:15-24; 11/4/15 53:8-17. At the same time, Schmit gave Metzner this terrible review, she also gave Metzner a PIP. Exh 342; TR 11/4/15 53:18-20.

In preparing Metzner's 2011 performance evaluation, Schmit relied on comments critical of Metzner's performance that Schmit received via "Survey Monkey." TR 10/28/15 89:13-20. Schmit, however, disregarded the remainder of the survey which, overall, was positive. In every category, the majority of participants rated Metzner as having at least "Successful Performance," and in every category more people rated her as having "Excellent Performance" than any other rating. Exh 340, TR 11/2/15 70:16-71:14.

In May 2012, Schmit met with Metzner to review Metzner's progress on the PIP. TR 11/4/15 56:23-25. Schmit told Metzner that she was satisfied with her progress. TR 10/26/15 75:8-14; 11/4/15 57:4-16. Metzner did not meet again with Schmit regarding the PIP or even discuss the PIP until October 18, 2012, almost a month after the PIP had ended, and at which time Schmit informed Metzner that she had failed the PIP. TR 11/4/15 71:2-24, 72:24-73:8. Although Schmit claimed that she had been providing Metzner with regular feedback on her performance during the PIP, TPMG presented no notes, follow-up emails or other documents that would demonstrate that Schmit and Metzner met or what they discussed. TR10/26/15 142:25-143:22, 151:13-23. Schmit also could not identify a single document in which she informed Metzner that her performance was no longer satisfactory or where she informed Metzner that she was in danger of failing the PIP. TR 10/26/15 149:14-152:4.

During the October 18, 2012 meeting, Schmit told Metzner that her options were to continue on the PIP, work for an additional three months, during which she could attempt to find another job, or resign and take a severance. TR 10/26/15 154:14-155:8; 11/4/15 73:7-21. Schmit called Metzner in November and informed her (over the telephone, after pulling Metzner from a meeting) that she no longer had the option of staying on the PIP. TR 11/4/15 84:5-23.

On December 14, 2012, Schmit informed Metzner that she was being removed from her position and was placed on administrative leave on December 18, 2012. TR 11/4/15 91:6-23; 10/26/15 81:21-82:15. Schmit recommended Metzner's termination to Steinback. Steinback accepted the recommendation, and Metzner was officially terminated on January 29, 2013. TR 10/26/15 82:22-23, 152:5-16; 10/29/15 68:8-11; Exh 448.

III. ANALYSIS OF TPMG'S DOCUMENTARY EVIDENCE

As set forth above, Metzner's *prima facie* case was established at trial largely through testimony from TPMG's witnesses, straightforward, contemporaneous documentary evidence, and uncontradicted testimony from Metzner.[6] TPMG's defense – that it terminated Metzner

[6] TPMG argues that Metzner's credibility is undermined because she testified about the June 13, 2011 and January 2012 meetings at trial. However, the deposition testimony (that she did not recall the particular meetings and did not recognize Schmit's notes) is not in direct conflict with her trial testimony (that a thorough review of documents after her deposition refreshed her

solely because of her poor performance – was based mostly on uncorroborated testimony and documents that TPMG *characterized* as evidencing Metzner's performance deficiencies. However, a thorough and chronological review of the documents[7] demonstrates that TPMG's claims are not supported by the documents themselves. This analysis is particularly important because while TPMG's witnesses could certainly *say* that they were consistently unhappy with Metzner's performance, the lack of contemporaneous articulation of such concerns, particularly given the vast number of documents produced by TPMG during litigation, significantly undermines TPMG's position.[8]

During trial, 204 work emails were entered into evidence. A review of the work emails in evidence shows that the majority do not on their face criticize or complain about Metzner. Additionally, despite testimony of constant complaints by doctors from 2010 through 2012, there are a dearth of emails reflecting complaints of any kind and no evidence of continuous complaints by doctors. Plaintiff's counsel reviewed all of the work emails in evidence and placed them into one of three categories.[9] Emails that were critical of Metzner on their face, or criticized Metzner for something she did (or failed to do) were categorized as "Critical of TM." Emails that expressed some operational concern or made some inquiry related to operations were categorized as "Operational Issue" and those that did not express any kind of concern or were positive were

recollection of the meetings). Further, other than one issue, TPMG's counsel did not ask Metzner regarding the substance any of the issues allegedly raised by Schmit during the meetings and on that one issue (compliance) Metzner's trial and deposition testimony are in accord. TR 11/4/15 25:5-8. Moreover, TPMG's witnesses provided testimony in conflict with their deposition testimony. *See e.g.*,11/13/15 91:8-92:11, 123:17-125:6 (Haugen testified in deposition that he did not know when the hold on hiring permanent staff was released because he did not "direct or get involved" but in trial testified that he *did* get involved, spoke with Steinback about the hold in August or September of 2010 and that the hold was released by September 2010).

[7] As the Court knows, the jury asked to see the documents in chronological order – a request invited by defense counsel – and in particular, focused on March through October 2011.

[8] This is particularly true given Schmit's practice of archiving and documenting physician complaints. TR 10/26/15 98:10-25, 99:23-100:12; *Plaintiff's Record of Video Excerpts Played at Trial* 82:18-83:19. (Schmit testified her practice was to document any doctor's complaint about a subordinate by sending a follow-up email after meeting with the subordinate).

[9] The Court, of course, does not have to accept Metzner's characterization of the documents any more than it has to accept TPMG's characterization. Before determining, however, that the jury *should* have reached a different result, the Court should, as the jury did, carefully review TPMG's documentary support.

categorized as "Benign/Positive." Plaintiff's counsel also counted the number of work emails evidencing a concern articulated by doctors and Steinback. The analysis shows that when the jury reviewed the evidence there was a significant lack of corroboration for the version of events TPMG presented at trial and thus a compelling basis to discredit TPMG's story.

A. September 2009 through December 2010

	Total # emails	Critical of TM	Operational Issue	Benign/ Positive	# Dr Concern	Loftus/ Steinback concern
Total	**75**	**15**	**40**	**33**	**6**	**5**
Sept 2009-Dec 2010	Before opening (9/2009-4/4/2010)					
	14	0	1	13	0	0
	Between opening and Joint Commission (4/5-8/31/2010)					
	47	13	34	11	4	5
	After Joint Commission to end of 2010 (9/1-12/31/2010)					
	13	2	5	9	2	0

In reviewing the emails for the period of September 2009 through the opening of the BMOB, there were no emails that were specifically critical of Metzner. During the period between opening and the Joint Commission survey (April-August, 2010), while everyone was looking at every aspect of operations with a critical eye to ensure the brand new unit would pass, there were thirteen emails that expressed some concern about Metzner. During this five-month period, there were significantly more emails than during the remaining eleven months in the September 2009 to December 2010 period, and it is only during this period that one finds emails critical of Metzner from either Steinback or Loftus. The only doctor who documented any concern about Metzner was Gardner. Following the Joint Commission to the end of December 2010 there were only two distinct emails that expressed concern about Metzner and they were all from Gardner. The majority of the emails during this post-Joint Commission period were Benign/Positive, and for the entire period, roughly half of the emails were Benign/Positive.

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B. January 2011 through December 2011

	Total # emails	Critical of TM	Operational Issue	Benign/ Positive	# Dr Concern	Loftus/ Steinback
Total	**45**	**13**	**24**	**18**	**1**	**0**
Jan 2011-Dec 2011	Jan 1 to Performance review (1/1 - 3/22/2011)					
	6	2	3	3	1	0
	Jan 1 to June 13 meeting (1/1 - 6/13/2011)					
	12	2	7	5	0	0
	March Performance review to June 13 meeting (3/23 - 6/13/2011)					
	6	0	4	2	0	0
	June 13 meeting to medical leave (6/13 - 9/6/2011)					
	22	4	8	13	0	0
	March -Oct 2011 - Jury Question - (3/1-10/31/2011)					
	39	11	21	11	0	0
	Nov-Dec 2011 (11/1 - 12/31/2011)					
	0	0	0	0	0	0

The review of emails from all of 2011 also shows that any documented concerns about or criticisms of Metzner were dramatically absent prior to her informing Schmit that she was considering spine surgery. Notably, there is only one email that is critical of Metzner from a doctor in 2011, and the vast majority of the critical emails were from Schmit between mid-July and mid-October, after she knew of Metzner's surgery plans. During the period between the glowing performance review and the June 13, 2011 meeting, there were no emails containing any express concern regarding Metzner from anyone. Thus, an objective review of the documents in evidence undermines TPMG's story that Metzner's performance was continuously poor and that her poor performance justified placing her on a PIP.

C. Documentation of Doctor's Concerns

Doctor's by date	**Foster**	**Barber**	**Riegels**	**Gardner**	**Haugen**	**Loftus**	**Steinback**
4/16/2010				x			
5/19/2010							x
6/1/2010							x
7/1/2010						x	x
7/1/2010							x
7/2/2010				x			
8/30/2010				x			
10/12/2010				x			
10/26/2010				x			
2/10/2011	x						
10/7/2012							x
12/10/2012			x				

The review of emails documenting doctor concerns about Metzner is even more stark. There were no emails which expressed concerns about Metzner from Barber, or Haugen.[10] The overwhelming majority of the emails evidencing concern are from 2010, during the period between the BMOB opening and the Joint Commission survey. From September of 2010 to March 2011, there are only three complaints, two from Gardner in October of 2010 and one from Foster in February of 2011. There are no documents evidencing doctor complaints about Metzner at any point after the glowing performance review in March 2011 through the end of the PIP in September 2012. The documents in evidence undermine the doctors' claims that they were constantly complaining about Metzner.[11]

IV. ARGUMENT

A. The Evidence Submitted at Trial Was Sufficient to Justify the Verdict.

A motion for new trial on the ground of insufficient evidence should not be granted unless, after weighing the evidence, the Court is convinced from the entire record, including reasonable inferences therefrom, that the jury "*clearly should* have reached a different verdict or decision." Cal. Civ. Proc. Code § 657 [emphasis added]. "Insufficient evidence" means "an absence of evidence or that the evidence received . . . is lacking in probative force to establish the proposition of fact to which it is addressed." *Dominguez v. Pantalone,* 212 Cal. App. 3d 201, 215 (1989). It is the exclusive province of the jury to find facts, and the duty of the trial court to ensure that the jury performs this function intelligently and justly. *Id.* The law anticipates that when the evidence is nearly balanced or when different minds could naturally and fairly come to different conclusions, the judge will not disturb the verdict. *Perry v. Fowler*, 102 Cal. App. 2d 808, 811 (1951) [citations omitted]. "In other words, the finding of the jury is to be upheld by him as against any mere doubts of its correctness." *Id.* [citations omitted]. The trial court should

[10] The doctors, including Haugen and Barber, wrote a few emails raising operational concerns, however, none of those emails express a concern about Metzner in particular. The doctors were capable of distinguishing - and testified that they did distinguish - between operational concerns and problems specifically with Metzner. *See, e.g,* TR 11/10/15 21:7-21, 70:19-23, 108:3-22.

[11] Based on Schmit's documentation practices (see fn. 8 *supra*) and the dearth of emails reflecting doctor complaints about Metzner, the jury could reasonably discredit the doctor's testimony.

set the judgment aside only when his or her judgment tells him or her "that it is wrong, and that the jury has erred, whether from mistake, prejudice, bias, or other cause, in finding against the fair preponderance of the credible evidence or the basic interests of justice. . . . " *Id.*

As discussed in detail above, the uncontradicted evidence introduced at trial demonstrated that, whatever concerns were expressed about Metzner's performance in early 2010, by the fall of that year, Schmit was satisfied enough with her performance to recommend her for multiple bonuses and to give her a glowing performance evaluation in March of the following year. The only clear articulation of concern regarding Metzner's performance ceased, for the most part, by the fall of 2010.

The uncontradicted evidence further demonstrated that very shortly after Metzner disclosed to Schmit that she was considering a significant back surgery, Schmit suggested to Steinback that Metzner be placed on a PIP. This was notwithstanding the fact that Schmit had, only two and a half months prior, provided Metzner with an excellent performance evaluation that made no mention of the alleged serious issues that would justify a PIP. Further, just two months later, Schmit was describing the BMOB as running "VERY efficiently" and "pretty seamlessly," despite her allegedly serious concerns about Metzner's performance.

The uncontradicted evidence also showed that Schmit rebuffed the idea of Metzner taking an earlier leave and that Steinback refused to allow Schmit the level of coverage she sought during Metzner's absence. Although Schmit suggested at trial that she and Steinback reached mutual agreement about coverage for Metzner, documentary evidence demonstrates that Schmit pushed back against Steinback's refusal. Additionally, TPMG's own analysis showed that out of 316 non-union, non-physician employees under Shirley Steinback, who took leave from January 1, 2009 to June 1, 2015, Metzner was Schmit's only direct report who took a medical leave and was one of very few such employees who was involuntarily terminated. TR 11/12/15 183:23-184:14; Exh. 1863.

According to Schmit and Steinback, the purpose of the June 13 meeting was to allow Metzner a chance to improve her performance. Metzner, however, only worked for another two and a half months after the June meeting before going on leave. Nonetheless, Schmit was

prepared to place Metzner on a PIP shortly after she returned from leave. Schmit claimed that, during the PIP, she met regularly with Metzner and provided her feedback regarding her performance. However, other than the May meeting where Schmit told Metzner that she was satisfied with her performance, TPMG did not produce a single document demonstrating that Schmit and Metzner actually met or that Schmit ever informed Metzner, prior to October 18, 2012, that she was not satisfying the PIP. Nor did TPMG introduce any documents evidencing that Schmit requested and did not receive deliverables from Metzner required by the PIP.[12] This, along with other evidence discussed above – particularly the fact that Schmit, by her own description, "papered" Metzner's file in the May through September 2012 period[13] – demonstrates that Schmit intended for Metzner to fail. TR 10/26/15 132:21-133:2, 133:22-134:8.

Based on the foregoing, there was more than sufficient evidence to establish Metzner's *prima facie* case of retaliation. TPMG's justification of its actions, further, do not stand up to scrutiny. Although TPMG emphasizes the number of witnesses it presented, "the sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is on the *quality* of the evidence. The *quantity* of evidence presented by each side is irrelevant." *Glage v. Hawes Firearms Co.*, 226 Cal. App. 3d 314, 324-25 (1990). Here, as discussed in detail above, while TPMG's witnesses testified that there were serious concerns – including patient safety concerns – about Metzner's performance throughout her time in the BMOB and Oakland POM, the documents do not support that contention. This lack of documentation is compounded by the

[12] For example, Metzner testified that she placed the strategic plan required by the PIP in Schmit's box after the May 2012 meeting. TR 11/4/15 81:11-22. Schmit denied receiving anything other than a draft of the strategic plan. TR 11/2/15 139:9-140:1. Yet there are no emails or notes from Schmit evidencing she did not receive the plan or indicating the she raised the issue with Metzner while she was on the PIP. *See, e.g.*, TR 10/26 149:14-152:4. TPMG argues that Metzner did not prove that she passed the PIP, but Metzner gave testimony regarding items that Schmit claimed Metzner had failed, such as UBT meeting levels and attendance calendars. Most importantly, TPMG, not Metzner, had control of information that would prove or disprove that Metzner failed the PIP. Given its failure to produce any contemporaneous documentation supporting its contention that Metzner failed the PIP, TPMG cannot shift this burden to Metzner. *See Judicial Council of California, Civil Jury Instructions*, CACI 203 (Party Having Power to Produce Better Evidence).

[13] There were a total of 82 emails from 2012 that were introduced. There were 40 emails from the period where Metzner was on the PIP (March 20th to September 20th), of which nine were prior to May 16 and thirty-one were mid-May through the end of the PIP. Smith Decl. ¶ 26.

fact that Schmit's practice was to document complaints she received from the doctors as evidenced by her testimony and her noting Gardner's complaints in 2010. Exhs 65, 129. Given this lack of contemporaneous documentation of complaints, the Court cannot say that the jury was clearly incorrect in rejecting TPMG's justification for its actions.

Additionally, other than the notes beginning with an alleged recitation of the June 13 meeting and the notes Schmit prepared in preparation for the January 2012 meeting with Metzner, there are no contemporaneous memoranda or notes from Schmit detailing her allegedly numerous performance concerns about Metzner. To bolster this lack of documentation, TPMG introduced numerous documents that it contends evidence Metzner's deficiencies. As noted above, however, the quality, not the quantity of evidence is key here. There are 45 emails in evidence from 2011, the period of upon which Metzner's terrible 2011 evaluation and the decision to place her on a PIP is ostensibly based. Of those 45 emails, only 13 are arguably critical on their face, 11 of which were sent after Metzner disclosed her need for surgery. The remaining two emails were sent in February, before Metzner received the excellent 2010 evaluation. Even, however, if one credits all these emails, they do not explain the difference between the outstanding 2010 evaluation and the dismal 2011 evaluation. Further, the vast majority of critical emails – and particularly from Schmit – come in the period from May to December 2012, when Schmit had an incentive to document Metzner's alleged performance deficiencies.

While TPMG certainly wanted the jury to credit the testimony of its witnesses and to agree with its characterization of the documents, the jury was not required to do so. Further, given the lack of documentary corroboration, this Court cannot say that the jury *should* have believed TPMG's witnesses or seen the documents as TPMG desired. Nor can the Court conclude that there was a miscarriage of justice because the jury did not accept TPMG's story.

B. The Damages Awarded Were Justified by the Evidence.

As with a motion for new trial on the ground of insufficient evidence, the Court cannot grant a new trial on the ground of excessive damages unless the Court concludes, after weighing all the evidence, that the jury *clearly should* have reached a different verdict. Cal. Civ. Proc.

Code § 657. “The mere fact that the judgment is large does not validate an appellant’s claim that the verdict is the result of passion or prejudice of the jury.” *DiRosario, et al. v. Havens, M.D.*, 196 Cal. App. 3d 1224, 1241 (1988). The jury is entrusted with vast discretion to award damages which should be disturbed only upon a showing that the award is grossly disproportionate to any reasonable view of the evidence concerning plaintiff’s damages. *See Bertero v. National General Corp.*, 13 Cal. 3d 43, 64 n.12 (1974). “The judge is not permitted to substitute his judgment for that of the jury on the question of damages unless it appears from the record that the jury verdict was improper.” *Bigboy v. County of San Diego*, 154 Cal. App. 3d 397, 406 (1984).

As the prevailing party, Metzner is entitled to be made whole, meaning she is entitled to that which she would have reasonably expected to earn absent the retaliatory termination. *See, e.g., Commodore Home Sys., Inc. v. Superior Court*, 32 Cal. 3d 211, 221 (1982); *Hope v. California Youth Auth.*, 134 Cal. App. 4th 577, 595 (2005); *Dyna-Med, Inc. v. Fair Employment & Hous. Com.*, 43 Cal. 3d 1379, 1387 (1987); Cal. Gov't Code § 12926(a).

The burden of establishing mitigation rests with the defendant, and in the absence of any proof of other earnings, a presumption arises that the amount of damages is the amount of withheld salary. *Mass v. Bd. of Ed. of San Francisco Unified Sch. Dist.*, 61 Cal. 2d 612, 627-28 (1964). “‘The burden is on the defendant to show that he could, by diligence, have obtained employment elsewhere. Whatever compensation may have been received in such employment is also to be shown by the defendant in mitigation of damages; otherwise, the damages will be measured by the salary or wages agreed to be paid.’” *Id.* at 627-628 (quoting *Rosenberger v. Pacific Coast Ry. Co.*, 111 Cal. 313, 318 (1896).

> Whether a plaintiff acted reasonably to mitigate damages is a factual matter to be determined by the trier of fact. The burden of proving a plaintiff failed to mitigate damages is on the defendant. Here, the trial court concluded the [defendant] did not carry that burden. Therefore, the question on appeal is whether there was uncontradicted and unimpeached [evidence] of such a character and weight as to leave no room for a judicial determination that it was insufficient to support the finding that [the plaintiff] failed to mitigate his damages.

Agam v. Gavra, 236 Cal. App. 4th 91, 111 (2015) (internal quotations and citations omitted).

The jury in this case awarded Metzner $2,430,715 for future economic loss, or "front pay." Damages to a wrongfully discharged plaintiff may include, in addition to back pay, an award of the salary and benefits the plaintiff would have earned from employment after the trial. *Mize-Kurzman v. Marin Community College Dist.*, 202 Cal. App. 4th 832, 873 n.17 (2012). [14] California courts have treated front pay as a damage issue for the trier of fact, which must determine the amount and extent of back pay and front pay necessary to make the plaintiff whole. *Cloud v. Casey*, 76 Cal. App. 4th 895, 910 (1999). "Front pay is measured by the employee's projected earnings and benefits over the period of time until he or she is likely to become reemployed or likely to retire, where reemployment is unlikely." *Id.*

In this case, at the time of trial, Metzner was 58 years old. Metzner had been employed by Kaiser for almost 20 years at the time of her termination. Metzner's long tenure with Kaiser was consistent with the long tenure of TPMG's witnesses – more than 30 years for Steinback, approximately 21 years for Schmit, approximately 25 years for Haugen. Other than the poor performance evaluation and the PIP Metzner received from Schmit in 2012, Metzner's performance throughout her time with Kaiser had always been well-reviewed. The evidence established that, prior to requesting and taking a medical leave, Metzner was both successful and happy working for Kaiser and that, like many of TPMG's witnesses, she had no intention of leaving prior to retirement.[15] The evidence also established that Metzner had applied for a number of specific jobs, as well as submitted open applications, and had consulted with several recruiters but had only been interviewed a couple of times and received no job offers. 11/4/15 95:2-96:6, 11/12/15 33:21-35:20. Metzner also testified that the longer she was out of the workforce, the more difficult it would be for her to obtain comparable employment, as her experience became less and less recent. TR 11/4/15 97:4-21.

[14] Other than claiming that Metzner should not have prevailed, TPMG does not challenge the award of past economic damages.

[15] Metzner and TPMG's witnesses discussed their longevity with TPMG and intent to stay with TPMG. See, e.g., TR 11/3/15 43:22-44:4 (Metzner); 11/13/15 187:20-188:9 (Salemi), 112:3-9 (Haugen); 10/21/15 6:6-13, 7:9-13 (Steinback);

Plaintiff's economics expert Dr. Margo Ogus concluded that Metzner's statistical worklife was an additional 8.6 years.[16] She further opined that, if Metzner retired at the end of her statistical worklife, the salary, benefits and pension she would have earned if she had continued to be employed by TPMG would have been $2,620,808. If Metzner retired at the retirement age of 65, the salary, benefits and pension she would have earned at the time of retirement would have been $2,279,966. TPMG's expert, Bruce Deal, who calculated what Metzner would have earned had she worked for TPMG to a retirement age of 65, had no significant quarrel with Ogus' mathematical analysis except that he found Metzner would have earned an additional $130,000.[17] His most significant disagreement with Ogus was his assumption, based on information he received from TPMG's mitigation expert Rhoma Young, that Metzner should have obtained employment within six months of her termination. TR 11/13/15 49:13-50:10, 52:10-22.

Given Metzner's long tenure with Kaiser, as well as the long tenure of TPMG's other witnesses, and the fact that she had been both happy and successful in her career with Kaiser until requesting and taking leave, it was not speculative to assume that, absent TPMG's unlawful conduct, Metzner would have continued to work for TPMG until retirement, only another seven years in the future. *See Passantino v. Johnson & Johnson Consumer Products, Inc.*, 212 F.3d 493, 512 (9th Cir. 2000) ($2 million front pay award was supported by the evidence where plaintiff was 43 years old, had a statistical working life of 22 years, and had worked for the defendant for 18 years.); *Bihun v. AT&T Information Systems, Inc.*, 13 Cal. App. 4th 976, 996 (1993), *disapproved on other grounds by Lakin v. Watkins Associated Indus.*, 6 Cal. 4th 644 (1993) (front pay award was not speculative given evidence that plaintiff received excellent evaluations while employed by defendant and was successful and happy there). Metzner's testimony and her experience with looking for other employment since her termination, also provided evidence that reemployment in a comparable position is not likely.

[16] Dr. Ogus' economic analysis is contained in Exh 467.
[17] Mr. Deal's economic analysis is contained in Exh 2015.

The jury's front pay award was consistent with Ogus' calculations as to the measure of Metzner's damages, an amount that was supported by TPMG's own economic expert. Although TPMG argued that Metzner should have obtained employment within six months of her termination, it had the burden of demonstrating that Metzner could have, with reasonable effort, obtained not just any employment, but *substantially similar* employment. *Villacorta v. Cemex Cement, Inc.*, 221 Cal. App. 4th 1425, 1432 (2013); *Parker v. Twentieth Century-Fox Film Corp.*, 3 Cal. 3d 176, 183 (1970).[18] Although Young, identified five jobs that she argued Metzner should have applied for, she could not say that any of those jobs were substantially similar to Metzner's position with TPMG. Further, although Young was permitted to testify – over Plaintiff's objections – about significant job growth in the health care industry, she was also unable to establish that this alleged job growth resulted in any substantially similar job opportunities for Metzner. Based on all this, the jury's verdict is supported by the evidence and is not grossly disproportionate to any reasonable view of the evidence concerning the plaintiff's damages. *See Bertero v. National General Corp.*, 13 Cal. 3d 43, 64 n.12 (1974).

C. The Court's Discretionary Rulings Do Not Amount to a Mistrial.

Under Code of Civil Procedure section 657, the moving party must produce a strong showing that the Court's rulings excluding or admitting evidence were an abuse of its broad discretion and that the judicial misconduct prevented the party from having a fair trial. Civ. Proc. Code §§ 657(1), (7). "A trial court has no discretion to grant a new trial on the basis of error in law unless its original ruling was erroneous as a matter of law." *Donlen v. Ford Motor Co.*, 217 Cal. App. 4th 138, 147 (2013), as modified on denial of reh'g (July 8, 2013); *see also Nazari v. Ayrapetyan*, 171 Cal. App. 4th 690, 694 (2009). Rulings regarding relevancy and Evidence Code section 352 are reviewed under an abuse of discretion standard. *People v. Lee*, 51 Cal. 4th 620, 643 (2011). Further, under Evid. Code § 352, the court has broad discretion to "exclude evidence

[18] TPMG's argument (that Metzner failed to prove that she would never work again) mirrors one previously rejected by California courts. *See, e.g., Hope v. California Youth Auth.*, 134 Cal. App. 4th 577, 595 (2005) (rejecting argument that there was insufficient evidence to support jury award of front-pay to retirement for 41-year-old employee because defendant's argument was based on faulty legal premise that the employee has the burden of proving an inability to work).

if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Cal. Evid. Code § 352.

No new trial can be granted based on the Court's admission or rejection of evidence unless an examination of the entire record shows the admission or rejection of evidence was improper and that there was a miscarriage of justice. Cal. Const. art. VI, § 13. TPMG has failed to meet this standard. None of the purported "irregularities/errors" that TPMG raised in its motion for new trial rise to the level of an abuse of discretion, and further, none of the court's rulings substantially prejudiced TPMG.

1. Limiting Witness Testimony about Their Personal Experiences with Leave Was Not Prejudicial.

TPMG argues that it was prejudiced because it was limited in the amount of detail it was allowed to elicit regarding its witnesses' own medical leave. As the Court properly concluded, however, whether a witness had taken medical leave was not relevant to Metzner's claims. Courts have recognized that a member of a protected class may, in fact, discriminate against another member of that same class. *See, e.g., Villareal v. Chubb & Son, Inc.*, No. SACV 11-0674 DOC(RNBx), 2012 WL 3151254, at *8 (C.D. Cal. July 31, 2012) (agreeing with several courts that held discrimination can occur between members of the same protected class). Further, the fact that one has taken medical leave does not necessarily relate to how one will respond when inconvenienced by another's leave.

Most importantly, however, despite TPMG's claim of prejudice, TPMG elicited testimony about its witnesses' personal experiences in taking leave both before and after the Court's ruling that testimony of witnesses' personal experiences had little probative value and was properly excluded under Evidence Code section 352. Moreover, TPMG mentioned such experiences during closing argument. [19] TPMG's complaint, in fact, is that "[u]ltimately, the

[19] After the Court repeatedly sustained objections to questions about witnesses' personal experiences in taking leave, Plaintiff had to explicitly ask the Court to Order TPMG to stop asking questions intended to elicit such testimony and then the witnesses repeatedly attempted to volunteer this information. TR 11/12/15 195:3-25; 11/13/15 90:2-7, 98:14-16. Despite this order,

court did not permit any detailed discussion about leaves."[20] Even if it were an abuse of discretion to limit testimony about witnesses' own leaves, TPMG cannot claim that it was so substantially prejudiced as to warrant a new trial.[21]

2. A Same Actor Instruction Was Not Warranted by the Evidence.

TPMG also argues that it was error for the Court to refuse to give its instruction on the "same actor" inference. A judgment may not be reversed for improper instruction to the jury, however, absent a showing that the instruction, or denial of the instruction, caused the jury to be misled, and the verdict was based on the instruction error. *Soule v. Gen. Motors Corp.*, 8 Cal. 4th 548, 574 (1994). Such a determination is based not only on the evidence, but counsel's arguments, the other instructions, the appropriateness of the instruction, and any indication that the jury was in fact misled. *Id.* at 572-574.

As the Court properly concluded at trial, cases in which the "same actor" inference have been applied have involved immutable characteristics, such as age. TPMG has not identified a single case where the same actor inference was applied outside the context of an immutable characteristic, and, in fact, TPMG admits that there is no authority that holds that the inference applies to a CFRA retaliation case. This is significant because the immutability of the characteristic in question is exactly what creates the inference. In other words, it is reasonable to infer that an employer will not hire someone who is 55 and then terminate that person two years later because they are now 57. Presumably, at the time the person was hired, the employer was aware of the person's age and was aware that the person would continue to get older. That is also

TPMG still mentioned its witnesses' personal leaves several times in its closing argument. TR 11/16/15 176:15-23, 180:23-25, 182:2-3. Ironically, its *Memorandum of Points and Authorities In Support Of Defendant The Permanente Medical Group's Motion For New Trial* ("TPMG's MPA for New Trial") cites to *Hawkes v. Super. Ct.*, 42 Cal. App. 3d 108, 126-27 (1974) for the proposition that "[i]t is misconduct to elicit testimony about and make reference in closing argument to matters specifically excluded from trial." TPMG's MPA for New Trial p. 17:27-28.

[20] See TPMG's MPA for New Trial p. 10:18-19.

[21] It was, in fact, error for the Court to allow TPMG to defy the Court's prior rulings and instructions, something TPMG did repeatedly from *voir dire* through closing argument. *See Martinez v. State*, 238 Cal. App. 4th 559, 568-69 (2015) In *Martinez v. State*, the Court reversed and ordered a new trial based on the failure of the trial court to take action in response to the defense attorney's repeated ignoring of his prior rulings. *Martinez*, 238 Cal. App. 4th at 570.

why a significant change in circumstances can rebut the inference. *See Sandell v. Taylor-Listug, Inc.*, 188 Cal. App. 4th 297, 323-24 (2010).

As is evidenced by this case, however, taking a medical leave cannot be subject to such an inference. Although Metzner took a six-week leave in 2009, her subsequent leave was substantially longer and the effort needed to cover her absence was greater. TPMG introduced no evidence that it knew that Metzner would take a four-month medical leave at the time it appointed her to lead the BMOB. TPMG has failed to prove that the same actor inference was a "correct" instruction and therefore cannot show that it was an abuse of discretion or miscarriage of justice for the Court to decline to give the instruction to the jury nor has TPMG shown that the jury was misled because the instruction was not given.[22]

3. Mention of Sandy Hook Was Relevant and Not Prejudicial.

TPMG also argues that mention of the fact that Metzner's niece was at Sandy Hook on the day Sandra Schmit informed Metzner that she was being removed from her position was irrelevant and prejudicial. This argument fails for several reasons. First, TPMG attempted to minimize Metzner's emotional distress by using testimony from Metzner's sister to infer that Metzner was not overly upset about losing her job and to undermine Metzner's credibility with her sister's testimony that Metzner said she was fired because of her age. The fact that Metzner visited her sister shortly after the massacre puts Metzner's conduct during the visit in context and provides a reasonable explanation of why Galda would not have a precise memory of what Metzner said about her termination. Secondly, Schmit testified that Metzner appeared quiet and solemn when Schmit told her she would be removed from her position but did not cry or seem angry. TR 10/29/15 56:6-58:4. TPMG attempted to convey that Metzner was not overly upset about being terminated and that she did not disagree with the decision to terminate her. That Metzner had been overwrought with grief and worry about her niece is essential context to how Metzner appeared and acted during her meeting with Schmit.

[22] *Soule.*, 8 Cal. 4th at 572 ("A party is entitled upon request to **correct**, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence.") (emphasis added). Further, TPMG cannot claim prejudice given that the Court gave TPMG leave to argue during closing that the same actor inference applied, and it did so.

The cases cited by TPMG all relate to testimony and argument that was unnecessary, wildly inflammatory, and evidenced blatant misconduct. TPMG's position ignores the fact that to leave mention of Sandy Hook out would have permitted a misleading portrayal of Metzner's emotional distress, a portrayal TPMG attempted to create. Moreover, the jury only awarded Metzner $50,000 in emotional distress, and the economic damages claim was supported by both economics experts. Nothing in the record demonstrates that the jury's verdict was unduly influenced by mention of Sandy Hook.[23]

4. Metzner's Expert Testimony Was Relevant and Not Prejudicial.

TPMG argues that the testimony of Metzner's expert witnesses – Allison West and Margo Ogus – was irrelevant or prejudicial and should have been excluded. TPMG's arguments should be rejected for a number of reasons.

Although TPMG moved to strike West's testimony during trial, after the Court stated that it would be willing to reconsider TPMG's motion after the Court heard Metzner's case (TR 10/29/15 132:17-23), TPMG did not to renew its motion and therefore has waived any argument that it was somehow prejudiced by West's testimony. *See, e.g., People v. Mills*, 48 Cal. 4th 158, 170 (2010). "As a general matter, when a trial court denies a motion without prejudice the matter is forfeited if not renewed." *Id.*

Further, TPMG's claim of prejudice with respect to West is based solely its claim that her testimony implied that management of Metzner was inadequately documented when no law or TPMG policy required any documentation. However, TPMG made, without interference from the Court, exactly that same argument during its cross-examination of West. TR 10/29/15 110:24-112:11. Further, as a management practices expert, West's was not required to limit her testimony to legal requirements or TPMG's policies. Rather, she properly testified regarding standard management practices related to the documentation of performance deficiencies. S*ee*

[23] TPMG claims that one of the jurors was crying during Metzner's testimony regarding Sandy Hook, but Plaintiff's counsel did not witness this and TPMG's counsel did not raise the issue at that time (which would have allowed the Court to raise the issue with the juror). TPMG has presented no evidence that Metzner's testimony about Sandy Hook impacted this juror's evaluation of the evidence. At least nine jurors voted in Metzner's favor on liability, regardless of how this one juror may have been impacted by the Sandy Hook testimony.

Kotla v. Regents of University of California, 115 Cal. App. 4th 283, 294 n.6 (2004) ("Expert testimony on predicate issues within the expertise of a human resources expert is clearly permissible."). TPMG also had the opportunity – which it did not take – to have its own management practices expert challenge West's opinions. TPMG's claim of prejudice is therefore without merit.

With respect to Ogus, TPMG claims her testimony was without any evidentiary support because Metzner introduced no evidence that she would never be able to work again in the future. As discussed above in Section V.B., however, Metzner did not *have* the burden of demonstrating that she would never be able to work again. *See Hope v. California Youth Auth.*, 134 Cal. App. 4th at 595. Her burden, rather, was to demonstrate what she would have reasonably expected to earn absent the retaliatory termination. *See Commodore Home Sys., Inc. v. Superior Court*, 32 Cal. 3d 211, 221 (1982). Metzner presented sufficient evidence demonstrating that she likely would have continued to work for TPMG for another eight years had she not been illegally terminated. Further, Ogus' analysis of what Metzner would have earned but-for the retaliatory termination was supported by TPMG's own expert. TPMG's argument that Ogus' opinion lacked proper foundation is therefore without merit.

5. The Court's Other Trial Rulings Did Not Prejudice TPMG.

TPMG argues that there were several instances where it was denied the opportunity to present all of the evidence it sought to introduce and that each of these instances were a miscarriage of justice. TPMG, however, fails to make any showing that there was either an abuse of the Court's discretion or that any of the purported errors may have affected the verdict.

a) Deal was not qualified to offer opinion regarding Metzner's mitigation efforts.

TPMG claims that it was reversible error for the Court to prohibit Bruce Deal from offering opinion regarding the reasonableness of the assumptions he was given for his calculations. In particular, TPMG wanted Deal to testify that the assumption that Metzner would have obtained substantially similar employment with substantially similar compensation was reasonable. Deal, however, was retained and qualified to opine about economics. He was neither

retained to, nor qualified to, opine about mitigation and the proper timeframe Metzner in which should have found new employment.[24] The Court did not prevent Deal from testifying that he believed that he had a duty to check the reasonableness of the assumption he was asked to make and that he performed such a check and was comfortable with the assumptions. The Court was well within its discretion to exclude testimony about matters beyond Deal's expertise.

b) Metzner did not violate the Court's motion in limine ruling.

TPMG's argues that it was prejudiced when Metzner violated the Court's rulings on its Motion in Limine No. 4, by testifying about experiencing physical pain. Aside from whether Metzner, in fact, violated the Court's ruling,[25] TPMG certainly "opened the door" to such evidence by introducing evidence and argument specifically related to whether any of TPMG's witnesses treated Metzner differently because she experienced pain. Further, the basis for TPMG's motion and the Court's ruling was that, if Metzner emphasized her pain or degree of impairment, the jury might be confused about whether Metzner's claim also encompassed disability discrimination or failure to accommodate. Metzner's testimony regarding her discussion with Schmit about the possibility of an earlier surgery date was directly relevant to her claim of retaliation, in that it evidenced Schmit's attitude toward Metzner having an earlier surgery date. The testimony chiefly concerned, not Metzner's pain, but Schmit's animus. Most importantly, TPMG's claim that the jury's verdict reflects sympathy for Metzner because she testified about pain is nothing more than speculation. As set forth above, the jury's verdict is supported by the evidence and consistent with testimony provided by the economic experts of both parties. There is no evidence that the jury's verdict reflects improper sympathy for Metzner or that TPMG is otherwise entitled to a new trial on this basis.

c) The Court properly admitted Metzner's communication with Rick Mead.

