

**No. 2nd Civ. B317334**  
(LASC Case No. BC684618)

**COURT OF APPEAL OF THE STATE OF CALIFORNIA**  
**SECOND APPELLATE DISTRICT**  
**DIVISION FOUR**

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KARL ZIRPEL,  
*Respondent,*

v.

ALKI DAVID PRODUCTIONS, INC., et al.,  
*Appellant.*

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Appeal from Los Angeles County Superior Court  
Hon. Dennis J. Landin, Judge Presiding

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**APPELLANT'S OPENING BRIEF**

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**CERTIFICATE OF INTERESTED PARTIES OR ENTITIES**

Pursuant to California Rule of Court 8.208, Appellant Alki David Productions, Inc. states that it knows of no person or entity that has an interest in the outcome of this proceeding other than the parties themselves.

Dated: September 7, 2022

GLASER WEIL FINK HOWARD  
AVCHEN & SHAPIRO LLP

By: \_\_\_\_\_ /s/

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## **I. Introduction And Summary Of Argument**

Appellant Alki David Productions (“ADP”) appeals from a judgment of over \$7.1 million in favor of its former employee, Respondent Karl Zirpel, whose employment was terminated after he refused to continue installing hologram equipment for a special event (the “Event”) at a theater ADP was renovating. Zirpel claimed that was fired because he had complained to ADP that electrical and plumbing work at the Theater had not been approved by Los Angeles City inspectors and there was no permit, an alleged act of retaliation by ADP that would have violated three whistleblower statutes, Labor Code §§1102.5(b), 1102.5(c), and 232.5(c).<sup>1</sup>

Mid-trial, the trial court erroneously ruled that the Event had not been properly permitted and construction related to the Event was unlawful (the “Illegality Ruling”), despite ample evidence and authority to the contrary. The jury was so instructed, effectively directing a verdict for Zirpel on his entire case, to which the jury added \$6 million in punitive damages.

The Illegality Ruling was erroneous because ADP did obtain a permit for the Event and Zirpel’s continued installation work for the Event would not have violated either the Los Angeles Municipal Code sections cited by Zirpel and adopted by

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<sup>1</sup>All statutory references are to the Labor Code unless otherwise indicated. The statutes prohibit retaliation against an employee who refuses to participate in an activity that would violate the law (§1102.5(c)) or discloses information about working conditions (§232.5(c)) or which he has reasonable cause to believe discloses a violation of the law (§1102.5(b)).

the trial court, or any other law. *See* §§IV(A)(1)-(2), *infra*.

The erroneous Illegality Ruling requires reversal of the judgment on not only the §1102.5(c) claim but the §1102.5(b) claim as well. It became legally and logically impossible for the jurors to find that Zirpel did not reasonably believe there was a violation of law when the trial court instructed them that the court had already found there was, and that they were bound to accept that finding. *See* §IV(B)(1), *infra*.

Additionally, the judgment on the claims under §§1102.5(b) and 232.5(c) should be reversed because there was insufficient evidence that Zirpel was fired because of his allegedly protected conduct. Zirpel relied solely on a theory of temporal proximity (the elapsed time between his refusal to work and his firing), which is insufficient as a matter of law to support either claim. *See* §§IV(B)(2), (C). The trial court compounded the error by applying the wrong test of causation when denying ADP's post-trial motions. *Id.*

Finally, the punitive damages are unconstitutionally excessive under controlling decisions by the United States and California Supreme Courts, authority which the trial court ignored in favor of case law superseded by those opinions. *See* §IV(D), *infra*. The judgment should be reversed in its entirety, with directions to enter judgment in ADP's favor or, in the alternative, for a complete new trial.

## **II. Statement Of Facts**

On appeal from a judgment entered on a jury verdict, the facts must be stated in the light most favorable to the jury's

verdict. *Blanks v. Seyfarth Shaw LLP*, 171 Cal.App.4th 336, 346 n.2 (2009). Viewed accordingly, the evidence (taken largely from Zirpel’s trial testimony) is as follows:<sup>2</sup>

**A. The Parties**

Zirpel grew up in Northern California and graduated in 2009 from Long Beach State with a degree in communications. 4RT 1924:2-20. After various jobs in the entertainment industry, he began working for ADP as a camera operator. Volume 4, Reporters’ Transcript (“RT”) at 1925:11-1929:16.

ADP is one of several entertainment and media companies owned by Alkiviades David. 4RT 1805:21-1806:5.<sup>3</sup> Initially, ADP produced mostly internet programming but in 2014, it began concentrating on hologram technology by which images are projected on to a screen or “foil” and reflected for the audience’s viewing. 4RT 1932:6-1933:9.

Zirpel became heavily involved in the hologram production, learning the technology and how to install the equipment and stage the productions that ADP created for television shows, concerts, and museums. 4RT 1933:13-1934:26, 1935:4-28, 1936:1-10. With Zirpel’s increased knowledge and responsibilities came

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<sup>2</sup>Certain additional facts appear in §§III-IV, *infra*.

<sup>3</sup>ADP is a Delaware corporation which at one point lost its good standing with the California Secretary of State. Volume 2, Appellant’s Appendix (“AA”) at 1166:5-7, 1170; 6RT 2528:13-16. Accordingly, ADP’s answer was stricken and its default entered. 2AA 1027, 1166:8-9. ADP’s current counsel caused ADP to be restored to good standing (2AA 1166:10-14, 1170; 2RT 3:14-4:10; 6RT 2528:13-16, 3018:6-7), after which ADP’s default was set aside and its answer reinstated (2AA 1168).

the new title of vice president of operations. 4RT 1934:7-15; 5RT 2149:2-5. Zirpel also received numerous raises, ultimately making a salary exceeding \$72,000. 4RT 1930:1-1932:5, 1936:22-1937:5, 13-15; 5RT 2149:6-7; 4AA 2448; 5AA 3011-3018. Zirpel was also paid bonuses and commissions on the sale of hologram projects. 4RT 1929:1-7, 1937:6-12.

## **B. The Theater**

ADP's hologram productions for television shows, concerts, and museums had decreased by mid-2017. 4RT 1936:1-10, 1938:1-19. Instead of working on those "one-off" projects, in late August or early September 2017 Zirpel began working on ADP's conversion of an old church on Hollywood Boulevard into a theater for hologram productions (the "Theater"). 3RT 1601:14-28; 4RT 1844:5-7, 1938:20-1939:28; 5RT 2189:4-6, 2189:22-28.

When Zirpel began working at the Theater, a private, invitation-only special event for celebrities and potential investors had already been planned for September 28, 2017 (the "Event"). 4RT 1940:9-14; 5RT 2215:17-28, 2235:2-3, 2252:23-2253:2. However, very little work on the Theater had been done. 3RT 1605:1-7; 4RT 1940:1-1941:22. There were no restrooms, fire exit signs, ADA-compliant ramps, or drywall. 4RT 1940:15-25. The hologram equipment had not been installed and remained in a storage unit. 4RT 1944:8-15. The hologram installation at the Theater, unlike the temporary hologram installations at the concerts and other productions that Zirpel had previously handled, would be permanent. 4RT 1943:20-1944:7.

Zirpel was at the Theater on September 25, 2017 when

several Los Angeles City inspectors came to the Theater. 4RT 1944:16-1945:12. Each “denied their own approvals” of work that had been done to date. 4RT 1945:13-21. Zirpel learned of deficiencies with the plumbing and electrical work. 4RT 1945:25-1946:28. The inspectors’ correction notices for the September 25, 2017 plumbing and electrical inspections, each labeled “Not Approved – Correction Notice” (4AA 2593-2596, 2623), are collectively referred to as the “Correction Notices.”

Zirpel was concerned about the plumbing and electrical work, as well as the hologram equipment he was going to install. 4RT 1947:3-7, 1950:4-16. Unlike the temporary installations Zirpel had done elsewhere, the projectors in the Theater, each weighing hundreds of pounds, would be hung directly over the audience and Zirpel was concerned about the integrity of the ceiling and the floor. 4RT 1947:3-1948:8, 16-20.

Zirpel spoke to the inspectors and learned that it was impossible for them to return and approve the electrical and plumbing work before the Event, both because of the inspectors’ schedules and the amount of work to be done. 4RT 1948:21-23, 1949:13-23, 1950:4-26. After the inspectors left, David ordered the construction crew to put plywood over the walls with exposed wiring underneath, the wood was painted black, and drapes were hung throughout the Theater. 4RT 1950:17-26, 1951:12-18.<sup>4</sup>

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<sup>4</sup>ADP’s former in-house attorney and project manager, Manuel Nelson, testified that the drapes were hung for aesthetic reasons, not to conceal wiring or anything else, and were easily pushed aside. 5RT 2233:23-2234:1, 15-20. Safety data on the curtains was requested by, and provided to, the fire department. 5RT 2234:2-14.

Zirpel was concerned that David was pushing to hold the Event even though the Theater was not ready. 4RT 1951:26-10952:4. The next day, September 26, 2017, Zirpel told Ian Robertson, ADP's senior vice president of operations (3RT 1596:16-23), of his concerns, including the lack of permits, and that he intended to call the fire inspector. 3RT 1616:28-1617:6; 4RT 1952:5-11, 1956:14-21. That afternoon, Zirpel called to speak to Eugene Andrews, a city fire inspector with whom he had worked on other ADP projects. 4RT 1952:5-28, 1953:1-24. However, Zirpel was nervous about "ratting out my boss and the people I work with," hung up, and then called back. 4RT 1954:2-1955:15; 5RT 2111:1-7; 4AA 2450.

The second time, Zirpel spoke to a receptionist. 4RT 1955:1-15; 4AA 2450. Without giving his name, Zirpel said that the Theater was due to open on September 28; that inspectors had come to the Theater; that "none of the work was approved to move forward with the opening;" that there were no permits; and that someone should come to the Theater "to take a look and see what was going on." 4RT 1956:1-13; 5RT 2112:1-23. Zirpel was told that someone would come out the next day. 4RT 1955:25-27; 5RT 2112:24-25.

### **C. The Termination Of Zirpel's Employment**

On the morning of September 27, Zirpel arrived at the Theater where he met Andrews outside. 4RT 1957:3-1958:2. Andrews asked who was in charge. 4RT 1958:3-7. Zirpel and ADP's chief technical officer ("Nick") each identified the other as being in charge. 4RT 1958:3-1959:1. Andrews took down both

men's identification information. 4RT 1959:2-4. Andrews then walked into the Theater, briefly looked around, stopped all work, told everyone to leave, and then walked back outside. 4RT 1959:5-24; 5RT 2153:3-12. Everyone else left the Theater, too. 5RT 2153:25-28.

Outside, Andrews stated that no work was to be done inside without posted fire exit signs. 4RT 1960:14-17, 5RT 2154:1-6. From this, Zirpel understood that "when those signs were posted, we had the clearance to go back in and work again." 5RT 2154:7-8. Nick left to buy the signs. 4RT 1960:20-25.<sup>5</sup>

Zirpel also learned from Andrews about the Ghost Ship warehouse fire in Oakland, a large fire four years earlier which had killed more than 20 people. 4RT 1961:7-24. Andrews said that there was the potential for liability, that if Zirpel were in charge of the building and there were an issue, Zirpel could be referred to the district attorney. 4RT 1961:15-1962:3.