TPMG repeatedly elicited testimony and made argument that Metzner never raised with

[24] *See* Plaintiff's Motion in Limine No. 3 to Limit Testimony of Defendant's Expert Witness Bruce Deal.

[25] The Court's ruling did not prohibit Metzner from discussing the fact that she experienced pain, and the testimony cited by TPMG did not "emphasize" Metzner's pain or degree of impairment.

any of TPMG's witnesses that she believed she was being retaliated against because of her medical leave.[26] In response, Metzner introduced an email that she sent prior to her termination where she expressed her suspicions that it was odd that she went from a 20-year career of exceeding expectations to a bad review and a PIP after taking an extended medical leave. (Exh 750). After TPMG opened the door by claiming Metzner had never raised an issue connecting her medical leave to the adverse employment actions taken against her, Metzner was entitled to put on contrary evidence. TR 11/3/15 4:4-9:18.[27]

d) TPMG was not prejudiced by the Court's exclusion of Katri Testimony.

Finally, regarding archival of emails, TPMG argues that it was prejudiced when the Court prohibited Amit Katri from testifying about Metzner's ability to archive emails, specifically because the exclusion of such testimony (along with CACI 203) left the jury with the impression that TPMG was engaged in some nefarious activity related to document retention. The issue of email archiving was a collateral issue and the Court read to the jury a stipulation that "TPMG automatically deletes stored e-mail messages in the active e-mail account after 90 days unless the e-mail has been exempted from automatic deletion." There is absolutely no support in the record for TPMG's claim that the jury was lead to believe that TPMG engaged in improper conduct with respect to document retention or that the exclusion of Katri's testimony had any impact on the jury's verdict.

V. CONCLUSION

For the foregoing reasons, the Court should deny TPMG's motion for new trial.

Dated: January 7, 2016 LEVY VINICK BURRELL HYAMS LLP

By: _____
DARCI E. BURRELL,
Attorneys for Plaintiff PATRICIA METZNER

[26] *See, e.g.*, TR 10/22/15 13:5-14:3, 26:25-27:3; 11/10/15 29:17-20.
[27] The Court ordered redacted all of the content of the subsequent emails in the string because there was some reference to the severance agreement but left in, at TPMG's insistence the fact that four days after Metzner sent her email to Mead, an attorney contacted Mead on Metzner's behalf. TR 11/3/15 7:7-18.

LESLIE F. LEVY, ESQ., State Bar No. 104634
DARCI E. BURRELL, ESQ., State Bar No. 180467
KATHERINE L. SMITH, ESQ., State Bar No. 295726
LEVY VINICK BURRELL HYAMS LLP
180 Grand Avenue, Suite 1300
Oakland, CA 94612
Tel.: (510) 318-7700
Fax: (510) 318-7701
E-Mail: leslie@levyvinick.com
darci@levyvinick.com
katherine@levyvinick.com

Attorneys for Plaintiff Patricia Metzner

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

UNLIMITED JURISDICTION

PATRICIA METZNER, Plaintiff, v. THE PERMANENTE MEDICAL GROUP and DOES 1-10, inclusive, Defendants.	Case No. RG 13702356 **RESERVATION NO.: R-1691686** ASSIGNED FOR ALL PURPOSES TO JUDGE VICTORIA S. KOLAKOWSKI DEPARTMENT 23 **PLAINTIFF PATRICIA METZNER'S OPPOSITION TO DEFENDANT THE PERMANENTE MEDICAL GROUP'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT** Date: January 19, 2016 Time: 4:00 p.m. Complaint Filed: November 7, 2013 Trial Date: October 9, 2015 Judgment Date: November 24, 2015

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I. INTRODUCTION

Rehashing many of the same arguments it raised unsuccessfully at trial, Defendant The Permanente Medical Group ("TPMG") moves this Court for judgment notwithstanding the jury's verdict in favor of Plaintiff Patricia Metzner. Specifically, TPMG contends that there is not substantial evidence to support the jury's verdict. As set forth further below, this argument is entirely without merit. The Court's authority on this motion "begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment." *Howard v. Owens* Corning, 72 Cal. App. 4th 621, 630-31 (1999). If there is a conflict in the evidence or if more than one inference can be drawn from the evidence, the motion for judgment notwithstanding the verdict should be denied. *Hauter v. Zogarts*, 14 Cal. 3d 104, 110 (1975).

In this case, the evidence introduced at trial was more than sufficient to establish that TPMG subjected Metzner to retaliation for requesting or taking a medical leave. There were substantial conflicts in the evidence, as well as uncontradicted evidence in support of Metzner's claim, all of which must be construed in Metzner's favor. In fact, the Court has, essentially, already ruled on this motion, as TPMG moved for directed verdict at the close of *both* parties' cases. There is no reason such a motion should succeed now.

II. FACTS ESTABLISHED AT TRIAL

Metzner had a long, successful career at Kaiser Permanente ("Kaiser") before coming to work in the Broadway Medical Office Building Special Procedure Suite ("BMOB"). Trial Exhibits ("Exh") 507, 508, 512, 513, 514; Trial Record ("TR") 10/29/15, 166 4-6, 167:10-11, 170:24-171:1, 173:5-7; 11/03/15 39:2-6). For approximately 18 years, Metzner always at least met and often exceeded her supervisor's expectations. *Id*.; Exh 1; TR 10/29/15 154:18-24). During her career with Kaiser, she had frequently been tasked with helping units within Kaiser comply with Joint Commission and other standards. TR 10/29/15 148:17-149:8, 150:3-10, 150:16-151:1. She also spent 10 years as Director of Kaiser's Cardiovascular Services ("CV") unit, where she played a major role in establishing Kaiser Oakland's Cath Lab and Surgery

services at Summit Hospital and creating a new cardiovascular clinic. TR 10/29/15 155:6-16, 160:9-18.

After Kaiser initiated the closure of the Oakland CV unit in the fall of 2009, Shirley Steinback decided to offer Metzner a position as the head of the BMOB. TR 10/21/15 25:18-26:15. Steinback offered Metzner the position because the qualifications and skills Metzner had developed throughout her career were transferable. TR 10/21/15 26:16-27:16; 28:19-23. Metzner accepted the job and, by the time the Special Procedures Suite opened on April 5, 2010, Metzner had been officially designated as the Director of the department, although she continued to operate as the Director of Cardiovascular Services through June 2010. TR 10/21/15 29:3-23; 10/22/15 62:1-9; 11/3/15 44:21-45:4, 50:7-10, 54:8-25, 56:2-6.

The BMOB Planning Workgroup performed the work of preparing the BMOB for operation. TR 10/21/15 27:1-6; 11/03/15 60:23-61:19. Recaps of Planning Workgroup meetings written by Sandra Schmit indicated that things were on track for the opening of the BMOB in April. Exhs 36, 38, 45. Her recap regarding the first day also indicated that things went well overall. Exh 53. There were some initial concerns about staffing but by May, 2010, Schmit reported that staffing was stable with the addition of travelers. Exh 93. There were also some concerns with supplies, but documents and other witness' testimony corroborate Metzner's testimony regarding on-going difficulties with Materials Management, despite escalation to the managers of that department. Exhs 60, 777; TR 10/22/15 72:21-73:21; 75:23-76:7; 11/03/15 79:14-24, 81:16-82:24. Metzner also provided detailed, uncontradicted testimony regarding her efforts in dealing with Materials Management issues. TR 11/3/15 79:14-83:10.

Although some concerns were expressed in the initial months of the BMOB's operations about matters in the fledgling department and about Metzner's management in particular, in June 2010, Steinback and Sandra Schmit began to discuss also designating Metzner as manager of Oakland's Peri-Operative Medicine unit ("POM"). Exh 1551; TR 10/21/15 58:22-25; 10/22/15 62:10-13. In August 2010, Metzner officially became the Director of Oakland POM, a unit

described by Schmit as "complex" with a "big huge initiative in the works." TR 11/3/15 159:18-160:7, 161:11-12; Exh 170.

In or around August 2010, the Joint Commission conducted a survey of the BMOB, which the BMOB passed with no findings. TR 10/21/15 42:22-43:7; 11/3/15 176:18-177:7. Although a number of internal surveys had found deficiencies in the BMOB prior to the Joint Commission, after passing the Joint Commission survey, there were no Continuous Performance Assessment ("CPA") findings in the BMOB related to Metzner's management of the unit.[1] TR 10/22/15 65:2-22; Exhs 72, 1543, 231. Further, any documented concerns raised regarding Metzner's performance lessened significantly after the Joint Commission's visit.[2]

In September 2010, Metzner received a bonus related to the BMOB's performance during The Joint Commission survey. Exh 565; TR 11/3/15 176:24-177:3; 10/26/15 31:21-32:12. In November 2010, Schmit recommended Metzner for another bonus. Exh 170; TR 10/26/15 34:5-35:3. Schmit preferred awarding bonuses "across the board," but if required to distinguish particular managers to receive bonuses, she would select Metzner, among others. Exh 170. Schmit also recognized that awarding low performers with bonuses had "legal implications." *Id.* Steinback signed off on all bonuses and specifically remembers approving one at the end of 2010. TR 10/21/15 60:10-22; 11/04/15 10:8-15. On November 18, 2010, Schmit also described the BMOB as "a model of efficiency." Exh 772; TR 10/26/15 37:5-16.

By the beginning of 2011, operations in the BMOB had begun to stabilize. TR 11/4/15 10:25-11:10. During a January 2011 BMOB staff meeting, Haugen and Metzner reported that the

[1] After the Joint Commission survey in 2010, there were two more CPAs that surveyed the BMOB, in July 2011 and November 2012. The CPA in 2011 had findings related to physician performance, not Metzner's management. Exh 776, TR 11/2/15 40:21-41:11, 66:3-67:2; 10/21/15 19:8-11. Although TPMG attempted to blame Metzner for findings in July 2011, those findings were directed to the medical staff (physicians), and were responded to by the medical staff. Exh 231. The only issue of concern raised in the November 2012 survey (which did not result in any findings) concerned a nervous nurse's inability to find information in a chart, information that was later located. TR 11/4/15 81:24-83:7.

[2] After August and the successful Joint Commission survey, there were only 2 emails in 2010 -- both from Dr. Gardner in October -- that raised concerns about Metzner's performance. See Section IV B *infra*; see also, *Plaintiff's Opposition to Defendant's Motion for New Trial* Section III filed herewith.

BMOB was "getting lots of good press from patients and the administration." Exh 793, TR 11/4/15 12:6-18; 11/13/15, 138:19-139:2. Outside groups began to visit the BMOB to observe its operations, including from outside the state. TR 11/4/15 12:6-18.

On March 22, 2011, Schmit provided a performance evaluation to Metzner for the period from January 1, 2010 through December 31, 2010. Metzner received an overall rating of "Excellent Performance" and was rated as having either "Excellent" or "Exceptional" performance in every category. Exh 205. In particular, Schmit stated,

> Trish consistently demonstrates her commitment to achieving results. She seeks out opportunities for improvement, develops solutions in collaboration and implements them efficiently. She reassesses and adjusts as necessary. She maintains vigilance around metrics for organizational success and ensures action plans are in place to achieve them. . . . Trish demonstrates a clear understanding of the behaviors and skills essential for success in her role. She embraces her responsibilities, even in the face of change. She is results driven and accountable for department performance.

Id. In the entire evaluation there was only one negative comment – "task completion" – taken from a "Survey Monkey" survey that solicited others to rate Metzner's performance in a number of areas. Exhs 204, 205, TR 10/26/15, 130:1-132:9. There was not a single negative comment from Schmit in the evaluation. TR 10/26/15 131:10-132:19.

In April 2011, the outgoing Director of the Richmond POM asked Metzner to provide some support for Richmond POM until an interim director could be hired. Ultimately, however, Steinback, Physician-In-Chief, Dr. John Loftus, and the head of East Bay POM, Dr. Todd Foster asked Metzner to go to Richmond on a daily basis to address some issues there, something Metzner agreed to do and did through June 2011.[3] TR 10/26/15 44:6-24; 11/4/15 19:12-21:11.

By May 2011, the epidurals Metzner had been receiving to deal with pain related to a back injury had ceased being effective, and Metzner's primary physician had referred her for

[3] TPMG witnesses bent over backwards to suggest that Metzner was chosen for this role only because no one else was available. Foster, in particular, suggested that Metzner was better – but not much better – than no one, his only other option. TR 11/10/15 43:17-44:8. Yet at the same time that TPMG would have the trier of fact believe that finding coverage for a few months until a new director could be hired in Richmond was so difficult they had no choice but to use Metzner, they also argued that finding coverage for Metzner's four month leave for the larger Oakland POM was no hardship. TR 11/9/15 153:21-23; 11/10/15 27:11-16.

spine surgery. TR 11/4/15 15:13-21, 17:3-18:10. In late May or early June, Metzner told Schmit that her leg pain had gotten worse, that she was contemplating a surgical option, and that she had a consultation with the surgeon scheduled. TR 11/4/15 18:11-19:8, 10/26/15 46:25-47:14. Metzner wanted Schmit's opinion on the surgeon. TR 11/4/15 18:11-24.

Very shortly after Schmit learned about the surgery, Schmit raised to Steinback the idea of placing Metzner on a Performance Improvement Plan ("PIP"). TR 10/21/15 72:6-18, 75:12-76:2; 10/26/15 49:16-19; 10/27/15 176:6-16.[4] Schmit acknowledges that she knew Metzner was considering surgery at the time she and Steinback discussed placing Metzner on a PIP. TR 10/26/15 136:15-137:7; *Plaintiff's Record of Video Excerpts Played at Trial* 268:11-269:21. This was less than two and a half months after Schmit rated Metzner's performance as "excellent," a fact not shared with Steinback. TR 10/21/15 80:21-81:1.

Steinback and Schmit decided that Schmit should talk to Metzner, rather than placing her on a PIP. TR 10/21/15 72:23-73:3; 10/27/15 160:17-25. Schmit met with Metzner on June 13, 2011. TR 10/26/15 49:2-12; 11/4/15 22:25-23:2. Schmit's note regarding the June 13 meeting is the first documentation of any discussion between Metzner and Schmit regarding concerns about Metzner's performance, although Schmit claimed that she had been providing negative feedback to Metzner regarding her performance all along. TR 10/26/15 135:1-11; Exh 1949. It is also the first note written by Schmit documenting concerns she allegedly had about Metzner's performance. TR 10/26/15 135:8-11. Schmit does not deny that she never warned Metzner that she was in danger of being placed on a PIP. TR 11/4/15 25:12-17; 10/26/15 139:11-140:20; 10/27/15 171:3-7.

Later in June, Metzner learned that she could have the spine surgery in July instead of September. TR 10/28/15 7:20-8:8; 11/4/15 25:23-26:11. When Metzner approached Schmit about the opportunity to have the surgery early. Schmit's response, simply, was that she did not think she could spare Metzner then, despite Ms. Metzner's uncontradicted testimony that, during

[4] There is no documentation evidencing this meeting, but it had to have taken place sometime between when Metzner told Schmit she needed surgery and June 13, 2011. TR 10/26/15 140:21-25, 136:15-137:7; *Plaintiff's Record of Video Excerpts Played at Trial* 268:11-269:21.

this conversation, she was in obvious pain, leaning over a bar because it was painful to stand up straight. TR 11/4/15 26:19-27:15.

In July 2011, Schmit began seeking coverage for Metzner during her leave. Exhs 248, 249, 252, 255; TR 10/26/15 58:19-59:19. Schmit suggested Lori Salemi for coverage of the BMOB, and, ultimately, proposed covering POM by having a staff nurse act as supervisor, hiring a traveler to backfill for the staff nurse, and designating another manager, Nenette Ebalo, to oversee things. Exh 255; TR 11/4/15 35:7-9, 38:10-20. Steinback agreed to the plan for the BMOB but rejected Schmit's plan for POM. Exh 255, 259. In particular, Steinback questioned why Schmit had so many people covering Metzner's role, indicated that having Ebalo provide extended coverage of POM was not appropriate, and informed Schmit that she was responsible for covering for her managers on leave. Exh 255. Schmit attempted to convince Steinback to reconsider her decision, stating that there were "compelling reasons to have additional interim coverage for POM," but Steinback did not relent. Exhs 255, 259. When Schmit reported Steinback's decision to Metzner, and Metzner stated that this was not fair to Schmit, Schmit agreed and said "but that's Brunhilda for you." TR 11/4/15 38:25-39:10.

In the meantime, on August 12, 2011, approximately two months after suggesting that Metzner be placed on a PIP, Schmit wrote the chiefs of the Interventional Radiology department and requested their support for Salemi, to provide interim coverage in the BMOB. Schmit argued that there would be a lot of value to Salemi in covering the BMOB because it "runs VERY efficiently" and "the unit runs pretty seamlessly." Exh 252; TR 10/26/15 57:12-58:17.

Metzner's leave officially began on September 6, 2011. TR 10/21/15 76:3-5; Exh 254. During an October 27, 2011 BMOB staff meeting, Haugen reported that the BMOB was being looked at as a center of excellence. Exh 795; TR 11/13/15 141:12-143:18.

Metzner returned from leave in January 2012, just after the New Year. Schmit began to reconsider placing Metzner on a PIP not long after Metzner returned. TR 10/21/15 76:6-7; 10/28/15 79:14-25. The purpose of the June 13 meeting had ostensibly been to provide Metzner with an opportunity to improve her performance, but Metzner had worked only two and a half

months between the June 13 meeting and her leave. At the end of Metzner's first week back from leave, Schmit met with Metzner and, in addition to raising issues Schmit claimed she had discovered while Metzner was out, Schmit told Metzner that Haugen and Gardner had "fallen in love" with Salemi. Exhs 1949, 310; TR 10/26/15 137:9-138:23; 11/4/15 42:19-43:6.

After her return from leave, Schmit, Haugen, and Gardner treated Metzner differently than they had prior to her leave. TR 11/4/15 39:13-40:13. By the end of March 2012, Schmit had presented Metzner with a performance evaluation that was diametrically opposed to the one she had received the year before. Exhs 205, 341. Specifically, Schmit rated Metzner as "Performance Improvement Needed" in every category except two. Exh 341. This was the first time in Metzner's nearly 20-year career with Kaiser that she was rated as anything less than meets expectations. TR 10/29/15 154:15-24; 11/04/15 53:8-17. While the 2010 and 2011 reviews had different goals, they required assessment of many of the same behaviors. Exhs 205, 341. In 2010, for example, although Schmit rated Metzner as "Exceptional" in "Drives for Results," she rated Metzner as "Performance Needs Improvement" in this same category in 2011. Similarly, Schmit rated Metzner as have "Excellent Performance" in "Takes Accountability" but rated her as "Performance Needs Improvement" in the same category in 2011 At the same time Schmit gave Metzner this terrible review, she also gave Metzner a PIP. Exh 342; TR 11/4/15 53:18-20.

In preparing Metzner's 2011 performance evaluation, Schmit relied on comments critical of Metzner's performance that Schmit received via "Survey Monkey." TR 10/28/15 89:13-20. Schmit, however, disregarded the remainder of the survey which, overall, was positive. In every category, the majority of applicants rated Metzner as having at least "Successful Performance," and in every category more people rated her as having "Excellent Performance" than any other rating. Exh 340; TR 11/2/15 70:16-71:14.

In May 2012, Schmit met with Metzner to review Metzner's progress on the PIP. TR 11/4/15 56:23-57:3. Metzner brought all of the audits and documents detailed in the PIP to the meeting. TR 11/4/15 57:4-10. Schmit told Metzner that she was satisfied with her progress. TR 10/26/15 75:8-14; 11/4/15 57:14-16. Metzner did not meet again with Schmit regarding the PIP

or even discuss the PIP until October 18, 2012, almost a month after the PIP had ended, and at which time Schmit informed Metzner that she had not satisfied the PIP. TR 11/4/15 71:2-73:8. Although Schmit claimed that she had been providing Metzner with regular feedback on her performance during the PIP, TPMG presented no notes, follow-up emails or other documents that would demonstrate that Schmit and Metzner met or what they discussed. TR10/26/15 142:25-143:22, 151:13-23. Schmit also could not identify a single document in which she informed Metzner that her performance was no longer satisfactory or where she informed Metzner that she had failed to provide deliverables required by the PIP. TR 10/26/15 149:14-152:4.

During the October 18, 2012 meeting, Schmit told Metzner that her options were to continue on the PIP, work for an additional three months, during which she could attempt to find another job, or resign and take a severance. TR 10/26/15 154:14-155:8; 11/4/15 73:11-25. Schmit again contacted Metzner in November and informed her that she no longer had the option of staying on the PIP. TR 11/4/15 84:5-23. On December 14, 2012, Schmit informed Metzner that she was being removed from her position and on December 18, 2012 she was placed on administrative leave. TR 11/4/15 91:6-23; 10/26/15 81:21-82:15; Exh 447. Schmit recommended Metzner's termination to Steinback, Steinback accepted the recommendation, and Metzner was officially terminated on January 29, 2013. TR 10/26/15 82:22-23, 152:5-16; 10/29/15 68:8-11; Exh 448.

III. LEGAL STANDARD

A motion for judgment notwithstanding the verdict challenges the legal sufficiency of the opposing party's evidence. *See Hauter v. Zogarts*, 14 Cal. 3d 104, 110 (1975). The trial court's ability to grant a motion for judgment notwithstanding the verdict is the same as its power to grant a directed verdict. *Id.* Under that standard, the Court must consider all evidence in the light most favorable to Metzner, giving the benefit of every reasonable inference, and resolving all conflicts in support of the judgment. *Howard v. Owens* Corning, 72 Cal. App. 4th 621, 630 (1999). The court cannot weigh the evidence or judge the credibility of witnesses. *Hauter*, 14

Cal. 3d at 110. Rather, the Court's authority "begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment." *Howard*, 72. Cal. App. 4th at 630-31. If there is a conflict in the evidence or if more than one inference can be drawn from the evidence, the motion for judgment notwithstanding the verdict must be denied. *Hauter*, 14 Cal. 3d at 110.

"A motion for judgment notwithstanding the verdict of a jury may properly 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 to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied." *Id.* (quoting *Brandenburg v. Pacific Gas & Elec. Co.*, 28 Cal. 2d 282, 284 (1946).[5] Evidence that is "substantial" is evidence that is of "ponderable legal significance," "reasonable in nature, credible, and of solid value." *Howard*, 72 Cal. App. 4th at 631.

IV. ARGUMENT

In this case, there is substantial evidence to support the jury's verdict. Furthermore, the jury's verdict turned on credibility determinations and the resolution of conflicts in the evidence – or reasonable inferences drawn therefrom – all of which require the Court to deny TPMG's motion.

A. There Is Substantial Evidence to Support the Jury's Verdict That Metzner Was Subjected to Retaliation for Requesting or Taking a Medical Leave.

TPMG argues in its motion, as it did at trial, that Metzner only had "timing" in support of her claim of retaliation. Very close proximity in timing, however, between a protected activity and an adverse action can support a claim of retaliation. *See Arteaga v. Brink's, Inc.*, 163 Cal. App. 4th 327, 353-54 (2008); *Passantino v. Johnson & Johnson Consumer Products, Inc.*, 212 F.3d 493, 507 (9th Cir. 2000); *Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 42-43 (5th Cir. 1992); *Moss v. Bluecross, Blue Shield of Kansas, Inc.*, 534 F. Supp. 2d 1190, 1203 (D. Kan. 2008). In

[5] In addition to drawing all reasonable inferences in favor of the plaintiff, conflicting evidence supporting defendant's position is to be disregarded. *McCoy v. Pac. Mar. Ass'n*, 216 Cal. App. 4th 283, 299 (2013).

this case, it is uncontradicted that no more than a few weeks and perhaps as little as a few days passed between the time Metzner disclosed her need for surgery to Schmit and when Schmit and Steinback first discussed placing Metzner on a PIP. Further, although Schmit could not remember who brought up the idea of placing Metzner on a PIP, Steinback testified that Schmit suggested it. On this timing, "retaliatory intent may be inferred." *Passantino*, 212 F.3d at 507.

There is more, however, than just timing to support Metzner's claim that she was subjected to retaliation for requesting or taking a medical leave. As outlined in detail above, on March 22, 2011, less than two and a half months before Schmit suggested that Metzner be placed on a PIP, Schmit rated Metzner's performance as "Excellent," which was consistent with Metzner's performance throughout her career with Kaiser. Prior to that, toward the end of 2010, Schmit successfully recommended Metzner for two bonuses and described the BMOB as a "model of efficiency." Furthermore, only two and a half months *after* suggesting that Metzner be placed on a PIP, Schmit described the BMOB as running "VERY efficiently" and "pretty seamlessly." Such evidence significantly undermines TPMG's claim that Metzner had ongoing performance issues which led to discussion of placing her on a PIP in June 2011 and to her ultimately being placed on a PIP in March 2012.

Additionally, the evidence further supported Metzner's contention that Schmit was motivated by retaliatory animus. Schmit expressed reluctance when Metzner informed her that she could have an earlier surgery date, notwithstanding the indicia that Metzner was in physical pain. The evidence also showed that Steinback denied Schmit's efforts to designate a manager to cover POM while Metzner was on leave, requiring instead that Schmit fill this role, and that Schmit was unhappy with this decision, arguing to Steinback that more coverage was needed and speaking of Steinback in a derogatory manner.

When Metzner returned from leave, she was given a performance evaluation with criticisms that directly contradicted the praise set forth in the 2010 evaluation. The evidence further demonstrated that Schmit did not give the PIP to Metzner as a last ditch effort to help Metzner succeed in her role but as a means to the end of Metzner's job with TPMG. Viewed in

the light most favorable to Metzner, the evidence demonstrated that Schmit met with Metzner only once to discuss the PIP, in May 2012, at which time it is uncontradicted that Schmit indicated that she was satisfied with Metzner's performance. Schmit claimed that Metzner did not sustain this level of performance. TPMG, however, produced no documentary or corroborating evidence that Schmit ever provided such feedback to Metzner, or that she even met with Metzner regarding the PIP between May 2012 and October 18, 2012, when she told Metzner she had failed. TPMG also provided no evidence corroborating Schmit's claim that Metzner failed to provide her with items required by the PIP (and Metzner's testimony contradicted Schmit's testimony in this regard).

Based on the foregoing, there was substantial evidence from which the jury could reasonably conclude that Metzner's termination was substantially motivated, at least in part, by retaliation.

B. The Jury Reasonably Rejected TPMG's Proffered Explanation for Its Actions.

Although TPMG attempted to convince the jury that, in terminating Metzner's job, it was solely motivated by Metzner's alleged performance deficiencies, the evidence, taken as a whole, did not support this claim. First, although TPMG claimed that there were problems with Metzner's performance throughout the time she led the BMOB and Oakland POM, the uncontradicted evidence established that in March 2011, Schmit gave Metzner a glowing performance evaluation. In that evaluation, Schmit explicitly stated, among other praise, that Metzner "demonstrates a clear understanding of the behaviors and skills essential for success in her role."[6] Thus, whatever concerns existed about Metzner's performance in 2010 or early 2011, the review suggests that those concerns were either not serious or had been sufficiently resolved.

[6] Other examples of how Schmit described Plaintiff's performance include, "She is results driven and accountable for department performance," "she consistently performs at a high level," "consistently demonstrates excellent communication" and "ensures staff are apprised," "consistently demonstrates her commitment to achieving results," and "recognizes her internal customers and reaches out to support and collaborate with them." This contemporaneous description of Metzner's performance evidenced in her review directly contradicts Schmit's and TPMG's other witnesses' characterization of Metzner performance given during trial.

This interpretation finds further support in the record, including but not limited to (1) the fact that Schmit recommended Metzner for two bonuses in 2010, while noting that low performers should not receive bonuses; [7] (2) that Schmit described the BMOB in November 2011 as a "model of efficiency;" (3) that even after suggesting that Metzner be placed on a PIP, Schmit described the BMOB as running "pretty seamlessly" and interim management of the unit by Salemi as a good learning opportunity; and (4) TPMG produced no documentation supporting its claim that Schmit, notwithstanding the positive evaluation, had been providing regular and ongoing negative feedback to Metzner regarding her performance.

Second, although all the doctors TPMG put on the stand claimed that they regularly complained about Metzner's performance from 2010 through the time of her termination, the documents TPMG introduced at trial do not support that testimony.[8] There were no documents evidencing complaints from Gardner after October 2010 or by Loftus after July 2010, well before Metzner received the 2010 performance evaluation. There was only one document from Haugen, from February 2012, that can even arguably be characterized as a complaint about Metzner.[9] Similarly, TPMG introduced evidence of only one complaint by Foster – from February 2011 – about Metzner[10] and no alleged documented complaints by either Dr. Barber or Dr. Riegels before Metzner had already been placed on a PIP.[11] Although both Foster and

[7] When asked to select specific individuals for a bonus, Metzner was her top choice. Exh 170.
[8] *See also Plaintiff's Opposition to Motion for News Trial* Section III, filed herewith.
[9] Haugen complains about the inability to obtain a last-minute appointment in POM; he does not specifically complain about Metzner. But, the June 2012 BMOB State of the Union meeting minutes state that Haugen was "happy with the numbers and metrics" in the BMOB. (Exh. 800)
[10] Foster's sole documented complaint, from February 2011, concerned Metzner missing a DiPOM meeting, a meeting she testified – without contradiction – that she missed because something "blew up" in the BMOB. TR 11/3/15 165:4-13. Although Foster claimed that Metzner missed other meetings as well, there is no documentation of this, Metzner testified that managers were not always invited, and Foster admitted that he did not know whether there were DiPOM meetings to which Metzner had not been invited. TR 11/3/15 165:24-166:17; 11/10/15 42:6-43:6.
[11] Barber's email, from September 2012 does not, on its face, appear to be a complaint about Metzner, although he mentions POM operations. In fact, his email is also addressed to Maricella Whitten, the Richmond POM manager, and his primary concern – about inaccurate OR cancellation rates – relates to work being performed by nurses in the OR, over whom Metzner had no authority. Exh 775. Reigels' complaint about the hiring of his friend occurred in December 2012, well after Metzner had already been informed that she would be removed from her position. TR 11/12/15 94:17-95:15

Riegels claimed that they constantly received calls while in surgery from doctors complaining about Metzner's performance in POM, TPMG did not introduce a single document to support this contention.

Third, although TPMG introduced documents prior to Metzner's leave[12] that it *characterized* as evidencing her performance deficiencies, a thorough analysis of these documents demonstrates that most of the documents do not, on their face, support TPMG's claims regarding Metzner's performance. For example,[13] TPMG introduced documents regarding the RAP sheet[14] in BMOB and suggested both that the fact that the RAP sheet was incomplete was primarily Metzner's fault and that the state of the RAP sheet was responsible for the problems with supplies in the BMOB in 2010.[15] The evidence, however, does not support this version of events. As an initial matter, Metzner was part of a team of individuals who developed the RAP sheet, including Haugen, the Physician Director of the BMOB, and Mike Romo, from Materials Management.[16] More importantly, however, Metzner testified without contradiction that the problem with supplies was not that they were not being ordered but that they were not being delivered by Materials Management.[17] There was substantial evidence corroborating Metzner's testimony that there were problems with Materials Management that continued despite escalation to both Steinback and the head of Materials Management including an email from Schmit where she acknowledged that there were known problems with Materials

[12] The period from January 2011 to Metzner's leave in September 2011 is a crucial period because it was her performance during this time that allegedly justified the performance evaluation she received in March 2012 (and, arguably, the PIP, given her unequivocally positive evaluation from 2010).
[13] Plaintiff does not have the space to address each of the emails in question but suggests that the Court must, as the jury did, carefully review the documents before concluding that there is insufficient evidence to support the jury's conclusion.
[14] The RAP sheet is a list of consumable supplies which is used to take inventory and order replacement supplies from Materials Management. TR 11/3/15 74:5-25.
[15] Metzner's testimony was that issues with supplies and materials were substantially improved by the end of 2010, and TPMG presented no documentation contradicting that testimony. TR 11/3/15 87:6-11.
[16] Exhs. 14, 36, 38, 44.
[17] TR 11/3/15 79:14-83:10.

Management and that Metzner had brought the problems to her attention.[18]

As another example, TPMG characterized Exhibits 1588 and 1589 as evidence of Metzner's performance failures. Exhibit 1588, sent on April 13, 2011, is an inquiry from Schmit to Mary Tealdi, Schmit's subordinate who was responsible for the Certified Registered Nurse Anesthetists, for clarification regarding pre-anesthesia evaluation and anesthesia handoffs. Exhibit 1589, sent the same day, is an inquiry from Schmit to Metzner asking about the procedure in the BMOB related to anesthesia handoffs. Neither of the documents suggest, on their face, any deficiency in Metzner's performance. At trial, however, Schmit gave substantial testimony explaining how the document evidenced performance deficiencies by Metzner, none of which was supported by any other documentation introduced by TPMG. Schmit claimed, for example, that there had been compliance findings in the unit about the staff not understanding the interface between their work and anesthesia's work.[19] The emails themselves make no mention of any such findings nor did TPMG present any other evidence of such findings. [20] TPMG produced no evidence of any Continuing Performance Audit or other informal survey making such a finding, and, although there were two wrong lens implants in April 2011, neither were related to a handoff between the BMOB staff and anesthesia.[21] Further, Schmit testified that she was connecting Tealdi and Metzner to figure out what the handoff should be,[22] but that is not what the document actually shows. Schmit further claimed that *she* identified on rounds that the nurses were not clear on the handoff procedure and that Metzner did not know the process,[23] although this claim seems to contradict both Exhibit 1589 – where she asks Metzner what the handout process was – and her own trial testimony that she sent Exhibit 1589 because

[18] TR 10/22/15 75:23-76:7; Exhs 60, 777.
[19] TR 10/27/15 146:6-10.
[20] In fact, the emails suggest a lack of established procedure, given that Schmit asks Tealdi to vet her clarification with the AR&L director "since I know we may be in different places about this and we have content experts in place to help us sort this out." This certainly does not support that *Metzner* was somehow deficient.
[21] One wrong lens implant resulted from a manufacture defect and one resulted from an incorrect biometry because the patient was wearing contact lenses when the biometry was prepared. TR 11/4/15 6:16-7:3.
[22] TR 10/27/15 146:11-15.
[23] TR 10/27/15 170:11-16.

she wanted to validate that they were doing a handoff in the BMOB, and that Metzner communicated that there was no handoff process.[24]

In yet another example, TPMG introduced an email from August 2011 in which Schmit emphasized to Metzner the importance of having a workflow related to POM appointments for Pedi MRI patients, after a patient did not have a history taken prior to arriving for his procedure.[25] A review of the document (Exh 250), however, shows that Dr. Foster's original inquiry was sent, not to Metzner, but to Maricella Whitten, the manager of Richmond POM and that the Nurse Practitioner and scheduler in question worked at Richmond POM and were not under Metzner's control but Whitten's. Further, Metzner testified – without contradiction – that the manager of radiology schedulers was primarily responsible for the workflow.[26] While TPMG, obviously, wanted the jury to agree that the documents in evidence corroborated the testimony of its witnesses, the jury was not required to reach that conclusion.

At the end up, TPMG wanted the jury to conclude that it had on-going concerns about Metzner's performance, that it gave her regular feedback and opportunities to improve her performance, and that it terminated her employment because, after two years of complaints, she still failed to improve. What the evidence showed, however, was very little documentation of any specific complaints about Metzner,[27] no documentation of alleged negative feedback about Metzner's performance prior to Schmit learning that Metzner was contemplating surgery, and

[24] TR 10/27/15 170:1-10.
[25] According to Metzner's uncontradicted testimony and to the document in question, in this instance, nurses and the POM scheduler had tried unsuccessfully to reach the parent and had informed radiology that they had been unable to reach the parent. TR 11/4/15 30:14-31:1. In fact, Dr. Foster testified that it was true that the Richmond staff tried to get ahold of the parents of the child repeatedly and were unable to do so and informed radiology that they couldn't get ahold of the parents to get the child's history. TR 10/10/15 31:22-32:11.
[26] TR 11/4/15 30:14-31:22. TPMG did not dispute either that the staff in question worked in Richmond, not Oakland, or that Metzner was not primarily responsible for the workflow. Rather, defense counsel questioned whether these factors excused Metzner's alleged failure to solve the problem. TR 11/10/15 17:25-18:23. It was not unreasonable for the jury to reject this as an example of an alleged deficiency on Metzner's part.
[27] TR 11/10/15 47:9-23, 108:3-22. The doctors distinguished between general operational issues and problems with Metzner and testified that they were complaining specifically about Metzner. See, e.g., TR 11/10/15 21:7-21 (Foster) 70:19-23, (Barber).

very little documentation of such feedback even after, including during the period when Metzner was on the PIP. On this record and the dearth of contemporaneous corroboration of TPMG's witnesses' testimony, there was more than substantial evidence to support the jury's verdict.

C. Plaintiff Is Entitled to Front-Pay Award as a Matter of Law.

TPMG argues that the jury's affirmative vote on the special verdict form's question number three[28] necessitates the conclusion that Metzner should have been terminated for poor performance and therefore as an at-will employee Metzner was not entitled to front-pay. TPMG's argument is entirely unsupported by the law and without merit.

TPMG's argument ignores the fact that the jury expressly found that TPMG would not have terminated Metzner absent TPMG's unlawful conduct.[29] The jury rejected TPMG's same-decision defense by finding that TPMG failed to prove by a preponderance of the evidence "that it would have terminated Ms. Metzner anyway based on her poor job performance even if it had not also been substantially motivated by retaliation for Ms. Metzner taking a medical leave in 2011[.]"[30] There is no authority which stands for the proposition that Metzner, who would not have been terminated absent TPMG's unlawful conduct, is not entitled to front-pay as a matter of law. The Court in *Harris* expressly rejects TPMG's argument that because it *could* have terminated Metzner for a non-retaliatory reason, Metzner is not entitled to damages: "To be clear, when we refer to a same-decision showing, we mean proof that the employer, in the absence of any discrimination, would have made the same decision *at the time it made its actual decision.*" *Harris v. City of Santa Monica*, 56 Cal. 4th 203, 224 (2013), *reh'g denied* (Apr. 17, 2013) (emphasis in original); *see also Price Waterhouse v. Ann B. Hopkins*, 490 U.S. at p. 252, 109 S.Ct. 1775 ("proving '"that the same decision would have been justified ... is not the same as

[28] Question Number three on the verdict form asks: "Did TPMG prove by a preponderance of the evidence that Ms. Metzner's poor job performance was also a substantial motivating reason for TPMG's decision to terminate Ms. Metzner's employment?" Judgment on Jury Verdict Exhibit A

[29] Further, TPMG's claim that the Jury's finding for question three precludes liability is a misstatement of the law. Even if TPMG were successful with its same-decision defense, that would cut off damages, not liability. *Harris v. City of Santa Monica*, 56 Cal. 4th 203, 232-234 (2013), *reh'g denied* (Apr. 17, 2013). Metzner would still be the prevailing party and could still seek attorneys' fees and costs. *Id.* at 235.

[30] Judgment on Jury Verdict Exhibit A Verdict Form, Question Four.

proving that the same decision would have been made."') Notably, the jury instruction at issue in *Harris* stated in relevant part

> An employer may not, however, prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. Neither may an employer meet its burden by merely showing that at the time of the decision it was motivated only in part by a legitimate reason. The essential premise of this defense is that a legitimate reason was present, and standing alone, would have induced the employer to make the same decision.

Harris, 56 Cal. 4th at 213 (quoting BAJI No. 12.26).

Under California law, Metzner is entitled to be made whole, meaning she is entitled to that which she would have reasonably expected to earn absent the retaliatory termination. *See, e.g., Commodore Home Sys., Inc. v. Superior Court*, 32 Cal. 3d 211, 221 (1982) ("[I]n a civil action under the FEHA, all relief generally available in noncontractual actions, including punitive damages, may be obtained."); *Hope v. California Youth Auth.,* 134 Cal. App. 4th 577, 595 (2005) (FEHA plaintiff was properly awarded back-pay, and front-pay to retirement because defendant failed to meet its burden regarding mitigation); *Dyna-Med, Inc. v. Fair Employment & Hous. Com.,* 43 Cal. 3d 1379, 1387 (1987) (plaintiff entitled to be made whole); Cal. Gov't Code § 12926(a). Because the jury found TPMG liable and rejected its same-decision defense, Metzner is entitled, as a matter of law, to all damages awarded.

D. Metzner's Credibility Is Irrelevant to This Motion.

Contrary to the principles set forth in *Hauter*, 14 Cal. 3d at 110, TPMG claims that credibility can be considered here, citing *Mikialian v. Los Angeles*, 79 Cal. App. 3d 150 (1978) and *Roddenberry v Roddenberry*, 44 Cal. App. 4th 634 (1996). However, neither of those cases support TPMG's argument.

In *Mikialian*, the plaintiff sought damages from the city and certain police officers for personal injuries he sustained when he was struck by a hit-and-run driver in the course of towing a vehicle from one side of the road to the other. In deposition, the plaintiff acknowledged that the police had not asked him to relocate the vehicle. At trial, initially, he testified that the police had

instructed him to move the vehicle but on cross-examination admitted that no one had told him to move the vehicle, and that he did not inform the police that he was going to move the vehicle. The plaintiff's testimony in deposition and during trial, therefore, contained clear admissions negating the duty of the police officers, an essential element of his claim. *Mikialian*, 79 Cal. App. 3d at 158. His testimony contradicting the admissions did not alone constitute substantial evidence. *Id.* There was not, therefore, sufficient evidence to establish that the police officers owed the plaintiff a duty under those circumstances. *Id.* at 163.

Similarly, in *Roddenberry*, the ex-wife of Star Trek creator Gene Roddenberry claimed that she was entitled, pursuant to the divorce agreement, to a percentage of income from all Star Trek properties, not simply the Star Trek property in existence at the time of the divorce. However, pre-trial attorney declarations, representations to the court, admissions in pleadings, and a long history of conduct contradicted the trial testimony regarding the intended meaning of the contracts terms. *Id.* at 654. A "bald assertion" contrary to other evidence was not substantial evidence. *Id.*

In both of these cases, the trial testimony in question was the *only* basis for establishing an essential factual element of a claim. Given that the testimony was in direct conflict with admissions and other conduct by the party offering the testimony, the testimony could not constitute substantial evidence in support of the judgment. In contrast, Metzner's testimony was not directly contradictory, and the testimony challenged by TPMG is not the only evidence in support of Metzner's claims.[31] As set forth in Section II, Metzner's claims were largely established by TPMG's witnesses, her uncontradicted testimony and contemporaneous

[31] In fact the testimony TPMG identifies does not directly prove or disprove any element of Metzner's claim. For example, the testimony regarding her meetings with Schmit establishes that Metzner testified at her deposition that she did not recall the meetings in question and did not recognize Schmit's notes. Other than one issue – compliance – TPMG's counsel did not ask Metzner regarding the substance any of the issues allegedly raised by Schmit during the meetings. The fact that Metzner did not remember having particular meetings and whether Metzner was truthful when she testified that she later recalled the meetings after reviewing the many documents produced by TPMG in this case, does not directly relate to any element of her claim and cannot provide the basis for judgment notwithstanding the verdict. *Hauter*, 14 Cal. 3d at 110.

documentary evidence. Under these circumstances, there is no basis for this Court to make credibility determinations in connection with TPMG's motion for judgment notwithstanding the verdict.

V. CONCLUSION

Viewing the evidence in the light most favorable to Metzner, this Court must conclude that there is substantial evidence to support the jury's verdict. For that reason, TPMG's motion must be denied.

Dated: January 7, 2016

LEVY VINICK BURRELL HYAMS LLP

By: _____
DARCI E. BURRELL,
Attorneys for Plaintiff PATRICIA METZNER

LESLIE F. LEVY, ESQ., State Bar No. 104634
DARCI E. BURRELL, ESQ., State Bar No. 180467
KATHERINE L. SMITH, ESQ., State Bar No. 295726
LEVY VINICK BURRELL HYAMS LLP
180 Grand Avenue, Suite 1300
Oakland, CA 94612
Tel.: (510) 318-7700
Fax: (510) 318-7701
E-Mail: leslie@levyvinick.com
darci@levyvinick.com
katherine@levyvinick.com

Attorneys for Plaintiff Patricia Metzner

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

UNLIMITED JURISDICTION

PATRICIA METZNER, Plaintiff, v. THE PERMANENTE MEDICAL GROUP and DOES 1-10, inclusive, Defendants.	Case No. RG 13702356 **RESERVATION NO.: R-1700598** ASSIGNED FOR ALL PURPOSES TO JUDGE STEPHEN KAUS **PLAINTIFF PATRICIA METZNER'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR STATUTORY ATTORNEYS' FEES** Date: February 25, 2016 Time: 3:00 p.m. Dept.: 23 Complaint Filed: November 7, 2013 Trial Date: October 9, 2015 Judgment Date: November 24, 2015

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I. INTRODUCTION

The law on attorneys' fees related to a claim under the California Fair Employment and Housing Act ("FEHA") is straightforward: where a party is entitled to recover attorneys' fees, the fee award should fully compensate that party for all time reasonably spent litigating the claims entitling the party to fees. In this case, Plaintiff Patricia Metzner, who is the prevailing party, petitions the Court for an order of attorneys' fees under Government Code Section 12965(b). Specifically, Metzner asks this Court to award attorneys' fees in the total amount of $2,867,252. This figure is based on the lodestar value of Metzner's attorneys' fees ($1,433,626, based on attorneys' hourly rates multiplied by hours worked), times a requested multiplier of 2.0 to compensate Metzner's counsel for the risk of non-payment, the inevitable delay in receiving payment, and to encourage Metzner's attorneys and other civil rights attorneys to undertake public interest litigation of similar importance in the future.

This case involved complex allegations of medical leave retaliation. It is the policy of the state of California "to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment . . . ." Cal. Govt. Code § 12920. This policy is "fundamental," and the right to be from discrimination in employment is a "civil right." *Brown v. Superior Court*, 37 Cal. 3d 477, 485-86 (1984). To protect this "civil right," the legislature has explicitly recognized the importance of encouraging skilled, committed attorneys to take cases in furtherance of these rights by including in the FEHA a fee-shifting provision whereby a prevailing plaintiff may recover attorneys' fees from the defendant. *See* Cal. Govt. Code § 12965(b).

As noted by the California Supreme Court in *Flannery v. Prentice*, 26 Cal. 4th 572 (2001):

> The basic, underlying purpose of FEHA is to safeguard the right of Californians to seek, obtain, and hold employment without experiencing discrimination . . . . There is no doubt that "privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions" and "[w]ithout some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible."

Id. at 582-83 [citations omitted].

As discussed below and as detailed in the supporting declarations filed herewith, the financial risk and time necessary to litigate this case through trial was staggering. Yet throughout this difficult litigation, plaintiff's counsel have not received *any* compensation. Absent a fully-compensatory fee, it would be impossible for attorneys like Metzner's counsel to take on the effort of ensuring that the fundamental purposes of the FEHA are fulfilled. Metzner's successful verdict represents the vindication of an important civil right that not only serves Metzner's interests, but the rights of other employees.

II. STATEMENT OF FACTS AND PROCEEDINGS

A. The Parties' Claims and Defenses

Patricia Metzner, a licensed Registered Nurse, had a long and successful career working for Kaiser Permanente. In the spring of 2010, after the unit in which she had worked for 10 years closed, she became the head of The Permanente Medical Group's (TPMG) Oakland Broadway Medical Office Building Special Procedure Suite ("BMOB"). Ultimately, she was also given another unit to head, the Oakland Peri-Operative Medicine Unit ("Oakland POM"). In March 2011, she received a glowing review of her 2010 performance. Two and one-half-months later, however, very shortly after she disclosed the need for back surgery to her supervisor, Sandra Schmit, Schmit suggested to her manager, Shirley Steinback, that Metzner be placed on a performance improvement plan ("PIP"). Although Metzner was not placed on a PIP at that point, when she returned from a four-month leave, she was placed on a PIP, leading to her ultimate termination.

TPMG claimed that Metzner's performance in her roles as head of the BMOB and Oakland POM had always been deficient. At trial, TPMG produced nine witnesses – including six doctors – who described the various ways in which Metzner had failed to perform her job adequately, including in ways that allegedly affected patient safety. It also introduced or relied upon more than 200 emails that it claimed evidenced Metzner's performance failures. According to TPMG, despite being given every opportunity to improve, Metzner failed to do so, leaving

them no choice but to terminate her employment.

B. Results Obtained

After nearly four weeks of trial, the jury in this matter deliberated over a period of five days for more than 20 hours and reached a verdict in favor of Metzner. The jury found that retaliation for requesting or taking a medical leave had been a substantial motivating reason for TPMG terminating Metzner's employment, and that she had been harmed. The jury also rejected TPMG's "same decision" defense, concluding that, while TPMG may also have been motivated by Metzner's job performance, it would not have terminated her if it had not also been motivated by retaliation. The jury awarded Metzner $569,285 in past economic loss, $2,430,715 in future economic loss, and $50,000 in past noneconomic loss, for a total of $3,050,000.

C. This Factually Complex Case Required an Enormous Amount of Work by Metzner's Counsel.

This case, as the Court itself has noted, was hard-fought. The litigation involved complex, factual disputes regarding Metzner's job performance, which required a vast amount of resources to flesh out. Specifics of the worked performed by Metzner's counsel is detailed in the supporting declarations and attached time records filed herewith, but the work performed includes, but is not limited, to:[1]

Written Discovery

Over the course of litigation, Metzner produced more than 1000 pages of documents in discovery and reviewed and analyzed more than 50,000 pages of documents produced by TPMG. Metzner served, in total, 23 form interrogatories, 159 requests for the production of documents, 85 special interrogatories, and 29 requests for admission (only one of which pertained to the authentication of documents). Metzner responded to 28 form interrogatories, 122 special interrogatories, including subparts, 40 requests for admission (none of which pertained to the

[1] A more detailed description of the work performed by Metzner's counsel is provided in the Declaration of Darci E. Burrell in Support of Plaintiff's Motion for Statutory Attorneys' Fees ¶ 10, the Declaration of Katherine L. Smith in Support of Plaintiff's Motion for Statutory Attorneys' Fees ¶ 5-29 and Exhibit A, and the Declaration of Leslie F. Levy in Support of Plaintiff's Motion for Statutory Attorneys' Fees ¶ 8-9.

authenticity of documents), with accompanying responses to Form Interrogatory No. 217.1, and 75 requests for production.

Depositions

There were 18 depositions taken in this case. Metzner took the depositions of ten percipient witnesses. TPMG took Metzner's deposition, as well as the depositions of Metzner's significant other and her sister. In addition to the percipient witness depositions, there were five expert witness depositions.

Law and Motion

This litigation involved a number of time-consuming motions. TPMG filed a voluminous motion for summary judgment or, in the alternative, summary adjudication. Metzner filed a motion to compel Lori Salemi to appear for deposition, and TPMG filed a motion to compel further discovery responses from Metzner. TPMG also sought "informal" resolution of its demand for a defense medical examination, which resulted in extensive work by both the parties and the Court.

Trial Preparation

Trial preparations in this case were extremely involved and required a substantial amount of time. Metzner's counsel spent a considerable amount of time preparing Metzner's testimony, honing the prior review of TPMG's document production to identify documents to be used at trial, preparing to use TPMG's witnesses to support Metzner's case, preparing pre-trial filings and conferring with TPMG's counsel regarding the same, and drafting and responding to numerous motions in limine.

Trial

Trial in this matter commenced on October 9, 2015 and concluded with a jury verdict on November 23, 2015. There were fourteen witnesses presented, and almost 300 exhibits introduced during the trial. The parties regularly arrived before the jury did and stayed after the jury had been dismissed to discuss various evidentiary issues and other matters. During the trial, Metzner's counsel also worked most evenings, on the regular day off from trial each week, and

during the weekends. That time was generally spent preparing upcoming testimony, reviewing evidence, preparing for upcoming motions and other matters, strategizing, preparing for closing argument, and corresponding with the Court and opposing counsel.

Post-Trial

Following the successful verdict in Metzner's favor, TPMG filed both a motion for new trial and a motion for judgment notwithstanding the verdict. Responding to the motion required extensive review of the exhibits moved into evidence and the trial transcript. Metzner's counsel also worked on an opposition to TPMG's motion to tax costs and on this motion for attorneys' fees.

D. Unique Circumstances Contributing to the Work Required by Metzner's Counsel.

There were a number of unusual circumstances that contributed to the number of hours necessary for Metzner's counsel to successfully prosecute this case. Examples of those circumstances include:[2] First, this was a fact intensive, complex case. The litigation focused on Metzner's job performance, and TPMG initially provided an approximately seven-page explanation (in response to form Interrogatories propounded by Metzner) of the basis for Metzner's termination and ultimately identified more than 1000 documents that it claimed provided evidence of Metzner's poor job performance. *Burrell Decl.* ¶ 10. An extensive amount of time was required to both understand and respond to the issues raised by these documents.

Second, TPMG produced more than 50,000 pages of documents in response to Metzner's discovery requests. *Id.* The spreadsheet containing Metzner's counsel's analysis of the documents produced by TPMG is more than 700 pages long, and reflects, not only counsel's review of the documents, but how those documents related to other documents and how they might be used in the future or what questions they raised for future discovery. *Id.* Counsel were

[2] Metzner provides only a few examples here. Further and more detailed examples are provided in the supporting declarations. *See Burrell Decl.* ¶ 10; *Smith Decl.* ¶ 5-29.

also required, throughout the litigation, to revisit their initial analysis in light of subsequent discovery and their developing understanding of the case. *Id.* at ¶ 9.

Third, the interplay between Metzner's right to privacy and TPMG's right to discover private information led to disputes between the parties and required a substantial amount of both the parties' and the Court's time to resolve. *Id.* at ¶ 10.

Fourth, TPMG litigated this case in an aggressive manner. This was not only time-consuming in that it required Metzner's counsel to expend substantial attorney hours to respond to TPMG's demands; it also resulted in a number of prolonged disputes that required significant resources to resolve. *Id.*

E. Settlement Negotiations

The parties unsuccessfully attempted to mediate this matter. The parties first mediated the matter with a private mediator, Cynthia Remmers. The parties then appeared twice for settlement conference with Judge Grillo. Neither settlement effort was successful. On March 18, 2015, TPMG made a Code of Civil Procedure section 998 offer to compromise for $175,000, inclusive of fees and costs. The result achieved at trial was more than 17 times greater than TPMG's 998 offer, not including Metzner's entitlement to attorneys' fees and costs.

III. THE COURT SHOULD AWARD THE REQUESTED ATTORNEYS' FEES

The jury verdict in Metzner's favor establishes her as the prevailing party, entitling her to an award of attorneys' fees pursuant to the Fair Employment and Housing Act. *See* Cal. Gov't Code § 12965(b). The discretion to deny a fee award to a prevailing plaintiff is narrow. "[I]n the context of the grant of discretion in Government Code section 12965, subdivision (b), it means something akin to the italicized portion of the following: "the court, [*in a manner that, in the judgment of the court, will best effectuate the purposes of FEHA*], may award to the prevailing party reasonable attorney's fees and costs." *Horsford v. Bd. of Trustees*, 132 Cal. App. 4th 359, 394 (2005). "[A]n award for attorneys' fees is not a gift. It is just compensation for expenses actually incurred in vindicating a public right." *Sundance v. Municipal Court*, 192 Cal. App. 3d 268, 273 (1987).

The method of calculating statutory attorneys' fees in California is well established. The court first determines the number of hours reasonably spent by counsel on the case and a reasonable hourly rate to be applied to those hours. The product of this calculation produces a figure known as the "lodestar" or "touchstone." *Serrano v. Priest*, 20 Cal. 3d 25, 48-49 (1977) (hereinafter *Serrano III*); *Serrano v. Unruh*, 32 Cal. 3d 621, 626 n.6 (1982) (hereinafter *Serrano IV*); *Ketchum v. Moses*, 24 Cal. 4th 1122, 1131-32 (2001); *Horsford*, 132 Cal. App. 4th at 394. The lodestar includes all hours reasonably spent by the plaintiff's counsel in pursuit of the litigation, including hours reasonably spent on legal theories or arguments that, ultimately, proved unsuccessful. *See Sundance v. Municipal Court*, 192 Cal. App. 3d 268, 273-274 (1987); *Odima v. Westin Tucson Hotel*, 53 F.3d 1484, 1499 (9th Cir. 1995); [3] *Wysinger v. Automobile Club of S. Cal.*, 157 Cal. App. 4th 413, 430 (2007); *Hogar Dulce Hogar v. Community Dev. Comm'n*, 157 Cal. App. 4th 1358, 1369 (2007).

Once the court calculates the lodestar figure, the court may then increase the lodestar by use of a "multiplier," based on various factors such as the contingent nature of the recovery, the difficulty of the issues involved, the skill displayed by counsel in presenting them, the extent to which the litigation precluded other employment by the attorneys, and the results obtained. *Serrano III*, 20 Cal. 3d at 49; *Serrano IV*, 32 Cal. 3d at 626 n.6; *Pellegrino v. Robert Half International, Inc.*, 182 Cal. App. 4th 278, 290-91 (2010); *Crommie v. Public Utilities Commission*, 840 F. Supp. 719, 726 (N.D. Cal 1994); *City of Oakland v. Oakland Raiders*, 203 Cal. App. 3d 78, 83 (1988).

In this case, Metzner's counsel request a lodestar of $1,433,626. This reflects the time spent by Metzner's counsel working on this case (over 3000 hours), multiplied by the requested hourly rates (Darci Burrell, $575 per hour; Leslie Levy, $650 per hour; Katherine Smith, $250

[3] "California courts should follow interpretations of similar federal laws in awarding attorney fees in age discrimination cases. Otherwise, if fee awards were doubtful in California courts, there would exist an incentive for plaintiffs to file suits in federal courts under the federal civil rights statute with more liberal attorney fee provisions." *Stephens, Jr. v. Coldwell Banker Commercial Group, Inc.*, 199 Cal. App. 3d 1394, 1405 (1988), *overruled on other grounds by White v. Ultramar, Inc.*, 21 Cal. 4th 563 (1999).

per hour; Sharon Vinick, $625 per hour; Palmer Buchholz, $200 per hour; law clerk rate of $175 per hour; and legal assistant rate of $150 per hour). The requested lodestar also reflects a reduction of the actual hours billed, based on billing judgment, by $75,454 or 5 percent. *See Burrell Decl.* ¶¶ 13-23. A spreadsheet detailing Metzner's counsel's work on this matter, the total amount billed, and the reflection of billing judgment is attached as Exhibit A to the Declaration of Katherine L. Smith in Support of Plaintiff's Motion for Statutory Attorneys' Fees. Metzner also requests a 2.0 multiplier, based on the considerations described below, for a total fee request of $2,867,252.

A. <u>The Purposes of FEHA Require a Fully Compensatory Fee</u>.

"[T]he attorney who takes [a FEHA] case can anticipate receiving full compensation for every hour spent litigating a claim against even the most polemical opponent." *Weeks v. Baker & McKenzie*, 63 Cal. App. 4th 1128, 1175-76 (1998). Because FEHA cases "vindicate important public interests whose value transcends the dollar amounts that attach to many civil rights claims," a judge does not abuse his or her discretion "by awarding fees in an amount higher, even very much higher, than the damages awarded, where successful litigation 'causes conduct which the FEHA was enacted to deter [to be] exposed and corrected.'" *Beaty v. BET Holdings, Inc.*, 222 F.3d 607, 612-13 (9th Cir. 2000), quoting *Vo v. Las Virgenes Muni. Water District*, 79 Cal. App. 4th 440, 445 (2000).

Fee-shifting statutes were enacted precisely because the potential damages in many discrimination cases would not provide a sufficient incentive for attorneys to take them, no matter how important the underlying rights. "Fee awards ensure that neither financial imperatives nor market considerations raise an insurmountable barrier that prevents attorneys from litigating meritorious cases, and even a relatively small damages award 'contributes significantly to the deterrence of civil rights violations in the future.'" *Beaty*, 222 F.3d at 612, quoting *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986). The United States Supreme Court has long rejected "the notion that the value of a civil rights action for damages constitutes nothing more than a private tort suit benefitting only the individual plaintiffs whose rights were

violated. Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." *Blanchard v. Bergeron*, 489 U.S. 87, 96 (1989) [citations omitted].

B. The Number of Hours Claimed in the Lodestar Is Reasonable.

As discussed above, Metzner's counsel are entitled to be compensated for "*all* the hours reasonably spent…." *Ketchum*, 24 Cal. 4th at 1133. Hours are reasonably spent if, at the time the work was performed, counsel's efforts were reasonable; whether, in hindsight, counsel could have spent fewer hours is irrelevant. *See Wooldridge v. Marlene Industries Corp.*, 898 F.2d 1169, 1177 (6th Cir. 1990) *abrogated on other grounds by Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Resources*, 532 U.S. 598 (2001). In determining the reasonableness of counsel's hours, the Court can consider "the entire course of the litigation, including pre-trial matters, settlement negotiations, discovery, litigation tactics, and the trial itself." *Vo. v. Las Virgenes Muni. Water Dist.*, 79 Cal. App. 4th 440, 447 (2000). The Court should also consider the strong disincentives counsel working on a contingency have to perform unnecessary work. "It must also be kept in mind that lawyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee. . . . By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case . . ." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008); *see also Declaration of Deborah Kochan in Support of Plaintiff's Motion for Statutory Attorneys' Fees* ¶ 10; *Burrell Decl.* ¶ 11.

That the plaintiff may not have succeeded on every motion is of no consequence. "Rare, indeed, is the litigant who doesn't lose some skirmishes on the way to winning the war. . . . [A] lawyer who takes on only those battles he is certain of winning is probably not serving his client vigorously enough; losing is part of winning." *Cabrales v. City of Los Angeles*, 935 F.2d 1050, 1053 (9th Cir. 1991); *see also Sundance*, 192 Cal. App. 3d at 273 ("To reduce the attorneys' fees of a successful party because he did not prevail on all his arguments, makes it the attorney, and

not the defendant, who pays the cost of enforcing that public right."). Moreover, a party cannot "litigate tenaciously and then be heard to complain about the time necessarily spent by the Plaintiff in response." *Serrano IV*, 32 Cal. 3d at 638.

Attorney time records are prima facie evidence of reasonableness. *See Hadley v. Krepel*, 167 Cal. App. 3d 677, 682 (1985); *see also Perkins v. Mobile Housing Ed.*, 847 F.2d 735, 738 (11th Cir. 1988) ("Sworn testimony that, in fact, it took the time claimed is evidence of considerable weight on the issue of the time required in the usual case . . ."). Metzner's counsel's records document and support the time spent on this litigation. *Burrell Decl.* ¶¶ 7-10; *Smith Decl.* ¶¶ 5-29 and Exhibit A; *Levy Decl.* ¶¶ 8-9; *Declaration of Phil Horovitz in Support of Plaintiff's Motion for Statutory Attorneys' Fees* ¶¶ 11-23.

C. <u>The Market Rates Claimed for the Lodestar Are Reasonable.</u>

Metzner's attorneys are entitled to compensation at hourly rates that reflect the reasonable market value of their services in the community. *Serrano IV*, 32 Cal. 3d at 643, and n. 38. Reasonable rates are those charged by private attorneys of comparable skill, reputation, and experience for similar litigation, as measured by the prevailing rates charged by corporate attorneys of equal caliber. *See Horsford*, 132 Cal. App. 4th at 394; *Children's Hospital & Medical Center v. Bonta*, 97 Cal. App. 4th 740, 782-83 (2002); *Bihun v. AT&T Inf. Sys.*, 13 Cal. App. 4th 976, 997 (1993), *overruled on other grounds by Lakin v. Watkins Assoc. Ind.*, 6 Cal. 4th 644 (1993); *Davis v. City and County of San Francisco*, 976 F.2d 1536, 1547 (9th Cir.1992), *partially vacated as moot on other grounds by* 984 F.2d 345 (9th Cir. 1993).

Ms. Burrell, who was lead counsel on this case, has been in practice 20 years litigating cutting edge civil rights and employment cases. Burrell Decl., ¶¶ 24-32. Ms. Levy has more than 30 years of experience, focusing on employment discrimination litigation for much of that time. Levy Decl.¶¶ 3-5. Ms. Vinick has been in practice for 28 years and has also spent the majority of that time litigating employment discrimination matters. *Declaration of Sharon R. Vinick in Support of Plaintiff's Motion for Statutory Attorneys' Fees* ¶¶ *4-9.* Ms. Smith has been in practice since 2014, focusing on employment cases throughout that time. *Smith Decl.* ¶ 31-36.

Their rates are well within the market rate of attorneys with comparable skill and experience. *See Declaration of Richard Pearl in Support of Plaintiff's Motion for Statutory Attorneys' Fees* ¶¶ 3, 10-14; *Kochan Decl.* ¶¶ 6-8, 12; *Horowitz Decl.* ¶ 25.

D. An Enhancement of the Lodestar Is Appropriate.

State law looks favorably upon multipliers or enhancers to the lodestar. *Serrano III*, 20 Cal. 3d at 48-49. Multiplier adjustments are not "windfalls."

> The adjustment to the lodestar figure, e.g. to provide a fee enhancement reflecting the risk that the attorney will not receive payment if the suit does not succeed, constitutes earned compensation; unlike a windfall, it is neither unexpected nor fortuitous. Rather, it is intended to approximate market-level compensation; for such services, which typically includes a premium for the risk of non-payment or delay in payment of attorney fees.

Ketchum, 24 Cal. 4th at 1138. To determine a fee that truly reflects that marketplace, factors in addition to hours and rates must be considered: "[T]he unadorned lodestar reflects the general local hourly rate for a fee-bearing case; it does not include any compensation for contingent risk, extraordinary skill, or any other factors a trial court may consider. . . ." *Id.* The "other factors" that the courts have considered in determining the entitlement to an upwards adjustment are: the results obtained, preclusion of other employment, and public service.

Applying these standards, enhancements have been awarded in numerous other employment discrimination cases. *Coalition for Los Angeles County Planning v. Board of Supervisors*, 76 Cal. App. 3d 241, 251 (1977) (more than doubled the lodestar); *Beasley v. Wells Fargo Bank*, 235 Cal. App. 3d 1407, 1419 (1991) (1.5 multiplier), *overruled on other grounds by Olson v. Automobile Club of Southern California*, 42 Cal. 4th 1142 (2008); *Wersha v. Apple Computer, Inc.*, 91 Cal. App. 4th 244, 255 (2001) (affirming 1.42 multiplier and noting that multipliers "can range from 2 to 4 or even higher."). In this case, all of the relevant factors apply, justifying a substantial multiplier.

1. The Risk Taken Supports a Significant Enhancement.

If Metzner's counsel had represented a fee-paying client, they would have been paid the lodestar amount, regardless of the outcome. Basic market principles support a higher fee to

compensate for the great risk Metzner's attorneys took to vindicate her fundamental rights. Risk enhancements are "intended to approximate market-level compensation for . . . services, which typically includes a premium for the risk of nonpayment or delay in payment." *Ketchum*, 24 Cal. 4th at 1138. A fee award that compensates contingent fee counsel only for the fee that they would have received from a fee-paying client, win or lose, is simply not a reasonable attorney's fee by market standards: "A contingent fee must be higher than the fee for the same legal services as they are performed." *Id.* at 1132 (internal citations omitted). Unless risk is factored into fee awards in successful cases, the incentive to litigate such cases in the future, and the availability of counsel, will be drastically curtailed:

> The purpose of a fee enhancement, or so-called multiplier, for contingent risk is to bring the financial incentives for attorneys enforcing important . . . [rights] into line with incentives they have to undertake claims for which they are paid on a fee-for-services basis. . . . A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases.

Ketchum, 24 Cal. 4th at 1132-33 (citations omitted).

Most employment discrimination plaintiffs are unable to pay their attorneys on an hourly basis and, so, can obtain representation only if they can find counsel who will accept their case on a contingent basis and advance all costs. That is what happened here. *Burrell Decl.* ¶ 43; *Kochan Decl.* ¶ 11 . If no monetary recovery had been obtained, Metzner's counsel would have received *zero* compensation for any of the work they performed. One need only consider the hundreds of hours as yet unpaid, as well as the out-of-pocket costs, that Metzner's counsel devoted to this case, to appreciate the magnitude of the risk they took with no guarantee of a return. The risks to the attorneys in this area are real since many contingent cases are lost, while others settle for figures that result in a contingency fee far below the actual fees expended by plaintiff's counsel. If the plaintiff's attorney can hope to recover nothing but actual time spent, the risks would so greatly outweigh any potential "upside" that small firms like Metzner's counsel simply could not afford to accept such cases. *Burrell Decl.* ¶ 50; *Kochan Decl.* ¶¶ 11-13.

Employment cases are generally risky. *Kochan Decl.* ¶ 13. This case was especially risky for reasons detailed in the supporting declarations. *Burrell Decl.* ¶ 43-49; *Declaration of Kyra Subbotin in Support of Plaintiff's Motion for Statutory Attorneys' Fees* ¶¶ 8-9; *Horowitz Decl.* ¶ 27. These risks included, but are not limited to: (1) the number of witnesses testifying on TPMG's behalf; (2) the lack of direct evidence of retaliatory animus; (3) the lack of contemporaneous documentation explicitly identifying Metzner's alleged deficiencies; (4) the passage of time between Metzner's disclosure of her need for surgery and her termination; and (5) the vast number of items identified by TPMG as alleged evidence of Metzner's failed performance. Any of these factors could have resulted in a victory for TPMG, and these were significant risks that Metzner had to overcome.

2. <u>The Excellent Results Obtained.</u>

A reasonable attorney's fee also should reflect the results obtained. *See Wallace v. Consumers Cooperative of Berkeley, Inc.*, 170 Cal. App. 3d 836, 849-50 (1985); *City of Oakland*, 203 Cal. App. 3d at 80, 83; *Crommie*, 840 F. Supp. at 726. Here, the $3,050,000 verdict in Metzner's favor represents an excellent result in light of the complete denial by TPMG that retaliation played any role in Metzner's termination, the number of witnesses testifying in TPMG's favor, and the vigorous defense put up by TPMG's counsel. The amount awarded by the jury far exceeded either the Section 998 offer from TPMG or the three month's salary TPMG offered as a severance. *Burrell Decl.* ¶ 12; *Subbotin Decl.* ¶ 6.

3. <u>The Extraordinary Skill of Counsel.</u>

While employment discrimination cases tend to be very complex and difficult, this case presented particular difficulties which required experience and skill to address, as detailed in the supporting declarations. *Burrell Decl.* ¶¶ 52-54. First, while, at first blush, the lack of contemporaneous documentation specifically identifying Metzner's alleged performance deficiencies may seem like a benefit, in practice, it made it extremely difficult to determine how best to respond to the generally vague allegations of Metzner's poor performance. Second, it took particular skill and expertise to strategically respond to a case in which, while the defendant

had many witnesses willing to support its position, the plaintiff had only one. Third, it took particular skill and expertise to manage the vast amount of information produced by TPMG in this case. Finally, it took particular skill and expertise to successfully litigate this matter in the face of TPMG's aggressive litigation style, including but not limited to, determining which battles needed to be fought and knowing how to respond to TPMG's litigation tactics, while at the same time continuing to prepare Metzner's case for trial. The extraordinary skill of Metzner's counsel, as evidenced by the excellent results obtained, is deserving of a multiplier.

4. <u>The Public Interest Value of Plaintiff's Lawsuit.</u>

Another factor justifying enhancement is the public interest served by Metzner's lawsuit. It is the "fundamental" policy of the state of California to protect employees from discrimination and retaliation. *Brown*, 37 Cal. 3d at 485-86. The Legislature recognizes that workplace discrimination "foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially adversely affects the interest of employees, employers, and the public in general." Cal. Gov't Code § 12920; *see also Stephens*, 199 Cal. App. 3d at 1406 (individual damages actions under FEHA "bring about benefits to a broad group of citizens"). Indeed, disclosure of discrimination through litigation "is itself important" and furthers the objectives of anti-discrimination legislation. *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 358-359 (1995). "[E]ven a relatively small damages award contributes significantly to the deterrence of civil rights violations in the future." *Beaty*, 222 F.3d at 612 (citations omitted).

Enhancements encourage the private enforcement necessary to vindicate these civil rights. *State of California v. Meyer*, 174 Cal. App. 3d 1061, 1073 (1985). The fact that this was an individual case does not diminish the importance of the public interest value it serves. *Crommie*, 840 F. Supp. at 726.

5. <u>Preclusion of Other Employment.</u>

An upward enhancement is appropriately granted where the attorneys have been precluded from other employment by the time required to litigate the case. *Serrano III*, 20 Cal.

3d at 49; *Ketchum,* 24 Cal. App. 4th at 1132. In taking a case of this magnitude, Metzner's counsel had to hold room in their schedule to devote to prosecution of this case, significantly limiting their ability to take and work on other cases. *Burrell Decl.* ¶ 51. Up to the date of the pre-trial conference, Metzner's counsel spent over 1800 hours working on this case, the equivalent of an attorney billing 40 hours a week for nearly a year. *Id.* From the trial readiness conference until the jury issued its verdict, this case almost exclusively occupied two of the firm's partners and one of its associates, as well as requiring contributions by two other members of the attorney staff. *Id.* Given the size of the firm – four partners, an associate, and a fellow – the time working on this case constituted a significant portion of the firm's billable time. *Id.*; *Horowitz Decl.* ¶ 28. Thus, time devoted to this case limited Metzner's counsel's ability to take on other cases.

All factors supporting enhancements are present. Accordingly, Metzner requests a 2.0 multiplier.

IV. CONCLUSION

In enacting Government Code section 12965, the Legislature intended to encourage competent attorneys to take on difficult retaliation cases like this one. Metzner's counsel are entitled to full compensation for performing exactly that function. Metzner respectfully requests that the Court order TPMG to pay $2,867,252, inclusive of a 2.0 multiplier, to Metzner's counsel of record for attorneys' fees incurred in litigating this matter.

Dated: January 25, 2016

LEVY VINICK BURRELL HYAMS LLP

By: _____
DARCI E. BURRELL,
Attorneys for Plaintiff PATRICIA METZNER

DARCI E. BURRELL, ESQ., State Bar No. 180467
LESLIE F. LEVY, ESQ., State Bar No. 104634
KATHERINE L. SMITH, ESQ., State Bar No. 295726
LEVY VINICK BURRELL HYAMS LLP
180 Grand Avenue, Suite 1300
Oakland, CA 94612
Telephone: (510) 318-7703
Facsimile: (510) 318-7701
E-Mail: darci@levyvinick.com
leslie@levyvinick.com
katherine@levyvinick.com

Attorneys for Plaintiff Patricia Metzner

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

UNLIMITED JURISDICTION

PATRICIA METZNER, Plaintiff, v. THE PERMANENTE MEDICAL GROUP and DOES 1-10, inclusive, Defendants.	Case No. RG 13702356 RESERVATION NO.: R-1700598 ASSIGNED FOR ALL PURPOSES TO JUDGE STEPHEN KAUS **DECLARATION OF DARCI E. BURRELL IN SUPPORT OF PLAINTIFF'S MOTION FOR STATUTORY ATTORNEYS' FEES** Date: February 25, 2016 Time: 3:00 p.m. Dept.: 23 Complaint Filed: November 7, 2013 Trial Date: October 9, 2015

I, Darci E. Burrell, declare:

1. I am duly licensed to practice as an attorney in the State of California. I am a partner at the law firm Levy Vinick Burrell Hyams LLP, counsel of record for Plaintiff Patricia Metzner in this action. I have personal knowledge of the facts in this declaration and could testify competently thereto, except as to matters stated on information and belief, and as to such matters I believe them to be true.

2. This Declaration is submitted in support of Plaintiff's request for attorneys' fees pursuant to California Government Code section 12965, which allows attorneys' fees to plaintiffs who have successfully prosecuted cases based on violation of rights under the Fair Employment and Housing Act, Government Code section 12900, et sec.