Zirpel left in a U-Haul truck to go to the storage unit containing the hologram equipment. 4RT 1962:10-21. After leaving the Theater, Zirpel texted Nelson, who was in charge of acquiring permits, about his conversation with Andrews. 4RT 1962:22-25, 1963:14-21. Zirpel told Nelson that he was not comfortable being identified as the person in charge and the subject of a possible referral to the district attorney as the responsible party if anything went wrong. 4RT 1963:14-25, 1964:20-1965:7. Zirpel stated that he would "get started on

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<sup>5</sup>The signs were installed above every exit (5RT 2209:22-28) and work, including installation of the hologram equipment by Robertson and others, continued that day (3RT 1611:21-26).

rigging [the] set up with the permit,” asked if there were “a time frame for the permit,” and said he would be “on standby to unload” the equipment. *Id.*

Nelson texted back, stating that the permit application had been submitted; that he was meeting with the inspectors the following day; and that until and unless the application was denied, “all of us need to continue working toward the special event.” 4RT 1965:11-22; 5RT 2232:14-27; 4AA 2439. Zirpel remained concerned because “there were still so many corrections that needed to be done” before the Event. 4RT 1966:4-15.

David tried repeatedly to call Zirpel, who did not answer because he was driving. 4RT 1966:16-1967:3; 4AA 2437. David then texted Zirpel, stating, “We need this setup done. I read this text you sent. The permits will be given tomorrow morning. Nothing stops.” 4RT 1967:23-27; 4AA 2435.

When Zirpel returned to the Theater, he parked the U-Haul and went inside, where he saw work being done. 4RT 1968:14-28. Zirpel met with Robertson and Nick, voicing concerns about installing the hologram equipment and the lack of approvals for the construction. 3RT 1607:8-14, 1607:25-1608:4; 4RT 1969:1-1970:2. Zirpel stated that the work should not be proceeding, that it was unsafe, and it was “our job and our responsibility” to say so. 3RT 1607:8-14; 4RT 1970:1924.

David arrived and demanded to know why everyone was standing around and no work was being done. 3RT 1608:24-1609:4; 4RT 1970:8-14. Zirpel said they needed to discuss if the Event were going forward because “we’ve got none of the

inspectors signed off on any of the work done,” and listed all the reasons the Theater should not be opening on September 28.

3RT 1608:24-27, 1609:10-15; 4RT 1970:19-28.

David “immediately blew up,” telling Zirpel to shut up and “go with the program,” and that he was either “in or out.” 3RT 1609:5-9, 16-17; 4RT 1971:1-7. Zirpel kept repeating that what they were doing “is not safe.” 4RT 1971:8-11. David went into “a fit of rage,” started yelling in Zirpel’s face and, using numerous obscenities, told Zirpel to “get out,” to “get the f. . . out, you faggot,” and that Zirpel was fired. 3RT 1613:18-28; 4RT 1843:3-9, 1971:13-23.

Zirpel handed David the U-Haul’s keys and walked out of the Theater. 4RT 1972:13-1973:26. As Zirpel left, David told Zirpel “to suck my dick.” 4RT 1971:19-20, 1972:13-18. The situation was very “traumatic” for Zirpel, who “wasn’t out to a lot of people” including many with whom Zirpel worked in a very masculine construction environment, and Zirpel had trusted David, who was one of the few people who knew that Zirpel was gay. 4RT 1972:1-12.

David followed Zirpel out of the Theater and continued yelling at Zirpel, saying that he was not a team player and it was not his job “to say what happens.” 3RT 1610:15-27, 1614:4-9; 4RT 1834:28-1835:4, 1909:11-17, 1973:27-1974:12. David walked away, returned, “came to his senses,” realized “the mistakes he had made,” and tried to hug Zirpel. 3RT 1611:12-18; 4RT 1974:13-18. Zirpel did not reciprocate, and told David to get away from him. 4RT 1974:18-20. David apologized but Zirpel

refused to accept the apology. 4AA 2431; 3RT 1621:19-1622:5; 4RT 1975:6-11, 1909:23-28; 5RT 2104:19-22. When David offered Zirpel his job back, Zirpel refused that too. 4RT 1975:12-18; 5RT 2103:24-2104:9; 4AA 2430. Zirpel did not go back into the Theater or return to work. 3RT 1611:9-11, 19-20.

#### **D. The Event**

Nelson acted as a project manager for the Theater renovation. 5RT 2189:12-16, 2190:22-28, 2197:11. Permits for the renovation work were obtained by the contractors, but Nelson facilitated inspections of the Theater. 5RT 2190:22-2193:2, 2197:7-15. During these inspections, correction notices for work such as plumbing and electrical were issued. 4RT 1844:12-18; 5RT 2200:25-2201:2. Work was then performed in response to the notices to remedy the issues identified and move the project forward. 5RT 2201:3-7, 2260:22-2261:1, 2289:26-2290:15.

Separately from the construction work, Nelson dealt with inspectors from Los Angeles Department of Building and Safety (“LADBS”) and the Los Angeles City fire department regarding special events at the Theater. 5RT 2191:8-11, 2193:11-13, 2203:27-2204:3. Nelson learned the permitting process for special events, working with Doug Devine, a LADBS specialist (different than the inspectors who reviewed electrical or plumbing work), who approved or denied permits for special events in collaboration with the fire department. 5RT 2193:14-2194:4, 2203:27-2204:3, 2216:23-2219:9.

To obtain a special event permit, Nelson filled out the application online; contacted Devine to arrange for an inspection;

Devine came to inspect the Theater, and then Devine approved the application, subject to subsequent approval by the fire department, by initialing the unsigned permit in the lower right hand corner. 5RT 2205:25-2207:28, 2216:23-2219:9, 2220:16-27. The form had to be initialed, showing LADBS' approval, before Andrews or another inspector would perform the fire inspection. 4RT 1861:28-1862:7, 1862:25-27, 1863:7-13, 1866:3-10, 1867:1-3; 5RT 2220:28-2221:7. Once the fire department approved and the fee was paid, the special event could take place. 5RT 2207:10-16.

Sometimes Andrews or another fire inspector would impose additional requirements, such as adding floor lighting or more exit signs, or covering cabling to prevent tripping. 5RT 2208:2-2209:22. Whatever the inspectors required at the Theater was done. 5RT 2209:17-21, 2210:3-18. Uniformed fire inspectors attended the special events at the Theater, making it doubly essential that any requirements imposed during inspections for the special event permit had been satisfied. 4RT 1866:24-28, 1869:22-1870:7; 5RT 2194:26-2196:8, 2210:10-14.

Nelson followed these steps when applying for a special event permit for the Event on September 28, 2017. 5RT 2218:10-2219:9, 2255:20-22; 5AA 2753.<sup>6</sup> Inspections for the Event were held by LADBS at 6 a.m. on September 28, at which time Devine approved the application by initialing it, and then by the fire department. 5RT 2219:2-9, 2222:19-23, 2281:4-6, 2281:26-2282:2. After the fire department's inspection and approval, Nelson

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<sup>6</sup>In the application, dated September 27, 2017, Nelson mistyped the Event's date as September 29, 2017. 5AA 2753; 5RT 2272:2-21, 2283:15-22, 2292:21-2293:6.

received the permit for the Event. 5RT 2124:10-13, 2223:2-6, 2276:12-14, 2291:14-25, 2295:26-2296:1; *see also* 4RT 1871:7-22 (Andrews: Theater had authorization to have the temporary special event on September 28, 2017).<sup>7</sup>

Nelson also applied for, and Andrews approved, two uniformed fire inspectors to attend the Event. 5RT 2223:8-24, 2224:6-22, 2225:6-13, 2194:26-28; 5AA 3055. The Event took place as scheduled on September 28, 2017. 5RT 2107:11-13, 2154:14-16, 2216:1-6, 2249:24-25.

### **III. Procedural History**

On November 27, 2017, Zirpel filed an unverified 14 count complaint against ADP and David (“Defendants”). 1AA 63-93. Zirpel alleged, *inter alia*, that the termination of his employment constituted retaliation under both §1102.5(b), for disclosing to Defendants information which Zirpel reasonably believed disclosed a violation of statute, rule, or regulation (1AA 69-70 ¶¶22-27), and under §232.5(c) for disclosing information about the employer’s working conditions (1AA 71 ¶¶36-40).

Defendants answered with a general denial and various affirmative defenses (1AA 96-102), and cross-complained for breach of contract and other claims (1AA 107-115).

Only Zirpel’s claims against ADP under §§1102.5 and 232.5(c) went to the jury. 2AA 1328-1333. All the other claims, including those against David and those alleging discrimination and harassment on the basis of Zirpel’s sex and sexual

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<sup>7</sup>The permit itself was not produced during trial. *See* §III(B)(2), *infra*.

orientation, were dismissed by Zirpel. 2AA 834-836, 1292-1297, 1298-1301, 1334-1336. Zirpel's claims for wages unpaid at the time of his employment's termination were settled. 4RT 1984:18-1985:6. Defendants' cross-complaint was also dismissed. 2AA 1292-1297, 1301.

**A. The Trial**

Trial began on September 27, 2021. 2AA 1301-1302. Zirpel testified and called Robertson, David, and Andrews. 2AA 1312-1313, 1315. Zirpel rested on October 1, 2021. 2AA 1315; 5RT 2163:16-17.

**1. Motion For Nonsuit**

After Zirpel rested, the defense moved for a nonsuit. 2AA 1315; 5RT 2163:27-2164:2. ADP argued that Zirpel had not presented evidence of causation showing that he had been fired because of his disclosures. 5RT 2164:3-5. ADP also argued that §1102.5(c) requires proof that the activity in which the employee had refused to participate would have been illegal, a legal issue for the court's determination, and that Zirpel had never identified any law that would have been violated by his continued installation of the hologram equipment. 5RT 2165:2-2166:7.

Zirpel contended that he satisfied §§1102.5(b) and 232.5 by complaining to Robertson and Nelson about unsafe working conditions, the lack of a permit, and the lack of approval for the plumbing and electrical work. 5RT 2168:24-2169:14, 2170:5-9, 2171:13-23, 2175:9-10. For the §1102.5(c) claim, Zirpel claimed that continuing to install the hologram equipment would have violated §§6403(c), 232.5, and 29 U.S.C. §654. 5RT 2169:15-

2171:9.

Zirpel also asserted that the absence of any permit for the Event in the documents produced by the City in response to his subpoena, and Nelson's last minute application for a special event permit and request for inspection, violated provisions of the Los Angeles Municipal Code ("LAMC"). 5RT 2173:21-2175:6. However, Zirpel agreed that the trial court, not the jury, had to determine whether any of those laws had been violated. 5RT 2171:28-2172:2.