History of Representation

3. I am a partner at Levy Vinick Burrell Hyams LLP, a boutique law firm specializing in representing employees in employment law matters. The firm has six attorneys – four partners, an associate, and a law fellow. We handle a limited number of cases, primarily on a contingency fee basis, although we very occasionally perform hourly work. Although we have litigated some class action lawsuits and continue to do so, our primary focus is on representing individual employees.

4. Our firm typically assigns two attorneys to each matter, but we regularly discuss all matters with all attorneys. We are generally flexible in our case assignments, and it is not unusual for attorneys who are not primarily involved with a case to step in to handle particular assignments or particular aspects of litigation.

5. Patricia Metzner filed this action against Defendant The Permanente Medical Group ("TPMG") on November 7, 2013. She asserted fee-bearing claims pursuant to the California Fair Employment and Housing Act for retaliation for requesting or taking medical leave, disability discrimination, and failure to accommodate.

6. Ms. Metzner, a licensed Registered Nurse, had a long and successful career working for Kaiser Permanente. In the spring of 2010, after the unit in which she had worked for 10 years closed, she became the head of TPMG's Oakland Broadway Medical Office Building Special Procedure Suite ("BMOB"). Ultimately, she was also given another unit to head, the Oakland Peri-Operative Medicine Unit ("Oakland POM"). In March 2011, she received a glowing review of her 2010 performance. Two and a half-months later, however, very shortly after she disclosed the need for back surgery to her supervisor, Sandra Schmit, Ms. Schmit suggested to her manager, Shirley Steinback, that Ms. Metzner be placed on a performance improvement plan ("PIP"). Although Ms. Metzner was not placed on a PIP at that point, when

she returned from a four-month leave, she was placed on a PIP, leading to her ultimate termination.

7. I became involved with this case during the pre-litigation stage in approximately March 2013. Until trial, I served as lead counsel and my work included coordinating the overall discovery plan, drafting written discovery and analyzing responses, reviewing the work product of other attorneys, defending Ms. Metzner's deposition, taking the depositions of six of the defense witnesses (Schmit, Steinback, Physician in Chief, Dr. John Loftus, Chief of Ophthalmology, Dr. Raymond Gardner, Physician Director of the BMOB, Dr. Jan-Petter Haugen, and Human Resources representative Johanna O'Guinn), reviewing and analyzing voluminous documents produced by TPMG in this action, meeting and conferring with opposing counsel, and engaging in motion practice. My associate Katherine Smith was also centrally involved throughout litigation, including drafting and responding to written discovery, taking the depositions of four of the defense witnesses (Dr. Todd Foster and Dr. Nicholas Riegels, both of whom served as Physician Director of East Pay POM, Dr. Thomas Barber, Assistant Physician in Chief, and manager Lori Salemi), defending the depositions of Ms. Metzner's significant other and sister, meeting and conferring with opposing counsel, conducting document analysis, and participating in motion practice. My law partner Leslie Levy served as lead counsel during the trial and was extensively involved in pre-trial preparations. My law partner Sharon Vinick took responsibility for coordinating, taking and defending expert depositions and assisted in preparing examination of experts at trial.

8. Our firm made every effort to litigate this case as efficiently as possible. Given that Ms. Smith has significantly less experience as a litigator than I do, I reviewed her work throughout the litigation but made her primarily responsible for work that was consistent with her level of experience. For example, Ms. Smith was primarily responsible for drafting and responding to discovery, reviewing and analyzing TPMG's discovery responses, engaging in meet and confer efforts with opposing counsel, performing document analysis, and conducting legal research, among other tasks. As another example, Ms. Smith and I divided review of the voluminous documents produced by TPMG, rather than both attorneys reviewing all 50,000 plus

pages.

9. The prosecution of this case has required an enormous commitment of attorney time by our firm. Before trial, our firm spent more than 1800 hours – the equivalent of an attorney working 40 hours a week for almost a year – working just on this case. The following is a summary of the work performed, details of which can be found in the time records attached as Exhibit A to the Declaration of Katherine L. Smith:

- ***Written Discovery:*** Over the course of litigation, our firm produced more than 1000 pages of documents in discovery and reviewed and analyzed more than 50,000 pages of documents produced by TPMG. Our firm served, in total, 23 form interrogatories, 159 requests for the production of documents, 85 special interrogatories, and 29 requests for admission (only one of which pertained to the authentication of documents). Our firm responded to 28 form interrogatories, 122 special interrogatories, including subparts, 40 requests for admission (none of which pertained to the authenticity of documents), with accompanying responses to Form Interrogatory No. 217.1, and 75 requests for production.

- ***Depositions:*** There were 18 depositions taken in this case. Our firm took the depositions of ten percipient witnesses. TPMG took Ms. Metzner's deposition, as well as the depositions of Ms. Metzner's significant other and her sister. Ms. Metzner was deposed for two and a half days. Ms. Metzner's supervisor, Sandra Schmit, was deposed for two days. In addition to the percipient witness depositions, there were five expert witness depositions.

- ***Law and Motion:*** This litigation involved a number of time-consuming motions. TPMG filed a voluminous motion for summary judgment or, in the alternative, summary adjudication. Ms. Metzner filed a motion to compel Lori Salemi to appear for deposition, and TPMG filed a motion to compel further discovery responses from Ms. Metzner. TPMG also sought informal resolution of its demand for a defense medical examination, which it expanded into a request that the Court order depositions and require Ms. Metzner to produce unredacted medical records. This "informal" resolution effort resulted in multiple briefs being filed, an hour-long phone call with the Court, and an extended hearing (as were many of the hearings and court appearances in this matter).

- ***Trial Preparation:*** Trial preparations in this case were extremely involved and required a substantial amount of time. Given that Ms. Metzner was to be Plaintiff's only friendly percipient witness at trial, our firm spent a considerable amount of time preparing her testimony. Our firm also spent time honing our prior review of the document production to identify documents to be used at trial and to prepare a response to TPMG's anticipated defense. Specifically, given our understanding of the case based on depositions and written discovery responses, we reviewed the spreadsheet we created previously to identify documents pertaining to issues we believed might be raised at trial. By the time of trial, TPMG had identified more than 1000 documents that it claimed evidenced performance deficiencies by Ms. Metzner. We then further refined the list of possible exhibits to reflect the fact that we could not possibly respond to all the issues that might be raised by TPMG. Since Ms. Metzner would be Plaintiff's only friendly percipient witness, particular attention had to be paid to preparation of TPMG's witnesses, both to use their testimony affirmatively and to respond to testimony elicited by TPMG. In addition to the above, Ms. Metzner filed eight motions in limine and responded to fifteen motions filed by TPMG, the hearing of which took more than two days. As counsel for TPMG stated repeatedly during trial, the parties also spent a substantial amount of time discussing exhibits and corresponding regarding trial preparation matters.

- ***Trial:*** Trial in this matter commenced on October 9, 2015 and concluded with a jury verdict on November 23, 2015. Due to the factual complexity of the case, as described above, examination of witnesses took an extended period of time. Ms. Schmit, for example, was on the stand for more than four days. Nearly 300 exhibits were introduced during the trial. The parties regularly arrived before the jury did and stayed after the jury had been dismissed to discuss various evidentiary and other matters. The parties requested daily transcripts of the trial, and the parties and the Court repeatedly referred to the transcripts to identify testimony or previous discussion on many of the numerous evidentiary issues. During the trial, our firm also worked most evenings, on the regular day off from trial each week, and during the weekends. That time was generally spent preparing upcoming testimony, reviewing evidence, preparing for upcoming motions and other matters, strategizing, and preparing for closing argument. Our firm

also spent a significant amount of time outside of court corresponding with the Court and counsel for TPMG.

- ***Post-Trial:*** Following the successful verdict in Ms. Metzner's favor, TPMG filed both a motion for new trial and a motion for judgment notwithstanding the verdict. Responding to the motion required extensive review of the exhibits moved into evidence and the trial transcript. TPMG's citations to the record, for example, filled four red wells. Responding to TPMG's motions was particularly time-consuming, as they obtained a page length extension for both motions, as well as for the reply brief for both motions. Our firm also worked on an opposition to TPMG's motion to tax costs and on this motion for attorneys' fees.

10. This case also had a number of unique circumstances, including TPMG's aggressive litigation, that led to the lodestar in this matter:

- This was a fact intensive, complex case. The litigation focused on Ms. Metzner's job performance, and TPMG initially provided an approximately seven page explanation (in response to Form Interrogatories propounded by Ms. Metzner) of the basis for Ms. Metzner's termination and ultimately identified more than 1000 documents that it claimed provided evidence of Ms. Metzner's poor job performance. In addition, the performance improvement plan Ms. Schmit gave Ms. Metzner in March 2012 had 22 separate action items. In order to prosecute the case, our firm had to understand each and every issue raised by these documents. This involved communicating extensively with Ms. Metzner in order to understand the factual context, as well as analyzing documents produced by TPMG in discovery to identify documents related to the same subjects. For every document identified by TPMG as evidence of Ms. Metzner's alleged job deficiencies, there might be five others that provided additional context. Additionally, since Ms. Metzner was the director of an eye surgery department and a pre-surgery unit, our firm had to master a substantial amount of technical information to understand the issues. This process was incredibly time consuming. For example, TPMG identified over 300 documents at Ms. Metzner's deposition, a deposition that took two and a half days to complete. In order to understand the issues raised in those documents, we met with Ms. Metzner for three full days. Our subsequent review of the initially more than 23,000 page document

production by TPMG provided additional information about the issues but raised additional questions as well. Ultimately, TPMG would produce more than 50,000 pages of documents requiring review and analysis. The factual complexity of the case is reflected in the more than 1200 documents identified as potential exhibits at trial (approximately 473 joint exhibits, 305 plaintiff exhibits, and 515 defendant exhibits).

- As noted above, TPMG produced more than 50,000 pages of documents in response to Plaintiff's discovery requests, quite a bit of it, as acknowledged repeatedly by TPMG's counsel, which was irrelevant. Although TPMG repeatedly claimed that production of voluminous and irrelevant material was called for by Ms. Metzner's discovery requests, Ms. Metzner's discovery requests were limited as to time, something TPMG largely disregarded. For example, TPMG produced more than 530 pages of unredacted private health information from units that were unrelated to Ms. Metzner's employment and from time periods other than those for which Plaintiff requested information. The documents produced in discovery also included approximately 13,000 pages of "spam" (unsolicited bulk email, junk mail, or unsolicited commercial email), that, despite being clearly irrelevant, our firm still had to review (particularly as there were substantive documents interspersed with the spam). Our review of the documents eliminated apparently irrelevant information and attempted to hone in on issues raised by TPMG's discovery responses. For example, we used the more than 300 documents marked as exhibits during Ms. Metzner's deposition as an initial guide to the relevant issues. The spreadsheet containing our analysis of the documents produced by TPMG is more than 700 pages long, and reflects, not only our review of the documents, but how those documents related to other documents and how they might be used in the future or what questions they raised for future discovery. Additional information regarding the process of reviewing and analyzing the documents produced can be found in the Smith Declaration ¶ 7-10.

- TPMG designated every single page of its initial more than 23,000 page document production, as well as the entirety of Ms. Metzner's two and a half day deposition, as confidential, requiring Ms. Metzner to engage in a meet and confer effort to force TPMG's counsel to designate information as confidential in a manner consistent with the law. Even after

this process, TPMG continued to over-designate documents as confidential. Because of TPMG's over-designation of documents as confidential even after the meet and confer process, our firm had to conditionally file certain documents under seal, even though TPMG ultimately took no action to maintain the confidentiality of the documents in question. Additional information regarding the additional work required by TPMG's conduct can be found in the Smith Declaration ¶ 11.

- Even though TPMG produced more than 23,000 pages of documents in response to Plaintiff's initial discovery requests, it produced very few emails written by Ms. Metzner or sent directly to Ms. Metzner by anyone other than supervisor Sandra Schmit. Plaintiff subsequently produced document requests explicitly seeking emails between Ms. Metzner and others. In response, TPMG produced more documents but none that responded to Plaintiff's very particular requests. TPMG claimed that the documents requested had not been produced because they did not exist. When Plaintiff requested that TPMG provide a code-compliant discovery response – i.e., stating that it was unable to respond to the request and providing an explanation for its inability to comply – TPMG refused to do so, claiming that Plaintiff's request was "make work." Subsequently, the evening after the first day of Ms. Schmit's deposition, TPMG produced an additional 23,000 pages of documents, including documents to and from Ms. Metzner that it had previously claimed did not exist. In addition to the time spent preparing additional discovery and meeting and conferring regarding TPMG's responses, the belated production of documents also required our firm to revisit preparation for both Ms. Steinback's deposition and the continuation of Ms. Schmit's deposition, as the documents illuminated some prior issues raised by TPMG, such as whether Ms. Metzner had taken action in response to a request by Ms. Schmit. A more complete description of this issue can be found in the Smith Declaration ¶ 12-13.

- Plaintiff attempted to coordinate with TPMG to arrange dates to depose six of TPMG's witnesses beginning on August 15, 2014. TPMG resisted those efforts, initially refusing to provide dates for *any* witnesses, insisting that Plaintiff did not need to take depositions prior to mediation of the matter. When Plaintiff insisted that she needed the depositions, both to prepare

for TPMG's summary judgment motion and because the parties seemed too far apart to make settlement likely, TPMG finally provided dates but only for two of the witnesses. TPMG did not propose dates for the remaining witnesses until the end of October. The parties exchanged 19 emails (including emails where TPMG ignored Plaintiff's inquiries about the depositions) until deposition dates for all the witnesses requested were finally provided. Our firm spent more than eight attorney hours simply trying to obtain proposed deposition dates for unquestionably relevant witnesses.

- Given the substantial number of documents, Plaintiff proposed to Defendant that the parties stipulate to the authenticity of documents produced in discovery, rather than requiring Plaintiff to serve requests for admission regarding the authenticity of the voluminous document production. TPMG initially agreed but subsequently reneged on that agreement, requiring more than 40 hours of attorney time identifying and preparing documents for authentication. Additional information regarding the additional work required by TPMG's conduct can be found in the Smith Declaration ¶ 14-16.

- In June 2015, TPMG began a meet and confer process related to discovery responses served by Plaintiff. Over four business days, TPMG sent six separate emails purporting to meet and confer regarding Ms. Metzner's discovery responses, some emails sent within minutes of each other, and demanding a response within two or three days. TPMG then refused to produce a witness for deposition – despite having agreed that counsel and the witness were available on that date – because Plaintiff had not responded to its numerous meet and confer demands within the time frames imposed, requiring Plaintiff to file a motion to compel that witness' presence at deposition. Only after our firm filed the motion to compel did counsel for TPMG finally agree to produce the witness.

- At TPMG's request, the Court compelled Ms. Metzner to review the more than 50,000 pages of documents produced by TPMG in discovery and to specifically identify by BATES number the documents produced by TPMG that responded to various of TPMG's defenses in this case. The resulting list of documents spanned more than 13 pages and took almost 30 hours to compile. Additional information regarding the work to respond to the Court's

order can be found in the Smith Declaration ¶ 20.

- As another indication of the factual complexity of this case, from May to July 2015, TPMG served more than 207 discovery requests – 122 special interrogatories, including subparts, 33 requests for admission (with accompanying responses to Employment Form Interrogatory No. 217.1) and 51 requests for production. In support of their request for discovery that well exceeded the statutory limits, counsel for TPMG Emilie Petirs affirmed that the number of requests were warranted "because of the complexity and the quantity of the existing and potential issues in this particular case." A description of the work entailed to respond to this discovery, as well as the voluminous discovery responses exchanged by the parties – another indication of the complexity of this matter – can be found in the Smith Declaration ¶ 17.

- On June 12, 2015, Ms. Carradero sent our firm a one-line email requesting that Ms. Metzner agree to stipulate to a defense medical examination. I responded that same day, seeking more information regarding the proposed exam – e.g., whether it was meant to be a physical or mental examination, the good cause for such an exam, the proposed examiner and his or her specialty, the proposed length of the examination, what tests, if any, TPMG intended to give to Ms. Metzner and who would administer the tests. Such information is required by Code of Civil Procedure section 2032.320. Ms. Carradero clarified that she was seeking a mental examination but declined to provide specific information regarding the proposed examination, the identity of the proposed examiner, and why there was good cause in this case for a mental examination. When I refused, absent the requested information, to either stipulate to an examination or limit Ms. Metzner's emotional distress claims, TPMG involved the Court, seeking an informal resolution. Ultimately, this "meet and confer" process regarding a mental examination evolved into a request that the Court order (1) a mental examination, (2) the deposition of Ms. Metzner's primary physician and her sister, and (3) the disclosure of unredacted medical records. TPMG's approach resulted in the exchange of more than 30 emails between the parties' counsel and the Court, nine filings with the Court by the parties, and two court orders.

- When TPMG sought unredacted access to Ms. Metzner's medical records, the

Court ultimately granted the request in very limited fashion, i.e., information regarding blood pressure, pulse or other coronary issues (related to Ms. Metzner discussing with her primary physician borderline tachycardia, possibly related to stress experienced at work). Further, the Court ordered that Ms. Metzner must provide the limited information *unless* she agreed not to mention the tachycardia at trial. Ms. Metzner subsequently notified the Court that she that she would not mention tachycardia. Nonetheless, TPMG served a subpoena for the deposition of Ms. Metzner's primary physician, continuing to seek the same medical records to which it had been refused access by the Court. It continued to seek these records even after Ms. Metzner had agreed to the Court's limitation on testimony related to the tachycardia. TPMG also sought the depositions of three additional medical providers and medical records related to consultation Ms. Metzner may have received regarding knee, hip, or back surgery. This request was based on TPMG's speculative theory that Ms. Metzner and her supervisor may have discussed a surgery other than spinal fusion prior to Ms. Schmit suggesting that Ms. Metzner be placed on a performance improvement plan. In other words, that if Ms. Metzner and Ms. Schmit had discussed a different surgery that would require a shorter leave, Ms. Schmit would not have had a motive to retaliate against Ms. Metzner. Both Ms. Metzner and Ms. Schmit, however, had testified that the surgery they discussed was the back surgery. Nonetheless, TPMG persisted in pursuing Ms. Metzner's medical information and refused to explain why the issue was in dispute given Ms. Metzner's and Ms. Schmit's testimony. Ultimately, the parties spent an inordinate amount of time exchanging emails on these matters, and our firm began drafting a motion to quash the subpoenas before the matter was resolved. TPMG had also served written discovery seeking information regarding consultation Ms. Metzner had received for knee, hip, or back surgery, Ms. Metzner was required to respond to TPMG's discovery, as well as meet and confer regarding the fact that TPMG was not entitled to Ms. Metzner's unrelated medical information.

11. Our firm had no incentive to work more hours than were necessary while prosecuting Ms. Metzner's case. As discussed further below, we represented Ms. Metzner on a contingency fee basis, meaning that we received no compensation throughout the almost three years this case has been pending. Time spent pursuing this case was time we could not devote to

other matters. It would make little financial sense to spend unnecessary time pursuing a case with the goal of inflating an uncertain fee. This is in direct contrast with defense counsel, who get paid for every minute they spend working on a case, regardless of the outcome.

12. The parties unsuccessfully attempted to mediate this matter. The parties first mediated the matter with a private mediator, Cynthia Remmers. The parties then appeared twice for a settlement conference with Judge Grillo. Neither settlement effort was successful. On March 18, 2015, TPMG made a Code of Civil Procedure section 998 offer to compromise for $175,000, inclusive of fees and costs. At that stage of the litigation, the attorneys' fees alone were nearly $400,000.

Exercise of Billing Judgment

13. Our firm currently uses the Clio case management system to maintain calendars and to record case-related time. During this litigation, I switched from using the Houdini timekeeping program to using Clio. I subsequently entered the time records originally maintained on the first program, Houdini, into the second program, Clio.

14. I have reviewed the record of my time as reflected in the consolidated time records attached as Exhibit A to the Declaration of Katherine L. Smith and attest that they include a true and correct accounting of the time I spent working on this case.

15. The time records found at Exhibit A of the Smith Declaration include all time spent working on this matter.

16. As the principal attorney in charge of pre-trial work in this matter, I have reviewed the time records of Levy Vinick Burrell Hyams LLP and have determined, in the exercise of billing judgment, to subtract or reduce all recorded attorney time that arguably could be construed to be clerical, non-legal, or duplicative, as well as to make other deductions from our time, as described below. This has resulted in a reduction of the fee lodestar by $75,454, amounting to approximately 5 percent of the attorneys' fees earned by our office.

17. Although Katherine Smith has been a licensed attorney since January 2014 and performed that function throughout the litigation of this matter, I have reduced Ms. Smith's hourly rate of $250 to $150 (our firm's hourly rate for legal assistants) for all time she performed

work on this case that was arguably not attorney-level work. For example, for work performed in the courtroom during trial, Ms. Smith is being billed as an attorney only for the work she performed as an attorney – e.g., presenting and defending witnesses, and arguing motions. Other work performed, such as tracking exhibits and operating audio/visual equipment, is being billed at the legal assistant rate of $150 per hour. We are also billing Ms. Smith at a law clerk rate ($175 per hour) for work she performed prior to January 2014, when she became a licensed attorney, even though she could be charged at the law fellow rate of $200.

18. Ms. Smith and I both attended all depositions. With respect to the principal witnesses – Sandra Schmit and Ms. Metzner – we are billing for both attorneys (TPMG had two attorneys, Brian Johnsrud and Emilie Smith Petirs at Ms. Metzner's two and a half day deposition). With respect to the remaining depositions, we are billing only for the attorney who took the deposition.

19. During the trial, our law fellow, Palmer Buchholz became a licensed attorney and the lodestar figure reflects her current hourly rate of $200. We have reduced her rate for work she performed during the trial to $150, our legal assistant rate, as her work could be appropriately characterized as legal assistant-level work.

20. Throughout the trial, as lead counsel, I reviewed work performed by Ms. Smith. Ms. Smith also frequently proofread briefs that I wrote. We are not charging for this time.

21. Both Ms. Smith and I were copied on emails to and from opposing counsel in this matter, and it was necessary for both us to be apprised about matters in the case. We have, however, not charged for duplicative time reviewing non-substantive matters.

22. Ms. Smith and I both attended nearly all hearings and case management conferences in this matter. We are not charging for more than one attorneys' presence at these hearings unless the appearance of multiple attorneys was necessary. So, for example, we are charging for the presence of only one attorney at all case management conferences and all hearings, with the exception of any hearings directly related to trial, such as the trial readiness conference and the hearing to argue motions in limine. Although Ms. Smith, Ms. Levy, and I all attended the trial readiness conference, we had divided amongst us responsibility for matters we

anticipated being addressed during that conference. We also divided argument of motions in limine. All three attorneys attended the mandatory settlement conference, but we are not charging for Ms. Schmit's time, as her presence was not strictly necessary. Ms. Levy's presence was necessary (and required by local rules) as lead trial counsel, as was my presence as lead counsel throughout the litigation prior to trial.

23. I provided Ms. Smith with a list of those hours from the billing records that were to be reduced or eliminated. I have reviewed the table of reduced hours attached to the Declaration of Katherine L. Smith and attest that they include a true and correct accounting of the hours I determined should be reduced or eliminated.

Plaintiff's Counsel's Experience and Expertise

24. I have attached my Curriculum Vitae as Exhibit A to this declaration.

25. I am a partner at Levy Vinick Burrell Hyams LLP. My practice focuses almost exclusively on representation of employees in cases of discrimination, harassment, retaliation, wrongful termination and other employment disputes.

26. In 1991, I graduated from the University of California, San Diego. After taking a year off, I attended the University of California, Los Angeles School of Law from where I graduated in 1995. I took and passed the bar that same year.

27. Following my graduation from law school, I spent one year as the Ruth Chance Law Fellow at Equal Rights Advocates ("ERA"), a national women's employment and education law center. In that job I staffed and supervised the organization's Advice and Counseling Hotline, providing employment law advice to hundreds of women and men, litigated individual and impact litigation in the areas of gender discrimination and harassment, and conducted sexual harassment trainings for employees and students across the state.

28. After I completed my fellowship at ERA, I served as Western Regional Counsel for the NAACP Legal Defense and Education Fund from 1996 through 1998. In that job, I litigated employment and other civil rights "impact" class action lawsuits. I then worked for the U.S. Department of Education, Office for Civil Rights as a Civil Rights Attorney from 1998 through 2000. As a Civil Rights Attorney, I enforced federal laws against discrimination in

education on the basis of race, ethnicity, age, gender, and disability, including complaint investigation, conciliation and monitoring.

29. In 2000, I transitioned to private practice and began working as an associate at the employment class action firm Goldstein, Demchak, Baller, Borgen & Dardarian ("GDBBD"), where I remained until 2004. At GDBBD, I litigated nationwide employment discrimination and wage and hour class action cases. In 2004, I left GDBBD to work at Boxer & Gerson, LLP, as part of its employment discrimination practice, where I litigated cases involving individual employment discrimination, retaliation, harassment, wrongful termination and other employment disputes.

30. I worked for Boxer & Gerson, LLP until the end of 2009, after which time, I founded, along with four other seasoned employment attorneys, Dickson Levy Vinick Burrell Hyams LLP. In February 2012, Dickson Levy Vinick Burrell Hyams LLP became Levy Vinick Burrell Hyams LLP.

31. I have published two articles on issues related to the civil rights of women, one of which was later republished in a legal treatise. I have served as a Chapter Editor for the American Bar Association's Section of Labor and Employment Law's treatise on Employment Discrimination Law. I have conducted many workshops and seminars on employment law throughout the country, including but not limited to:

"The Real Nitty-Gritty: Workers' Compensation for Employment Lawyers," California Employment Lawyers' Association Annual Conference, 2005

"Sex Based Harassment: Workplace Policies for the Legal Professional," American Bar Association Annual Meeting, 2007

"Emerging Issues in Employment," Continuing Education of the Bar, 2008

"Litigating a Sexual Harassment Claim: Pre-Trial Strategies," National Bar Association Labor and Employment CLE Conference, 2008

"The Impact of the 2008 Amendments to the Family Medical Leave Act on Employees," National Bar Association Labor and Employment CLE Conference, 2009

"Annual Employment Law Update," California Employment Lawyers' Association

Annual Conference, 2009

"The 2008 Amendments to the Americans with Disabilities Act," American Bar Association 4th Annual Section of Labor and Employment Law Conference, 2010

"Use of Juror Questionnaires in Discovering Juror Bias in Race Discrimination Cases," American Bar Association, Section of Labor and Employment Law, National Conference on Equal Employment Opportunity Law, 2012

"Employment Retaliation: An Ever Present Danger," American Bar Association, Section of Labor and Employment Law, ABA Annual Meeting, 2013

"Third Party Retaliation Claims After *Thompson v. North American Stainless*," National Employment Lawyers' Association 2014 Annual Convention, 2014.

"Legal and Practical Considerations in Representing Plaintiffs in Sexual Harassment Claims Against CEOs and Other Senior Executives," American Bar Association, Section of Labor and Employment Law, National Conference on Equal Employment Opportunity Law, 2015.

32. Some significant cases I have litigated include: *Charles v. State of California* (a lawsuit in Alameda County Superior Court alleging sexual harassment and retaliation based on co-worker harassment, resulting in a $345,300 verdict), *Pollard v. City of Emeryville* (a lawsuit in Alameda County Superior Court for retaliation and wrongful termination following a complaint of race discrimination that resulted in a settlement valued at $3,600,000); *Hill v. San Francisco Bay Area Rapid Transit District* (a lawsuit filed in Alameda County Superior Court, a case in which the plaintiff alleged racial harassment and retaliation and which resulted in a $1,271,500 jury verdict); *Chavez v. Cal-Pac Sonoma, LLC et. al* (a lawsuit in Sonoma County Superior Court for sexual harassment and retaliation that resulted in a $300,000 Section 998 offer to compromise, plus fees and costs); *Lacy T., et. al v. The Oakland Raiders* (a wage and hour class action in Alameda County Superior Court on behalf of a class of 80 part-time professional cheerleaders that resulted in a $1,250,000 settlement); and *Vasquez et. al v. The Brass Rail* (a wage and hour class action in Santa Clara County Superior Court on behalf of exotic dancers that resulted in a $2,000,000 settlement). The *Pollard* case successfully presented a somewhat

untested theory of aiding and abetting a FEHA violation by a psychiatrist who provided a fitness for duty evaluation to the City.

Plaintiff's Counsel's Reasonable Hourly Rates

33. The vast majority of our firm's cases are contingent cases and, in cases involving a statutory right to attorneys' fees, our attorneys' fees claims are almost always resolved by settlement. My partners and I have also received fee awards in a number of cases. Fees have been awarded for the following attorneys as part of these fee awards:

Leslie F. Levy, Bar No. 104634, admitted to practice in California in 1982;

Jean K. Hyams, Bar No. 144425, admitted to practice in California in 1989;

Darci E. Burrell, Bar No. 180467, admitted to practice in California in 1995.

34. Although Sharon Vinick, who was admitted to practice in 1987, has not had her hourly rate approved by a court or arbitrator, she and Ms. Hyams have similar years of experience and charge the same hourly rate. Information regarding approval of Ms. Hyams' hourly rate is included as it is relevant to Ms. Vinick's hourly rate.

35. In 2006, the attorneys in my firm (while employed for Boxer & Gerson LLP) received an award attorneys' fees following a favorable jury verdict in *Charles v. State of California* (Alameda County), a sexual and racial harassment and retaliation case I tried with my now law partner, Jean Hyams. Judge Bonnie Sabraw granted me an hourly rate of $350.00 and Ms. Hyams an hourly rate of $425.00. Judge Sabraw also awarded a 1.25 multiplier.

36. In 2008, Judge Gordon Baranco awarded fees based on the successful trial of *Hill v. San Francisco Bay Area Rapid Transit*, (Alameda County), a racial harassment and retaliation case. Ms. Hyams and I tried this case just weeks after joining the case as counsel, and Ms. Levy worked on the fee petition. Judge Baranco approved my hourly rate of $400.00, Ms. Hyams' rate of $465.00, and Ms. Levy's rate of 500.00. Judge Baranco also awarded a 1.2 multiplier for trial work.

37. In 2008, Marin County Superior Court Judge Lynn Taylor approved an hourly rate of $500.00 for Ms. Levy, $465.00 for Ms. Hyams, and $350 for me after trial of *A.M. v. Albertsons*.

38. In 2010, the San Diego Superior Court awarded Ms. Levy an hourly rate of $550.00 based on the successful trial of *Sulpizio v. San Diego Mesa College*.

39. In 2011, Ms. Hyams' hourly rate of $500 was approved following a successful arbitration before Michael Loeb in *Arias v. Antioch Toyota*.

40. Based on 20 years in practice, including over 16 years devoted almost exclusively to practicing employment law in the Bay Area, my frequent contact with colleagues in the employment bar, and my work with the various entities and associations listed above, I am familiar with the nature and availability of attorneys who litigate employment discrimination cases in the Bay Area, with the standard of practice among such attorneys, and with the rates charged by such attorneys.

41. My current hourly rate, and in my opinion my market rate, is $575.00.

42. In this case, according to a declaration filed in support of a request for sanctions by TPMG in connection with a motion to compel further discovery, TPMG's lead counsel, Victoria Carradero's hourly rate is $425.00. Upon information and belief and based on information from the California State Bar's website, Ms. Carradero, whose firm is located in Menlo Park, has been in practice for approximately 14 years. Thus, my hourly rate (approximately $28 per hour for each year in practice) is consistent with Ms. Carradero's rate (approximately $30 per hour for each year in practice).

Contingency Representation and the Risks Faced by Plaintiff's Counsel

43. Our firm began representing Ms. Metzner with regard to her civil claim in February 2013. During the pendency of this litigation, we have represented Ms. Metzner on a contingency basis. The crux of Ms. Metzner's claims was that she was illegally terminated from employment. As a consequence, like most plaintiffs in similar cases, she was unable to pay our regular hourly rate. As part of our representation, my firm also agreed to advance all litigation costs, which have amounted to more than $100,000. Our firm has not received any compensation for any of the time spent on this matter. Since its beginning, the prosecution of this case entailed significant risk for our firm, which undertook the matter solely on a contingent

basis with no guarantee of recovery or any assurance that our firm would be paid for the time spent litigating Ms. Metzner's claims.

44. This case presented significant challenges that increased our firm's risk in representing Ms. Metzner on a contingency basis. The most significant challenge we faced was the fact that while TPMG had nine witnesses – including six doctors – who were willing to testify that Ms. Metzner had not adequately performed her job, we had only Ms. Metzner's testimony. TPMG was prepared to present even more witnesses to provide negative testimony about Ms. Metzner but had to curtail its witness list to get the case to the jury in time. Although Plaintiff had documents and testimony from TPMG's witnesses supporting her position, there was a significant risk that a jury would find the mere number of witnesses testifying on TPMG's behalf persuasive.

45. Another challenge was the fact that there was a dearth of contemporaneous documentation regarding Ms. Metzner's alleged employment deficiencies. In most employment cases, one can anticipate that there will be documents that explicitly articulate what the employer alleges the plaintiff did or failed to do that lead to his or her termination. In this case, however, there were very few of such documents and the ones that did exist were vague and lacking in detail. While this, at first blush, would seem beneficial to Plaintiff, it made it difficult to determine how to respond to allegations that Ms. Metzner had not adequately performed her job. It also made it very difficult to depose witnesses, as depositions largely had to be used to get TPMG's witnesses to articulate their complaints about Ms. Metzner, rather than thoroughly exploring complaints that had already been articulated. This was compounded by the more than 50,000 pages of documents produced by TPMG in discovery. It was literally impossible to effectively depose witnesses on so many documents, particularly given the vague nature of the complaints against Ms. Metzner. The lack of documentation also left TPMG witnesses free to say whatever they wanted about Ms. Metzner's deficiencies. To counter this, we had to become intimately familiar with the voluminous document production because it often required analysis of several emails, sometimes spanning several months, to understand what the documents

demonstrated regarding particular issues. There was a significant risk that we would miss something or that TPMG would come up with something that we had not been able to anticipate.

46. Another challenge was that, in discovery, TPMG identified hundreds of documents it claimed evidenced Ms. Metzner's performance deficiencies. Many of these documents, upon examination, particularly in relation to other documents, did not evidence any deficiency but others required Plaintiff to be prepared to offer an explanation. Based on my many years as an employment attorney, I am aware that the more a party has to explain to the jury, the more difficult success can be. This was a particularly challenging fact given TPMG's approach to the litigation – i.e., present numerous witnesses to provide negative testimony and characterize hundreds of documents as evidence of Ms. Metzner's deficiencies. A less careful jury may very well have been swayed by the easy story TPMG's defense offered, rather than being willing to delve into the details. Ms. Metzner would not have prevailed absent the jury's willingness to delve into the details.

47. Another challenge was the lack of direct evidence of retaliatory animus. Although there was evidence that Ms. Schmit was unhappy with the fact that she would have to cover for Ms. Metzner's leave, there were no statements criticizing Ms. Metzner for taking leave or expressing unhappiness with her for taking leave. Rather, the evidence of retaliatory animus was circumstantial. There was a significant risk that, even if the jury concluded that TPMG did the wrong thing, it might not find that it did so for retaliatory reasons.

48. Yet another challenge was the amount of time that passed between when Ms. Metzner disclosed her need for surgery to Sandra Schmit and when Ms. Metzner was terminated. Although Plaintiff was able to explain the amount of time that had passed, there was still a significant risk that a jury would believe that too much time had passed between the June 2011 disclosure and the termination.

49. Another challenge was that Ms. Schmit had generated a significant amount of documentation during the end of the performance improvement plan ("PIP") period that appeared to demonstrate that Ms. Metzner had not adequately performed her job. Given the circumstances of the poor evaluation and the PIP, we believed that this documentation would not

prevent a finding of retaliation, but there was still a significant risk that a jury would be persuaded by the documentation Ms. Schmit managed to gather in 2012, and there was no way that Plaintiff could effectively respond to all of the allegations made.

50. Despite the risk that Ms. Metzner would not prevail and despite the likely large costs we would need to advance to prosecute the case, our firm agreed to represent Ms. Metzner on a pure contingency basis, with no guarantee of payment for our services unless we obtained a settlement or judgment for Ms. Metzner. The fact that the FEHA claims carried statutory fee-shifting provisions was a significant consideration in our firm's decision to take on this matter. In addition, it was our expectation, given the difficulty of the case, as well as the risk our firm took in bringing the case, that our compensation would be enhanced through a multiplier if we achieved a successful result on behalf of Ms. Metzner.

51. Representing Ms. Metzner meant not only devoting thousands of hours to the case, it also required our firm to limit its docket of cases so that we would have available the time we anticipated would be spent on litigating the matter. Up to the date of the pre-trial conference, our firm spent over 1800 hours working on this case, the equivalent of an attorney billing 40 hours a week for nearly a year. From the trial readiness conference until the jury issued its verdict, this case almost exclusively occupied two of our firm's partners and one of our associates, as well as requiring contributions by two other members of our attorney staff. Given the size of our firm – four partners, an associate, and a fellow – the time working on this case constituted a significant portion of the firm's billable time. Over the course of our involvement with this case, our firm has had to limit the number and type of new matters we could take so that we could ensure that we would have sufficient resources.

Attorney Skill Required to Deal with Complex Factual and Legal Issues

52. While employment discrimination cases generally tend to be complex and difficult, this case presented particular difficulties that required experience and skill to address. The lack of contemporaneous documentation specifically identifying Ms. Metzner's alleged performance deficiencies made it extremely difficult to determine how best to respond to the generally vague allegations of Ms. Metzner's poor performance. While, in response to

discovery, TPMG identified documents that it claimed evidenced Ms. Metzner's performance deficiencies, the majority of those documents did not, on their face, evidence an actual deficiency. For example, TPMG might designate an email from Ms. Schmit to Ms. Metzner asking her to provide information as evidence that Ms. Metzner failed to perform her job satisfactorily. On its face, however, the document merely indicates that Ms. Schmit asked Ms. Metzner to do something. Without further context, it was difficult to determine what, exactly, Ms. Metzner had allegedly done wrong. Deposition of Ms. Metzner's manager was not particularly illuminating in this regard, as Ms. Schmit often did not recall details, even when presented with a document that should have refreshed her recollection. Our firm was required, therefore, to develop a strategy within this unique context that encompassed how to formulate a response to TPMG's articulated justification, how to take depositions in the matter, what additional written discovery needed to be taken, and how to analyze the thousands of pages of documents produced by TPMG in discovery. Absent counsel's ability to rethink a typical approach to litigation and to develop a strategy for this particular case, responding to TPMG's allegations would have been impossible.

53. It took particular skill and expertise to strategically respond to a case in which, while the defendant had many witnesses willing to support its position, the plaintiff had only one. This required strategizing how to use *TPMG's* witnesses to establish Ms. Metzner's case and how to counteract a substantial amount of negative testimony.

54. It took particular skill and expertise to manage the vast amount of information produced by TPMG in this case. As TPMG repeatedly acknowledged, much of the information produced was not relevant, but our firm still had to find a way to review, analyze, and track the more than 50,000 pages of documents produced in discovery. This included keeping track of how particular documents related to other documents, something crucial to responding to TPMG's claim that Ms. Metzner had not adequately performed her job.

55. It also took particular skill and expertise to successfully litigate this matter in the face of TPMG's aggressive litigation style, including but not limited to, determining which

battles needed to be fought and knowing how to respond to TPMG's litigation tactics, while at the same time preparing Ms. Metzner's case for trial.

The foregoing is true and correct based on my personal knowledge. This declaration is made under penalty of perjury under the laws of the State of California and was executed on January 25, 2016.

_____

DARCI E. BURRELL

LESLIE F. LEVY, ESQ., State Bar No. 104634
DARCI E. BURRELL, ESQ., State Bar No. 180467
KATHERINE L. SMITH, ESQ., State Bar No. 295726
LEVY VINICK BURRELL HYAMS LLP
180 Grand Avenue, Suite 1300
Oakland, CA 94612
Tel.: (510) 318-7700
Fax: (510) 318-7701
E-Mail: leslie@levyvinick.com
darci@levyvinick.com
katherine@levyvinick.com

Attorneys for Plaintiff Patricia Metzner

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

UNLIMITED JURISDICTION

PATRICIA METZNER, Plaintiff, v. THE PERMANENTE MEDICAL GROUP and DOES 1-10, inclusive, Defendants.	Case No. RG 13702356 **RESERVATION NO.: R-1700598** ASSIGNED FOR ALL PURPOSES TO JUDGE STEPHEN KAUS **PLAINTIFF PATRICIA METZNER'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR STATUTORY ATTORNEYS' FEES** Date: March 15, 2016 Time: 2:00 p.m. Dept.: 23 Complaint Filed: November 7, 2013 Trial Date: October 9, 2015 Judgment Date: November 24, 2015

I. INTRODUCTION

The basic, underlying purpose of the Fair Employment and Housing Act ("FEHA") is to safeguard the rights of Californians to hold employment without being subjected to discrimination or retaliation. *Flannery v. Prentice*, 26 Cal. 4th 575, 582-83 (2001). That purpose can only be fulfilled if plaintiff-side employment attorneys can rely on the expectation that, if successful, they will be fully and fairly compensated for their efforts, no matter how large the resulting fee. As the prevailing party, Plaintiff Patricia Metzner is entitled to every minute of time spent litigating this hard-fought, highly contentious case. Metzner's counsel are highly-skilled practitioners, who are well-regarded in the community and therefore entitled to premium rates. Further, TPMG's complaints about the hours billed by Metzner are without merit. This Court should therefore award Metzner the fees she seeks.[1]

II. ARGUMENT

A. The Hourly Rates Requested by Metzner Are Reasonable.

In challenging the rates requested by Metzner's counsel, TPMG relies heavily on the declaration of James P. Schratz and his criticisms of the rates requested by Metzner's counsel. This is not the first time that Metzner's counsel has encountered Schratz. In 2006, Schratz made many of the same arguments in opposition to the plaintiff's fee request that he makes here.[2] In that case, *Charles v. State of California, et al.*, No. RG03112609, Judge Bonnie Sabraw wholly disregarded Schratz's criticisms and awarded the plaintiff the rates and hours requested, as well as a 1.25 multiplier.[3] The Court should similarly disregard Schratz in the present case.

1. Metzner Has Submitted Sufficient Evidence of the Applicable Market Rate.

In support of her fee request Metzner has submitted declarations by each of the counsel

[1] TPMG efforts to convince the Court that Metzner's counsel was the "bad guy" in this litigation are, in the words of Shakespeare, "a tale . . . full of sound and fury. Signifying nothing." Metzner, therefore, is not going to respond to these accusations, other than to categorically deny them.

[2] *See* Exhibit A to the Supplemental Declaration of Darci E. Burrell in Support of Plaintiff's Motion for Statutory Attorneys' Fees ("Burrell Sup. Decl.").

[3] A copy of Judge Sabraw's June 13, 2006 Order Awarding Attorneys' Fees is attached as *Burrell Sup. Decl. Exh. B*.

requesting fees,[4] a declaration from Richard Pearl, and declarations from Deborah Kochan, Kyra Subbotin, and Phil Horowitz. With this Reply, Metzner also submits the declaration of John O'Connor, a long-term litigator and fee expert, who provides additional information regarding appropriate market rates and the rates requested by Metzner's counsel.[5]

Pearl's declaration provides information regarding the range of hourly rates charged by attorneys in the Bay Area. *See Lota v. Home Depot U.S.A., Inc.*, No. 11-cv-05777, 2013 WL 6870006 *16 (N.D. Cal. Dec. 31, 2013). Kochan's declaration describes her experience as a plaintiff-side employment attorney, sets forth her hourly rate and indicates that, based on her familiarity with the rates charged by attorneys in the San Francisco Bay Area, her hourly rate of $625 is commensurate with the prevailing market rate. Horowitz sets forth his extensive experience as a plaintiff-side employment lawyer and his familiarity with hourly rates charged by lawyers of similar experience and qualifications to Metzner's counsel. Subbotin's declaration sets forth, among other things, her personal knowledge of the reputation of Metzner's counsel. All of this information supports the hourly rates requested by Metzner.

Court decisions from the applicable geographic area awarding fees can also be instructive in determining the appropriate hourly rate. In 2010, in *Campbell v. National Passenger R.R. Corp.*, 718 F. Supp. 2d 1093 (N.D. Cal. 2010), the Northern District Court concluded that a reasonable hourly rate for an experienced and well-respected civil rights and employment discrimination attorney with almost 30 years of experience was $700 per hour. *Id.* at 1099 - 1100.[6] In 2012, the Northern District awarded the same attorney $750 per hour. *Davis v. Prison Health Services*, No. C 09-2629 SI, 2012 WL 4462520, *9 (N.D. Cal. Sept. 25, 2012). In *Lota v. Home Depot U.S.A., Inc.*, the Northern District concluded that, in 2013, the range of market rates for an employment attorney with more than 30 years of experience was $675-750 on the higher

[4] Schratz complains that Metzner did not submit a declaration for Palmer Buchholtz, whose work was primarily billed at a legal assistant level rate that TPMG does not dispute. Metzner, however, files herewith a declaration from Buchholtz as to her legal qualifications.
[5] O'Connor, who is familiar with Schratz's work, also responds to the declaration of Schratz.
[6] The court also set the rate for an attorney with four years of experience at $265 per hour, and an attorney with thee years of experience at $245 per hour. *Id.* at 1100-1101.

end and $525 on the lower end. *Lota*, 2013 WL 6870006, *17.[7] That same year, the Northern District opined that a reasonable rate for an employment attorney with over 30 years of experience was $625 per hour. *Kranson v. Federal Express Corporation*, No. 11-cv-05826-YGR, 2013 WL 6503308, * 9 (Dec. 11, 2013). The same court set the rate for an attorney with 10 years of experience at $425 per hour, specifically noting that the $350 requested by the defendant was too low, given that another court had awarded an attorney with seven years of experience that same amount in 2011. *Id.* at *10.

As set forth in the declarations filed with Metzner's opening brief and the Supplemental Declaration of Darci Burrell, Metzner's counsel have years of experience specializing in plaintiff's employment and civil rights litigation. All of Metzner's senior counsel have been recognized as Super Lawyers,[8] and Levy and Vinick have repeatedly been distinguished as one of the top 50 women attorneys in California. In 2014 and 2015, Metzner's counsel were recognized by the U.S. News & World Report as one of the best law firms in the country.[9] Additionally, in 2014, Metzner's counsel was recognized by Super Lawyers as one of the top law firms in California.[10] Metzner's counsel, particularly Burrell, are regularly asked to speak across the country on employment issues. Thus, the evidence submitted by Metzner's counsel establishes that the requested rates are consistent with the applicable market.

Of note, on March 3, 2015, Judge Wynne Carvill signed an order and judgment for final approval of the settlement in *Lacy T., et al v. The Oakland Raiders*, RG1410815.[11] In approving the settlement, Judge Carvill also approved an award of fees for Metzner's counsel.[12] Plaintiff's request for fees was based on a common fund theory, but in establishing the reasonableness of the amount of requested, Metzner's counsel provided Judge Carvill with the same information

[7] In concluding that the attorney in question's rate should be $575 per hour, the court specifically considered the rate of Jean Hyams, whose rate at that time was $600 per hour.
[8] *See also* Burrell Supl. Decl. ¶ 3.
[9] *Id.*
[10] *Id.*
[11] *Id.* at ¶ 4.
[12] *Id.*

provided to the Court in this case related to hourly rates, skill, experience, and reputation of Metzner's counsel.[13] As noted, Judge Carvill granted the request.[14]

2. The Rates Suggested by TPMG Do not Comply with Applicable Law.

TPMG argues that Metzner's counsel should be awarded significantly lower rates that those requested but suggests rates that bear no relation to the appropriate market rate. Schratz suggests that the rates for Metzner's attorneys must be limited to the rate they actually charge or the rate previously awarded to them by courts. This approach, however, ignores the fact that the rate charged by plaintiff's attorneys is not the "market" rate. *See Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210-11 (9th Cir. 1986), *as amended*, 808 F.2d 1373 (9th Cir. 1987) ("[d]etermination of a reasonable hourly rate is not made by reference to rates actually charged the prevailing party," but rather, "by the rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation).

Schratz's reliance on prior court rates also ignores the necessity of raising rates over time. In *Lota*, for example, the court took a previous award and added $25 for each subsequent year, concluding that an increase to hourly rates of $25 per year was reasonable. *Lota*, 2013 WL 6870006, *17.[15] Similarly, in *Kranson*, the court adjusted a prior rate award at the rate of 3.2 percent per. *Kranson*, 2013 WL 6503308, *9.

Thus, even if the Court were to accept Schratz's approach, the adjustment of the rate for the passage of time would result in rates very similar to those requested. For

[13] *Id.* at ¶ 4

[14] The order is currently on appeal but not related to the amount of fees awarded. *Id.* On a related note, in its opposition papers, TPMG claims that one of the significant cases litigated by Metzner's counsel was reversed on appeal. In reality, the case was remanded for retrial with respect to one cause of action and had no bearing on the fee award to Metzner's counsel. Ultimately, the plaintiff still received in excess of $600,000, with no economic damages. *Id.* at ¶ 5.

[15] The court's selection of the $25 a year increase was based on Jean Hyams' statement that Metzner's counsel increase their rates by approximately $25 each year. *Id.*

example, Levy was awarded $550 an hour in 2010. If that rate was increased by $25 per year, Levy's rate would be $675 today. Similarly, Burrell's hourly rate of $400 was approved in 2008. If that rate was increased by $25 for each year between 2008 and 2015, her rate would be $575 today. Counsel's rates, therefore, are not only consistent with the rate for experienced employment and civil rights litigators, they are consistent with Schratz's approach, once appropriately adjusted for time.

Schratz also argues Metzner's counsel should be awarded a lower rate because they are a small firm. Schratz, however, cites no state law authority for this proposition, and courts in the Northern District have repeatedly rejected this argument. As recently stated in *Kalani v. Starbucks Corp.*, No. 13-CV-00734-LHK, 2016 WL 379623 (N.D. Cal. Feb. 1, 2016), "Schratz cites no Ninth Circuit authority holding that attorneys who practice at small law firms should be forced to recover fees at a lower hourly rate than those at large law firms, regardless of the prevailing market rates for a particular type of work. Like other district courts that have rejected this contention, the Court is not persuaded that prevailing clients of civil rights attorneys practicing at smaller firms should be penalized in the manner Schratz suggests." *Id.* at *6; *see also Cruz v. Starbucks Corp.*, No. C-10-01868 JCS, 2013 WL 2447862, *5 n.8 (N.D. Cal. June 5, 2013); *Bobol v. HP Pavilion Management*, No. C 04 00082 JW (RS), 2006 WL 927332, *2 (N.D. Cal. Apr. 10, 2006); *Lopez v. San Francisco Unified School Dist.*, 385 F. Supp. 2d 981, 991 (2005).[16]

Lastly, the rates that Schratz suggests are not related to counsel's skills, qualifications and reputation. In fact, Schratz does not actually explain the specific basis for the rates he recommends. The rate suggested by Schratz for Levy appears to be based on the rate awarded to

[16] Schratz cites *Common Cause v. Jones*, 235 F. Supp. 2d 1076 (C.D. Cal. 2002), contending that the court in that case compared firms of similar size and reputation in setting plaintiff's rates. To the contrary, the court makes no reference to firm size in its analysis. The closest the court comes to even touching on this subject is repeating the defendant's suggestion that the plaintiff's counsel could not compare its rates to those of the "largest and most prestigious firms in Los Angeles," a suggestion the court went on to reject. *Id.* at 1081.

her by a court in 2010, a rate that does not provide fair compensation today. Schratz's recommendations for Burrell and Vinick are entirely unrelated to their skill or reputation. In fact, the rate suggested for Burrell is explicitly tied to the rate charged by TPMG's counsel, Victoria Carradero, with Vinick presumably set at a slightly higher rate because she is senior to Burrell. Tying Burrell's rate to Carradero's rate, however, completely ignores the disparity between their qualifications and reputation. Burrell has a number of years more experience than Carradero, and TPMG has provided nothing to show that Carradero can claim any of the accomplishments claimed by Burrell. Schratz accepts that the $150 rate charged by Metzner's counsel for legal assistant level services but argues, without support, that Smith's admission to the bar justifies only a 33 percent increase in her billing rate.[17] The Court should disregard these suggestions.

B. The Hourly Reductions Requested by TPMG Are Unreasonable, Inaccurate and Inconsistent with the Applicable Law.

TPMG also requests that the hours requested by Metzner be reduced for various reasons. Metzner responds to the specific allegations below, but as an initial matter, Metzner notes that the requested amount of deductions appears to double and possibly triple count the reductions sought. Schratz does not account for the more than $75,000 Metzner's counsel have already deducted in the exercise of billing judgment. Schratz makes his deductions from the $1,433,626 lodestar requested, without acknowledging that this already reflects billing judgment of five percent. Second, Schratz never explains how he calculated the amount of the requested deduction. It is not clear, therefore, whether his requested deductions account for the fact that some of the entries he identifies have already been no-charged. TPMG's requested deductions should be refused for this reason alone.

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[17] All of Buchholz's time through trial was intended to be charged at a rate of $150 per hour. This error, however, is more than covered by the $75,000 Metzner had already deducted as billing judgment.

1. TPMG's Requested Deductions for So-Called Duplicate Billing Are Unreasonable.

TPMG identifies as "duplicate" billing, not only those instances where more than one attorney made an appearance at a hearing or deposition but also any instance where an attorney had a meeting that included another attorney or reviewed the same document or each other's documents. "Participation of more than one attorney does not necessarily amount to unnecessary duplication of effort." *Democratic Party of Washington State v. Reed*, 388 F.3d 1281, 1286-87 (9th Cir. 2004). Metzner has already exercised billing judgment to deduct duplicate appearances by counsel in some instances and explained why it was necessary in others. Given Schratz's broad definition of "duplicate billing," co-counsel would never be permitted to confer with each other or keep abreast of what co-counsel were doing. This is neither reasonable nor required.[18]

2. Metzner's Lodestar Cannot Be Reduced for Unsuccessful Claims.

"Attorneys' fees need not be apportioned between distinct causes of action where plaintiff's various claims involve a common core of facts or are based on related legal theories." *Harman v. City & Cty. of San Francisco*, 158 Cal. App. 4th 407, 417 (2007). "Thus, the test is whether the relief sought on the unsuccessful claim is intended to remedy a course of conduct entirely distinct and separate from the course of conduct that gave rise to the injury upon which the relief granted is premised." *Odima v. Westin Tucson* Hotel, 53 F.3d 1484, 1499 (9th Cir. 1995). If successful and unsuccessful claims are found to be related, the Court must evaluate the overall success in relation to the hours reasonably expended in the litigation. *Harman*, 158 Cal. App. 4th at 417. "'[T]he most critical factor is the degree of success obtained.'" *Id.* at 418 [citations omitted].

[18] Metzner did mistakenly bill for Burrell's presence at Griffing's deposition, but that error is more than covered by the more than $75,000 already deducted as an exercise of billing judgment.

In this case, all of Metzner claims related to a common core of facts – namely facts related to Metzner's job performance and the reasons for her termination – and were intended to remedy the same course of conduct – Metzner's termination. Metzner was awarded full compensation for her unlawful termination. She could not achieved any greater success, even if her disability and reasonable accommodation claims had not been dismissed.[19]

3. Metzner Was Not Required to Hire a Contractor to Perform Document Review.

TPMG argues that Metzner's fee should be reduced for the time spent by counsel to review documents produced in discovery. Specifically, TPMG argues Metzner's counsel should have used junior attorneys or a paralegal to perform the initial review or hired contract attorneys to do so. This is not an appropriate basis for decreasing the requested lodestar. "Modeling law firm economics drifts far afield of the *Hensley* calculus and the statutory goal of sufficiently compensating counsel in order to attract qualified attorneys to do civil rights work." *Moreno*, 534 F.3d at 1114-15. Metzner's counsel's review of the documents was reasonable and necessary. "By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all he won, and might not have, had he been more of a slacker." *Id*

4. Other Deductions Requested Are not Reasonable or Accurate.

TPMG also requests that Metzner's lodestar be reduced for (1) entries where Metzner's counsel bill for more hours then they worked; (2) for unnecessary litigation tactics; (3) for clerical work; (4) and for vague entries. First, TPMG's allegation that Metzner billed for more

[19] The only claim that could even conceivably characterized as separate and distinct *might* be the reasonable accommodation claim. Metzner, however, devoted minimal time that claim. In total, Metzner spent less than three hours drafting and responding to discovery on that issue. *Supplemental Declaration of Katherine L. Smith in Support of Plaintiff's Motion for Statutory Attorneys' Fees* ("Smith Sup. Decl.") ¶¶ 13, 14.

time than worked is mostly based on misreading the billing records, as is explained in the Smith Supplemental Declaration. Second, the claim that Metzner engaged in unnecessary litigation tactics is largely addressed in her opening brief and the supporting declarations.[20] Third, as is explained further in the Smith Supplemental Declaration, Metzner has already discounted most of the hours Schratz identifies as clerical. Fourth, the complaints regarding vague entries concern entries made during trial, when the Court is generally well aware of what counsel was doing. The declaration of John O'Connor also addresses the reasonableness of this allegation. None of these complaints justify a deduction from the lodestar.

C. Metzner Is Entitled to a Multiplier.

Given space limitations, Metzner refers the Court to the caselaw set forth in Metzner's opening brief supporting a multiplier and addresses only TPMG's contention that Metzner is not entitled to a multiplier based on the risk taken.[21] Contingent risk on its own may justify a multiplier. *See, e.g., Greene v. Dillingham Construction, N.A., Inc.*, 101 Cal. App. 4th 418, 428-29 (2002) (case remanded after trial court failed to consider an enhancement based on contingent risk).

TPMG incorrectly asserts that Metzner is not entitled to a multiplier because this is a "garden variety case." Even if this was true, California law does not require that a case be complex to require a multiplier. Rather, risk enhancements are "intended to approximate market-level compensation for . . . services, which typically includes a premium for the risk of nonpayment or delay in payment." *Ketchum v. Moses*, 24 Cal. 4th 1122, 1138 (2001).

[20] The only exception to this is the motion to continue trial, which, as the Court may recall, the Court gave Metzner a deadline to file. *Burrell Sup. Decl. ¶ 6*. Metzner had to continue drafting the motion while attempting to reach agreement with TPMG. *Id.*.

[21] Metzner does want to take issue with a legally incorrect assertions made by TPMG. Specifically, TPMG argues that Metzner is not entitled to a multiplier because the primary purpose of the case was to forward her pecuniary interests. In support of this contention, TPMG cites to *Weeks v. Baker & McKenzie*, 63 Cal. App. 4t 1128 (1998) and *Flannery v. California Highway Patrol*, 61 Cal. App. 4th 629 (1998). The language TPMG cites, however, relates to each court's discussion of claims for attorneys' fees pursuant to Code of Civil Procedure section 1021.5, which has distinctly different requirements then an award of fees under FEHA. *See Feminist Women's Health Center v. Blythe*, 32 Cal. App. 4th 1641, 1666 (1995).

TPMG argues, based on *Weeks v. Baker & MacKenzie*, that Metzner is not entitled to a fee enhancement for risk because FEHA's fee-shifting scheme created a reasonable expectation that Metzner's attorneys would receive full compensation for their efforts. The *Weeks* decision, however, was issued prior to the California Supreme Court's decision in *Ketchum v. Moses*. As numerous courts have recognized, in *Ketchum*, "the Supreme Court . . . reaffirmed that contingent risk is a valid consideration in determining whether to apply a fee enhancement . . ." invalidating the reasoning to the contrary in *Weeks*. *Greene*, 101 Cal. App. 4th at 257-58; *see also Noyes v. Kelly Services, Inc.*, No. 2:02-cv-2685-GEB-CMK, 2008 WL 3154681, *6 (E.D. Cal. Aug. 4, 2008).

Based on TPMG's vociferous defense of the case, it cannot conceivably claim that there was no risk that Metzner might not prevail and therefore not recover any of the substantial number of attorneys' hours that were poured into this case. Metzner would also submit that, based on this Court's order conditionally denying TPMG's motion for new trial, it must also agree that there was a substantial risk that Metzner would lose and that her counsel would receive no compensation. Under Ketchum, that alone justifies a fee enhancement.

III. CONCLUSION

For the foregoing reasons, Metzner respectfully requests that the Court order TPMG to pay $2,867,252, inclusive of a 2.0 multiplier, to Metzner's counsel of record for attorneys' fees incurred in litigating this matter.

Dated: February 18, 2016

LEVY VINICK BURRELL HYAMS LLP

By: _____
DARCI E. BURRELL,
Attorneys for Plaintiff PATRICIA METZNER

WINNING PRE- AND POST-TRIAL MOTIONS
#NELA16
National Employment Lawyers Association
2016 Annual Convention
June 22-25, 2016
Westin Bonaventure Hotel & Suites, Los Angeles, California

Panel Presentation

Winning Post-Trial Motions: Appellate Considerations

Valerie T. McGinty
Law Office of Valerie T. McGinty
524 Fordham Road
San Mateo, CA 94402
Tel: (415) 305-8253
Fax: (415) 373-3703
valerie@plaintiffsappeals.com

PRE-TRIAL MOTIONS

I. MOTIONS IN LIMINE

A. Procedural Issues

1. Authority For MILs
   a) There is no express statutory authority.
   b) MILS are widely recognized by case law *People v. Morris*, (1991) 53 Cal 3d 152, 188
2. No Notice required for MIL (See CRC 3.1112(f))
   a) But check local rules – usually give time for filing MILs and oppositions to MILs
   b) However, you may file an MIL without notice during trial
3. MILS must:
   a) Include specific legal grounds for exclusion of evidence;
   b) be directed to a particular, identifiable body of evidence; and
   c) be made at a time before or during trial when the judge can determine the evidentiary question in its proper context. Evid. Code 353

B. Purposes of Motions in Limine

1. Exclude cumulative or prejudicial evidence (Evid. Code 352)
2. Exclude irrelevant facts about plaintiff (Evid. Code 210, 350)
3. Decide evidentiary issues prior to opening statement
4. Avoid futility of unringing the bell with limiting instructions *FMC Corp. v. Plaisted & Cos.* (1998) 61 Cal App 4th 1132, 1168
5. Educate the judge on complex evidentiary issues

C. Common Motions in Limine for Plaintiffs

1. Exclude Prejudicial Evidence (Cal Evid 352, Relevance 210, 350)

a) Drunk driving /other misdemeanor type crimes

b) Terminations from other jobs

c) Marital affairs

d) Other lawsuits

e) Job performance

(1) **SEE INCLUDED MOTION**

2. Exclude Defense Expert Opinions

a) Speculative

(1) Although experts are given considerable leeway concerning the matters on which they may rely, they may not rely on *speculation* or *conjecture*. *Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal. App. 4th 1516, 1526; *Sargon Enterprises, Inc. v. University of Southern Calif.* (2012) 55 Cal. 4th 747, 769–772, 781. In such cases, the trial court acts as the gatekeeper to exclude speculative expert testimony because such testimony does not assist the trier of fact. *Id.* The court must determine "whether the matter relied on can provide a reasonable basis for the opinion or whether that opinion is based on a leap of logic or conjecture. *Id.* at 772.

(2) When an expert's conclusions are based on assumptions unsupported by the record, the conclusions have "no evidentiary value and should be excluded." *Pedeferri v. Seidner Enterprise*, (2013) 216 Cal App. 4th 359, 375–376.

b) Exclude Experts that Rely on Another Expert whose opinion is not admissible

(1) E.g. Economist damages relies solely on Voc Rehab Whose Opinion is not supported by the record

c) Non-compliance with CCP

(1) California Code of Civil Procedure §2034.280(c) requires that any expert disclosed in a supplemental disclosure be made *immediately* available for deposition.

(2) CCP 2034.300 the trial court **shall** exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to do any of the following:

(a) List that witness as an expert under Section 2034.260.

(b) Submit an expert witness declaration.

(c) Produce reports and writings of expert witnesses

(d) Make that expert available for a deposition

3. Claims Dismissed in Summary Judgment (Relevance Evid. Code 210, 350)

4. Witnesses/Exhibits Not Disclosed in Discovery

a) "One of the principal purposes of discovery was to do away 'with the sporting theory of litigation namely, surprise at trial." Greyhound Corp. v. Superior Court In and For Merced County (1961) 56 Cal.2d 355, 376.

5. Witnesses not listed in trial witness list

a) See L.A. Sup.Ct. Rule 3.25(f)(1)

6. Exclude Collateral Sources

a) Pension benefits - *Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 873

b) Disability Benefits - *Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 13-14

c) Unemployment Benefits - *Mayer v. Multistate Legal Studies, Inc.* (1997) 52 Cal.App.4th 1428, 1436 n.3

7. Poor Financial Condition or Health of Defendant

a) Evid Code 352

b) Relevance 210, 350

D. Common Motions for Defense

1. Exclude "Me Too" Evidence Witnesses

a) Oppose with these 2 great cases:

(1) *Johnson v. United Cerebral Palsy/Spastic Children's Found.* (2009) 173 Cal.App.4th 740, 765: **per se admissible** under both relevance and Evidence Code section 352 standards. ***Dissimilarities between the facts related in the other employees' declarations and the facts asserted by plaintiff with regard to her own case go to the weight of the evidence, not its admissibility.***

(1) In *Pantoja v. Anton*, (2011) 198 Cal.App.4th 87, exclusion of "me too" evidence can be especially damaging in employment cases, in which "plaintiffs face the difficult task of persuading the fact-finder to disbelieve an employer's account of its own motives." The court went on to say that it was difficult for the law to protect workers from discrimination (or retaliation) when "it is so easy to concoct a plausible reason for ... firing ... a worker who is not superlative." As such, "a plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries." *Pantoja*, 198 Cal. App. at 113.

b) **SEE INCLUDED OPPOSITION**

2. Discriminatory Statements on hearsay grounds

a) *See Colarossi v. Coty US Inc.* (2002) 97 Cal App 4th 1142, 1150, (In a wrongful termination case, Supervisor charged with sexual harassment was overheard threatening to "get revenge" on those employees who participated in the sexual harassment investigation. This out-of-court statement was admissible nonhearsay circumstantial evidence of Supervisor's mental state—a feeling that she had been harmed and harbored ill-will against those responsible.)

3. Exclude HR Experts

a) Several courts have held that experienced human resources expert's testimony is relevant and helpful to juries. *See Kotla v. Regents of Univ. of California* (2004) 115 Cal.App.4th 283, 289-90 (*Kotla*); *In re Apollo Group Inc. Sec. Litig.* 527 F. Supp. 2d 957, 964 (D.Ariz. 2007) (*Apollo*), *and Humphreys v. Regents of Univ. of California* 2006 WL 1867713, at *3 (N.D. Cal. July 6, 2006) (*Humphreys*).)

b) Regarding expert testimony on human resources issues, the Court of Appeal declared in *Kotla,*

Expert testimony on predicate issues within the expertise of a human resources expert is clearly permissible. For example, evidence showing (or negating) that an employee's discharge was grossly disproportionate to punishments meted out to similarly situated employees, or that the employer significantly deviated from its ordinary personnel procedures in the aggrieved employee's case, might well be relevant to support (or negate) an inference of retaliation. Opinion testimony on these subjects by a qualified expert on human resources management might well assist the jury in its factfinding. *Kotla,* 115 Cal.App.4th at 294 n.6.

c) See Included Opposition

B. Key Case for Opposing any MIL

1. Kelly v. New West Federal Savings (1996) 49 Cal.App.4th 659

a) "Actual testimony sometimes defies pretrial predictions of what a witness will say on the stand. ... '[U]ntil the evidence is actually offered, and the court is aware of its relevance in context, its probative value, and its potential for prejudice, matters related to the state of the evidence at the time an objection is made, the court cannot intelligently rule on admissibility.'" *Id.* at 671.

b) Court can't rule on evidence in a vacuum

c) Motions have to be based on contexts and facts and not generalities "no evidence which is speculative"

d) Can't grant an MIL that would deprive Plaintiff of ability to prove their case based on the evidence

e) Matters of day to day logistics/common professional courtesy improper in MILs

f) Can't compel witness to conform to testimony in pretrial discovery (unless an RFA)

C. Excluding Expert Witnesses

1. CCP 2034.300 – See above

2. Defendant failed to disclose them simultaneously as required by C.C.P. § 2034.210. The remedy for Defendant's failure to simultaneously disclose these experts is to exclude their testimony from trial. *Fairfax v. Lords*, (2006)138 Cal.App.4th 1019.

3. Testimony based on speculation or contrary to the evidence.

a) "[E]ven an expert witness cannot be permitted just to testify in a vacuum about things that he might think could have happened." *Hyatt v. Sierra Boat Co.* (1978) 79 Cal App 3d 325, 337

4. Testimony that invades province of the jury.

a) "Undoubtedly there is a kind of statement by the witness which amounts to no more than an expression of his general belief as to how the case should be decided or as to the amount of unliquidated damages which should be given. It is believed all courts would exclude such extreme expressions. There is no necessity for this kind of evidence; to receive it would tend to suggest that the judge and jury may shift responsibility for decision to the witnesses; and in any event it is wholly without value to the trier of fact in reaching a decision." *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1182-83

II. Other Important Pre-Trial Motions

A. Motion to Bifurcate Liability and Damages

1. The court has broad discretion whether to bifurcate the trial. Code Civ. Proc., §§ 598, 1048; Evid.Code, § 320; *Grappo v. Coventry Financial Corp.* (1991) 235 Cal.App.3d 496, 504.

2. In applying that discretion the court should consider the interests of justice, judicial economy, and the prejudice to the parties caused by bifurcation. CCP 598, *See also* Yanni v. City of Seattle (W.D. Wash., Sept. 9, 2005, C04-0896L) 2005 WL 2180011, at *2 ("The Court also considers whether the parties

will suffer prejudice absent bifurcation, whether that prejudice outweighs the prejudice resulting from bifurcation, and whether the prejudice can be mitigated by other means, including limiting instructions).

3. Stress Judicial Economy and Efficiency Bifurcation Necessarily means the trial will take longer. Also inevitably the same evidence gets put on twice

B. Motion to Bifurcate Punitive Damages

1. Can be waived

a) "A request under Civ.C. § 3295(d) is essentially a motion in limine, and ordinarily should be made before trial." [*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal App 3d 1220, 1241. Therefore, the court may properly *deny* a § 3295(d) motion after the jury has already heard references to defendant's wealth in plaintiff's opening statement. At this point, it would be impossible to "unring the bell." [*Las Palmas Associates v. Las Palmas Center Associates*, supra, 235 Cal App 3d at 1242.

C. The Trial Brief

1. Tell Your Client's Story

2. Educate the Court About Complex Legal or Evidentiary Issues

POST TRIAL MOTIONS

I. Motions for New Trial

A. Procedural Issues

1. Right to a new trial is purely statutory. Courts have no inherent authority to grant a new trial. *Marriage of Herr*, 174 Cal. App. 4th 1463, 1465 (2009).

2. Procedural requirements are mandatory and jurisdictional. "As the motion for 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." *Mercer v. Perez*, 68 Cal. 2d 104, 118 (1968); *Pacific Trends Lamp & Lighting Products, Inc. v. J. White, Inc.*, 65 Cal. App. 4th 1131, 1135 (1998).

3. A motion for new trial can be used to ask the trial court to reexamine any issue of fact or law.

4. Time for filing:

a) *Notice of intent* to file a motion for new trial must be filed within 15 days of mailing notice for entry of judgment or within 180 days after entry of judgment, whichever is earliest.

b) Time limits are jurisdictional and cannot be extended by stipulation or court order. Cal. Civ. Proc. Code § 659.

c) No relief under Cal. Civ. Proc. Code section 473(b).

d) No extension for service by mail or by electronic means.

e) Memorandum of points and authorities in support of motion for new trial must be filed within 10 days after the notice of intent is served and filed.

f) Deadline for filing memorandum of points and authorities may be extended up to 10 additional days by stipulation or court order.

g) Failure to file memorandum of points and authorities is not jurisdictional. The court may consider the motion even if no memorandum of points and authorities is filed.

h) Opposition briefs are due within 10 days after service and filing of moving party's brief but can be extended up to 10 additional days by stipulation or court order.

i) Moving party has 5 days after service and filing of the opposition papers to file a reply, which may also be extended for up to 5 additional days by stipulation or court order.

5. Court consideration of motion:

a) Court must hold a hearing – i.e., call the attorneys together at a designated time and place – on the motion for new trial before issuing an order related to the motion. *Avery v. Associated Seed Growers, Inc.*, 211 Cal. App. 2d 613, 627 (1963). The court, however, can decline to hear oral argument. *See* Cal. Civ. Proc. Code § 661.

b) Trial court loses power to rule on the motion 60 days after notice of entry of judgment. This time limit is not extended for service by mail or electronic means. *Westrec Marina Mgmt., Inc. v. Jardine Ins. Brokers Orange County, Inc.*, 85 Cal App. 4th 1042, 1049 (2000).

c) Court is supposed to set the time for hearing after the deadline for filing a memorandum of points and authorities and other supporting papers has passed. Cal. Civ. Proc. Code § 661.

d) Court may deny a motion for new trial either by issuing an order to that effect or by failing to act within the 60 days before it loses jurisdiction. *See* Cal. Civ. Proc. Code § 660. Court is not required to provide any reasons for denial.

e) An order granting new trial motion must state the ground or grounds relied upon by the court, as well as a specification of reasons. Cal. Civ. Proc. Code § 657. Must be in writing. *La Manna v. Stewart*, 13 Cal. 3d 413, 417 (1975).

f) Court must state reasons for granting motion for new trial within the 60 day period. Any order made after the 60 day period is void. *Van Beurden Ins. Services Inc. v. Customized Worldwide Weather Ins. Agency, Inc.*, 15 Cal. 4th 51, 64 (1997).

g) Although court must state grounds for granting motion for new trial before expiration of 60 day period, it may provide a separate statement of the reasons within 10 days after filing the new trial order. Cal. Civ. Proc. Code § 657. The limit for providing specification of reasons may extend past the 60 day period. *Fortenberry v. Weber*, 18 Cal. App. 3d 213, 221 (1971); *Resort Video, Lt. v. Laser Video, Inc.*, 35 Cal. App. 4th 1679, 1694 (1995).

h) Order may be conditional, such as requiring a party to consent to a modification of the judgment or perform some other act to avoid or obtain a new trial. Cal. Civ. Proc. Code § 662.5.

(1) The order should state the time limit for performing the conditions.

(2) Time for performing conditions may extend past the 60 days. So long as the order is issued within 60 days, the court may make the order conditional on matters occurring within a reasonable time thereafter. *Schelbauer v. Butler Mfg. Co.*, 35 Cal. 3d 442, 454 (1984).

(3) The court may extend the time of performance of the condition, but such order must be made within the 60 day period for ruling on the new trial motion.

(4) Procedure for acceptance:

(a) Party consenting to a conditionally ordered addition or reduction must file and serve an acceptance on all parties. Cal. Civ. Proc. Code § 662.5(c).

(b) A party filing and serving an acceptance must concurrently serve an amended judgment reflecting the modified judgment. Cal. Civ. Proc. Code § 662.5(c).

(5) If plaintiff consents to remittitur and defendant then files an appeal, the plaintiff can cross-appeal. *Barker v. Pratt*, 176 Cal. App. 3d 370, 385 (1986).

i) Trial court generally does not have jurisdiction to reconsider its new trial order. *People v. Taylor*, 19 Cal. App. 4th 836, 840-42 (1993).

j) Court has the authority to order partial new trial but only where issues are severable. Cal. Civ. Proc. Code §§ 657, 662; *Liodas V. Sahadi*, 19 Cal. 3d 278, 285-86 (1977).

B. Grounds for New Trial Established by California Code of Civil Procedure Section 657

1. Irregularity in the proceedings of the court, jury or adverse party or any order of the court or abuse of discretion by which either party was prevented from having a fair trial. Includes:

a) Personal misconduct by the judge or other irregularity in the proceedings that materially affects the substantial rights of a party;

b) Erroneous and prejudicial evidentiary rulings, including erroneous exclusion of expert testimony;

c) Erroneous and prejudicial jury instructions, i.e., failure to instruct on a theory of the case supported by substantial evidence;

d) Irregularity in the proceedings of the jury;

e) Irregularity in the proceedings of the adverse party or counsel.