Without deciding whether any of the cited laws would have been violated by Zirpel's continued work, the trial court denied the nonsuit, stating that "there is enough evidence to satisfy the plaintiff's burden at this time, including circumstantial evidence relating to the termination." 5RT 2179:12-19; 2AA 1315.

ADP then called Nelson, after which the defense rested. 2AA 1315. Thereafter, each side moved for a directed verdict (2AA 1316): Zirpel on Defendants' affirmative defense that he had failed to mitigate his damages and ADP on the same grounds as its motion for nonsuit. 5RT 2307:19-26, 2309:12-18. The trial court denied both motions (2AA 1316; 5RT 2309:10, 19) but allowed Zirpel to amend his complaint to conform to proof by adding a claim under §1102.5(c). 2AA 1317; 5RT 2314:17-2315:2.

**2. The Trial Court Rules That Construction For The Event Was Unlawful (the "Illegality Ruling").**

Following the amendment, ADP filed a trial brief contending that the new §1102.5(c) claim should not go to the

jury. 2AA 1320-1327. ADP argued that the predicate question for the claim, whether Zirpel’s continued work would have violated a law, was a legal one for the trial court and Zirpel had not established that his continued work would have violated any law. 2AA 1321:12-1325:9.

The parties argued the §1102.5(c) issue on October 4, 2021. 2AA 1318; 6RT 2401:21-2415:6. Zirpel agreed that the question of illegality was one for the trial court, but contended that he had presented sufficient evidence that his continued work would have been illegal. 6RT 2401:25-2402:1, 7-11.

First, he asserted, there was no permit for the Event. 6RT 2402:16-24. Additionally, regardless of whether there was a permit, Zirpel claimed that there was a violation of law because ADP had not applied for the permit five days before the Event, as required by LAMC §91.106.1.3.1.2.2(2). 6RT 2402:25-2403:17, 2405:1-16; 5AA 3057, 3062.

Nor had ADP requested an inspection two days prior to the Event, as required by LAMC §91.106.1.3.1.2.3. 6RT 2403:18-2404:4, 2405:7-16; 5AA 3057, 3062. Finally, ADP had not obtained “concurrence from the . . . Fire Department . . . prior to the Department [of Building and Safety] issuing a permit,” as required by LAMC §91.106.1.3.1.4(4). 6RT 2404:5-28; 5AA 3058, 3062.<sup>8</sup>

ADP responded that under §1102.5(c), the issue was not

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<sup>8</sup>Zirpel’s counsel gave the trial court copies of the provisions he had cited. The documents were introduced into evidence as the trial court’s Exhibits A and B. 2AA 1318; 2RT 2427:21-2428:6; 5AA 3056-3059 (Ex. A), 3060-3064 (Ex. B).

whether there had been an alleged violation of a law but whether **Zirpel's continued work** would have violated a law. 6RT 2406:14-28, 2407:1-20, 2408:10-18. The trial court agreed, telling Zirpel's counsel to focus on the "continued work" issue, which was "the crux of the problem." 6RT 2408:13-18.

Zirpel's attorney insisted that Zirpel's continued work was illegal because under the LAMC, "They needed the temporary special event permit in order to obtain the certificate of occupancy to allow the people to set up for the special event, which included the rigging that my client did . . . You can't do any work towards a special event without . . . the permit because that gives you the certificate of occupancy that you need to allow the workers in there." 6RT 2409:19-2412:1.

The trial court ruled that there was adequate evidence to support the §1102.5(c) claim. 6RT 2412:2-6. Asked by ADP to articulate what the alleged violation of law would have been had Zirpel continued to work, the trial court stated: "It would be the lack of obtaining a permit pursuant to the requirements of LA Municipal Code Chapter 9 and Sections 91.106.3.1.2.2 (sic), et seq." 6RT 2413:4-6.<sup>9</sup>

Pursuant to this ruling (the "Illegality Ruling"), the jury was instructed: "The Court has determined that the September 28, 2017 event at the Hologram Theater had not been properly permitted and thus the construction that related to that September 28, 2017 was unlawful." 2AA 1355 (the "Illegality Instruction").

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<sup>9</sup>The trial court appears to have meant "§91.106.1.3.1.2.2." *See, e.g.*, 4AA 2228, 2239; 5AA 3061.

### 3. The Verdicts

The jury began deliberating on October 4, 2021. 2AA 1318. On the following afternoon, the jury indicated that it had reached a verdict. 2AA 1337; 6RT 2701:19-21. However, it became apparent that the special verdict form had mistakenly directed the jury to skip the questions on the §1102.5(c) claim. 2AA 1330:3-4, 1337-1338; 6RT 2701:13-2704:14. The mistake was corrected and the jury sent back for further deliberations. *Id.*

Shortly thereafter, the jury returned a complete verdict on this phase of the trial. 2AA 1328-1333, 1337-1342; 6RT 2708:5-14.<sup>10</sup> The jury found that ADP had terminated Zirpel's employment on September 27, 2017 and was liable under §§1102.5(b), 1102.5(c), and 232.5(c). 2AA 1329-1331, 1338-1340; 6RT 2708:19-2711:7. The jury awarded Zirpel economic damages of \$368,717 and noneconomic damages of \$700,000. 2AA 1332, 1341; 6RT 2711:18-24. It also found that Zirpel had proven by clear and convincing evidence that ADP had terminated Zirpel's employment with malice, oppression, or fraud. 2AA 1333, 1341; 6RT 2712:4-7.

Punitive damages were tried on October 6, 2021. 2AA 1343-1345. No witnesses were called. *Id.*; 6RT 3001-3049. Zirpel introduced the evidence of ADP's financial condition that ADP had produced that morning. 2AA 1343; 5AA 2871-3009; 6RT 3028:6-3029:4. However, because ADP did not produce all the requested documents, the court ruled that ADP could not

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<sup>10</sup>Punitive damages had been bifurcated. 2RT 615:17-21, 937:17-18.

challenge the sufficiency of the evidence of its net worth. 2AA 1343; 6RT 3013:16-19, 3017:23-24, 3031:6-17.

After argument by counsel (6RT 3031:18-3044:20), the jury returned a verdict later that afternoon, awarding \$6 million in punitive damages against ADP. 2AA 1344, 1347-1348; 6RT 3045:24-3046:11.

## **B. Post-Trial Proceedings**

ADP objected to the form of Zirpel’s proposed judgment, which stated that Zirpel was entitled to attorneys’ fees, on the grounds that the court had not yet made that determination. 2AA 1366-1369. The court modified the proposed judgment to provide that if attorneys’ fees were awarded, the amount would be reflected in an amended judgment. 2AA 1374. As modified, judgment was entered on the special verdicts on October 8, 2021 (the “Judgment”). 2AA 1370-1375. Notice of entry of the Judgment was served by the clerk the same day. 2AA 1376-1377.

### **1. Costs And Fees**

On October 22, 2021, Zirpel filed a memorandum of costs (2AA 1378-1390), followed on December 7, 2021 by a motion for attorneys’ fees pursuant to §1102.5(j). 4AA 2248-2366. The latter was denied without prejudice. 4AA 2385-2386, 2392. Ultimately, an amended judgment including fees and costs in Zirpel’s favor was entered and will be separately appealed.

### **2. Post-Trial Motions**

On October 25, 2021, ADP moved for a JNOV and a new trial (the “Post-Trial Motions”). 2AA 1391-1400. ADP sought a JNOV on the grounds that Zirpel’s continued installation of the

hologram equipment would not have violated any law because LAMC §91.106.1.3.1.2.2, on which Zirpel based his §1102.5(c) claim, was inapplicable and there was no other basis for the Illegality Ruling. 3AA 1589:14-1590:3, 1591:26-1596:24; 4AA 2225. ADP also argued that Zirpel’s belief that he was disclosing a legal violation was unreasonable, and did not cause the termination of his employment anyway, entitling ADP to judgment on the §§1102.5(b) and 232.5 claims. 3AA 1590:4-1591:15, 1596:25-1600:3; 4AA 2225.

The motion for JNOV was supported, *inter alia*, by a copy of the permit issued on September 28, 2017 for the Event. 3AA 1681 (“Last Status: Permit Finaled; Status Date: 09/28/2017; Printed: 10/07/21 04:08 PM”).<sup>11</sup>

ADP sought a new trial on the same grounds as the JNOV, arguing that the Illegality Ruling on the §1102.5(c) claim was wrong as a matter of law, and fatally prejudiced the jury’s findings on the related §1102.5(b) claim. 3AA 1413:10-22, 1417:11-1418:21; 4AA 2225, 2235. ADP also contended that the punitive damages were unconstitutionally excessive as a matter of law under *State Farm Mutual Automobile Ins. Co. v. Campbell*,

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<sup>11</sup>Zirpel’s subpoena to the City had requested records for “6656” Hollywood Boulevard. 4AA 2455-2456. But the building in which the Theater is located has multiple addresses: 6650, 6652, 6654, and 6656 Hollywood Boulevard. 5RT 2296:7-23. The Event’s permit used the “6650” address (3AA 1681), and thus was not produced by the City in response to Zirpel’s subpoena. 3AA 1590 n.3, 1601 ¶6; 6RT 3306:21-3307:2. Using the correct address, ADP finally located the permit after the trial ended. 3AA 1590 n.3, 1601 ¶6; 6RT 3306:21-3307:2. Zirpel did not file evidentiary objections to the Event’s permit (or anything else in the Post-Trial Motions.) 4AA 2396-2428 [docket].

538 U.S. 408 (2003), but did not challenge the sufficiency of the evidence of its net worth. 3AA 1413:26-27, 1420:1-1422:18; 4AA 2225, 2235-2236. *Id.*<sup>12</sup>

After opposition to, and replies in support of, the Post-Trial Motions were filed (3AA 1708-4AA 2222), the Post-Trial Motions were argued on November 29, 2021. 2AA 1401-1402, 4AA 2223; 6RT 3301-3336. Zirpel insisted that “the clear indication of the municipal code is in order to have these special events, you need this permit before you start working on all this stuff.” 6RT 3318:9-12. ADP responded that Zirpel had made a “fundamental mistake” about the Event’s permit. 6RT 3322:24-26.

“There’s a distinction between a permit for a special event and a [building] permit to do construction. . . . The permit that was obtained on September 28th was for the special event. It was not to do the construction that had been ongoing for a considerable period of time. It was not a permit for Mr. Zirpel to do what he had to do. It was a permit to hold the special event.” 6RT 3322:27-3323:7.

ADP contended that not only was the Illegality Ruling wrong as a matter of law for purposes of §1102.5(c), it also

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<sup>12</sup>ADP also cited errors in the jury selection and admission of certain evidence, and misconduct by Zirpel’s counsel during the punitive damages phase. 3AA 1413:6-9, 23-25; 1415:3-1417:10, 1418:22-1419:28, 1422:19-1424:8. ADP does not pursue these arguments on appeal.

effectively and erroneously directed a verdict on the §1102.5(b) claim. 6RT 3324:11-16. After further argument, the Post-Trial Motions were taken under submission. 4AA 2223; 6RT 3336:1-3.