2. Jury misconduct

a) The trial court is required to undertake a three-step inquiry when ruling on a motion for new trial based on juror misconduct:

(1) Whether affidavits supporting the motion are admissible;

(2) If admissible, whether the facts establish misconduct; and

(3) If there is misconduct, whether it was prejudicial. *Whitlock v. Foster Wheeler, LLC*, 160 Cal. App. 4th 149, 160 (2008).

3. Accident or surprise

a) A new trial can be granted on the ground of accident or surprise "which ordinary prudence could not have guarded against." Cal. Civ. Proc. Code § 657(3).

b) Requires the showing of three conditions:

(1) An accident or surprise occurring during the trial.

(2) The accident or surprise had a material adverse effect on the moving party's case.

(3) The accident or surprise is one that could not have been guarded against or prevented through reasonable diligence by the moving party.

c) Mistake or inadvertence not sufficient. A mistake of fact or law is not an accident; nor is negligence of trial counsel.

d) Relief from accident should be sought during trial or risk a finding that right to new trial on this ground has been waived. *See, e.g., Garcia v. County of Los Angeles*, 177 Cal. App. 3d 633, 637 (1986).

4. Newly-discovered evidence – material for the party making the application that he or she could not, with reasonable diligence, have discovered and produced at the trial.

a) The evidence must be newly-discovered – i.e., evidence that was not known and could not reasonably have been known at the time of trial.

b) The evidence must be material – i.e., likely to bring about a different result.

c) The moving party must show he or she exercised reasonable diligence to discover and produce the evidence at trial. A general averment of diligence is insufficient. The moving party must state the particular acts or circumstances that establish diligence.

5. Excessive or inadequate damages:

a) When reviewing a motion for new trial on the ground of excessive damages, the trial court has the power and responsibility to reweigh the evidence.

b) However, "a new trial shall not be granted upon the ground of . . . excessive or inadequate damages, 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." Cal. Civ. Proc. Code § 657.

c) "The judge is not permitted to substitute his judgment for that of the jury on the question of damages unless it appears from the record that the jury verdict was improper." *Bigboy v. County of San Diego*, 154 Cal. App. 3d 397, 406 (1984).

d) The jury is entrusted with vast discretion to award damages which should be disturbed only upon a showing that the award is grossly disproportionate to any reasonable view of the evidence concerning plaintiff's damages. *See Bertero v. National General Corp.*, 13 Cal. 3d 43, 64 n.12 (1974).

6. Insufficient evidence: Insufficiency of the evidence to justify the verdict or other decision.

a) Trial court has the broadest power under this standard – acts as the "13th juror."

b) Trial court is not bound by factual resolutions made by the jury and may grant a new trial even though there is sufficient evidence to sustain the jury's verdict.

c) Trial court has the power to reweigh the evidence, including the power to consider the credibility of witnesses and to draw reasonable inferences contrary to those drawn by the jury.

d) *But* a "new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision . . . 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." Cal. Civ. Proc. Code § 657.

e) The law anticipates that when the evidence is nearly balanced or when different minds could naturally and fairly come to different conclusions, the judge will not disturb the verdict. *Perry v. Fowler*, 102 Cal. App. 2d 808, 811 (1951) [citations omitted]. "In other words, the finding of the jury is to be upheld by him as against any mere doubts of its correctness." *Id.* [citations omitted].

7. Verdict or decision is against law.

a) Differs from "insufficiency of the evidence" in that the trial court is not permitted to reweigh the evidence or assess witness credibility. This ground applies only when there is no material conflict in the evidence and the evidence is insufficient as a matter of law.

b) Examples include:

(1) A verdict unsupported by evidence.

(2) A verdict contrary to instructions.

(3) Verdict or findings hopelessly uncertain or inconsistent.

(4) Incomplete statement of decision (judge trial).

c) May raise a theory not raised during trial.

8. Error of law during trial.

a) Error must be prejudicial.

b) Error must have been timely raised during trial.

C. Effect of granting new trial: An order granting a new trial begins the trial process anew. A new trial automatically restarts the time limitations on discovery. Cutoff dates are measured from the date set for retrial. *Fairmont Ins. Co. v. Superior Court*, 22 Cal. 4th 245, 253-54 (2000).

II. Motion for Judgment Notwithstanding the Verdict

A. Standards for JNOV

1. Motion for judgment notwithstanding the verdict or "JNOV," challenges the legal sufficiency of the opposing party's evidence. *See Hauter v. Zogarts*, 14 Cal. 3d 104, 110 (1975).). The trial court's ability to grant a motion for judgment notwithstanding the verdict is the same as its power to grant a directed verdict. *Id.*

2. The Court must consider all evidence in the light most favorable to the judgment, giving the benefit of every reasonable inference, and resolving all conflicts in support of the judgment. *Howard v. Owens* Corning, 72 Cal. App. 4th 621, 630 (1999).

3. The court cannot weigh the evidence or judge the credibility of witnesses. *Hauter*, 14 Cal. 3d at 110. Rather, the Court's authority "begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment." *Howard*, 72. Cal. App. 4th at 630-31.

4. If there is a conflict in the evidence or if more than one inference can be drawn from the evidence, the motion for judgment notwithstanding the verdict must be denied. *Hauter*, 14 Cal. 3d at 110.

5. "A motion for judgment notwithstanding the verdict of a jury may properly 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 to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied." *Hauter, 14 Cal. 3d at 110.* (quoting *Brandenburg v. Pacific Gas & Elec. Co.*, 28 Cal. 2d 282, 284 (1946).

6. Evidence that is "substantial" is evidence that is of "ponderable legal significance," "reasonable in nature, credible, and of solid value." *Howard*, 72 Cal. App. 4th at 631.

7. Even evidence improperly admitted constitutes "substantial evidence" on a JNOV motion. The proper method for reviewing erroneous evidentiary rulings is a motion for new trial or appeal. *Donahue v. Ziv Television Programs, Inc.*, 245 Cal. App. 2d 593, 609 (1966).

8. Inconsistencies in witness testimony do not constitute insufficient evidence because it is up to the jury to determine the weight to be given to internally inconsistent testimony. *Clemmer v. Hartford Ins. Co.*, 22 Cal. 3d 865, 878 (1978). The controlling factor is whether there was evidence from which the jury could have inferred facts supporting the verdict. *Hale v. Farmers Ins. Exch.*, 42 Cal. App. 3d 681, 692 (1974).

9. A party's testimony at trial may be disregarded if it contradicts his other own unequivocal pretrial admissions. *See Mikialian v. Los Angeles*, 79 Cal. App. 3d 150 (1978) and *Roddenberry v Roddenberry*, 44 Cal. App. 4th 634 (1996).

B. Procedural Issues

1. A court may grant JNOV as to some, but not all of the issues. *See Beavers v. Allstate Ins. Co.*, 225 Cal. App. 3d 310, 323-24 (1990).

2. A JNOV motion may be made by either party against whom the verdict was rendered or by the court on its own motion. Cal. Civ. Proc. Code § 629(a).

3. JNOV motions are generally governed by the same time limits as new trial motions.

a) A notice of motion is required but hearing date is set by the court, not by motion.

b) Where court acts on its own motion, only five days' notice to the parties is required. Cal. Civ. Proc. Code § 629(a).

c) A party's motion for JNOV must be filed and served within the time allowed under Section 659 for service and filing of a notice of intent to move for a new trial.

d) Papers supporting motion for JNOV must be filed at the time the notice of motion is filed.

e) Opposing and reply papers must be filed and served within the same time limits required by new trial motions.

f) As with motions for new trial, the court loses jurisdiction if it does not act within 60 days of filing and service of notice and entry of judgment. If the court fails to grant a JNOV within the 60 day period, the motion is automatically denied.

III. Motion for Attorneys' Fees

A. When authorized by contract, statute or law, reasonable attorneys' fees are allowable costs. Cal. Civ. Proc. Code § 1033.5(a)(10)(A), (B), & (C); *Santisas v. Goodwin*, 17 Cal. 4th 599, 606 (1998).

B. Sources for attorneys' fees in employment cases include:

1. California Fair Employment and Housing Act, Government Code section 12965(b) (discretionary fees for being prevailing plaintiff in lawsuit under the Act);

2. Code of Civil Procedure section 1021.5 (attorneys' fees for enforcing important rights affecting the public interest);

3. Labor Code section 2699(g)(1) (attorneys' fees under the Private Attorney General Act, California Labor Code section 2699 et seq.);

4. Labor Code section 218.5 (attorneys' fees for being prevailing plaintiff in lawsuit seeking nonpayment of wages, fringe benefits and health and welfare or pension benefits);

5. Labor Code section 1194 (attorneys' fees for action to recover unpaid minimum wage and overtime compensation);

6. Labor Code section 226(e) (attorneys' fees in lawsuit regarding failure to provide timely and accurate itemized wage statements or failure to timely provide copies of or access to personnel documents);

7. Labor Code section 2802(c) (attorneys' fees for enforcing right to indemnification by employer).

C. Procedure

1. A noticed motion is required whenever the court is required to determine entitlement to fees – e.g., "prevailing party" status – or to fix the amount of fees. California Rules of Court, Rule 3.1702; *612 South LLC v. Laconic Ltd. Partnership*, 184 Cal. App. 4th 1270, 1284 (2010).

2. Except as provided by statute, the time for filing a motion for recovery of statutory fees is the same as for motions to recover contractual fees. California Rules of Court, Rule 3.1702(a).

a) A notice of motion claiming fees must be served and filed within the time for filing a notice of appeal. California Rules of Court, Rule 8.104, 8.108)

b) The normal time limit for filing a notice of appeal is 60 days after notice of entry of judgment or 180 days after the date of entry, whichever is the earliest. California Rules of Court, Rule 8.104(a).

c) The parties may stipulate to extend the deadline for filing a motion for attorneys' fees for an additional 60 days in an unlimited civil case or 30 days after that time in a limited civil case.

d) The court can extend the deadline for good cause.

e) Competent evidence, generally in the form of supporting declarations, as to the nature and value of the services rendered must be presented. *Martino v. Denevi*, 182 Cal. App. 3d 553, 559 (1986).

D. Generally Applicable Principles

1. Court has broad discretion with respect to the amount of the fee award. *PLCM Group, Inc. v. Drexler*, 22 Cal. 4th 1084, 1095 (2000).

a) In a FEHA case, the discretion to deny a fee award to a prevailing plaintiff is narrow. "[I]n the context of the grant of discretion in Government Code section 12965, subdivision (b), it means something akin to the italicized portion of the following: "the court, [*in a manner that, in the judgment of the court, will best effectuate the purposes of FEHA*], may award to the prevailing party reasonable attorney's fees and costs." *Horsford v. Bd. of Trustees*, 132 Cal. App. 4th 359, 394 (2005).

2. Joinder with non-fee bearing or unsuccessful causes of action:

a) If successful claims for which statutory or other fees are available are joined either with unsuccessful claims or claims for which no fees are available, the court may need to apportion fees so the losing party is only required to pay for fees incurred prosecuting those causes of action for which fees are available. *Akins v. Enterprise Rent-A-Car Co. of San Francisco*, 79 Cal. App. 4th 1127, 1133 (2000).

b) However, "Attorneys' fees need not be apportioned between distinct causes of action where plaintiff's various claims involve a common core of facts or are based on related legal theories." *Harman v. City & Cty. of San Francisco*, 158 Cal. App. 4th 407, 417 (2007).

(1) "Thus, the test is whether the relief sought on the unsuccessful claim is intended to remedy a course of conduct entirely distinct and separate from the course of conduct that gave rise to the injury upon which the relief granted is premised." *Odima v. Westin Tucson* Hotel, 53 F.3d 1484, 1499 (9th Cir. 1995).

(2) If successful and unsuccessful claims are found to be related, the Court must evaluate the overall success in relation to the hours reasonably expended in the litigation. *Harman*, 158 Cal. App. 4th at 417. "'[T]he most critical factor is the degree of success obtained.'" *Id.* at 418 [citations omitted].

3. Prevailing party

a) Normally, the prevailing party is the one in whose favor a net judgment is entered. *Smith v. Rae-Venter Law Group*, 29 Cal. 4th 345, 365 (2002).

b) Court should analyze which party prevailed on a "practical" level. *Heather Farms Homeowners Ass'n, Inc. v. Robinson*, 21 Cal. App. 4th 1568, 1574 (1994).

4. Calculating award:

a) Lodestar methodology: Under this method, the court first determines the number of hours reasonably spent by counsel on the case and a reasonable hourly rate to be applied to those hours. The product of this calculation produces a figure known as the "lodestar" or "touchstone." *Serrano v. Priest*, 20 Cal. 3d 25, 48-49 (1977) ("*Serrano III*").

(1) Hours reasonably spent:

(a) Hours are reasonably spent if, at the time the work was performed, counsel's efforts were reasonable; whether, in hindsight, counsel could have spent fewer hours is irrelevant. *See Wooldridge v. Marlene Industries Corp.*, 898 F.2d 1169, 1177 (6th Cir. 1990) *abrogated on other grounds by Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Resources*, 532 U.S. 598 (2001).

(b) In determining the reasonableness of counsel's hours, the Court can consider "the entire course of the litigation, including pre-trial matters, settlement negotiations, discovery, litigation tactics, and the trial itself." *Vo. v. Las Virgenes Muni. Water Dist.*, 79 Cal. App. 4th 440, 447 (2000).

(c) Attorney time records are prima facie evidence of reasonableness. *See Hadley v. Krepel*, 167 Cal. App. 3d 677, 682 (1985); *see also Perkins v. Mobile Housing Ed.*, 847 F.2d 735, 738 (11th Cir. 1988) ("Sworn testimony that, in fact, it took the time claimed is evidence of considerable weight on the issue of the time required in the usual case . . .").

(d) An award of fees may include, not only the time spent litigating the action, but also fees incurred to establish and defend a fee claim. *Serrano v. Priest*, 32 Cal. 3d 621, 639 (1982) ("*Serrano IV*").

(2) Reasonable hourly rate:

(a) Attorneys are entitled to compensation at hourly rates that reflect the reasonable market value of their services in the community. *Serrano IV*, 32 Cal. 3d at 643, and n. 38.

(b) Reasonable rates are those charged by private attorneys of comparable skill, reputation, and experience for similar litigation, as measured by the prevailing rates charged by corporate attorneys of equal caliber. *See Horsford*, 132 Cal. App. 4th at 394.

b) Enhancement to the lodestar

(1) To determine a fee that truly reflects that marketplace, factors in addition to hours and rates must be considered: "[T]he unadorned lodestar reflects the general local hourly rate for a fee-bearing case; it does not include any compensation for contingent risk, extraordinary skill, or any other factors a trial court may consider. . . ." *Ketchum v. Moses*, 24 Cal. 4th 1122, 1138 (2001).

(2) The "other factors" that the courts have considered in determining the entitlement to an upwards adjustment are: the results obtained, preclusion of other employment, and public service.

(a) Risk enhancements are "intended to approximate market-level compensation for . . . services, which typically includes a premium for the risk of nonpayment or delay in payment." *Ketchum*, 24 Cal. 4th at 1138.

(i) A fee award that compensates contingent fee counsel only for the fee that they would have received from a fee-paying client, win or lose, is simply not a reasonable attorney's fee by market standards: "A contingent fee must be higher than the fee for the same legal services as they are performed." Id. at 1132.

(b) A reasonable attorney's fee also should reflect the results obtained. *See Wallace v. Consumers Cooperative of Berkeley, Inc.*, 170 Cal. App. 3d 836, 849-50 (1985).

(c) An upward enhancement is appropriately granted where the attorneys have been precluded from other employment by the time required to litigate the case. *Serrano III*, 20 Cal. 3d at 49; *Ketchum*, 24 Cal. App. 4th at 1132.

(d) Enhancements encourage the private enforcement necessary to vindicate these civil rights. *State of California v. Meyer*, 174 Cal. App. 3d 1061, 1073 (1985)

Winning Post-Trial Motions: Appellate Considerations

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NELA 2016 Annual Convention, Los Angeles

Appellate factors before trial

Planning ahead will put you ahead of opposing counsel.

The two most important documents in litigation are:

Amend Complaint if Needed

- Review your complaint to see if it contains all the theories you want to pursue at trial.
- If it does not, amend!

File Verdict Form Before Trial

- Help yourself: The verdict form is a guide for witness examination.
- Help the jury: Use key words from the verdict form when you examine witnesses.
- Make your record: On a contested verdict form, make sure to file with the clerk the verdict form you propose.
- Consider dropping IIED or putting it last when also bringing statutory claims.
- Root out any inconsistencies.

Appellate factors during trial

During trial is where the critical groundwork is laid for appeal.

Make your record. Waiver + error + prejudice = reversal; you control waiver and prejudice.

Evidence

- Objections must be timely and state all grounds.
- Get 402 hearing on the record for any evidence you offer that is excluded.
- Elicit specific testimony ("here to there" means nothing to court of appeal.
- Have court reporter transcribe all depo excerpts or have excerpts filed.

Rulings

- Get limine rulings on the record.
- After jury instructions conference, get objections on the record and file your requested instructions.
- After sidebar, put objections on the record or file notice of objection and ruling.

Writ review: If critical rulings such as limine motions are against you, consider a writ.

- Court of Appeal almost never interferes if trial has started
- Request immediate temporary stay
- Need to show either:
  - Irreparable injury
  - Issue not otherwise reviewable
  - Order eliminates substantial portion of the case
  - Novel issue

Appellate factors in posttrial motions.

Posttrial motions are generally underutilized.

Posttrial motions are critical for the appeal.

- Preserve the issue for appeal (remittitur)
- Complete the record.

New trial motion only after trial?

No! A motion for new trial is a versatile tool…

New Trial Motions: Use them to attack…

- Summary Judgment
- Judgment on demurrer
- Judgment on the Pleadings
- Default judgment
- Judgment on Nonsuit
- Judgment on Directed Verdict

Obtaining a New Trial

Strategies for obtaining a new trial.

The Notice

- Always include all grounds in the notice
- Specify in the notice the date on which court's jurisdiction expires

The MPA

- Always include a TOC
- Rule of thumb limit to 3 arguments.
- For instructional error, show prejudice using Soule analysis.
- For erroneous evidentiary ruling, show prejudice.
- For juror bias, show your voir dire was specific enough to elicit the bias and that you did not know of bias previously.

Strategies for obtaining a new trial.

The Evidence

- Get juror declarations to support any claims of juror bias or misconduct
- Get new testimony from expert or lay witnesses to address court's criticisms

The Record

- Exclusionary rulings: submit the excluded documents or testimony
- Instructional error: get juror declarations to establish the bias.
- Submit attorney declaration to document rulings that were not on the record and attach evidence that was offered and erroneously excluded.

Deadlines

Motion for New Trial

- Notice—filed within 15 days from service of judgment or notice of entry of judgment.
- MPA—filed within 10 days of notice.
- Reply—not provided for; always file one.
- Order—must be issued within 60 days or denied by operation of law.
- Appeal—within 30 days from service of order denying a *validly filed* motion for new trial.
- Note: orders on 998 costs are separately appealable.

Bullet Proof Verdict Form

1) Avoid confusing verdicts:
    a. Use the instructions' wording.
    b. If trying both IIED and FEHA claims together, put the IIED claim last or make clear in the instructions and verdict form that a "no" answer for IIED damages does not preclude the jury from awarding E.D. damages if they find a FEHA violation.
2) Ask for a lump-sum damage award:
    a. An award of a lump-sum of damages prevents a ruling that elements of the damage award were improper.
    b. A defendant that permits an unsegregated jury verdict waives the objection that one element of damages was erroneous.
3) Use a general verdict whenever possible:
    a. The weight of authority is that where several causes of action are tried to a general verdict for plaintiff, the appellate court will affirm if any theory is supported by subst. evidence and free from error.
4) Avoid inconsistent verdicts—segregate factual findings relevant to each claim and allow the jury to make that finding only once.
5) To avoid estoppels, make a record of the verdict form you proposed (to show the erroneous form was not yours).
6) To avoid waiver, raise all objections to the form at trial.

New Trial Motion

1. File a timely notice (deadlines are jurisdictional)—usually 15 days from service of the first notice of entry of judgment. CCP § 659.
2. Beware **multiple notices** of entry of judgment! The 15-day period is triggered by the **earliest** one.
3. Read the court's order to determine whether it is a judgment:
    a. Does it merely grant the motion? If so, no judgment.
    b. Or does it enter judgment for the defendant **or** dismiss all causes of action? A dismissal is a judgment. CCP § 581d.
4. Use the new trial motion to **complete the record**:
    a. Attach excluded documentary evidence.
    b. For any contested rulings that were not on the record, attach attorney declaration explaining yours and opposing counsel's positions at trial, and the court's ruling.
    c. For any excluded expert testimony, include the expert's declaration or attach excerpt of expert's deposition.
5. Obtain a ruling within the jurisdictional 60-day statutory period—otherwise the motion is **denied by operation of law** after 60 days from service of the first notice of entry of judgment. CCP § 660.
    a. On the first page of the notice, put the date that jurisdiction expires.
    b. At the hearing and in a follow-up letter after the hearing, remind the court of its deadline to rule on the motion.
6. In the notice, include **all possibly applicable** grounds (CCP § 657) because the notice is jurisdictional (i.e. motion could not be granted by trial court or affirmed by court of appeal on grounds not included in your notice).
7. Assert any claim of inadequate damages in the new trial motion—or else it is waived on appeal.
8. When claiming juror misconduct or juror bias:
    a. Put only admissible evidence in juror declarations (no "mental processes"; Evid. Code § 1150(a)).
    b. Include attorney declaration to show attorney's lack of prior knowledge of misconduct or bias and juror's concealment of bias (attaching voir dire transcript).

The Complaint and the Verdict Form:
Don't let them scuttle your case.

This article explains how you can make the complaint and the verdict form work for you by always amending your complaint, by carefully drafting your verdict forms, and by making your record on any modifications to your proposed verdict form.

A. On demurrer, amend the complaint to add facts.

Because all pre-trial dispositive motions are based on the complaint, the complaint must embrace all of the plaintiff's theories of recovery and the supporting evidence. On demurrer, the complaint will be the only factual record the Court of Appeal will have if judgment on demurrer is later appealed. And Courts of Appeal will not overrule judges who may be eager to dispose of your case on summary judgment if the complaint does not embrace all of the theories and the evidence (that evolves in discovery).

When facing demurrer, amend your complaint to make it more factually specific and to include all legal theories. Not only could this help stave off the granting of a demurrer, but if you choose to appeal the judgment on demurrer, the amended complaint will provide a more detailed and persuasive statement of your claims.

B. If demurrer is sustained without leave to amend, consider a new trial motion.

After a demurrer is sustained without leave to amend, a new trial motion is proper. (*Doe v. United Airlines, Inc.* (2008) 160 Cal.App.4th 1500, [73 Cal.Rptr.3d 541]; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 858, [107 Cal.Rptr.2d 841]; *Green v. Del-Camp Investments, Inc.* (1961) 193 Cal.App.2d 479, 481 [14 Cal.Rptr. 420].) "[T]here may be a 'trial' and hence a situation proper for a new trial motion where only issues of law are determined." (*Carney v. Simmonds* (1957) 49 Cal.2d 84, 90; [315 P.2d 305] (approving the new trial procedure after judgments without a conventional trial, including judgment of dismissal after demurrer sustained, judgment on the pleadings, and judgment of dismissal generally); *accord, Hendershot v. Superior Court (Southwest Investment)* (1993) 20 Cal.App.4th 860, 865 [24 Cal.Rptr.2d 645].)

C. On summary judgment, amend your complaint to embrace *all* theories and facts.

When a summary judgment motion exposes a weakness in the complaint, amend the complaint to embrace all theories of recovery including relevant facts you may have uncovered in discovery. "If plaintiff wishes to expand the issues to be considered, he must seek leave to amend the complaint." (*Alvis v. County of Ventura* (2009) 178 Cal.App. 4th 526, 548, [100 Cal.Rptr.3d 494, 504] (holding plaintiff could not argue the County's wall was a substantial factor in causing the slide because plaintiff alleged only that the wall *altered* the course of the landslide).)

If the motion for summary judgment shows that the complaint omits important theories of recovery, move to amend at once (though a motion to amend may be made at the hearing or even

before entry of judgment). (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 648 [32 Cal.Rptr. 3d 266]; *Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1663 [42 Cal.Rptr.2d 669].) If the motion reveals that the complaint is deficient, the court may grant summary judgment when a demurrer or motion for judgment on the pleadings should have been granted. *American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1118 [51 Cal.Rptr.2d 251].) But amendment should be granted where the defect in the complaint is curable. *College Hosp., Inc. v. Sup. Ct. (Crowell)* (1994) 8 Cal.4th 704, 719 [34 Cal.Rptr.2d 898].)

"The pleadings delimit the issues to be considered on a motion for summary judgment." (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1253 [78 Cal.Rptr.3d 372, 381-382] (citing *Turner v. State of California* (1991) 232 Cal.App.3d 883, 891 [284 Cal.Rptr. 349].) Thus, a "defendant moving for summary judgment need address only the issues raised by the complaint; the plaintiff cannot bring up new, unpleaded issues in his or her opposing papers." (*Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98–99, fn. 4 [93 Cal.Rptr.2d 820].) "If the opposing party's evidence would show some factual assertion, legal theory, defense or claim not yet pleaded, that party should seek leave to amend the pleadings before the hearing on the summary judgment motion." (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1264–1265 [102 Cal.Rptr.2d 813] (citations omitted).) "[T]he pleadings 'delimit the scope of the issues' to be determined," "'[t]he complaint measures the materiality of the facts tendered in a defendant's challenge to the plaintiff's cause of action," and plaintiff's "separate statement of material facts is not a substitute for an amendment of the complaint." (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1201–1202, fn. 5 [37 Cal.Rptr.3d 863] (citations omitted).)

Two recent cases illustrate this point.

First, in *Nein v. HostPro, Inc.* (2009) 174 Cal.App.4th 833, 839 [95 Cal.Rptr.3d 34], an employee alleged his employer breached the employment agreement by terminating plaintiff approximately 30 days before a $12 million dollar deal closed and refusing to pay the plaintiff any commission for his role in initiating the transaction. *Nein* held that the language of the contract was "reasonably susceptible to only [defendant's] interpretation—that once plaintiff ceased to be employed by defendant, he would no longer be eligible for commission pay." *Id*. at 850. Though plaintiff's declaration "arguably raise[d] a triable issue as to the existence of an oral employment agreement" with no "termination clause," the operative complaint failed to allege whether the original agreement was written or oral, alleging only that modifications to the agreement were "written." *Id.* at 851.

"Moreover, while plaintiff could have sought to amend his pleading to conform to proof even as late as the date of the summary judgment hearing, he never did so." *Ibid.* Thus, even where the complaint arguably embraces plaintiff's claims on summary judgment, it should be amended to specifically include all of plaintiff's theories and evidence.

Second, in *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242 [78 Cal.Rptr.3d 372], plaintiff alleged a City intersection constituted a dangerous condition that caused her injury. Plaintiff alleged there was "inadequate sight distance" and that the City was "negligent in designing, constructing, maintaining, controlling and otherwise creating and failing to correct dangerous road conditions." *Id*. at

1250-1251. On summary judgment, the City argued lack of ownership and control and that it was entitled to design immunity. *Id.* at 1251.

Though plaintiff opposed the City's asserted grounds and argued that the placement of the light pole "too close to the roadway" was another factor that contributed to the dangerous condition, there was "no specific mention" of the light pole "or any similar object" in the complaint. *Id.* at 1251, 1253. *Laabs* held that plaintiff's failure to "seek leave to amend her complaint" precluded her from using that fact to oppose summary judgment because the court determined it was "not the least bit involved" with the alleged "intersection or sight distance." *Id*. at 1253, 1258.

In sum, before the summary judgment motion is served (or at least before the summary judgment hearing) ensure that all theories *and evidence* are affirmatively embraced in the complaint—and if not, move to amend the complaint.

a. If summary judgment is granted, consider a new trial motion.

As noted, a motion for new trial is proper after summary judgment and other pretrial judgments. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 858 [107 Cal.Rptr.2d 841]; *Green v. Del-Camp Investments, Inc.* (1961) 193 Cal.App.2d 479, 481 [14 Cal.Rptr. 420]; *Carney v. Simmonds* (1957) 49 Cal.2d 84, 90 [315 P.2d 305] (approving the new trial procedure after judgments without a conventional trial, e.g., judgment after demurrer sustained, judgment on the pleadings, and judgment of dismissal generally); *accord, Hendershot v. Superior Court (Southwest Investment)* (1993) 20 Cal.App.4th 860, 865 [24 Cal.Rptr.2d 645].)

If summary judgment is granted, a motion for new trial might be useful (1) if the trial judge misunderstood the law or the evidence and so might change his or her mind, or (2) if needed evidence could not be presented because the judge denied plaintiff's motion to continue the hearing to collect needed evidence, or (3) if newly discovered evidence is uncovered despite plaintiff's due diligence. But plaintiff should request a continuance of the hearing to submit the new evidence for the original hearing. Code Civ. Proc. § 437c, subd. (h).

The earlier in the litigation that summary judgment is granted, the less diligence in procuring evidence is required to warrant a new trial. (*Scott v. Farrar* (1983) 139 Cal.App.3d 462, 468 [188 Cal.Rptr.823].)

b. Amend the complaint before trial.

Do not assume that a motion to amend will be granted in the middle of trial. Judges may be concerned that such a late amendment would be unfair to the other side—and may justify this decision on the ground that the evidence supports the claims already contained in the complaint so that there is no prejudice to plaintiff in denying the request. Such a scenario presents the danger that if the claim on which the jury found for plaintiff has any legal defect, the verdict could be overturned because the alternative claim was never added (and the denial of the mid-trial amendment will not be held an abuse of discretion).

In sum, err on the safe side by ensuring that you go into trial with a complaint that embraces all your theories of recovery.

D. Prepare and file the verdict form before trial.

For two reasons, prepare and file the verdict form before trial.

First, the first party to present a form of verdict has the best chance to control the final verdict form.

Second, for the plaintiff to win the ultimate victory, plaintiff's counsel must draft an error-free verdict form and make a proper record. Otherwise, when the verdict is for the plaintiff, if the trial judge or the appellate judges find the verdict suffers from prejudicial error, the plaintiff's judgment will be reversed. And when the plaintiff loses at trial due to error in the verdict form, if the trial judge or appellate judges find that plaintiff's attorney waived or invited the error, the defense judgment will be affirmed.

a. The verdict form aids witness examination.

If you draft the form of verdict before trial, you can ask questions that will elicit answers tailored to the issues on the verdict—making sure you have provided all the evidence the jury needs to vote for your client.

b. To avoid estoppel, file your requested verdict form.

Always file your proposed verdict forms so the appellate court will know if your opponent's form was used. The doctrine of estoppel bars a party from objecting to an error created by the party's own form of verdict. (*Myers Building Industries, Ltd., v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949 [17 Cal.Rptr.2d 242].)

In *Myers*, where defendant appealed to challenge an award of punitive damages on the ground that the jury verdict did not contain a finding that any tort had been committed, plaintiff was not allowed to defend the verdict on the ground that the jury's finding of the defendant's "fraud, oppression or malice" in the punitive damage finding should be construed as a finding that the defendant had committed fraud because the verdict did not contain an express finding of fraud, an error that was invited by the plaintiff who had failed to cure the deficiency in the verdict before it was submitted to the jury. *Id*. "Myers . . . must bear the responsibility for a special verdict submitted to the jury on its own case [which] failed entirely to elicit findings concerning a fraud cause of action." *Id.* at 961-962.

E. To avoid waiver, put objections and rulings on the record.

Numerous cases hold that the appellant waives any objection to the verdict form by not raising it on the record in trial, e.g., *Lynch v. Birdwell* (1955) 44 Cal.2d 839, 851 [285 P.2d 919] (defendants who were aware of jury verdict form before it was submitted to the jury but did not object before submission or when the verdict was returned "waived any right to complain as to its form"); *Green v. Rancho Santa Margarita Mortgage Co.* (1994) 28 Cal.App.4th 686, 696 [33 Cal.Rptr.2d 706] (appellant did not object at

trial to special verdict forms, waiving objection to plaintiff's recovery based on unrebutted prima facie case of discrimination); *Ateeq v. Najor* (1993) 15 Cal.App.4th 1351, 1359 [19 Cal.Rptr.2d 320] (appellant's failure to object to special verdict form waived objection on appeal that the jury failed to find that plaintiff reasonably believed that defendant would have him deported); *Martinides v. Mayer* (1989) 208 Cal.App.3d 1185, 1193 [256 Cal.Rptr. 679] ("[T]he defendants offered the special verdict form which was given to the jury and accordingly have waived any objection as to the form or content thereof"); *Moore v. Preventive Medicine Medical Group, Inc.* (1986) 178 Cal.App.3d 728, 745 [223 Cal.Rptr. 859] (jury's failure to segregate damages, leaving doubt whether jury awarded damages for lost future earning capacity; "[S]ince PMMG submitted the special verdict form which the jury used and never objected to the form of the verdict as returned, it waived any right to challenge the actual form of the verdict"); *Niles v. City of San Rafael* (1974) 42 Cal.App.3d 230, 240 [116 Cal.Rptr. 733] (waiver of objections to the form of the verdict occurred when "appellants agreed to the form of the special verdict . . . . Appellants cannot be heard to complain about these matters for the first time on appeal").

For example, the waiver doctrine was applied specifically to bar an appellant's complaint about a verdict form in *Pacific Tel. & Tel. Co. v. Monolith Portland Cement Co.* (1965) 234 Cal.App.2d 352, 360-361 [44 Cal.Rptr.410]. In this eminent domain proceeding, the landowner appealed from the judgment claiming that the verdict form, which had blank spaces only for the damages for the four parcels that were subject to a complete taking or easement, erroneously failed to include space to award severance damages for the impairment in value of the land not taken. Appellant Monolith argued that, because of the error in the form of the verdict, the verdict did not comport with the evidence, which set forth the defendant's severance damages. But, because Monolith had not objected to the form of the verdict at trial, the appellate court ruled that the appellant had waived this objection on appeal to the irregularity in the form of the verdict.

And in *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677 [12 Cal.Rptr.2d 279], though the court agreed the verdict was inconsistent, it rejected appellant's challenge because of waiver: "Drafted jointly by the parties the verdict form makes clear that the jury was permitted to answer `yes' to only one of the questions [about excessive force]. . . .¶ In light of its deliberate choice to avoid the gamble of an all-or-nothing verdict in favor of a compromise verdict, we hold the County waived its right to assert error on the ground the ensuing verdicts were inconsistent." *Id.* at 1687.

F. Make the verdict form clear to jurors.

a. Use the same language as the instructions.

Avoid juror confusion; use the instructions' wording in the verdict. Don't confuse the jurors by inserting words in the verdict form that differ from the instructions. For example, if the instructions speak of "pain and suffering" but not emotional distress, the verdict form should speak of "pain and suffering," not "emotional distress."

b. Consider dropping IIED (or putting it last) when also bringing statutory claims.

To avoid juror confusion, consider dropping IIED when also bringing statutory claims (unless there is a statute of limitations reason or other strategic advantage to leaving IIED in). If you do leave it in,

consider putting it last because a jury that finds against you on IIED may be confused on whether to award emotional distress damages if the statutory claim comes later. But, if the IIED claim comes at the end, a jury will can award noneconomic damages for the statutory violation without being confused by its finding on IIED.

G. Avoid multiple damage awards for the same harm.

The verdict should not separate awards for different wrongs that contributed to a single harm. "Regardless of the nature or number of legal theories advanced by the plaintiff, he is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence." (*Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1158 [17 Cal.Rptr.2d 608].)

In *Roby v. McKesson* (2009) 47 Cal.4th 686, 693 [219 P.3d 739] "some of plaintiff's noneconomic damages awards overlapped one another" and were "hopelessly ambiguous." The Court of Appeal held that the jury's different awards for "the three termination-related claims (wrongful termination, discrimination, and failure to accommodate) overlapped one another." *Id.* at 700. Because plaintiff "preferred to concede this issue rather than face a new trial," the plaintiff accepted a reduction in compensatory damages of $800,000.

Thus, the verdict form should include only one award for each element of damage. Or, if there are spaces to enter amounts after each claim, the jury should be instructed (both by the judge and in the verdict form) to enter the same amount for the same harm.

H. Avoid inconsistent verdicts.

a. Factual inconsistencies

Where one factual finding is central to more than one claim, allow the jury to make that finding only once to avoid two inconsistent factual findings.

For example, in *Mesecher*, supra, an action against a sheriff for battery and the county for violation of civil rights, the jury was asked to decide the identical question of whether the deputy used excessive force with respect to both causes of action. The jury answered the question affirmatively as to battery but negatively as to the civil rights violation, and then awarded damages to plaintiff. The court held these opposite findings on the same factual question rendered the verdict inconsistent. (*Mesecher, supra,* 9 Cal.App.4th at 1685.)

b. Legal inconsistencies

In trying multiple claims to a jury, ensure that the verdict form prevents the jury from making inconsistent legal findings.

For example, it is inconsistent for a jury to find that a product design was negligent but not defective. (*Lambert v. General Motors* (1998) 67 Cal.App.4th 1179 [79 Cal.Rptr.2d 657].) In *Lambert*, an auto design case, the jury held that the car was negligently designed but that the design was not defective. The Court of Appeal ruled that these contrary findings were fatally inconsistent. The

inconsistency existed because "[[w]here liability depends on the proof of design defect, no practical difference exists between negligence and strict liability; the claims merge." *Id.* at p. 1185.

Thus, either the negligence claim should be dropped or, if tried together with product liability, there must be evidence of negligent conduct apart from the design (e.g., failure to warn or failure to recall or retrofit) to support a valid contrary finding that the design was not defective.

Protect the Record

1) Why protect the record?
    a. Factors governing reversal: waiver, error, prejudice.
    b. You control waiver and prejudice (offer of proof).
2) If demurrer is a threat, amend your complaint to make factual allegations as specific as possible.
3) For juror bias, voir dire must be transcribed and questions must be specific.
4) Get limine rulings on the record and be vigilant when the issue resurfaces.
5) Objections must be timely and state all grounds (new grounds cannot be added on appeal).
6) For objections or rulings at sidebar or in chambers:
    a. Put objections and ruling on record afterward
    b. File notice of objection and rulings.
    c. Use your declaration in the new trial motion to document parties' positions and court's ruling.
7) Getting your evidence in the record:
    a. File any depo excerpts shown or read to the jury.
    b. Create 8.5 x 11 reduction of large exhibits.
    c. Elicit specific witness testimony—"from here to there" is meaningless to the Court of Appeal.
8) File your requested instructions with the clerk.
9) If conference on instructions or verdict form is not transcribed, put adverse rulings on the record.

THE MOTION FOR NEW TRIAL: WHEN TO MAKE IT AND HOW TO WIN IT

Valerie T. McGinty[1]

The motion for new trial is a powerful tool for the unsuccessful litigant. It is the only vehicle for preserving evidence and rulings not captured in the trial court record so that it can be presented to the Court of Appeal. See CCP §657(4). And the motion for new trial is underutilized--many are unaware that the motion for new trial is proper after judgment without trial such as after the sustaining of a demurrer, judgment on the pleadings, and summary judgment. A party must make the motion because the trial court lacks the power to order a new trial on its own motion. CCP §657; *Fomco, Inc. v. Joe Maggio, Inc.* (1961) 55 Cal.2d 162.

The motion for new trial contains so many traps for the unwary that one California Supreme Court justice has called it a "procedural minefield." *Sanchez-Corea v. Bank of Am.* (1985) 38 Cal.3d 892, 911 (Kaus, J., dissenting). For example, the time limits for filing the notice of intention to move for a new trial (15 days from service of the first notice of entry of judgment) and for deciding the motion (60 days from service of the first notice of entry of judgment) are jurisdictional; their violation cannot be cured. The failure to seek a new trial on the grounds of inadequate or excessive damages bars the assertion of such grounds on appeal. *Campbell v. McClure* (1986) 182 Cal.App.3d 806 (failure to challenge punitive damage award on new trial as unsupported bars appellate review).

This article discusses the (1) availability of the motion for new trial, (2) key reasons to bring a motion for new trial, (3) best practices for bringing the motion, and (4) tips for opposing the motion.

A. A new trial motion is proper after most judgments.

The motion for new trial is more widely available than many realize. A motion for new trial is available after:

(1) summary judgment;

(2) dismissal upon sustaining a demurrer;

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[1] Valerie T. McGinty is a partner at Smith & McGinty, representing plaintiffs on appeal. Before handling appeals, Ms. McGinty practiced employment litigation at Lawless & Lawless. Ms. McGinty helped represent California Employment Lawyers Assocation (CELA) as amicus in the California Supreme Court. She received her B.A. from Stanford University and her J.D. from UC Hastings College of the Law. Ms. McGinty externed for the Honorable John E. Munter of the San Francisco Superior Court and Presiding Justice J. Anthony Kline of the Court of Appeal, First District, Division Two.

(3) judgment on the pleadings,

(4) a default judgment for failure to comply with discovery orders;

(5) a judgment of nonsuit or a directed verdict;

(6) a judgment on an agreed statement of ultimate facts; an order granting a motion to quash a writ of execution to set aside a levy, and

(7) a judgment entered at the direction of the appellate court.

CCP § 656; 8 Witkin, California Procedure *Attack on Judgment* §§22-23 (4th ed 1997). *E.g.*, *Doe v. United Airlines, Inc.* (2008) 160 Cal.App.4th 1500; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 858; *Green v. Del-Camp Investments, Inc.* (1961) 193 Cal.App.2d 479, 481. "[T]here may be a 'trial' and hence a situation proper for a new trial motion where only issues of law are determined." *Carney v. Simmonds* (1957) 49 Cal.2d 84, 90 (approving the new trial procedure after judgments without a conventional trial, including judgment of dismissal after demurrer sustained, judgment on the pleadings, and judgment of dismissal generally); *accord*, *Hendershot v. Superior Court (Southwest Investment)* (1993) 20 Cal.App.4th 860, 865.

B. Four reasons to file a motion for new trial.

When the jury returns an adverse verdict, there are four primary reasons to file a motion for new trial.

1. Complete the record.

The new trial motion is the only opportunity to strengthen the record on appeal by making the strongest possible showing with respect to evidence that was unavailable at trial, or was not fully presented, or was presented only through an offer of proof.

Newly discovered material evidence favorable to the moving party may be grounds for a new trial if the evidence could not have been discovered by the moving party with reasonable diligence and produced at trial. *Linhart v. Nelson* (1976) 18 Cal.3d 641; *Weathers v. Kaiser Found. Hosps.* (1971) 5 Cal.3d 98. Pending discovery may generate "newly discovered evidence" supporting a new trial after summary judgment. *Scott v. Farrar* (1983) 139 Cal.App.3d 462.

2. Correct juror misconduct.

Attorneys and parties with knowledge of juror misconduct must come forward at the earliest opportunity, so that the court may take corrective measures and proceed with an error-free trial. *Weathers v. Kaiser Found.*

Hosps. (1971) 5 Cal.3d 98, 103. Where the misconduct is discovered only after the jury returns its verdict, the new trial motion is the earliest opportunity to raise it.

A moving party that asserts juror misconduct must submit declarations from the attorney and the client showing that each did not have knowledge of the asserted misconduct before the jury's verdict. *People v. Southern Cal. Edison Co.* (1976) 56 Cal.App.3d 593, 598. These declarations are necessary to dispel any inference that the moving party was guilty of waiver or gambled on the verdict.

A motion for new trial based on juror misconduct triggers a three-step inquiry by the court: (1) whether the supporting affidavits are admissible; (2) whether the facts, if admissible, establish misconduct; (3) whether any misconduct prejudiced the outcome of the trial. *Whitlock v. Foster Wheeler, LLC* (2008) 160 Cal.App.4th 149.

When jury misconduct is observed by counsel or the parties, affidavits can document what they witnessed, such as the unauthorized observation of an exhibit, *Tunmore v. McLeish* (1919) 45 Cal.App. 266, 187 P. 443, or communications with parties. *Wright v. Eastlick* (1899) 125 Cal. 517, 58 P. 87. If the misconduct is observed only by the jurors, counsel must submit juror affidavits to prove overt acts of misconduct during deliberations, as opposed to proving a juror's state of mind. *People v. Hutchinson* (1969) 71 Cal.2d 342.

Juror affidavits must relate objective events such as "statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly." Evid C §1150. A juror is barred from impugning his own or fellow jurors' mental processes or reasons for assent or dissent. *Sanchez-Corea v. Bank of Am.* (1985) 38 Cal.3d 892 (juror claim that no vote was taken after she changed her mind on liability). Affidavits regarding the jurors' "mental processes" are inadmissible. *See Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108; *Andrews v. County of Orange* (1982) 130 Cal.App.3d 944, 953.

Juror affidavits may show that the jurors improperly added plaintiff's attorney's fees to the verdict, *Krouse v. Graham* (1977) 19 Cal.3d 59, or that a juror in a medical malpractice case concealed the fact that he was a doctor, *Clemens v. Regents of Univ. of Cal.* (1970) 8 Cal.App.3d 1, or that one juror contradicted the plaintiff's testimony with a report of his own low back

problem, that another juror was biased against plaintiff for fear of raising insurance rates, and that some jurors believed a husband's marriage vows barred his claim for loss of consortium. *Smith v. Covell* (1980) 100 Cal.App.3d 947.

Types of juror misconduct provable through juror affidavits include: communications with the judge, bailiff, parties, counsel, or witnesses, soliciting an outside opinion or privately viewing the scene or an exhibit, improperly experimenting with an exhibit, obtaining information through the media, concealing bias on voir dire, or adopting a chance or quotient verdict. Cases involving these violations are collected in California Judges Benchbook, Civil Trials 451-459 (CJER 1981). See also *Whitlock v. Foster Wheeler, LLC* (2008) 160 Cal.App.4th 149 (juror's presentation of new evidence to jury of Navy's boiler maintenance practices prejudiced plaintiff Navy boiler technician); *Andrews v. County of Orange, supra* (refusal to deliberate; assertion of facts not in evidence).

The party seeking the new trial usually has the burden of proving that the misconduct was prejudicial. *Grant v. F.P. Lathrop Constr. Co.* (1978) 81 Cal.App.3d 790, 804; *Deward v. Clough* (1966) 245 Cal.App.2d 439, 445. But some courts have taken the opposite position, requiring the party defending the verdict to show the misconduct was harmless. *Whitlock v. Foster Wheeler* (2008) 160 Cal.App.4th 149 (showing of misconduct creates presumption of prejudice); *Andrews v. County of Orange, supra*.

3. Correct juror bias.

Juror bias may be a ground for new trial under both CCP §657(1) and (2); see *Clemens v. Regents of Univ. of Cal.* (1971) 20 Cal.App.3d, 356, 361. Counsel asserting juror bias as a ground for a new trial can also rely on the constitutional guarantee of the right of trial by jury. Cal Const art I, §16. The right to unbiased and unprejudiced jurors is an "inseparable and inalienable part" of the right to jury trial. *Andrews v. County of Orange* (1982) 130 Cal.App.3d 944, 953.

The trial court found juror bias in *Weathers v. Kaiser Found. Hosps.* (1971) 5 Cal.3d 98. In *Weathers*, plaintiffs' wrongful death action against a hospital resulted in a nine-to-three defense verdict. Plaintiffs submitted affidavits from the three dissenting jurors reciting bias by the majority jurors. One white juror said a plaintiff was a "black woman" and that "where he

came from, they don't even let a black woman in a courtroom." 5 Cal.3d at 107.

Another juror expressed the fear that "if we voted for the plaintiffs in this case, the hospital rates at Kaiser Hospital would go up, and we would all have to pay more money for hospital rates." She also told the jury "how good Kaiser Hospital was" and that a verdict against Kaiser would be "attacking it and endangering the whole hospital system." 5 Cal.3d at 107.

A new trial for juror bias was granted and was affirmed by the Supreme Court. Although the majority of jurors filed declarations flatly denying the alleged statements, the trial court's determination of conflicting facts was not disturbed on appeal under the substantial evidence rule because the trial court was responsible for weighing the credibility of conflicting declarations. 5 Cal.3d at 108. *See also Tapia v. Barker* (1984) 160 Cal.App.3d 761 (bias against Mexican plaintiff).

To prevent juror bias (and to arm jurors to report the bias of their fellow jurors when it crops up), ask the judge to read CACI 100 at the beginning of trial and remind the jury of it during closing argument.

4. A prerequisite for appellate review on inadequate or excessive damages.

A motion for new trial is a prerequisite to appellate review when damages are excessive or inadequate. CCP §657(5). The trial court has the power to increase or reduce the damage award. CCP §662.5. But this power cannot be exercised to correct the jury's mistaken appointment of fault, for which the proper remedy is a limited retrial on apportionment. *Schelbauer v. Butler Mfg. Co.* (1984) 35 Cal.3d 442.

A new trial on damages may be granted conditionally unless the nonmoving party agrees to an increase or a reduction in damages to an amount set by the court. CCP §662.5. The time period for acceptance of the conditional remittitur or additur must be reasonable, and may extend beyond the 60-day period for granting a new trial. *Schelbauer v. Butler Mfg. Co.* (1984) 35 Cal.3d 442, 454 n. 6 (three weeks is reasonable).

C. Best practices for filing the motion.

Because the right to a new trial is "purely statutory," the procedural steps prescribed by law are mandatory and must be strictly followed. *In re Marriage of Herr* (2009) 174 Cal.App.4th 1463; *Wall Street Network, Ltd. v.*

New York Times Co. (2008) 164 Cal.App.4th 1171; *Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624.

The best approach is to calendar each item including the date the court's jurisdiction expires. If possible, a stipulated briefing schedule will provide certainty and eliminate the need to bring or oppose motions to extend the time on the supporting points and authorities and the opposition.

1. File a timely notice--untimely notice can doom both the new trial motion and the appeal.

The first step in obtaining a new trial order is to file and serve a notice of intention to move for a new trial within 15 days of the mailing of the first notice of entry of judgment by the clerk, or service by any party. CCP § 659; *Ehrler v. Ehrler* (1981) 126 Cal.App.3d 147. The 15-day period for filing the notice of intention to move for new trial is jurisdictional, so that failure to comply with it is fatal. *Ehrler v. Ehrler, supra*.

The notice may be filed before the entry of judgment, or before the earlier of (1) 15 days of the date of mailing notice of entry of judgment by the clerk or service by any party, or (2) 180 days after the entry of judgment. CCP § 659. However, in a court trial if the notice is filed before the court signs and files the findings, conclusions, and judgment, the notice is premature and of no effect. *Ehrler v. Ehrler, supra*. Any notice filed before all issues in the action have been decided is premature and ineffectual. *Tabor v. Superior Court* (1946) 28 Cal.2d 505.

Then, within ten days after service of the notice, counsel must file and serve supporting affidavits and memorandum of points and authorities. CCP §659a. For good cause, the time of filing affidavits may be extended up to 20 days. CCP § 659a.

2. Put all possibly applicable grounds in the notice to avoid foreclosing a basis the court may want to rely on.

Because the notice of intention to move for new trial is jurisdictional, it is prudent to list all statutory grounds in the notice. On appeal an order granting a new trial may be affirmed on any ground stated in the notice of intention (except insufficiency of the evidence and excessive or inadequate damages, which must be stated in the order). CCP § 657.

The grounds for a motion for new trial are found in CCP §657: irregularity in the proceedings or abuse of discretion (§657(1)); misconduct,

including bias, prejudice, or prejudgment of the jury (§657(2)); accident or surprise that ordinary prudence could not have guarded against (§657(3)); newly discovered material evidence that could not, with reasonable diligence, have been produced at trial (§657(4)); excessive or inadequate damages (§657(5)); insufficiency of the evidence or a decision against law (§657(6)); and errors in law occurring at trial and excepted to by the moving party (§657(7)).

As the last ground suggests, the waiver doctrine applies, so that errors that could have been cured by a timely objection from counsel cannot support a new trial. *Sanchez-Corea v. Bank of Am.* (1985) 38 Cal.3d 892 (waiver of defect in jury voting by failure to request further deliberations).

3. Put the date that jurisdiction expires on the first page of the notice.

Counsel seeking a new trial should, in the notice of intention to move for new trial and in the memorandum of points and authorities, notify the trial judgment of these statutory requirements. Such a notice might read as follows:

> The attention of this Honorable Court is directed to the requirements of CCP §§ 657 and 660 that the order granting the new trial and stating grounds for granting the motion must be entered in the permanent minutes of the court or be signed and filed by the judge within sixty (60) days of service of the notice of entry of judgment, which occurred on _ _ _ _ _. The expiration of this 60-day period will occur on _ _ _ _ _.
>
> Moreover, within ten (10) days of the order granting the new trial, the court must prepare in writing and file with the clerk a specification of reasons in support of the order. The specification of grounds and reasons must recite and analyze the testimony of particular witnesses to show why a new trial was proper. *E.g. Jones v. Citrus Motors Ontario, Inc.* (1973) 8 Cal.3d 706; *Kolar v. County of Los Angeles* (1976) 54 Cal.App.3d 873. Conclusory statements of grounds and reasons may lead to reversal. *Silberg v. California Life Ins. Co.* (1974) 11 Cal.3d 452; *Smith v. Moffat* (1977) 73 Cal.App.3d 86, 92.

4. Complete the record by including additional evidence not introduced or admitted at trial.

Use the new trial motion to complete the record for appeal. This is particularly important for excluded evidence, concealed evidence, and evidence showing that a cause of action exists (if dismissed on demurrer).

First, if the judge improperly and prejudicially excluded evidence, attach that evidence to your declaration (if documentary) or, if testimonial, include a summary of what the evidence would be. Also, summarize in your declaration any sidebar discussions that were not reported, so the appellate court will know what the judge considered in making the ruling.

Second, if the opposing party concealed evidence or there is newly discovered evidence, use the new trial motion to present that evidence, asking for a new trial (and seek sanctions for the opposing party if evidence was concealed). *See Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152 (reversing the denial of a new trial motion because additional reports of incidents involving the product withheld by the defendant were material).

Third, if moving for a new trial after a demurrer, submit any evidence you have from experts and percipient witnesses that show a valid cause of action existed.

5. Get a ruling before the court's jurisdiction expires.

The procedure to set the hearing date is handled differently in various counties and by various judges. The important consideration for the moving party is to set a hearing date that allows the judge sufficient time after the hearing to review the papers and prepare an order granting the motion before expiration of the 60-day period triggered by service of the first notice of entry of judgment. The clerk must give five days' notice by mail to all parties. CCP § 661.

If the motion is heard by a judge other than the trial judge, then the hearing must be set not later than ten days before the expiration of the 60-day period. CCP § 661. If the reporter's notes have not been transcribed, the reporter must attend the hearing at the request of the judge or either party and read his or her notes as required. CCP § 660.

Once a party notices an intention to move for a new trial, the other parties have 15 days after service of the notice to file and serve a similar notice. CCP § 659.

Counsel for the moving party should ensure that the trial judge complies with the procedural requirements stated above for a valid order granting a new trial.

First, the court's jurisdiction expires 60 days after mailing of notice of entry of judgment by the clerk or 60 days after service on the moving party by any party of written notice of entry of judgment, whichever is earlier, or, if notice of entry is not previously served, the 60 days after filing of the first notice of intention to move for a new trial. CCP § 660. The 60-day period is not extended by the five days provided in CCP §1013. *Meskell v. Culver City Unified Dist.* (1970) 12 Cal.App.3d 815. If no determination is made within the 60-day period, the motion is deemed denied. *Sanchez-Corea v. Bank of Am.* (1985) 38 Cal.3d 892. If the motion is granted but the order is defective, nunc pro tunc orders to cure defects in the order are ineffective. *La Manna v. Stewart* (1975) 13 Cal.3d 413.

Second, an order stating grounds for granting the motion must be filed before the court's 60-day jurisdiction expires. CCP §§ 657; 660. An order that fails to state grounds is defective but not void and may be affirmed on any grounds stated in the motion. *Bell v. Bayerische Motoren Weke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108; *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892.

Third, if the order granting the motion did not contain reasons as well as grounds, the court must, within ten days after filing the order, prepare, sign, and file written specifications of reasons for granting the order, referring specifically to the evidence.

An order granting a new trial for insufficiency of the evidence or for the excessive or inadequate damages cannot be affirmed unless those grounds are stated both in the motion and in the order. CCP §657. However, the trial court's failure to adequately specify other grounds and reasons may be overcome on appeal if those grounds are stated in the motion. See *Treber v. Superior Court* (1968) 68 Cal.2d 128, 133; *Don v. Cruz* (1982) 131 Cal.App.3d 695, 705.

The party seeking the new trial may not prepare the order specifying grounds and reasons for the grant of a new trial. CCP §657. But counsel can take other steps to assist the busy trial judge in preparing such an order. The motion should contain a detailed statement of facts, quoting as nearly as possible the relevant testimony of witnesses. This statement of facts should be supported by the declaration of counsel that that testimony recited in the

statement of facts is accurate according to his notes and recollections. And counsel should supply the trial court with a transcript of testimony supporting the motion for new trial.

D. Tips on opposing the motion.

Opposing counsel should file counter-affidavits and a memorandum in opposition within ten days after the moving party serves the supporting affidavits. The judge may extend this time for an additional period not exceeding 20 days on a showing of good cause. CCP § 659a.

If the moving party has failed to comply with applicable time limits, opposing counsel should seek denial of the motion on that basis. If the moving party's affidavits contain hearsay or other incompetent material, opposing counsel should move that those portions of the declarations be stricken.

Opposing counsel should look for the waiver of any arguments in the new trial motion that evidence was improperly admitted where the moving party failed to object to the introduction of that evidence at trial. *Mosesian v. Pennwalt Corp.* (1987) 191 Cal.App.3d 851 (overruled on other grounds in *People v. Ault* (2004) 33 Cal.4th 1250).

Opposing counsel should urge that the moving party has failed to demonstrate that the asserted grounds for a new trial resulted in a "miscarriage of justice." Cal Const art VI, §13. The "miscarriage of justice" concept is virtually synonymous with the requirement discussed above that the party seeking a new trial must demonstrate prejudice. *Kuffel v. Seaside Oil Co.* (1977) 69 Cal.App.3d, 555, 567.

(a) Opposing a claim of juror bias.

First, opposing counsel can show that jurors did not conceal bias because the questions asked on voir dire were too general. To establish concealed bias, voir dire questions must be "sufficiently specific to elicit the information" that assertedly was not disclosed. *People v. Blackwell* (1987) 191 Cal.App.3d 925, 929. A juror does not "conceal" information on voir dire if the questions asked do not request that information in a "direct and unambiguous" manner. *People v. Kelly* (1986) 185 Cal.App.3d 118, 126. For example, a defense attorney's questions whether jurors could "put aside natural sympathy, listen to the evidence objectively," and not apply "passion or prejudice" were held to be too general to elicit bias from the jurors'

experiences with pain and suffering. *Moore v. Preventive Medicine Medical Group*, (1986) 178 Cal.App.3d 728. In a child molestation case, questions whether jurors or anyone they knew had ever been accused of molestation or involved in a molestation case were held to be too general to elicit a juror's experience of molestation as a child. *People v. Kelly* (1986) 185 Cal.App.3d 118. And in a drug possession case, a defense attorney's question whether "anything" in the jurors' "background" had "come to mind" as a "skeleton in the closet" was held to be too general to elicit the death of a juror's nephew from a drug overdose. *People v. Jackson* (1985) 168 Cal.App.3d 700.

Second, because courts are wary of attempts by jurors to impeach their own verdict, appellate courts apply a stringent test for bias. Thus, bias is not shown by such statements as "if we found for the plaintiff, our taxes would be raised a lot," *Rogers v. County of Los Angeles* (1974) 39 Cal.App.3d 857, or by a juror's statement that he would not buy a car manufactured by the defendant "because the gas tank was in the fender and I knew it." *Self v. General Motors Corp.* (1974) 42 Cal.App.3d 1. *See also Romo v. Ford Motor Co.* (2002) 99 Cal.App.4th 1115 (no prejudicial misconduct where juror referenced a television program and another juror appealed to "moral necessity" of saving children's lives because conduct was not repeated after judge's instruction) (overruled on other grounds in *People v. Ault* (2004) 33 Cal.4th 1250).

A noteworthy example of a stringent test for impermissible bias is *Johns v. City of Los Angeles* (1978) 78 Cal.App.3d 983. The appellate court reversed the trial court's finding of concealed juror bias, based on the following rulings:

1. Testimony by jurors on voir dire while under oath is presumptively truthful, Evid Code §520, so that the burden of proof is on the party making the charge of concealed bias. 78 Cal.App.3d at 990.

2. The party attacking the verdict must establish by a preponderance of the evidence that the controverted statements were made and that the jurors who made them had committed perjury on voir dire, citing Evid. C §§ 115, 500 and 520. 78 Cal.App.3d at 991.

3. Where the evidence is presented only by affidavit, the trier of fact does not have the unfettered right to accept the averments of one affidavit as against eleven to the contrary without articulating "some cogent reason for doing so." 78 Cal.App.3d at 993. The trial judge's failure to demonstrate a reason for trusting the statements of some jurors but not others renders his

specification of reasons invalid because it deprives the appellate court of a record "susceptible of 'meaningful review.'" 78 Cal.App.3d at 998.

4. The trial judge's comments on the hearing of the motion for new trial were devoted to one juror's criticism of him and his instructions, an issue that bore no relevancy to bias against the plaintiffs. 78 Cal.App.3d at 995.

5. The alleged juror bias did not rise to the level of an "irrevocable commitment" to vote against the losing party. 78 Cal.App.3d at 996.

Counsel opposing the claim of juror bias should offer exculpating declarations by the majority jurors to rebut any contention that the juror answered untruthfully on voir dire. Moreover, the transcript of the voir dire questioning could show that the jurors' answers were honest to the best of their ability and that any concealment of bias was unintentional. The Supreme Court in *Weathers v. Kaiser Found. Hosps.* (1971) 5 Cal.3d 98, acknowledged that "unintentional concealment" of bias on voir dire was a separate issue, not decided in *Weathers*.

WINNING PRE- AND POST-TRIAL MOTIONS
#NELA16
National Employment Lawyers Association
2016 Annual Convention
June 22-25, 2016
Westin Bonaventure Hotel & Suites, Los Angeles, California

Panel Presentation

Winning Your Case Before Trial With Pre-Trial Motions

Jayme L. Walker
Gwilliam, Ivary, Chiosso, Cavalli & Brewer
1999 Harrison Street, Suite 1600
Oakland, CA 94612
Tel: (510) 832-5411
Fax: (510) 832-1918
jwalker@giccb.com

I. MOTIONS IN LIMINE

A. Procedural Issues

1. Authority For MILs
   a) There is no express statutory authority.
   b) MILS are widely recognized by case law *People v. Morris*, (1991) 53 Cal 3d 152, 188
2. No Notice required for MIL (See CRC 3.1112(f))
   a) But check local rules – usually give time for filing MILs and oppositions to MILs
   b) However, you may file an MIL without notice during trial
3. MILS must:
   a) Include specific legal grounds for exclusion of evidence;
   b) be directed to a particular, identifiable body of evidence; and
   c) be made at a time before or during trial when the judge can determine the evidentiary question in its proper context. Evid. Code 353

B. Purposes of Motions in Limine

1. Exclude cumulative or prejudicial evidence (Evid. Code 352)
2. Exclude irrelevant facts about plaintiff (Evid. Code 210, 350)
3. Decide evidentiary issues prior to opening statement
4. Avoid futility of unringing the bell with limiting instructions *FMC Corp. v. Plaisted & Cos.* (1998) 61 Cal App 4th 1132, 1168
5. Educate the judge on complex evidentiary issues

C. Common Motions in Limine for Plaintiffs

1. Exclude Prejudicial Evidence (Cal Evid 352, Relevance 210, 350)
    a) Drunk driving /other misdemeanor type crimes
    b) Terminations from other jobs
    c) Marital affairs
    d) Other lawsuits
    e) Job performance
        (1) **SEE INCLUDED MOTION**
2. Exclude Defense Expert Opinions
    a) Speculative
        (1) Although experts are given considerable leeway concerning the matters on which they may rely, they may not rely on *speculation* or *conjecture*. *Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal. App. 4th 1516, 1526; *Sargon Enterprises, Inc. v. University of Southern Calif.* (2012) 55 Cal. 4th 747, 769–772, 781. In such cases, the trial court acts as the gatekeeper to exclude speculative expert testimony because such testimony does not assist the trier of fact. *Id.* The court must determine "whether the matter relied on can provide a reasonable basis for the opinion or whether that opinion is based on a leap of logic or conjecture. *Id.* at 772.
        (2) When an expert's conclusions are based on assumptions unsupported by the record, the conclusions have "no evidentiary value and should be excluded." *Pedeferri v. Seidner Enterprise*, (2013) 216 Cal App. 4th 359, 375–376.
    b) Exclude Experts that Rely on Another Expert whose opinion is not admissible
        (1) E.g. Economist damages relies solely on Voc Rehab Whose Opinion is not supported by the record
    c) Non-compliance with CCP
        (1) California Code of Civil Procedure §2034.280(c) requires that any expert disclosed in a supplemental disclosure be made *immediately* available for deposition.
        (2) CCP 2034.300 the trial court **shall** exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to do any of the following:
            (a) List that witness as an expert under Section 2034.260.
            (b) Submit an expert witness declaration.
            (c) Produce reports and writings of expert witnesses
            (d) Make that expert available for a deposition

3. Claims Dismissed in Summary Judgment (Relevance Evid. Code 210, 350)

4. Witnesses/Exhibits Not Disclosed in Discovery

a) "One of the principal purposes of discovery was to do away 'with the sporting theory of litigation namely, surprise at trial." Greyhound Corp. v. Superior Court In and For Merced County (1961) 56 Cal.2d 355, 376.

5. Witnesses not listed in trial witness list

a) See L.A. Sup.Ct. Rule 3.25(f)(1)

6. Exclude Collateral Sources

a) Pension benefits - *Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 873

b) Disability Benefits - *Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 13-14

c) Unemployment Benefits - *Mayer v. Multistate Legal Studies, Inc.* (1997) 52 Cal.App.4th 1428, 1436 n.3

7. Poor Financial Condition or Health of Defendant

a) Evid Code 352

b) Relevance 210, 350

D. Common Motions for Defense

1. Exclude "Me Too" Evidence Witnesses

a) Oppose with these 2 great cases:

(1) *Johnson v. United Cerebral Palsy/Spastic Children's Found.* (2009) 173 Cal.App.4th 740, 765: **per se admissible** under both relevance and Evidence Code section 352 standards. ***Dissimilarities between the facts related in the other employees' declarations and the facts asserted by plaintiff with regard to her own case go to the weight of the evidence, not its admissibility.***

(1) In *Pantoja v. Anton*, (2011) 198 Cal.App.4th 87, exclusion of "me too" evidence can be especially damaging in employment cases, in which "plaintiffs face the difficult task of persuading the fact-finder to disbelieve an employer's account of its own motives." The court went on to say that it was difficult for the law to protect workers from discrimination (or retaliation) when "it is so easy to concoct a plausible reason for ... firing ... a worker who is not superlative." As such, "a plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries." *Pantoja*, 198 Cal. App. at 113.

b) **SEE INCLUDED OPPOSITION**

2. Discriminatory Statements on hearsay grounds

a) *See Colarossi v. Coty US Inc.* (2002) 97 Cal App 4th 1142, 1150, (In a wrongful termination case, Supervisor charged with sexual harassment was overheard threatening to "get revenge" on those employees who participated in the sexual harassment investigation. This out-of-court statement was admissible nonhearsay circumstantial evidence of Supervisor's mental state—a feeling that she had been harmed and harbored ill-will against those responsible.)

3. Exclude HR Experts

a) Several courts have held that experienced human resources expert's testimony is relevant and helpful to juries. *See Kotla v. Regents of Univ. of California* (2004) 115 Cal.App.4th 283, 289-90 (*Kotla*); *In re Apollo Group Inc. Sec. Litig.* 527 F. Supp. 2d 957, 964 (D.Ariz. 2007) (*Apollo*), *and Humphreys v. Regents of Univ. of California* 2006 WL 1867713, at *3 (N.D. Cal. July 6, 2006) (*Humphreys*).)

b) Regarding expert testimony on human resources issues, the Court of Appeal declared in *Kotla,*

Expert testimony on predicate issues within the expertise of a human resources expert is clearly permissible. For example, evidence showing (or negating) that an employee's discharge was grossly disproportionate to punishments meted out to similarly situated employees, or that the employer significantly deviated from its ordinary personnel procedures in the aggrieved employee's case, might well be relevant to support (or negate) an inference of retaliation. Opinion testimony on these subjects by a qualified expert on human resources management might well assist the jury in its factfinding. *Kotla,* 115 Cal.App.4th at 294 n.6.

c) See Included Opposition

B. Key Case for Opposing any MIL

1. Kelly v. New West Federal Savings (1996) 49 Cal.App.4th 659

a) "Actual testimony sometimes defies pretrial predictions of what a witness will say on the stand. ... '[U]ntil the evidence is actually offered, and the court is aware of its relevance in context, its probative value, and its potential for prejudice, matters related to the state of the evidence at the time an objection is made, the court cannot intelligently rule on admissibility.'" *Id.* at 671.

b) Court can't rule on evidence in a vacuum

c) Motions have to be based on contexts and facts and not generalities "no evidence which is speculative"

d) Can't grant an MIL that would deprive Plaintiff of ability to prove their case based on the evidence

e) Matters of day to day logistics/common professional courtesy improper in MILs

f) Can't compel witness to conform to testimony in pretrial discovery (unless an RFA)

C. Excluding Expert Witnesses

1. CCP 2034.300 – See above

2. Defendant failed to disclose them simultaneously as required by C.C.P. § 2034.210. The remedy for Defendant's failure to simultaneously disclose these experts is to exclude their testimony from trial. *Fairfax v. Lords*, (2006)138 Cal.App.4th 1019.

3. Testimony based on speculation or contrary to the evidence.

a) "[E]ven an expert witness cannot be permitted just to testify in a vacuum about things that he might think could have happened." *Hyatt v. Sierra Boat Co.* (1978) 79 Cal App 3d 325, 337

4. Testimony that invades province of the jury.

a) "Undoubtedly there is a kind of statement by the witness which amounts to no more than an expression of his general belief as to how the case should be decided or as to the amount of unliquidated damages which should be given. It is believed all courts would exclude such extreme expressions. There is no necessity for this kind of evidence; to receive it would tend to suggest that the judge and jury may shift responsibility for decision to the witnesses; and in any event it is wholly without value to the trier of fact in reaching a decision." *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1182-83

II. Other Important Pre-Trial Motions

A. Motion to Bifurcate Liability and Damages

1. The court has broad discretion whether to bifurcate the trial. Code Civ. Proc., §§ 598, 1048; Evid.Code, § 320; *Grappo v. Coventry Financial Corp.* (1991) 235 Cal.App.3d 496, 504.

2. In applying that discretion the court should consider the interests of justice, judicial economy, and the prejudice to the parties caused by bifurcation. CCP 598, *See also* Yanni v. City of Seattle (W.D. Wash., Sept. 9, 2005, C04-0896L) 2005 WL 2180011, at *2 ("The Court also considers whether the parties

will suffer prejudice absent bifurcation, whether that prejudice outweighs the prejudice resulting from bifurcation, and whether the prejudice can be mitigated by other means, including limiting instructions).

3. Stress Judicial Economy and Efficiency Bifurcation Necessarily means the trial will take longer. Also inevitably the same evidence gets put on twice

B. Motion to Bifurcate Punitive Damages

1. Can be waived

a) "A request under Civ.C. § 3295(d) is essentially a motion in limine, and ordinarily should be made before trial." [*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal App 3d 1220, 1241. Therefore, the court may properly *deny* a § 3295(d) motion after the jury has already heard references to defendant's wealth in plaintiff's opening statement. At this point, it would be impossible to "unring the bell." [*Las Palmas Associates v. Las Palmas Center Associates,* supra, 235 Cal App 3d at 1242.

C. The Trial Brief

1. Tell Your Client's Story

2. Educate the Court About Complex Legal or Evidentiary Issues

Winning Your Case Before Trial With Pre-Trial Motions

By Jayme L. Walker


gettyimages
moodboard
85449422

Pre-trial Motions: Motions in Limine

- Authority For MILs
- No Notice required for MIL (See CRC 3.1112(f))
  - But check local rules – usually give time for filing MILs and oppositions to MILs
  - However, you may file an MIL without notice during trial
- MILS must:
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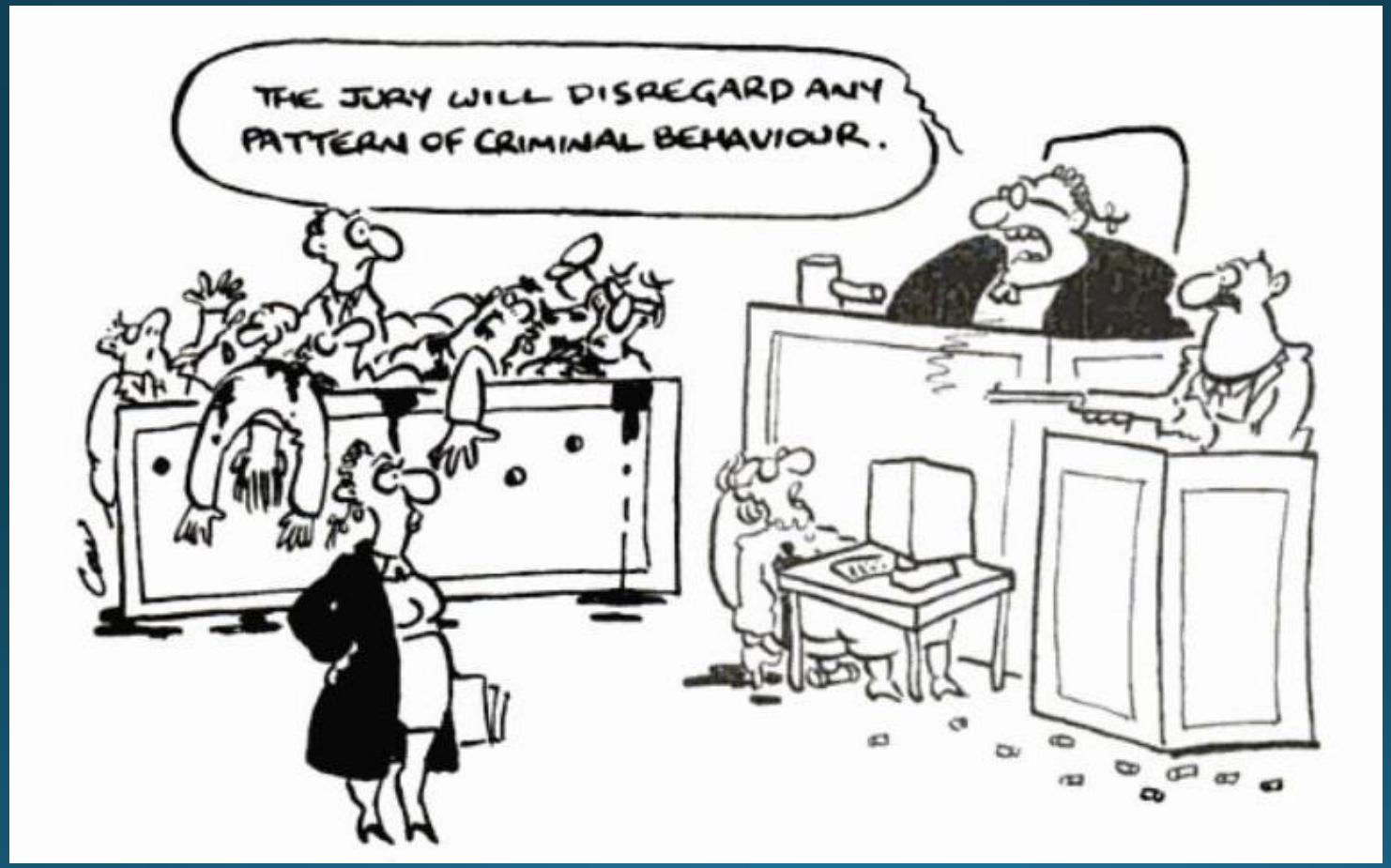
Purpose of Motions in Limine



Purposes of Motions In Limine

- Exclude prejudicial (Evid. Code 352)
- Exclude irrelevant facts about plaintiff (Evid. Code 210, 350)
- Decide evidentiary issues prior to opening statement
- Avoid futility of unringing the bell with limiting instructions *FMC Corp. v. Plaisted & Cos.* (1998) 61 Cal App 4th 1132, 1168
- Educate the judge on complex evidentiary issues

Common Motions for Plaintiff

- KEEP OUT THE BAD STUFF
- KEEP OUT THE BAD GUYS
- GET A RULING PRE-OPENING ON EVIDENCE/

Common Motions for Plaintiff

- Witnesses/Exhibits Not Disclosed in Discovery
  - "One of the principal purposes of discovery was to do away 'with the sporting theory of litigation namely, surprise at trial." Greyhound Corp. v. Superior Court In and For Merced County (1961) 56 Cal.2d 355, 376.
- Witnesses not listed in trial witness list
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  - Unemployment Benefits - *Mayer v. Multistate Legal Studies, Inc.* (1997) 52 Cal.App.4th 1428, 1436 n.3
- Poor Financial Condition or Health of Defendant

Common Motions for Defense

Common Motions for Defense

- Exclude "Me Too" Evidence Witnesses
  - *See Johnson v. United Cerebral Palsy/Spastic Children's Found.* (2009) 173 Cal.App.4th 740, 765 and *Pantoja v. Anton*, (2011) 198 Cal.App.4th 87
- Discriminatory Statements on hearsay ground
  - *See Colarossi v. Coty US Inc.* (2002) 97 Cal App 4th 1142, 1150.
- Exclude HR Experts
  - *See Kotla v. Regents of Univ. of California* (2004) 115 Cal.App.4th 283, 294 n. 6

Opposing Motions In Limine

Kelly v. New West Federal Savings (1996) 49 Cal.App.4th 659

"Actual testimony sometimes defies pretrial predictions of what a witness will say on the stand. … '[U]ntil the evidence is actually offered, and the court is aware of its relevance in context, its probative value, and its potential for prejudice, matters related to the state of the evidence at the time an objection is made, the court cannot intelligently rule on admissibility.'" *Id.* at 671.