On December 3, 2021, the trial court issued its order denying the Post-Trial Motions in their entirety. 4AA 2224-2246. On the §1102.5(b) claim, the trial court held that there was substantial evidence that Zirpel had reasonable cause to believe that ADP violated the law. 4AA 2227-2228, 2238-2239. Zirpel testified that he had learned of “approximately 20 code violations” for the plumbing and electrical work; had concerns about the electrical work and integrity of the ceiling from which heavy projectors would hang; remembered Andrews warning him of potential liability for allowing construction to continue and telling him about a warehouse fire that had resulted in a mass casualty; witnessed other ADP employees continuing work; and was told by ADP, including its attorney, that they were obtaining a permit “i.e., implying that a permit was required for the Event.” 4AA 2227, 2238. The court ruled that Zirpel could reasonably rely on inspectors and others “more informed than him.” *Id.*

The trial court also rejected ADP’s causation argument. *Id.* Citing the evidence of Zirpel’s disclosure of his concerns to Nelson and David about permit violations and liability, after which Zirpel was “eventually” fired (*id.*), the court found that “a jury could reasonably infer from this evidence that a contributing factor in Plaintiff’s termination was Plaintiff’s disclosure of information to inspectors (sic).” *Id.*

On the §1102.5(c) claim, the court ruled that there was

substantial evidence of the requisite violation of law. 4AA 2228, 2239-2240. “Regardless of whether or not Municipal Code 91.106.1.3.1.2.2 applies,” the Correction Notices listed numerous code violations, including those relating to electrical work, when Zirpel was fired. *Id.* “Accordingly, any continuance of work until a permit was obtained would have been a violation of law. . . . Plaintiff’s work in installing the hologram equipment was not to correct these violations, hence Plaintiff’s work would have been in furtherance of these violations.” *Id.*; 4AA 2231, 2243.

Furthermore, the trial court held, “there was substantial evidence that a temporary special events permit was required for the [Event], which included the hologram installation.” 4AA 2229, 2241 (capitalization omitted); 4AA 2231, 2243 (“the evidence shows that a temporary special events permit was required”). Labeling the newly located permit for the Event attached to ADP’s motion for JNOV as an “application” rather than a permit (4AA 2229, 2241), the trial court stated that this was further proof that “even ADP was under the belief that a temporary special event permit was required.” *Id.* It concluded, “ADP has not offered sufficient evidence to change the court’s opinion that a temporary special event permit was not required (sic) for Plaintiff to continue with his work on installing the hologram.” *Id.*

The trial court also denied the Post-Trial Motions as to Zirpel’s §232.5 claim. 4AA 2230, 2232, 2241, 2244. The court found that there was substantial evidence to establish that “(1) Plaintiff disclosed his concerns about unsafe working conditions

to David and Nelson and that (2) Plaintiff's doing so was a contributing factor to Plaintiff's discharge." 4AA 2230, 2241. Accordingly, substantial evidence was presented from which "a jury could reasonably find in favor of Plaintiff on a section 232.5(c) claim." *Id.*

Next, the trial court held that even if its Illegality Ruling was wrong as a matter of law, the error was not prejudicial. 4AA 2231-2232, 2243-2244. It ruled that there was sufficient evidence to award Zirpel all the compensatory damages "on the 1102.5(b) claim alone and/or the 232.5 claim alone," so the trial's outcome would not change even if the §1102.5(c) claim were stricken. *Id.*

Finally, the court upheld the award of punitive damages. 4AA 2232-2233, 2245-2246. It held that the punitive damages were not excessive because "there was sufficient evidence of reprehensible conduct on the part of Alki David" and ADP was prevented from challenging the sufficiency of the evidence of its net worth. 4AA 2233, 2245-2246.

### **3. Appeal**

The clerk mailed notice of the order denying the Post-Trial Motions on December 3, 2021. 4AA 2247. ADP appealed from the Judgment and the denial of the motion for JNOV on December 29, 2021. 4AA 2367-2369. Both the Judgment and the denial of the JNOV are appealable. Code Civ. Proc. §§904.1(a)(1), (4).<sup>13</sup> The appeal is timely. Cal.R.Ct. Rules 8.104(a)(1), 8.108(b)(1)(A),

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<sup>13</sup>Although an order denying a motion for new trial is not directly appealable, it is reviewable on appeal from the underlying judgment. *Walker v. Los Angeles Co. Metropolitan Transportation Authority*, 35 Cal.4th 15, 18 (2005).

(d)(1)(A).

#### **IV. ARGUMENT**

On appeal from the denial of a JNOV, the reviewing court determines whether there is any substantial evidence to support the jury's verdict; if so, the denial will be affirmed. *Wolf v. Walt Disney Pictures & Television*, 162 Cal.App.4th 1107, 1138 (2008). However, the appellate court reviews the record *de novo* to determine independently whether there is any substantial evidence to support the jury's findings. *Hirst v. City of Oceanside*, 236 Cal.App.4th 774, 782 (2015). Review is also *de novo* if the appeal from the denial of a JNOV raises purely legal issues. *Wolf*, 162 Cal.App.4th at 1138. The standard of review for the denial of a nonsuit and a directed verdict is the same as for a JNOV. *DLI Properties LLC v. Hill*, 29 Cal.App.5th Supp. 1, 6 (2018) (citing cases).

The denial of a motion for new trial is reviewed for abuse of discretion, except that a trial court's factual determinations are reviewed for substantial evidence. *Minnegren v. Nozar*, 4 Cal.App.5th 500, 514 n.7 (2016). However, "a trial court's decision that rests on an error of law is itself an abuse of discretion." *Shuts v. Covenant Holdco LLP*, 208 Cal.App.4th 609, 617 (2012); *see also David v. Hernandez*, 226 Cal.App.4th 578, 581, 590 (2014) (appellate court reviews *de novo* the denial of a new trial based on an error of law). As with a JNOV, on the denial of a new trial the appellate court reviews the entire record independently to determine whether there were grounds for granting the new trial. *Santillan v. Roman Catholic Bishop of*

*Fresno*, 202 Cal.App.4th 708, 733 (2012).

**A. Judgment On The §1102.5(c) Claim Should Be Reversed Because Zirpel’s Continued Installation Of The Hologram Equipment Would Not Have Violated Any Statute, Rule, Or Regulation, Entitling ADP To Judgment As A Matter Of Law.**

Section 1102.5(c) provides:

“An employer, or any person acting on behalf of an employer, shall not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation.” *Id.*

Whether “the activity in question *actually would* result in a violation or noncompliance with a statute, rule, or regulation . . . is a quintessentially legal question.” *Nejadian v. County of Los Angeles*, 40 Cal.App.5th 703, 719 (2019) (italics in original).

Issues of law are reviewed *de novo*. *Bruno v. Hopkins*, 79 Cal.App.5th 801, 818 (2022).

“[T]o prevail on a claim under this provision, the plaintiff must identify both the specific activity and the specific statute, rule, or regulation at issue; the court must then determine the legal question whether the identified activity would result in a violation or noncompliance with the identified statute, rule, or

regulation.” *Nejadian*, 40 Cal.App.5th at 706 (plaintiff failed to show identified activity would violate specific statute, rule, or regulation; judgment for plaintiff reversed and judgment entered for employer). The “specific activity” identified by Zirpel was his continued installation of the hologram equipment in the Theater leading up to the Event. 1AA 69 ¶25; 2AA 1330 ¶5, 1355; 3AA 1712:16, 1829:7-8; 4AA 2439; 6RT 2410:6-15, 2440:8-12.

Zirpel was much less clear about the “specific statute, rule, or regulation” which his continued work allegedly would have violated. Zirpel testified to various “concerns,”<sup>14</sup> but never identified a “specific statute, rule, or regulation” in his testimony. Zirpel’s counsel was often equally vague, referring to “unsafe working conditions” (5RT 2169:4-5); “fire safety” (5RT 2169:10); “concerns about the construction there” (5RT 2169:11); the Correction Notices (5RT 2169:11-13); the (alleged) lack of a permit for the Event (3RT 1583:21-24; 5RT 2169:5-7; 6RT 2402:16-24, 2404:18-25, 2405:17-21); “permit issues” (6RT 3314:19); and “safety issues” (6RT 3314:19-21).

Not until after Zirpel had rested did he finally identify any “specific statute, rule, or regulation” which his continued installation allegedly would have violated. When opposing ADP’s motion for nonsuit, Zirpel cited §§6403(c) and 232.5, 29 U.S.C. §654, and LAMC §§91.106.1.3.1 *et seq.* See §III(A)(1), *supra*.

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<sup>14</sup>These included the electrical and plumbing work (4RT 1945:25-1946:28, 1950:4-8, 14-23); “construction work not being signed off” (4RT 1969:28-1970:2); installing the hologram projectors (4RT 1947:11-1949:8, 1969:25-27); general safety (4RT 1951:6-1952:4, 1966:4-15, 1969:16-24, 1971:8-11); and possible personal liability (4RT 1961:15-1962:3, 1963:12-23).

However, during the October 4 argument on §1102.5(c), Zirpel abandoned any reliance on §§6403(c), 232.5, or 29 U.S.C. §654. 2AA 1318; 6RT 2401:21-2413:6.

Instead, reading from Exhibit B, “Los Angeles Municipal Code,”<sup>15</sup> Zirpel argued that his continued work would have violated LAMC §§91.106.1.3.1.2.2(2) (applications for temporary special event permit must be filed at least five business days before the event) and 91.106.1.3.1.2.3 (requests for inspection must be received at least two days before use or occupancy). 6RT 2403:4-2404:4, 2410:16-2411:3; 5AA 3062.

Additionally, reading from Exhibit A, “Temporary Special Events,”<sup>16</sup> Zirpel argued that (1) applications for temporary special event permits had to be filed with LABDS at least two business days prior to the event after all other required clearances or approvals had been obtained from other agencies; and (2) the safety plan showing the layout of the event must be approved by the fire department prior to submitting an application to LADBS. 6RT 2405:1-28; 5AA 3057-3058.

**1. The Illegality Ruling Was Error Because ADP Did Obtain A Permit For The Event And The Cited LAMC Sections Had Not Yet Been Enacted.**

The trial court based the Illegality Ruling on ADP’s alleged failure to obtain a permit pursuant to LAMC §§91.106.1.3.1.2.2 *et*

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<sup>15</sup>5AA 3060-3064; 6RT 2402:25-2403:2, 2427:21-2428:6; 2AA 1318.

<sup>16</sup>5AA 3056-3059; 6RT 2402:25-2403:2, 2405:1-28, 2427:21-2428:6; 2AA 1318.

*seq.* See §III(A)(2), *supra*. The Illegality Ruling was erroneous for two reasons.

First, a permit *was* obtained for the Event. 3AA 1681; 4RT 1871:19-22; 5RT 2223:2-6, 2291:14-18, 2295:26-2296:1. Second, **the requirements cited in the Illegality Ruling were not in effect in September 2017.** They were not added until July 4, 2021, as stated on Exhibit B (5AA 3061); *see also* 2AA 1324 n.3, 6RT 2401:22-23, 2412:28-2413:6.