Kelly v. New West Federal Savings Cont'd

- Court can't rule on evidence in a vacuum
- Motions have to be based on contexts and facts and not generalities "no evidence which is speculative"
- Can't grant an MIL that would deprive Plaintiff of ability to prove their case based on the evidence
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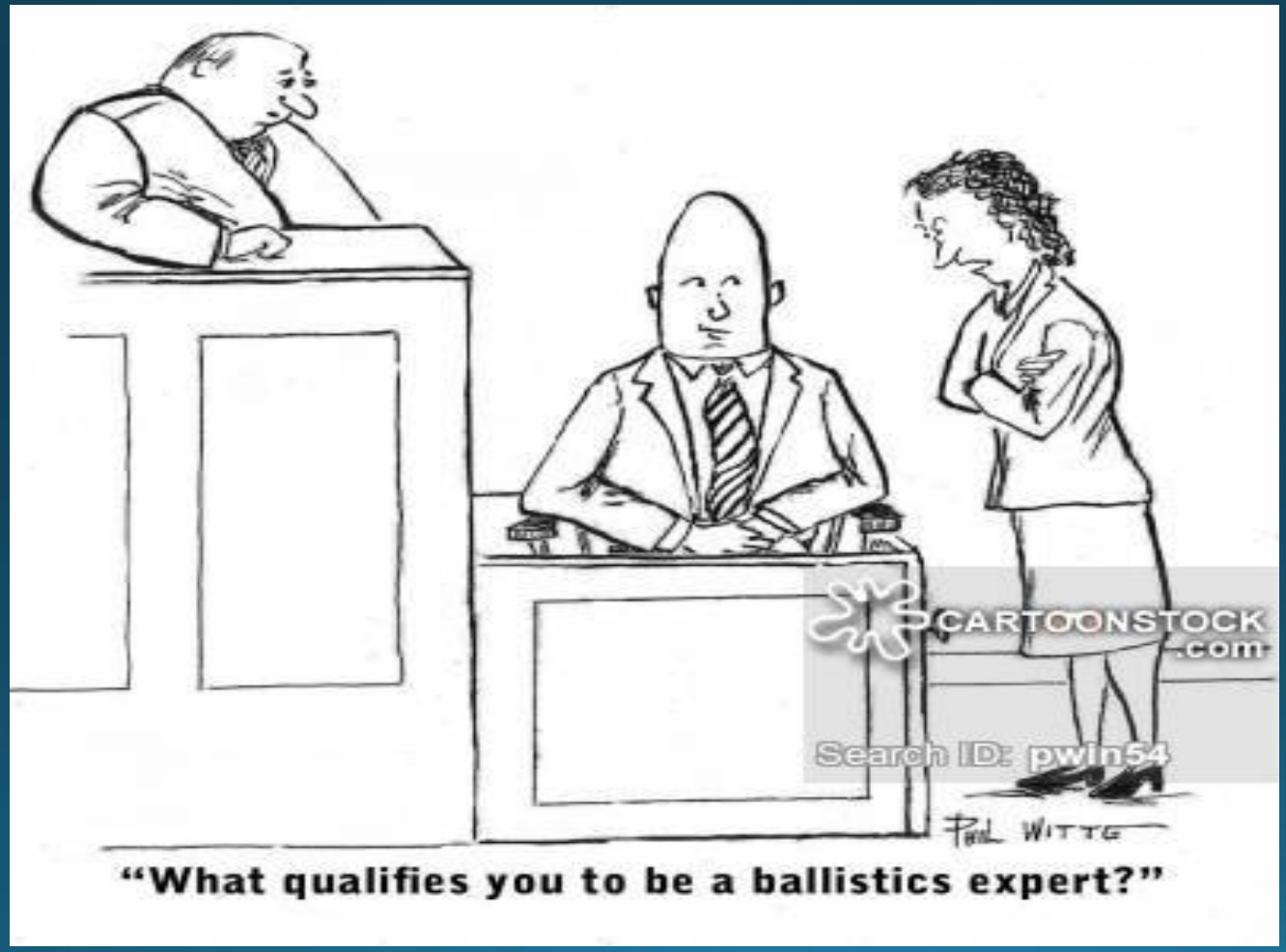
Excluding Expert Witnesses



Excluding Expert Witnesses

- CCP 2034.310
- Testimony based on speculation or contrary to the evidence.
  - "[E]ven an expert witness cannot be permitted just to testify in a vacuum about things that he might think could have happened." *Hyatt v. Sierra Boat Co.* (1978) 79 Cal App 3d 325, 337
- Testimony that invades province of the jury.
  - *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1182-83

Other Important Pre-trial Motions

- Motion to Bifurcate Liability and Damages
- Motion to Bifurcate Punitive Damages
- The Trial Brief

Jayme L. Walker (SBN. 273159)
GWILLIAM IVARY CHIOSSO CAVALLI & BREWER
1999 Harrison St., Suite 1600
Oakland, CA 94612
Phone: (510)832-5411
Fax: (510)832-1918
Email: jwalker@giccb.com

Attorneys for Plaintiff

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

JANE PLAINTIFF, Plaintiff, vs. EVIL CORP., JOE WRONGDOER, and DOES 1-100, Defendants.	Case No.: OFFICIAL COURT# PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION IN LIMINE NO. 3 TO EXCLUDE 1) EVIDENCE OR ARGUMENT REGARDING THE CITY'S POLICIES AND PROCEDURES FOR WHISTLEBLOWER COMPLAINTS OF RETALIATION 2) THE TESTIMONY OF PLAINTIFF'S EXPERT MARY MANAGEMENT AND 3) ANY ARGUMENT THAT THE CIYT HAD A LEGAL "DUTY: TO INVESTIGATE PLAINTIFF'S CLAIMS OF RETALIATION

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

This is a case for whistleblower retaliation brought by former analyst, Jane Plaintiff. In 2001, Jane Plaintiff reported to her supervisors that Joe Wrongdoer had violated the law when he failed to write a report, open an investigation, or otherwise take action when faced with illegal

acts in the company. Ms. Plaintiff was charged with prosecuting the subsequent discipline case against Wrongdoer.

After the charges were filed, Plaintiff received a phone call from Wrongdoer's attorney, Jim Jones, who proceeded to go on a tirade yelling that Plaintiff was "going to be sorry" she decided to pursue this case and that "she didn't know how this company worked" and this was going to be "an employment problem" for her.

Despite these threats to her employment, Plaintiff continued to diligently prosecute the case against Wrongdoer because she reasonably believed that not doing so would violate the law. She was an attorney for the company and it was her job to mitigate risk. Plaintiff believed that dropping the case against Wrongdoer would put Evil Corp. in the position of being out of compliance with the Penal Code.

On January 1, 2001, Plaintiff was informed again that Wrongdoer was going to "take her out" if he became her supervisor. She wrote another email to her supervisors informing them of the threats of retaliation. (See Ex. D to Walker Decl. Plaintiff Decl. ¶ 17 and Ex. C thereto). She also spoke to Margaret Nancy, the Head of Human Resources about her fears of retaliation. (See Walker Decl. Ex. N, Nancy depo 38:6-39:24).

Despite this plethora of complaints from Plaintiff about potential retaliation, two and a half weeks after Wrongdoer was appointed her superior, he terminated Plaintiff.

Right after Plaintiff was terminated, she ran into Supervisor and asked him to intervene. He agreed to talk to Big Boss and relay Ms. Plaintiff's concerns about her termination. Big Boss told Supervisor he was not going to do anything about it. (See Walker Decl. Ex. P, Supervisor Conf. depo 23:12-24:17).

Defendant seeks to preclude Plaintiff from testifying that the company's policies and procedures were inadequate to prevent whistleblower retaliation. Defendant also seeks to exclude testimony from Supervisor that he complained to the Big Boss about Plaintiff's termination immediately after Plaintiff was terminated. Finally, Defendant seeks to exclude Plaintiff's expert in management practices, Mary management, from testifying about standard

management practices in preventing whistleblower retaliation and Defendants' deviation from such standard practices.

Defendant argues that although there is a public policy against whistleblower retaliation, there is no requirement that employers seek to prevent such retaliation or correct it once it is brought to their attention. This argument is not supported by the law or the facts of this case and should be denied.

II. ARGUMENT

A. An Employer Has a Duty to Prevent Whistleblower Retaliation

Labor Code section 1102.5 is "California's general whistleblower statute" *Carter v. Escondido Union High School Dist.* (2007) 148 Cal.App.4th 922, 933. Labor Code 1102.5(a) provides:

An employer may not make**, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency**, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.

(Emphasis added).

Labor Code 1102.5(b) provides:

> An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.

These "provision[s] reflect the broad public policy interest in encouraging workplace whistle-blowers to report unlawful acts without fearing retaliation." *McVeigh v. Recology San Francisco,* (2013) 213 Cal.App.4th 443, 468.

Defendant argues that, although there is a broad public policy to encourage workplace whistleblowers to come forward without fear of retaliation, the fact that Defendant's

whistleblower policies were wholly inadequate to allow whistleblowers to report violations of law without facing retaliation is not relevant.

Defendant further argues that the well publicized inadequacies of its whistleblower program and its pattern of failing to protect whistleblowers is irrelevant.

Finally, Defendant argues that it had no duty to prevent whistleblower retaliation against Plaintiff. Defendant makes this argument despite the fact that Plaintiff reported to numerous people that she feared being retaliated against by Wrongdoer and after she was terminated by Wrongdoer the Supervisor immediately informed the Big Boss that the termination was retaliatory. The Big Boss did not so much as direct an appropriate person to perform an investigation of the reported retaliation. In failing to take even basic steps to prevent retaliation and to let city managers know that retaliation would not be tolerated, the Big Boss of Evil Corp. did not comply with his duties to encourage workplace whistleblowers to report violations of law without fear of retaliation. Stated plainly, Defendants argue that this court should ignore the very purpose of the Whistleblower Protection Act which is to encourage whistleblowers to come forward and report violations without fear of retaliation.

In *Franklin v. Monadnock Co.* (2007) 151 Cal.App.4th 252 the court rejected a similar argument with regard to the Labor Code §6310 *et seq* on workplace safety. The court stated as follows:

Defendants' position that there is no explicit public policy concerning the prevention of workplace violence would lead to the anomalous result that the Labor Code provisions to which we refer establish an express public policy requiring employers to take reasonable steps to protect employees from foreseeable occupational injuries and illnesses, but do not establish any corresponding policy concerning injuries in the workplace from foreseeable violence or credible threats of violence. There is no logic in drawing such an artificial distinction, and such a distinction ignores the reality of workplace violence that statutes like Code of Civil Procedure section 527.8 were enacted to address. Moreover, it is self-evident that the policy expressed in the statutes upon which we rely that protects employees from violence or threats of violence in the workplace is a fundamental and substantial public policy.

Id. at 260.

Similarly here, Defendants' position is that there is no express policy requiring employers to prevent, correct and deter whistleblower retaliation. This position would lead to the result that while retaliation is prohibited, the employer has no duty to respond to credible reports of potential retaliation and is allowed to shrug its shoulders when its top executive is informed that his direct report has just terminated someone in violation of the whistleblower statutes. Certainly, such a result was not intended by a Legislature whose stated purpose is to encourage workplace whistleblowers to come forward without fear of retaliation and whom has just significantly broadened whistleblower protections under recent amendments to those statutes.

Defendants admit that FEHA does require them to take reasonable steps to prevent retaliation. However, Defendant ignores the fact that FEHA makes no mention of retaliation in the provision that requires employers to take reasonable steps to prevent *harassment and discrimination* from occurring. Yet, Defendant does not dispute that the FEHA requires employers to take reasonable steps to prevent retaliation from occurring.[1] *See also Taylor v. City of Los Angeles Dept. of Water and Power* (2006) 144 Cal.App.4th 1216, 1239-40 *disapproved on other grounds by Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158 *and Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1050 ("When the provisions of section 12940 are viewed as a whole, ... we believe it is more reasonable to conclude that the Legislature intended to extend a comparable degree of protection both to employees who are subject to the types of basic forms of discrimination at which the FEHA is directed—that is, for

[1] Gov. Code, § 12940(k) provides it is a prohibited employment practice, "[f]or an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring."

example, discrimination on the basis of race or sex—and to employees who are discriminated against in retaliation for opposing such discrimination.")

Similarly, when the policy of Labor Code 1102.5 is viewed as a whole, it certainly must be relevant whether an employer took any reasonable steps to prevent, deter, and remedy whistleblower retaliation.

Finally, Labor Code §1102.5(a) provides that an employer cannot make any rule or policy preventing an employee from making a disclosure of information they believe to be unlawful. Defendants' wholly inadequate response to Plaintiff's repeated complaints about threats of retaliation is highly relevant to its liability under this section. As the Grand Jury found in its report of Defendants' whistleblower program, "[a] poor or mediocre Whistleblower Program – one that seems to be something it is not – is perhaps worse than none at all." (See Request for Judicial Notice (RJN) Ex. D p. 3). The Grand Jury concluded as follows" "[o]f paramount importance, the [Evil Corp.] whistleblower program, does not protect the whistleblower." (See RJN Ex. D p. 22).

This is the very program that Margaret Nancy said she alerted Plaintiff to when Plaintiff complained of retaliation at the time she was terminated. (See Walker Decl. Ex. N, Nancy depo 61:14-63:21, 70:15-21). It is also the program that the Big Boss's Vice President, Jim Bob, referred to in his deposition as the proper place for whistleblower complaints to be directed. (See Walker decl. Ex. Q, Bob depo 44:13-45:13). Vice President Jim Bob and Big Boss allegedly do not recall that Supervisor came to them with Plaintiff's complaints of whistleblower retaliation and it is undisputed that they did nothing to prevent or correct whistleblower retaliation.

Such evidence is highly relevant and material in deciding the liability of Evil Corp. and should be admitted. At the very least, the court should reserve judgment on this matter until this testimony comes up in the context of the trial.

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B. The City's Failure to Prevent and Correct Retaliation Subjects It to Liability

As discussed above in detail, employers do have a duty to prevent and correct whistleblower retaliation. In *Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.* (2009) 555 U.S. 271 the Supreme Court remarked about this duty as follows:

[a]n employer [is] subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with ... authority over the employee." ... An employer [has] a defense [to vicarious liability] if it "exercised reasonable care to prevent and correct promptly any" discriminatory conduct. Employers are thus subject to a strong inducement to ferret out and put a stop to any discriminatory activity in their operations as a way to break the circuit of imputed liability.

Id. at 278-79. Although the court was referring to the duty to prevent and correct discrimination, such an analysis is equally applicable to retaliation for whistleblowing considering it is the public policy of this state to protect and encourage whistleblowers. *See Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1549-50.

Big Boss, as the head of Evil Corp., was the only Evil Corp. employee that had the authority to prevent and correct retaliation by Defendant Wrongdoer. California Government Code 815.2(a) provides that Evil Corp. is vicariously liable for the acts (or failures to act) of its employees.

Here, Jane Plaintiff had informed Supervisor when he was the her superior that she was concerned about retaliation from Wrongdoer. (Supervisor Depo Conf. 16:2-17:3). Supervisor felt that Wrongdoer's termination of Plaintiff was retaliatory. (Supervisor depo Conf. 17:24-18:2.)

Supervisor talked to Big Boss and Vice President Jim Bob about Wrongdoer's termination of Jane Plaintiff. Supervisor testified as follows:

> Q. In any event, you recall a conversation where she asked you for help and you offered to contact the Big Boss's office?
>
> A. Yes.

Q. And did you, in fact, do so?

A. Yes.

Q. And earlier you indicated that you spoke both to the Big Boss and to his Vice President Jim Bob?

A. Yes.

Q. Tell me about those conversations. Who did you speak with first?

A. They were together and very generally, it was a very short conversation, but I expressed my concern having to do with Plaintiff's termination and basically carry her message. I felt it was important for the Big Boss to be aware of this personnel action as well as others, and I made that known to him.

Q. Do you recall when that conversation took place?

A. It was very shortly after Jane asked me to do so, within a day or two.

Q. And where did the conversation take place?

A. Big Boss's office.

Q. And what was the response from either the Big Boss or the Vice President?

A. Again, very generally because I don't recall specifics, but basically they heard me and they felt that they were not going to do anything about it.

(See Walker Decl. Ex. P, Supervisor Conf. 23:12-24:17).

Defendant argues that Big Boss did not have personal knowledge of the reasons Plaintiff was terminated. This is not true. He knew that Plaintiff had been threatened by Wrongdoer's attorneys and others that she would be fired if Wrongdoer ever became her superior. Supervisor oversaw the resolution of the discipline case against Wrongdoer and Supervisor certainly knew of Ms. Plaintiff's contention that the termination was retaliatory. As he testified above, he carried Jane Plaintiff's message that her termination was retaliatory when he spoke to the Big Boss.

Defendant's reliance on *Hansen v. California Dept. of Corrections and Rehabilitation* (2008) 171 Cal.App.4th 1537 is misplaced. In that case, the employee alleged that all of the retaliation took place after he was no longer an employee. *Id.* at 1546. Here,

Plaintiff's termination was the adverse employment action specifically proscribed by Labor Code 1102.5. Plaintiff was an employee of Evil Corp. when she was fired. She is not claiming any retaliation that occurred after she is fired. She is merely claiming that the company failed to comply with the whistleblower statutes when the Big Boss sat idly by and did nothing to prevent or correct the retaliation that had occurred against an Evil Corp. employee and for which he had direct personal knowledge.

For these reasons, the court should admit testimony from Supervisor about his complaints to the Big Boss and also testimony from Jim and the Big Boss about their failure to act in response to these complaints.

C. It is Well Established that Human Resources Experts are Helpful to the Jury

Several courts have held that experienced human resources expert's testimony is relevant and helpful to juries. *See Kotla v. Regents of Univ. of California* (2004) 115 Cal.App.4th 283, 289-90 (*Kotla*); *In re Apollo Group Inc. Sec. Litig.* 527 F. Supp. 2d 957, 964 (D.Ariz. 2007) (*Apollo*), *and Humphreys v. Regents of Univ. of California* 2006 WL 1867713, at *3 (N.D. Cal. July 6, 2006) (*Humphreys*).)

Regarding expert testimony on human resources issues, the Court of Appeal declared in *Kotla*,

Expert testimony on predicate issues within the expertise of a human resources expert is clearly permissible. For example, evidence showing (or negating) that an employee's discharge was grossly disproportionate to punishments meted out to similarly situated employees, or that the employer significantly deviated from its ordinary personnel procedures in the aggrieved employee's case, might well be relevant to support (or negate) an inference of retaliation. Opinion testimony on these subjects by a qualified expert on human resources management might well assist the jury in its factfinding.

(115 Cal.App.4th at 294 n.6 [emphasis added].)

Ms. Management will testify that Defendants materially deviated both from generally acceptable management and human resources practices and its own policies/procedures in terminating Plaintiff. This expert opinion testimony is "fair game" because such evidence would support an inference of retaliation. (*See Kotla* at 295 n.8; *see also Humphreys*, 2006 WL 1867713, at *2 (Human resources expert's proposed testimony about the defendant's deviation from good human resources practices was proper expert testimony under Federal Rules of Evidence Rule 702).)

At trial, Mary Management will testify that under generally accepted and usual management practices employers have a responsibility to prevent, correct, remedy and deter whistleblower retaliation. These generally accepted practices have their basis in four sources: in public policy under the California Labor Code and other anti-retaliation statutes; under federal and state whistleblower protection statutes and advisory guidance, particularly that offered by the Federal Sentencing Guidelines for Organizations that essentially mandate employers to have an effective compliance program whereby employees can report potential or actual criminal activity without fear of retaliation; in legal precedent, including United States Supreme Court precedent such as *Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.* (2009) 555 U.S. 271; and in the extensive body of knowledge relied upon by compliance professionals in advising and assisting employers as to their obligations and relevant standard of care regarding necessary anti-retaliation measures in the workplace. (See Walker Decl. Ex. R, Management Decl. ¶ 5). (See also RJN Ex. D, excerpts from Federal Sentencing Guidelines).

Defendant leaves out a lot of testimony in its citations to the court. Ms. Management testified that she would be commenting on far more than the inadequacy of the company's whistleblower policies.

> Q. So your opinions relate to the -- generally what you see as the inadequacy of the company's retaliation programs?
> A. Yes, essentially. That's what I do, I analyze, evaluate, and compare to similarly situated employers at the time the management practices that Evil Corp engaged in and that which they should have engaged

in to meet their obligations to prevent, correct, defer and/or remedy retaliation and potential retaliation for employees engaging in protected activity at the time.

Q. Now, you reviewed the Evil Corp.'s employee handbook and I also believe that you've -- have a copy here of the whistle-blower complaints program within your materials?

A. Correct.

Q. Did you form an opinion that these programs were insufficient as far as you're concerned?
A. They are. The policies and procedures that are included here are, in a word, insufficient. They failed to meet usual and reasonable standard of care. However, much more important than the failure of these written policies is the other things that I've mentioned. In other words, policies and procedures are only a small part of how an employer meets its compliance obligations. More important are leadership and whether they actually have the personnel, the systems, and the commitment to enforce those policies and procedures.
So yes, in my view, comparing it to my experience and expertise in this field, the written policies are inadequate. They're deficient. But far more important is the deficiency of the implementation of policies that should have existed as well as the policies that did. And here, by the way, I'm being specific to the department.

…

Q. Just in the interest of time, I want to try to short-circuit a lot of this. As I understand your opinions generally, they relate to the inadequacy of the company's policies with respect to these issues; correct?
A. Right.
Q. The second component of your opinions or your testimony is the implementation of what policies do exist?

A. Well, and the failure to implement policies that should have existed. In other words, it's not just the failure of the implementation of such policies that the company actually had. Even more important, the company should have had better policies and much more robust procedures to stop managers and supervisors from thinking that they could engage in retaliation or retaliatory activity, that they had no responsibility in the compliance departments to make sure it wasn't happening and to take steps to see that it didn't. There's so many other efforts. It's not just these policies were deficient or their implementation was deficient; it's also that there was a whole program that should have existed, an awareness and a commitment to that program that did not.

…

Q. Okay. Do you have any information that the reason given for her release from the Evil Corp are pretextual?

A. Well, primarily of course the actual decision on that is a factual decision that will be made by the jury. It is within my expertise to note, although I may not be asked to describe it, the ways in which retaliation is ordinarily spotted and stopped. For example, when an employee receives a threat of retaliation and the employee raises that concern and nothing is done, then it would be within my opinion to say that allows retaliation to flourish. So there are management failures that I have noted here that certainly set the scene at Evil Corp. for retaliation. Whether or not it actually occurred will be up to the jury.

(See Walker Decl. Ex. S, Mary Depo 29:11-30:25, 38:13-39:13, and 39:18-40:9).

All of Ms. Management's opinions are relevant and material and will assist the jury in deciding whether Evil Corp. is liable for its failure to prevent retaliation against a whistleblower.

III. CONCLUSION

For all of these reasons, Plaintiff respectfully requests the court deny Defendants' Motion in Limine No 3 and allow testimony that 1) Defendants' whistleblower policies are inadequate and failed to prevent retaliation against Plaintiff; 2) that Supervisor alerted the Big Boss of Plaintiff's retaliatory termination and the Big Boss did nothing and 3) the testimony of Plaintiff's management practices expert Mary Management.

DATE: April 29, 2016 GWILLIAM IVARY CHIOSSO CAVALLI & BREWER

Jayme L. Walker
Attorneys for Plaintiff

Jayme L. Walker (SBN.273159)
GWILLIAM IVARY CHIOSSO CAVALLI & BREWER
1999 Harrison St., Suite 1600
Oakland, CA 94612
Phone: (510)832-5411
Fax: (510)832-1918
Email: jwalker@giccb.com

Attorney for Plaintiff

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

JAMES PLAINTIFF, Plaintiff, vs. BIG CITY BANKING, Defendant	Case No.: ABC-00-123456 PLAINTIFFS' MOTION IN LIMINE NO. 1 TO EXCLUDE IRRELEVANT AND PREJUDICIAL INFORMATION REGARDING PLAINTIFF JAMES PLAINTIFF'S PERFORMANCE

NOTICE OF MOTION AND MOTION

TO DEFENDANT AND ITS ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on January 1, 2010, at 8:30 a.m., or as soon thereafter as the matter may be heard, before the Honorable Joe Judge in the Superior Court for the State of California, County of Alameda, plaintiff James Plaintiff will, and hereby does, move this Court for an order excluding evidence or argument at the trial in this matter regarding plaintiff's performance as it relates to coaching the tellers.

This motion is supported by the following Memorandum of Points and Authorities; the complete files and records in this case; and such other argument or evidence as may be presented at the hearing on the motion.

///

DATE: April 29, 2016

GWILLIAM IVARY CHIOSSO CAVALLI & BREWER

JAYME L. WALKER
Attorneys for Plaintiff

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is an age discrimination case. Plaintiff James Plaintiff worked for Big City Banking for 20 years before he was terminated because of his age. Defendant claims it terminated Plaintiff because he signed her minor child's name to a withdrawal slip and asked another teller to process the transaction while his child was not present. Defendant claims it terminated Plaintiff for this despite the fact that Defendant agrees that Plaintiff did so at the request and with the permission from his child.

Much of Defendant's Motion for Summary Judgment and much of its deposition of James Plaintiff centered around alleged performance deficiencies related to coaching the other tellers on their sales goals. It is undisputed that Plaintiff was not terminated for performance reasons. (See Deposition of Mean Boss at page 3:22, and Defendant's Responses to Special Interrogatory 1, Set 1). Furthermore, no one ever even considered terminating Plaintiff for these alleged performance deficiencies. Therefore, any alleged deficiencies in Plaintiff's performance are a red herring, and simply a waste of time designed to distract the jury away from the real issues in this case. As such, Plaintiff request an order excluding any argument or reference to Plaintiff's alleged performance deficiencies in coaching the tellers.

II. ARGUMENT

First, any evidence regarding Plaintiff's alleged failure to adequately coach the tellers on their sales goals is irrelevant to the issues in the trial. (Evid. Code §§ 210, 350.) The evidence has no bearing on Plaintiff's termination by Defendants or the reasons for that termination. The only issues in dispute in this case are whether Plaintiff was terminated for withdrawing money from his minor child's account or whether that reason is pretext for age discrimination. Put simply, evidence of his alleged failure to coach the tellers has no tendency in reason to prove or disprove any disputed fact that is of consequence to the verdict in the trial.

Second, even if the evidence were somehow relevant, which Plaintiffs vigorously dispute, it easily fails an Evidence Code section 352 analysis. Any evidence or argument regarding such matters will lead to the undue consumption of time and will create a substantial danger of undue

prejudice, of confusing the issues, and misleading the jury. (Evid. Code § 352.) As stated above, these alleged performance deficiencies had nothing to do with Plaintiff's termination from the Bank. For these reasons, the evidence must be excluded

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion in limine to exclude irrelevant and prejudicial information regarding Plaintiff's alleged performance deficiencies in coaching tellers to meet their sales goals.

DATE: April 29, 2016 GWILLIAM IVARY CHIOSSO CAVALLI & BREWER

JAYME L. WALKER
Attorneys for Plaintiff

Jayme L. Walker (SBN. 273159)
GWILLIAM IVARY CHIOSSO CAVALLI & BREWER
1999 Harrison St., Suite 1600
Oakland, CA 94612
Phone: (510)832-5411
Fax: (510)832-1918
Email: jwalker@giccb.com

Attorneys for Plaintiff

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

JANE PLAINTIFF, Plaintiff, vs. EVIL CORP., JOE WRONGDOER, and DOES 1-100, Defendants.	Case No.: ABC-00-123456 PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION IN LIMINE NO. 2 TO EXCLUDE THE TESTIMONY OF WITNESSES THAT BIG BOSS RETALIATED AGAINST THEM OR OTHERS

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

This is a case for whistleblower retaliation brought by former Department Manager, Jane Plaintiff. In 2000, Jane Plaintiff reported to her supervisors that Joe Wrongdoer had violated the law when he failed to write a report, start an investigation, or check for a restraining order when responding to a serious reported incidents. Ms. Plaintiff was charged with prosecuting the subsequent discipline case against Wrongdoer. The case against Wrongdoer

was ultimately resolved by Supervisor. Two and a half weeks after Wrongdoer was appointed her direct superior, he terminated Plaintiff.

Susie Q was the Human Resources Manager assigned to Wrongdoer's case. After she tried to interview Wrongdoer's friend, who was at the center of the alleged wrongdoing, a complaint was filed against Q. When Wrongdoer was promoted, he further retaliated against Q by taking her off her current assignment reassigning her to a less desirable location. (Plaintiff depo 184:22-186:22).

Susie Q was married to Michael Q. Michael also worked in the same department as Plaintiff and Q. When Wrongdoer was promoted, Michael asked to be moved out of the department because she believed Wrongdoer was unethical. Almost immediately thereafter, Michael was the subject of an investigation. Thereafter he was also given undesirable assignments due to his association with Nancy and Plaintiff and his own work in the department. (See Walker Decl. Ex. G, Michael Decl. ¶ 7 and 12).

Defendant seeks to preclude these witnesses from testifying that Wrongdoer retaliated against them because of their work on his discipline case and/or because of their association with plaintiff or others who worked on Wrongdoer's discipline case. Such evidence is highly probative of Wrongdoer's retaliatory motive in this case and should be admitted.

II. ARGUMENT

A. Evidence that Wrongdoer Retaliated Against Other Employees Is Relevant and Admissible

Clear California authority holds that evidence that other employees were retaliated against under similar circumstances, often referred to as "me-too evidence" is admissible. The Court of Appeal declared in *Johnson v. United Cerebral Palsy/Spastic Children's Found.* (2009) 173 Cal.App.4th 740, 765:

> [H]ere we can say as a matter of law that the "me too" evidence presented by plaintiff In the instant case is **per se admissible** under both relevance and Evidence Code section 352 standards. The evidence sets out factual scenarios related by former employees of defendant that are sufficiently similar to the one presented by plaintiff concerning her own discharge by defendant, and the probative value of the evidence clearly outweighs

> any prejudice that would be suffered by defendant by its admission. ***Dissimilarities between the facts related in the other employees' declarations and the facts asserted by plaintiff with regard to her own case go to the weight of the evidence, not its admissibility.***

In *Pantoja v. Anton*, (2011) 198 Cal.App.4th 87, the Court of Appeal reaffirmed the admissibility and relevance of "me-too" evidence in discrimination cases. Citing *Estes v. Dick Smith Ford, Inc.* (8th Cir.1988) 856 F.2d 1097, 1103, the California court observed that exclusion of "me too" evidence can be especially damaging in employment cases, in which "plaintiffs face the difficult task of persuading the fact-finder to disbelieve an employer's account of its own motives." The court went on to say that it was difficult for the law to protect workers from discrimination (or retaliation) when "it is so easy to concoct a plausible reason for ... firing ... a worker who is not superlative." As such, "a plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries." *Pantoja*, 198 Cal. App. at 113. Therefore court noted:

> Circumstantial proof of discrimination typically includes unflattering testimony about the employer's history and work practices— evidence which in other kinds of cases may well unfairly prejudice the jury against the defendant. In discrimination [or retaliation] cases, however, such background evidence may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive.
>
> *Id.* at 113 citing *Estes*, 856 F.2d at p. 1103.

Furthermore, in *Johnson, supra*, the California Court of Appeal cited the Supreme Court opinion in *Sprint/United Management Co. v. Mendelsohn* (2008) 552 U.S. 379, and noted the issue on appeal was: " [W]hether, in an employment discrimination action, the Federal Rules of Evidence require admission of testimony by nonparties alleging discrimination at the hands of persons who played no role in the adverse employment decision challenged by the plaintiff." The Supreme Court's answer was that the relevance of the evidence "is fact based and depends

on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case," and that similar considerations are involved in balancing the probative value of the evidence against its prejudicial effect." *Johnson, supra,* 173 Cal.App.4th at 766-67. Moreover, courts have rejected the notion that me too evidence is *unfair prejudice.* No doubt Defendants will be prejudiced by the multitude of evidence of such pattern of retaliation, but not unfairly so. As one district court explained in *Kneisley v. Hercules, Inc.* (D. Del. 1983) 577 F.Supp. 726, when an employer has a specific retaliatory plan "***it is hard to see how there is sufficient danger of unfair prejudice to substantially outweigh the testimony's probative value. If [the Defendant], in fact, carried out the alleged plan, then the evidence surely will be prejudicial, but not unfairly so… "*** *Id.* at 732-33 (emphasis added).

Defendant relies on mostly federal court cases that do not apply California law. *Beachy v. Boise Cascade Corp.,* (9th Cir. 1999) 191 F. 3d. 1010 was an Oregon case based on Oregon laws. The court held that the testimony plaintiff sought to offer in a disability discrimination case was not admissible because it did not show other disability discrimination it merely showed the employer was hard-nosed with regard to medical appointments. The court noted that, if the employer's treatment of these individuals did rise to the level of disability discrimination, it would be admissible. *Id. at* 1013-14.

First, *Beachy* is contrary to California law, and therefore, is not even persuasive. *See Johnson v. United Cerebral Palsy/Spastic Children's Found, supra.* The fact that Chief Suhr retaliated against anyone who was involved in his discipline case is highly probative of the fact that he was motivated to retaliate against the prime person in charge of that case, Ms. Plaintiff.

The only California case relied on by Defendants is *Brown v. Smith* (1997) 55 Cal.App.4th 767. In that case, the court found that the testimony of the other witnesses of sexual harassment was not sufficiently similar to the pattern of harassment endured by the plaintiff. The court found that one vulgar comment to the other witnesses was not sufficiently severe and pervasive to constitute sexual harassment, and should therefore, be excluded as overly prejudicial to Defendant. *Id.* at 794-95.

Here, the other witnesses were either involved in Wrongdoer's discipline case or closely associated with people who were involved in the discipline case. Wrongdoer fired both Nancy and Plaintiff who were involved in the discipline case. However, Wrongdoer could not fire others in that department without dealing with their union. Therefore, he sought to retaliate in terms of their assignments. However, the motivation to retaliate is based on the exact same facts as Plaintiff's case. For these reasons, evidence that Wrongdoer retaliated against others for their participation in his discipline case or their association with Jane Plaintiff is relevant and admissible.

B. The Fact That Wrongdoer Retaliated Against Other People Involved in His Discipline Case Shows a Plan

Defendant argues that the testimony of other witnesses that Wrongdoer retaliated against them is inadmissible character evidence and should be excluded under Evid. Code 1101.

However, subdivision (b) of Evidence Code section 1101 clarifies, that the rule does not prohibit admission of evidence of misconduct when such evidence is relevant to establish some fact other than the person's character or disposition. Evid. Code 1101(b) provides "[n]othing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity …) other than his or her disposition to commit such an act." Evid. §1101(c) provides, "[n]othing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness."

Even the *Brown* case cited by Defendants acknowledges that "[t]he presence of a design or plan to do or not to do a given act has probative value to show that the act was in fact done or not done." *Brown v. Smith*, (1997) 55 Cal.App.4th 767, 790 (citing *People v. Ewoldt*, (1994) 7 Cal.4th 380, 393).

Here, Joe Wrongdoer clearly harbored ill will against any person that was involved in his discipline case, including Jane Plaintiff, Jerry Tidwell, Susie Q and Paget Mitchell. As such,

the evidence goes to his plan, motives and intent to retaliate against those who were involved in his discipline case, not his character, and should be admitted.

III. CONCLUSION

For all of these reasons, Plaintiff respectfully requests the court deny Defendants' Motion in Limine No. 2 to preclude evidence that Wrongdoer retaliated against other employees of the Evil Corp.

DATE: Gwilliam Ivary Chiosso Cavalli & Brewer

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Jayme L. Walker

Attorneys for Plaintiff