Exhibit A cannot support the Illegality Ruling, either. As Zirpel acknowledged (6RT 2405:1-9), Exhibit A is merely an informational form downloaded from LADBS' website.<sup>17</sup> It is not a “statute . . . rule or regulation,” as required by §1102.5(c). *See Nejadian*, 40 Cal.App.5th at 709, 721 (county’s guidelines for rebuilding after fire or other natural disaster did not support §1102.5(c) claim because they were not “statutes, rules, or regulations.”)

Furthermore, the version of §91.106.1.3 that *was* in effect in September 2017 did not apply, as ADP argued. 3AA 1592:5-1594:15; 4AA 2215:17-2216:4; 6RT 3303:21-3304:23, 3321:26-3322:9. That version of §91.106.1.3 (there were no subsections at that time) stated in pertinent part:

**“91.106.1.3. Temporary Permits.**

Before commencing the construction of any work for temporary use, a building permit authorizing such work shall be

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<sup>17</sup>[https://www.ladbs.org/docs/default-source/forms/inspection-forms/application-for-temporary-special-event-permit-in-app-08.pdf?sfvrsn=32efeb53\\_34](https://www.ladbs.org/docs/default-source/forms/inspection-forms/application-for-temporary-special-event-permit-in-app-08.pdf?sfvrsn=32efeb53_34).

obtained from the department. Such construction shall be occupied or used only for the period set forth on the permit application, but shall not exceed 120 days.” 3AA 1700 (boldface in original).

By its terms, this version of §91.106.1.3 applies only to “work for temporary use.” *Id.* Zirpel testified unequivocally that the hologram equipment he was installing in the Theater in advance of the Event was **permanent**, not “for temporary use.” 4RT 1943:20-1944:7 (“In this case, it was entirely different [than the concerts and other projects he had done] because it was a permanent installation that we were putting in.”) Zirpel’s attorney also characterized the work as “permanent” in his opening statement. 3RT 1578:1-8 (“They were going to renovate this old early 1900’s building and make it a permanent hologram installation . . .”)

Under §1102.5(c), the issue is whether the specific activity identified by the plaintiff — here, Zirpel’s continued installation of the hologram equipment in the Theater leading up to the Event — violated the specific law identified by the plaintiff. *Nejadian*, 40 Cal.App.5th at 706. It did not, because §§91.106.1.3.1.2.2 *et seq.* did not exist in September 2017, and the code section which did exist then, LAMC §91.106.1.3, applied only to “work for temporary use,” which Zirpel’s installation at the Theater was not. The Illegality Ruling is contrary to both the law and the undisputed evidence — as is the trial court’s denial of the Post-Trial Motions on the same grounds. 4AA 2229, 2239-2240.

**2. There Are No Other Grounds For Upholding The Trial Court’s Finding That Continued Construction Would Have Been Unlawful.**

The Illegality Ruling cannot be upheld on any other grounds. *Rappleyea v. Campbell*, 8 Cal.4th 975, 980-981 (1994) (a ruling wrong as a matter of law will be affirmed if correct on any applicable legal theory).

For example, Zirpel argued that ADP did not file its application, or request its inspection, far enough in advance of the Event. 5RT 2173:21-2175:16; 6RT 2403:4-2404:4, 2405:1-28, 2410:16-2411:3. That might have been grounds for LADBS to reject the application or refuse to inspect the Theater, but LABDS did neither. It “bent over backward” to conduct the inspection, doing so outside normal business hours (5RT 2217:17-21, 2218:17-2219:9), **and** it issued the permit (4RT 1871:19-22; 5RT 2223:2-6, 2291:14-18, 2295:26-2296:1; 3AA 1681).

Moreover, Zirpel’s argument is a red herring. The issue is not whether the application was filed, or the inspection was held, in a timely manner. The issue under §1102.5(c) is whether **the activity in which the plaintiff refused to participate** would have been a violation of law (§1102.5(c)), as the trial court acknowledged (6RT 2408:13-18). Zirpel presented no law or evidence establishing that it would have been illegal for him to continue installing the hologram equipment because the application was filed, or the inspection held, a day or two late (and the permit was issued before the Event was held).

Faced with proof that the Municipal Code sections he cited were not in effect in September 2017, and that a permit for the Event had been issued, Zirpel fell back on the assertion that continued installation of the hologram equipment would have violated the code sections listed in the Correction Notices. 3AA 1715:18-1717:18.

One of those sections, Zirpel argued (4AA 2596), was LAMC §93.0201, which states: “No person shall, (sic) install, alter, reconstruct or repair any electrical wiring unless a permit therefor has been obtained from the Department except as otherwise provided in this Code.” On its face, this section does not apply because Zirpel was hanging hologram projectors, not installing electrical wiring. 1AA 69 ¶25; 2AA 1330 ¶5, 1355; 3AA 1712:16, 1829:7-8; 4AA 2439; 6RT 2410:11-12, 2440:10-11.

To circumvent the plain language of §93.0201, Zirpel contended that “because Plaintiff’s installation of the hologram equipment *was not to correct these violations*, Plaintiff’s continued work to install the equipment would have been in furtherance of these violations.” 3AA 1718:14-16 (italics in original). The trial court agreed, denying the Post-Trial Motions for this reason “[r]egardless of whether or not Municipal Code 91.106.1.3.1.2.2 applies.” 4AA 2228, 2239-2240.

Nothing in §93.0201 states (or implies) that all other construction work must stop until an electrical permit is obtained. It does not even provide that **electrical work** must stop until a permit is obtained (for obvious reasons, since if that work stopped, it would then be impossible to remedy the very

deficiencies listed on the Correction Notices, a reality that Zirpel recognized in the italicized quote above).

Construction work is stopped not by Correction Notices but by means of a written stop work notice. 5RT 2203:2-10. *See* LAMC §§91.104.2.4 (stop work of any construction work), 91.104.2.5 (stop use or occupancy), 93.0310 (stop installation of electrical wiring). Nelson never received such a notice and was never told by any inspector that construction had to stop. 5RT 2203:11-13, 2235:24-26; *see also* 3RT 1619:5-8 (Robertson: Theater was never shut down by inspectors for being out of code); 4RT 1865:14-17 (Andrews: does not remember ever shutting down construction at the Theater), 1868:16-19 (Andrews: would remember if he had shut down construction at Theater).<sup>18</sup>

Furthermore, it is undisputed that renovation work on the Theater did not need to be completed in order to obtain special event permits. 5RT 2204:4-14, 2290:28-2291:7 (Nelson); 4RT 1868:13-15 (Andrews: “Once they are signed off with fire safety, they are allowed to have their events and open up . . .”), 1869:18-21 (Andrews: “construction doesn’t have to be 100% complete before you have a special event”), 1873:27-1874:4 (Andrews: not

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<sup>18</sup>Zirpel himself testified that although the construction was temporarily “on pause” on September 27 while fire exit signs were purchased (5RT 2154:25-2155:4), “when those signs were posted, **we had the clearance to go back in and work again.**” 5RT 2154:7-8 (emphasis added). The signs were promptly purchased (4RT 1960:22-25, 1962:10-13; 5RT 2208:16-22, 2209:17-2210:2); work, including installation of the hologram equipment, by Robertson and others continued that same day (3RT 1611:21-26); and the Event permit was issued (4RT 1871:19-22; 5RT 2223:2-6, 2291:14-18, 2295:26-2296:1; 3AA 1681).

all items on correction notices might have been addressed before holding special event).

Indeed, ADP obtained numerous special event permits before the renovation work was complete. 5RT 2204:15-18, 2214:10-22, 2264:2-7, 21-28; 2265:2-14, 2269:91-6. Cf. 4AA 2645, 2651, 2657, 2663, 2675, 2681, 2687, 2693, 2699 (special event permits issued for dates in November and December 2017); 4AA 2593-2596, 2623 (Correction Notices showing compliance dates in February and November 2018).

Conversely, Nelson never received any notices of violations in connection with any special event at the Theater, was never told that a special event could not take place, and no special event was ever shut down. 5RT 2196:16-2197:2, 2235:11-14, 2235:27-2236:1; 3RT 1619:5-8 (same; Robertson), 1865:14-17 (same; Andrews).

As ADP noted, Zirpel fundamentally misunderstands the difference between building permits and temporary special event permits. 6RT 3322:24-3323:7. The two are separately defined and treated by the Municipal Code, both now and in September 2017. Cf. §§91.106.1.1 (“Building Permits”), 91.106.1.3 (“Temporary Permits”). ADP needed (and got) a temporary special event permit **to hold the Event**. §91.106.1.3. ADP did not need to complete **the ongoing construction work** to hold the Event or obtain special event permits (4RT 1868:13-15, 1869:18-21; 1873:27-1874:4; 5RT 2204:4-14, 2290:28-2291:7), as evidenced by the numerous special event permits ADP obtained before the renovation work was complete (*see supra*).

**3. The Verdict Cannot Be Saved By  
Attributing All The Damages To The Claims  
Under §§1102.5(b) And 232.5(c).**

In denying the Post-Trial Motions, the trial court stated that even if it had erred in finding continued construction on the Theater to be unlawful, the error was not prejudicial. 4AA 2231-2232, 2243-2244. It reasoned that the damages “could have been awarded for the 1102.5(b) claim only, the 232.5 claim only, the 1102.5(b) and 232.5 claim combined, all three claims combined, etc.” 4AA 2232, 2244. “Given that the damages awarded could have been awarded for any of Plaintiff’s three claims, even if the 1102.5(c) claim was stricken, that would not change to (sic) the outcome of trial – i.e., Plaintiff would have been awarded the same amount of damages.” *Id.*

This ruling was itself erroneous. First, a court reviewing a special verdict cannot infer findings to support the verdict. *Zagami, Inc. v. James A. Crone, Inc.*, 160 Cal.App.4th 1083, 1092 (2008). Second, the trial court’s finding of “no harm, no foul” is unsupported by the record. The Illegality Ruling permeated and prejudiced the §1102.5(b) claim too.

The jury was instructed that for Zirpel to prevail under §1102.5(b), he had to prove that he had reasonable cause to believe that his complaints to ADP about working conditions at the Theater and the lack of required permits disclosed a violation of local rules and regulations. 2AA 1355. **The jury was also instructed that the trial court had already found that the Event was *not* properly permitted and that the**

**construction was unlawful.** *Id.* Thus, the Illegality Ruling effectively directed a verdict for Zirpel on the §1102.5(b) claim, as Zirpel argued vigorously to the jury in closing. *See* §IV(B)(1), *infra*. The jury’s verdict on §1102.5(b) cannot support the damages any more than can its verdict on §1102.5(c).

Nor can the damages be salvaged by attributing them all to the §232.5(c) claim. 4AA 2232, 2244. That claim should also be reversed because there is no evidence that Zirpel’s disclosure of information was a substantial motivating factor in the termination of his employment. *See* §IV(C), *infra*.

**B. Judgment On The §1102.5(b) Claim Should Be Reversed Because The Trial Court Erroneously Found That Construction For The Event Was Unlawful And Applied The Wrong Test Of Causation.**

Section 1102.5(b) provides:

“An employer, or any person acting on behalf of an employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or

for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties." *Id.*

Thus, under §1102.5(b), the employee's operative disclosure can be made in any of three ways: (1) "to a government or law enforcement agency;" (2) "to a person with authority over the employee or another employee with the authority to investigate, discover, or correct the violation or noncompliance"; or (3) to "any public body conducting an investigation, hearing or inquiry."

§1102.5(b). The second method is at issue here. 2AA 1329 ¶2, 1355; 5RT 2167:3-6, 2168:19-23; 6RT 2446:24-2447:8.<sup>19</sup>

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<sup>19</sup>The order denying the Post-Trial Motions erroneously cited the first method of disclosure, stating that a jury could reasonably find from Zirpel's text to Nelson [2AA 2439] and conversation with David [4RT 1970:19-1971:3] regarding the lack of permits and approvals, that "a contributing factor in Plaintiff's termination was Plaintiff's disclosure of information to **inspectors.**" 4AA 2228, 2239 (emphasis added). The text and conversation were disclosures to ADP, not inspectors; Zirpel did not proceed on a theory of disclosure "to a government or law enforcement agency" (2AA 1355; 5RT 2168:19-23; 6RT 2446:24-2447:8); and the jury did not find that he had made such a disclosure (2AA 1329).

1. **The Jury’s Finding That Zirpel Had Reasonable Cause To Believe He Was Disclosing A Violation Of Law Was Irrevocably Tainted By The Erroneous Illegality Ruling.**

After establishing a disclosure, the plaintiff must prove that he had “reasonable cause to believe” that he was disclosing a violation of, or noncompliance with, a statute, rule, or regulation. §1102.5(b); 2AA 1355. The jury found that Zirpel had “reasonable cause to believe, as of September 27, 2017, that unsafe work conditions existed and/or that continued work on the Hologram theater would violate the law.” 2AA 1329.

That finding was virtually dictated by the trial court’s erroneous Illegality Ruling and Illegality Instruction. Having been instructed by the trial court that there **was** a violation of the law, it would have been logically and legally impossible for the jury to find that it was unreasonable for Zirpel to believe what **the trial court itself had found** – and what the jurors were instructed that **they must accept as true**. 2AA 1350 (“I will now tell you the law that you must follow to reach your verdict. You must follow the law, exactly as I give it to you, even if you disagree with it.”)

The jury was also told that they must consider all the instructions together. *Id.* (“All the instructions are important because together they state the law that you will use in this case. You must consider all of the instructions together.”) This instruction further fortified the link between the §§1102.5(b) and

(c) claims.

The prejudicial effect of the Illegality Ruling on the §1102.5(b) claim was also strongly reinforced by Zirpel’s closing argument. First, Zirpel’s counsel heavily stressed the Illegality Ruling. 6RT 2438:26-2440:1 (“The judge gets to decide it. And he decided in Mr. Zirpel’s favor. . . . The legalities - - or illegality, I should say, has been established.”)<sup>20</sup>

Then Zirpel’s counsel told the jury that the Illegality Ruling applied not just to the §1102.5(c) claim **but also to the §1102.5(b) claim**. 6RT 2447:9-24 (it was unnecessary for counsel to review the evidence why Zirpel reasonably believed continued work would be illegal “because the court already said it’s illegal, okay? So he had reasonable cause”); 2490:9-13 (Zirpel complained about lack of permit; “We don’t have the permit. That’s what the judge said. They didn’t have the permit. It would have been unlawful, so obviously it was reasonable for him to complain about this”).<sup>21</sup> Under these circumstances, it would

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<sup>20</sup>See also 6RT 2449:20-25 (“Obviously Mr. Zirpel refused to participate in illegal activity. The court already found it would have been illegal”); 2487:8-2488:18 (reading Illegality Ruling; “I don’t get this every day in my cases, where the judge has already done the work for you. The judge has already determined. You have to accept that as true, that they were not properly permitted and that the construction was unlawful. . . . You don’t see this special event permit, and that’s why the judge decided that the theater had not been properly permitted and the construction related to that event was unlawful. He already made that decision for you.”)

<sup>21</sup>See also 6RT 3313:19-23 (“I think the fact that the court had determined that continued work would be illegal and, more importantly that Defendants felt they needed a permit in order to

have been astonishing had the jury *not* ruled for Zirpel on the §1102.5(b) claim.

Denying the Post-Trial motions, the trial court held there was sufficient evidence from which the jury could “reasonably infer that Plaintiff’s belief that continued installation of the hologram equipment was illegal was reasonable.” 4AA 2227-2228, 2238-2239. This ignores the effect on the §1102.5(b) claim of the Illegality Ruling, the Illegality Instruction, and the other instructions set forth above. Once the jury was instructed that it must accept as true that the construction was illegal, there was no need for the jury to make its own determination of reasonableness from the evidence: it was a foregone conclusion that — just as Zirpel argued in closing — “obviously it was reasonable for him to complain about this.” 6RT 2490:9-13.

In its order, the trial court also cited alleged testimony by Zirpel that he “learned of approximately 20 code violations.” 4AA 2227, 2238, citing “Zirpel Testimony, 490:20-491:27 [3AA 1632:20-1633:27].” Zirpel did not testify that he had learned of “code violations.” Zirpel testified only that he learned inspectors had “denied their own approvals” of work that had been done to date (4RT 1945:13-21) — a material distinction since §1102.5(b) requires reasonable cause to believe that there was **a violation of law**.

Finally, the trial court’s legal analysis was flawed. Two of its cited “reasonable cause” cases have been disapproved. *See Lawson v. PPG Architectural Finishes, Inc.*, 12 Cal.5th 703, 718

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move on with this event, all shows that Mr. Zirpel’s belief was certainly reasonable.”)

n.2 (2022), disapproving both *Mokler v. County of Orange*, 157 Cal.App.4th 121 (2007), and *Patten v. Grant Joint Union High School District*, 134 Cal.App.4th 1378 (2005). The other cases are readily distinguishable, procedurally and factually.<sup>22</sup> The Post-Trial Motions on the §1102.5(b) claim should have been granted.

## **2. The Trial Court Applied The Wrong Test Of Causation When Denying The Post-Trial Motions.**

Having irrevocably prejudiced the jury's verdict on the §1102.5(b) claim with the Illegality Ruling, the trial court erred again by denying the Post-Trial Motions on the basis of the wrong test of causation.

The jury found that Zirpel's "disclosure to an ADP employee that unsafe work conditions existed and/or that continued work on the Hologram theater would violate the law" was "a contributing factor" in David's decision to terminate Zirpel's employment. 2AA 1329-1330.

Zirpel produced no evidence that he had actually been fired

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<sup>22</sup>*Jadwin v. County of Kern*, 610 F.Supp.2d 1129, 1202 (E.D.Ca. 2009), granted summary judgment to the **employer** on the §1102.5(b) claim. *Devlyn v. Lassen Mun. Util. District*, 737 F.Supp.2d 1116, 1124 (E.D.Ca. 2010), denied a motion to dismiss because the complaint properly alleged the elements of a §1102.5(b) claim using the statutory language. *Ross v. County of Riverside*, 36 Cal.App.5th 580, 592 (2019), held that under §1102.5(b), "the employee must be able to point to some legal foundation for his suspicion," a foundation lacking here. See §IV(A), *supra*. In *McVeigh v. Recology San Francisco*, 213 Cal.App.4th 443, 469 (2013), the employees whose fraud was reported by plaintiff were actually "caught doing it," evidence not present here.

for disclosing information about his working conditions. He relied entirely on a theory of temporal proximity, contending that because David had fired him after Zirpel told him conditions in the Theater were unsafe, *a fortiori* the disclosure must have been the cause of his firing. 4RT 1971:1-23 (David “immediately blew up on me” and fired Zirpel); 5RT 2171:10-12 (“obviously temporal proximity is ridiculous in this case. The temporal proximity is literally seconds after he reports it.”)

The trial court adopted Zirpel’s temporal proximity argument, citing the “immediately blew up” testimony and ruling that the timing of Zirpel’s firing constituted substantial evidence from which the jury could have found that Zirpel’s disclosure of information was “a contributing factor to Plaintiff’s discharge.” 4AA 2228, 2239.

The trial court short-circuited the causation analysis required for §1102.5 claims. Zirpel’s temporal proximity theory is — at most — only the beginning of the analysis, not the end. In §1102.5 cases, once the plaintiff has demonstrated that an activity proscribed by §1102.5 was a contributing factor in the adverse employment action, the burden shifts to the employer to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had engaged in protected activity. §1102.6.

Thus, even assuming *arguendo* that Zirpel met his initial burden with nothing but temporal proximity, which ADP disputes, that does not entitle Zirpel to prevail. It only shifts the burden to the employer. §1102.6; *Lawson*, 12 Cal.5th at 712, 718;

*Vatalaro v. County of Los Angeles*, 79 Cal.App.5th 367, 379-380 (2022).

ADP met its burden under §1102.6. David stated unequivocally and without contradiction that he had done so because Zirpel was refusing to work and because David thought Zirpel was trying to extract a pay raise (4RT 1842:4-11, 1893:1-8, 1904:19-22, 1906:24-1907:1) — *not* because Zirpel had disclosed information about his working conditions (4RT 1910:2-11). Indeed, David testified that when he fired Zirpel, he was unaware that Zirpel was contending he was being required to do work that was illegal, or even that Zirpel had spoken with the fire inspectors. 4RT 1837:2-18, 1899:22-1900:3, 1903:4-10, 1903:28-1904:12, 1905:1-10.

When the employer meets the burden of showing a legitimate and independent reason for the adverse employment action, the employer is entitled to judgment. *Vatalaro*, 79 Cal.App.5th at 371, 384, 386 (affirming summary judgment for employer, which showed plaintiff had been terminated because she was insubordinate and disrespectful, not in retaliation for reporting violation of civil service rules).

**C. Judgment On The §232.5(c) Claim Should Be Reversed Because The Jury’s Finding Of Causation Was Not Supported By Substantial Evidence And The Trial Court Applied The Wrong Test Of Causation In Denying The Post-Trial Motions.**

Section 232.5(c) provides that no employer may

“[d]ischarge, formally discipline, or otherwise discriminate against an employee who discloses information about the employer’s working conditions.” *Id.*

The jury was instructed that to prove this claim, Zirpel had to prove that, *inter alia*, “Zirpel’s disclosure of information about his working conditions was a substantial motivating reason” for the termination of his employment. 2AA 1356. The jury was also instructed:

“A ‘substantial motivating reason’ is a reason that actually contributed to an adverse employment action. It must be more than a remote or trivial reason. It does not have to be the only reason motivating the adverse employment action.” *Id.*

A substantial motivating reason or factor requires more than mere “thoughts,” “stray remarks,” or “passing statements.” *Harris v. City of Santa Monica*, 56 Cal.4th 203, 225, 232 (2013). Zirpel’s disclosure of information must have “actually” contributed to the termination of his employment. *King v. U.S. Bank National Association*, 53 Cal.App.5th 675, 705 (2020).

It did not. Zirpel relied solely on temporal proximity, while ADP produced uncontradicted evidence that David fired Zirpel because Zirpel was refusing to work and because David thought Zirpel was just angling for a pay raise, not because Zirpel had disclosed information. *See* §IV(B)(2), *supra*.

Nevertheless, the trial court denied a JNOV on the

§232.5(c) claim, just as with the §1102.5(b) claim, on the grounds of temporal proximity. 4AA 2230, 2241. It ruled that the timing of Zirpel’s firing constituted substantial evidence from which the jury could have found that Zirpel’s disclosure of information was “a contributing factor to Plaintiff’s discharge.” *Id.*

The trial court erred twice. First, it applied the wrong legal standard. “Contributing factor” is the causation standard for claims under **§1102.5**. §1102.6; 2AA 1355. To prevail under **§232.5**, Zirpel had to prove that his disclosure of information was a “substantial motivating reason” for his discharge. 2AA 1356.

The distinction between the two standards is deliberate and significant. In *Harris*, 56 Cal.4th at 241, the Court required a retrial in a wrongful termination case because the trial court had incorrectly instructed the jury that the plaintiff only had to prove that discrimination was “a motivating factor or reason” for her firing instead of “a substantial factor or reason”:

“Requiring the plaintiff to show that [an ‘illegitimate criterion’] was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the employment decision.” *Id.* at 232 (italics in original).

Second, a “substantial motivating reason” is not established by temporal proximity alone, which is all that Zirpel proffered

and the trial court cited. As explained in *McRae v. Department of Corrections & Rehabilitation*, 142 Cal.App.4th 377, 382 (2006), reversing for lack of substantial evidence a jury verdict that the plaintiff had been the victim of retaliation for filing an administrative complaint:

“For purposes of making a **prima facie** showing, the causal link may be established by an inference derived from circumstantial evidence. A plaintiff can satisfy his or her **initial** burden under the test by producing evidence of nothing more than the employer’s knowledge that the employee engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision. [Citation]. **Such evidence, however, satisfies only the plaintiff’s initial burden.** *Id.* at 388 (emphasis added).

Thereafter, if “the employer produces a legitimate, nonretaliatory reason” for the termination — as ADP did by showing that Zirpel was fired because he refused to work — then the presumption of retaliation raised by mere temporal proximity “drops out of the picture.” *Id.* (internal quotation marks omitted). To prevail, the employee must now prove that the employer’s asserted reasons were merely pretextual (*id.*) — a showing that

Zirpel did not make.

Similarly, *Arteaga v. Brink's Inc.*, 163 Cal.App.4th 327, 334 (2008), affirmed summary judgment for the employer on claims of discrimination and retaliation over the employee's temporal proximity arguments. "[T]emporal proximity . . . may satisfy the causation requirement at the *first step* of the burden-shifting process . . . But temporal proximity alone is not sufficient to raise a triable issue" once the employer has offered legitimate reasons for the discharge. *Id.* at 353 (italics in original). "Standing alone against Defendant's strongly supported legitimate reason for terminating [Plaintiff], temporal proximity does not amount to more than a scintilla of evidence of [discrimination]." *Id.*

A "scintilla" of evidence does not constitute substantial evidence. *In re Alexander L.*, 149 Cal.App.4th 605, 614 (2007). Therefore, it is insufficient to uphold a judgment. *Roddenberry v. Roddenberry*, 44 Cal.App.4th 634, 652 (1996); *Saks v. Charity Mission Baptist Church*, 90 Cal.App.4th 1116, 1121 (2003) (reversing judgment because "substantial evidence does not support the jury's verdict.") It is also insufficient to avoid a nonsuit, directed verdict, or JNOV. *Murray's Iron Works, Inc. v. Boyce*, 158 Cal.App.4th 1279, 1284-1285 (2008) ("scintilla" of evidence insufficient to avoid JNOV, nonsuit); *Wolf*, 162 Cal.App.4th at 1119-1120 (same; directed verdict).

Causation generally, and the substantial motivating reason/ factor test in particular, cannot be based on the "mere possibility of causation, nor on probabilities that are, at best,

evenly balanced, nor on speculation, or conjecture.” *City of Modesto v. Dow Chemical Co.*, 19 Cal.App.5th 130, 153 (2018). That is, “at best,” what Zirpel proffered, and it is insufficient.

**D. The Punitive Damages Should Be Reversed Because They Are Unconstitutionally Excessive.**

The trial court denied ADP’s challenge to the punitive damage award on the grounds that (1) ADP was precluded from challenging the evidence of its net worth, and (2) there was “sufficient evidence of reprehensible conduct” by David. 4AA 2233, 2245-2246.

ADP did not challenge the evidence of its net worth; it argued that the punitive damage award was excessive as a matter of (constitutional) law under *State Farm* and its progeny. 3AA 1420:1-1422:18, 2165:6-2166:2; 6RT 3324:19-3325:3, 3328:17-19. As the California Supreme Court explained:

“In a series of decisions culminating in *State Farm*, the United States Supreme Court has determined that the due process clause of the Fourteenth Amendment to the United States Constitution places limits on state courts’ awards of punitive damages, limits that appellate courts are required to enforce in their review of jury awards.” *Simon v. San Paolo U.S. Holding Co., Inc.*, 35 Cal.4th 1159, 1171 (2005).

When determining whether punitive damages are

unconstitutionally excessive under *State Farm*, appellate courts review the award *de novo*. *Id.* at 1172. “This exacting appellate review is intended to ensure that punitive damages are the product of the application of law, rather than a decisionmaker’s caprice.” *Id.* (internal quotation marks omitted).

The “guideposts” for appellate review of an award’s constitutionality are (1) the degree of reprehensibility of the defendant’s conduct; (2) the disparity between the actual and punitive damages; and (3) the difference between the punitive damages awarded and the civil or statutory penalties authorized or awarded in similar cases. *Id.* at 1172, citing *State Farm*, 538 U.S. at 419.

The appellant does not have to show that all three *State Farms* factors weigh in its favor to establish that the award is unconstitutional. Punitive damages may be reversed as unconstitutionally excessive even if only two factors favor the appellant. *See, e.g., Grassilli v. Barr*, 142 Cal.App.4th 1260, 1289-1290 (2006) (high ratio, punitives exceeded applicable penalties). Indeed, courts have found punitive damages to be unconstitutionally excessive based on just one factor — the ratio of compensatory to punitive damages. *See, e.g., Johnson v. Ford Motor Co.*, 135 Cal.App.4th 137, 148-150 (2005); *Romo v. Ford Motor Co.*, 113 Cal.App.4th 738, 743, 755, 763 (2003); *Tilkey v. Allstate Insurance Co.*, 56 Cal.App.5th 521, 558-563 (2020).

The trial court made no *State Farm* findings. Instead, it relied on law which predates *State Farm* and does not comply with currently required constitutional scrutiny. 4AA 2232, 2245,

citing *Rufo v. Simpson*, 86 Cal.App.4th 573, 619-620 (2001).<sup>23</sup>

When this case is properly analyzed under *State Farm*, there is an even stronger argument for reversing this punitive damage award than in the cases cited above because here, all three guideposts point unswervingly to the conclusion that the award was unconstitutionally excessive.

### **1. The Degree Of Reprehensibility Was Low.**

As with the other guideposts, the appellate court assesses independently the degree of reprehensibility. *Simon*, 35 Cal.4th at 1172. The court must consider whether (1) the harm was physical as opposed to economic; (2) the conduct evidenced a reckless disregard or indifference to the health or safety of others; (3) the target of the conduct was financially vulnerable; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, deceit, or mere accident. *Id.* at 1180, citing *State Farm*, 538 U.S. at 419.

As with the overall three-part *State Farm* framework, the appellant does not have to show that all five subfactors favor it, disproving reprehensibility entirely. “[I]t is the **degree** of the

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<sup>23</sup>For example, *Rufo* paid a deference to the jury’s determination (*id.* at 623) which has been superseded by the *de novo* review required after *State Farm*. *Simon*, 35 Cal.4th at 1172. *Rufo* also relied heavily on the wealth of the defendant (86 Cal.App.4th at 623-625), which is not a constitutional factor (*State Farm*, 538 U.S. at 418), but did not consider any comparable statutory penalties, which **is** constitutionally required under *State Farm* (*id.*). The trial court’s use of *Rufo* is puzzling because neither side cited or argued it, correctly invoking *State Farm* and its progeny instead. 3AA 1420:1-1422:18, 1833:5-1835:29.

reprehensibility, not its existence in an absolute sense, that is the critical factor in evaluating whether a damages award withstands constitutional scrutiny.” *Grassilli*, 142 Cal.App.5th at 1288 (emphasis added); *see also State Farm*, 538 U.S. at 418 (first guidepost is “degree” of reprehensibility); *Simon*, 35 Cal.4th at 1172 (same).

Reprehensibility is evaluated on a continuum or sliding scale, considering the “totality of the circumstances” to determine the “level” of reprehensibility. *Grassilli*, 142 Cal.App.5th at 1288. *See Romo*, 113 Cal.App.4th at 755 (conduct was “toward the higher end of the reprehensibility scale”); *Century Surety Co. v. Polisso*, 139 Cal.App.4th 922, 965 (2006) (conduct “rates moderately high on the reprehensibility scale”); *Gober v. Ralphs Grocery Co.*, 137 Cal.App.4th 204, 208, 219 (2006) (“Within the spectrum of possible conduct under the first subfactor . . . we conclude Ralphs’ actions are on the mitigated side of the continuum.”)

Because the trial court used outdated law, it did not analyze any of the *State Farm* subfactors. 4AA 2233, 2245-2246. Nor did it determine the **degree** of reprehensibility, as required by *State Farm*: it merely concluded, in one sentence, that there was adequate evidence of “reprehensible conduct.” *Id.*

Correctly analyzed under *State Farm*, ADP’s conduct is at the very low end of the scale, assuming *arguendo* that it registers on the scale at all. Two of the five subfactors are inapplicable. Zirpel was not financially vulnerable; when fired, Zirpel was earning a salary of \$72,800 plus bonuses and commissions. 4AA

2445, 2448; 4RT 1937:10-15. The termination of Zirpel's employment was a single, isolated incident; Zirpel testified that he had never been fired by David before (4RT 1974:28-1975:5) and had repeatedly received raises and promotions. *See* §II(A), *infra*.

Another subfactor, whether the harm was the result of intentional malice or mere accident, "is of little value in assessing a California punitive damages award because 'accidentally harmful conduct cannot provide the basis for punitive damages under our law.'" *King*, 53 Cal.App.5th at 729, citing *Simon*, 35 Cal.4th at 1181.

Nevertheless, this subfactor does not put ADP's actions at the high end of the continuum. David and Zirpel had been friends for years. 4RT 1828:3-4, 1841:2-4, 1948:9-15, 1974:23-25; 5RT 2130:15-17, 2145:14-2147:3, 2162:12-14. David's outburst and termination of Zirpel's employment was not premeditated or calculated; it was an impulsive act born out of anger, frustration, and a sense of betrayal "in the moment." 4RT 1910:7-11.

Yet even "[i]n that moment . . . all in the same breath," David "was thinking: maybe he's got a point of view." 4RT 1910:12-14. David apologized immediately (4RT 1909:23-28; 5RT 2104:19-20) and rehired Zirpel "in the same breath." 4RT 1841:4-5, 15; 1843:10-12, 1895:13-15. When Zirpel left the Theater, David tried repeatedly to telephone Zirpel, who declined the calls. 4AA 2437; 4RT 1895:22-1896:1, 1966:19-27. It was Zirpel who decided not to return to ADP. 4RT 1975:12-18; 5RT 2239:17-22 (Nelson: Zirpel would have been welcome to continue working for

ADP because he “was critical to the company”).

This is not the intentional malice required for an award of \$6 million in punitive damages. *Cf. Amerigraphics, Inc. v. Mercury Casualty Co.*, 182 Cal.App.4th 1538, 1563 (2010) ((intentional malice subfactor not present; although plaintiff went out of business as the end result of insurer’s mishandling of claim, “the evidence does not suggest that Mercury was guided by this goal from the outset.”)

Moving to the next subfactor, there is no evidence that Zirpel suffered any physical, as opposed to economic, harm from his employment’s termination. *Simon*, 35 Cal.4th at 1180. Zirpel did not even contend that he suffered any physical symptoms from his alleged emotional distress, such as headaches or sleeplessness. *See Nickerson v. Stonebridge Life Ins. Co.*, 5 Cal.App.5th 1, 17 (2016) (“The record contains no indication that Nickerson suffered any physical symptoms from his emotional distress and so this factor does not apply.”)<sup>24</sup>

When there is neither physical injury nor physical symptoms from emotional distress, courts have concluded that an employer’s conduct is, at most, “of only a modest degree of

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<sup>24</sup>Moreover, the evidence of Zirpel’s alleged emotional distress was minimal. Although Zirpel asserted that the day he was fired was “one of the worst days of my life” (5RT 2130:10), he did not go to a therapist, feeling it was best just to get a new job “and focus on other things.” 5RT 2132:22-2133:8. And while he testified that he felt cut off from David and coworkers who had been his friends and felt “some hurt” from being unable to attend their weddings or baby showers (5RT 2130:11-2131:10), that isolation was self-imposed because Zirpel did not want to compromise his litigation against ADP (5RT 2130:21-25, 2131:7-9).

reprehensibility.” *Gober*, 137 Cal.App.4th at 208, 219, 222-223 (in sexual harassment case, grocery chain promoted manager knowing of his prior inappropriate conduct but quickly removed and demoted him after additional complaints; punitives reduced from \$5 million per plaintiff to \$300,000-\$450,000 apiece).

The remaining subfactor is whether the defendant’s conduct evinced indifference to or a reckless disregard of others’ health or safety. *Simon*, 35 Cal.4th at 1180. This subfactor comes into play, as *Gober* noted (137 Cal.App.4th at 220), where a huge, wealthy corporation manufactures a product it knows is dangerous, yet continues to sell and market the product to millions of innocent consumers, usually through deceptive and fraudulent practices. *See, e.g., Boeken v. Philip Morris, Inc.*, 127 Cal.App.4th 1640, 1691-1692, 1694 (2005) (cigarettes; conduct was “extremely reprehensible”), cited at *Gober*, 137 Cal.App.4th at 220; *Romo*, 113 Cal.App.4th at 755 (2003) (defectively designed car; conduct was “highly reprehensible”); *Izell v. Union Carbide Corp.*, 231 Cal.App.4th 962, 985-987 (2014) (asbestos; conduct showed “high reprehensibility”).

This case is not remotely similar to those cited above. ADP did not ignore others’ health and safety. To the contrary, ADP took care of every issue raised by any city inspector. 5RT 2208:16-2209:21, 2210:3-14. The required fire exit signs were purchased immediately (4RT 1960:22-25, 1962:10-13; 5RT 2208:16-22, 2209:17-2210:2) and were installed before any event was held at the Theater (5RT 2209:22-2210:2). ADP knew that a permit was required for the Event (5RT 2203:27-2204:3, 2217:22-

26, 2228:2-7, 2236:2-10, 2277:12-16); applied for one (5AA 2753; 5RT 2218:13-16, 2255:20-27); and told Zirpel that it had done so (4AA 2439; 5RT 2232:14-19). That permit was obtained (3AA 1681; 4RT 1871:19-22; 5RT 2223:2-6, 2291:14-18, 2295:26-2296:1), as were permits for the numerous other special events which followed (*see* §IV(B)(2), *supra*).

City inspectors attended the Event. 5RT 2194:26-2195:24; 5AA 3055. They never raised any unresolved issue, either then or at any other special event. 5RT 2196:16-23, 2210:15-18. All of the items listed in the Correction Notices were resolved. 4AA 2593-2596, 2623; 5RT 2200:25-2201:7. ADP was never out of compliance with its permits for any show and was never told an event could not proceed. 5RT 2235:4-9, 2235:27-2236:1.

In summary, ADP showed no disregard for the health and safety of others. Furthermore, Zirpel was neither physically harmed nor financially vulnerable, and the termination of Zirpel's employment was an isolated incident, an impulsive rather than premeditated act which David immediately tried to take back and for which he apologized.

When so many of the *State Farm* subfactors are absent, courts routinely hold that punitive damage awards are unconstitutionally excessive. *See, e.g., Amerigraphics*, 182 Cal.App.4th at 1563, 1566 (only financial vulnerability subfactor present; punitives reduced on appeal from \$1.7 million to \$500,000, a 3.8:1 ratio); *Walker v. Farmers Ins. Exchange*, 153 Cal.App.4th 965, 974-975 (2007) (same; affirming reduction from \$8.3 million to \$1.5 million, a 1:1 ratio); *Simon*, 35 Cal.4th at

1181, 1189 (only intentional malice subfactor present; punitives reduced from \$1.7 million to \$50,000). The punitive damages awarded here cannot stand either.

**2. The Ratio Of Compensatory To Punitive Damages Is Unreasonably High, Especially Given The Large Award Of Noneconomic Damages.**

Due process requires a “reasonable relationship” between the actual and punitive damages. *Simon*, 35 Cal.4th at 1181; *State Farm*, 538 U.S. at 426 (punitive damages must be “both reasonable and proportionate” to harm and actual damages). Ratios of 3 or 4 to 1 are “instructive” as the “due process norm.” *Simon*, 35 Cal.4th at 1182; *State Farm*, 538 U.S. at 425 (same; 4:1 “might be close to the line of constitutional impropriety”).

Here, the ratio of punitive to compensatory damages is approximately 6 to 1. Ratios of this size, and lower, have been reversed as unconstitutionally excessive in other employment cases. *See, e.g., Roby v. McKesson Corp.*, 47 Cal.4th 686, 719-720 (2009) (sexual harassment; 4:1 ratio reduced to 1:1); *King*, 53 Cal.App.5th at 682-683, 731 (2020) (wrongful termination; 2:1 reduced to 1:1); *Colucci v. T-Mobile USA, Inc.*, 48 Cal.App.5th 442, 458-460 (2020) (workplace retaliation; 4:1 reduced to 1:5); *Tilkey*, 56 Cal.App.5th at 561-563 (wrongful termination; 6:1 reduced to 1.5 times the defamation damages).

When the compensatory damages are already substantial, “then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process

guarantee.” *State Farm*, 538 U.S. at 425. *See Roby*, 47 Cal.4th at 717-718 (1:1); *King*, 53 Cal.App.5th at 683, 730-731 (1:1); *Colucci*, 48 Cal.App.5th at 446-447, 449-450, 461-462 (1:5).

Punitive damage awards are especially suspect when, as here, those substantial compensatory damages “include an amount for emotional distress, such as humiliation or indignation aroused by defendant’s act, [so] there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both.” *State Farm*, 538 U.S. at 426 (\$1 million for emotional distress; punitive damages reversed).

Thus, in *Roby*, where \$1.3 million of the \$1,905,000 in compensatory damages was for physical and emotional distress which “may have reflected the jury’s indignation at McKesson’s conduct, thus including a punitive component,” the punitive damages were reduced from \$15 million to \$1,905,000. 47 Cal.4th at 718. *See also Colucci*, 48 Cal.App.5th at 459-460 (\$700,000 of \$1,320,042 in compensatory damages awarded for noneconomic harm and/or emotional distress; punitive damages reduced from \$4 million to \$1,530,063). Here, \$700,000 of the \$1,068,717 in compensatory damages was for noneconomic damages and emotional distress (65.5%). That is almost identical to the percentages in *Roby* (68.2%) and *Colucci* (68.6%), which both held the punitive damages excessive.

Nor is the relevant analysis dependent solely on arithmetic. Also particularly pertinent here is *State Farm*’s observation that an award for emotional distress already includes an element of

punishment, making a large additional award of punitive damages especially suspect. 538 U.S. at 426. In this case, the award for emotional distress was so large, and the evidence of Zirpel’s emotional distress so weak (*see* §IV(D)(1), *supra*), there is a strong inference that the jury had already punished ADP with its \$700,000 award for emotional distress, making the \$6 million in punitive damages duplicative and reinforcing the conclusion that they are unconstitutionally excessive.

**3. The Punitives Vastly Exceed The Maximum Civil Penalty For Such Conduct.**

Finally, under *State Farm* the reviewing court must consider the difference between the punitive damages awarded and the civil or statutory penalties authorized or awarded in similar cases. *Simon*, 35 Cal.4th at 1172.

While there are no such penalties for violation of §232.5 (*Sargent v. Board of Trustees etc.*, 61 Cal.App.5th 658, 670, 675 (2021)), there is a maximum civil penalty of \$10,000 for a violation of §1102.5. §1102.5(f). The punitive damages here are **600 times** that cap.

Punitive damages of “only” 100 times the corresponding maximum statutory penalty were ruled unconstitutionally excessive in *Roby*, 47 Cal.4th at 718-719. Even smaller ratios of punitives to penalties have also been ruled unconstitutional. *See, e.g., Gober*, 137 Cal.App.4th at 208, 222-223 (14:1 ratio reduced to 1:1; \$350,000 maximum penalty; punitives of \$5 million per plaintiff reduced to \$300,000-\$450,000 apiece).

In short, ADP’s degree of reprehensibility was low; the ratio



**CERTIFICATE OF COMPLIANCE  
PURSUANT TO CRC 8.204(C)(1)**

Pursuant to California Rules of Court 8.204(c)(1), I certify that the attached brief was produced on a computer and, according to the word count of the computer program used to prepare the brief, contains 13,776 words, within the above-stated limits applicable to said brief.

Dated this 7th day of September, 2022.

*/s/*

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FRED D. HEATHER